

# Trapped in ideology?

The law and what judges bring to the table

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# Introduction

## Where are we?

### **Courts are political actors because their decisions have political consequences**

- ▶ regulate political activity
- ▶ distribute competences
  - ▶ subject to political pressure
- ▶ **make policies**

⇒ *What is the policy content of the Court's rulings?*

# What is the difference between Courts and legislators?

**Courts establish a “case law”:** a set of interpretations applied in many cases

- ▶ legislators create general laws in the abstract (“outside of facts”)
- ▶ courts resolve a stream of concrete legal disputes
  - ▶ what is the “just” outcome?
  - ▶ what are the broader consequences?

⇒ *case law is the set of previous decisions that the Court can refer back to*

# Why care about case law?

## Case law can be more or less consistent, why does this matter?

- ▶ **legalistic argument:** a formal distinction between
  - ▶ common law countries (US and UK): case law is in principle binding
  - ▶ civil law countries (the rest of EU): useful tool, but not legally binding→ *is case law really binding anywhere?*
- ▶ **attitudinal argument**
  - ▶ case law can be “accidentally” consistent
  - ▶ judges with the same attitudes will resolve legal gaps in similar ways→ *do EU judges prefer EU solution?*
- ▶ **strategic argument**
  - ▶ case law informs actors how to behave
  - ▶ ... but this is only true if it is consistent→ *added value of courts*

⇒ *today, we're interested in the patterns, not why they appear*

# Today

## **ECJ has received a bad rap for being a driver of neoliberal economic policies**

- ▶ ... but isn't this just the EU law?
  - ▶ majority of EU law revolve around economic rights
  - ▶ this is reflected in the Court's case load
- ▶ has it made innovations of its own?
  - ▶ ... how consistent has it been?

## The joint decision making trap

**Scharpf (1988) famously argued that member states locked themselves into inaction**

- ▶ to protect their sovereignty, they agreed to only decide following a high voting threshold
- ▶ ... but before that, they inserted a few policy directions in the Treaties
  - ▶ mostly about free trade
  - ▶ negative integration: what member states cannot do
- ▶ intention to expand with more policies through secondary legislation
  - ▶ positive integration: regulation/action at EU level
- ▶ follow-up legislation became impossible due to
  - ▶ differences in preferences
  - ▶ high voting thresholds

⇒ *joint-decision making trap paralyzed the Council*

# Empowerment of the Court

## Division in the legislator is often predicted to empower courts

- ▶ legislator can neither instigate legislation, nor counter-act judicial policies:
  - ▶ theories of judicial behavior : separation of powers argument
  - ▶ EU theories: “joint-decision making trap”
- ▶ mechanism:
  - ▶ high voting threshold in Council vs. simple majority in the Commission/Court
  - ▶ Court relies on Treaties to infer policies

⇒ *what did the Court use this political leeway for?*



# The direction of the Court's case law

## What did the Court use this political leeway for?

- ▶ Caporaso and Tarrow (2009): to “embed” markets
- ▶ Höpner and Schäfer (2012): to push for EU integration, thus neoliberal policies

⇒ *a debate between neofunctionalists*

## A look ahead

- ▶ we'll get back to the joint decision-making trap when we consider judicial-legislative relationship
- ▶ ... but then the question is whether the Court is unbound/governments are trapped

# Embedded liberalism

# What is embedded liberalism? (John Ruggie)

- ▶ economic order after WW II, particularly during the Bretton Woods era (1944–1971).
- ▶ compromise between the principles of free-market liberalism and the need for state intervention to ensure social stability and welfare.
- ▶ includes:
  - ▶ international economic cooperation: free(er) trade
  - ▶ state intervention: domestic governments ensure social protection, unemployment, protection of key industries. . .
  - ▶ social compromise

## A three step power move

## A three step power move

**Caporaso and Tarrow (2009) base their argument on the Court's caselaw on free movement of workers**

- ▶ provide workers with an opportunity to claim rights (direct effect)
- ▶ expand the definition of worker (market failure)
- ▶ expand to workers' family (social embedding)

## Step 1: Direct effect

### Direct effect of free movement of workers

- ▶ social protection of workers is done in national legislation
- ▶ Treaty of Rome (1958): principle of free movement for workers
  - ▶ ... but could they claim any rights?
- ▶ Royer (1975): direct effect for free movement of workers
  - ▶ a constitutional right

⇒ *if member states wanted, they could at this point define worker in a narrow way (to constrain their rights)*

## Step 2: Correction of market failures

### Broaden the definition of “worker”

- ▶ a “market failure” is when citizens fail to move...
  - ▶ not because they don't *want* to, but because it is hindered
- ▶ this requires *non-discrimination* of workers
  - ▶ careers across borders
  - ▶ worker or citizen?

⇒ *a broader set of citizens with rights*



## Step 3: Social embedding

### **Extend the rights to the workers' families**

- ▶ family benefits cross border
- ▶ residence rights of spouses of EU citizens

⇒ *workers are considered in their social context*

# What is the direction of the case law on free movement of workers?

- ▶ facilitates commodification of labor
- ▶ with an incrementally social aspect

⇒ *more about including more recipient to extant social welfare systems, than crafting new social welfare*

# The Hayekian bias

# The Hayekian bias

## Höpner and Schäfer (2012) criticize Caporaso and Tarrow on two grounds:

- ▶ contextualize: free movement of workers is only a component of EU “social policy”
  - ▶ market-shaping: social embedding of markets
  - ▶ market-enhancing: competition and free movement
  - ▶ non-discrimination on the basis of:
    - ▶ personal characteristics: progressive
    - ▶ nationality: Caporaso 2009
- ▶ danger of rebuttal:
  - ▶ benefits are reaped by migrant workers
  - ▶ but not the contribution?

## Hayekien interstate federalism

- ▶ individual (social and economic) rights are located centrally:
  - ▶ four freedoms (goods, capital, services, labor)
- ▶ taxation and redistribution are located locally

⇒ *limits the political capacity to intervene in the market*

## The situation in the EU

- ▶ social protection from markets is a national competence
- ▶ governments cannot agree on common policies
  - ▶ because of variations in welfare systems/capitalism
  - ▶ ... so different preferences

## Market shaping (“embedding”)

### **EU secondary law does not have much social content**

- ▶ delegations of competences or social policy making at the EU level are
  - ▶ few
  - ▶ non-binding (so no judicial review)

⇒ *limited role for ECJ (lack of EU competence + soft law)*

## Market enhancing (“disembedding”)

### **EU treaties instead create “individual rights” related to the free market (four freedoms, competition)**

- ▶ non-discrimination (equal treatment) on the basis of nationality is replaced by non-restriction of the market (Dassonville)
- ▶ any political regulation for social purposes is in principle illegal:
  - ▶ corporate vs. personal taxation
  - ▶ minimum vs. maximum social protection
  - ▶ company seat

⇒ *this is done by ECJ (economic heterogeneity makes it hard for governments to counteract)*



## Non-discrimination

### The EU legislator supported by the Court has used non-discrimination to “embed” markets

- ▶ on the basis on personal characteristics: age, gender, race, sexual orientation. . .  
→ *ECJ truly progressive*
- ▶ on the basis on nationality (Caporaso and Tarrow 2009)
  - ▶ the case law has given national social rights to non-nationals  
→ *risk of popular nationalist/euroseptic backlash*

# Is the ECJ trapped in ideology?

**In another article, Höpner and Schäfer (2010) argue:**

- ▶ ECJ judges face two policy dimensions:
  - ▶ integration: the prevalence of EU law
  - ▶ left-right: the policy content of a decision
- ▶ they will always pick “integration”
  - ▶ because of their position (supranational institution)
  - ▶ because of the content of EU law (deregulation)

⇒ *even the most fervent social democrat (in the Commission) becomes an economic liberal once in EU office*

# How convinced are you?

## How convinced are you by the two articles? Why?

- ▶ take 5 minutes to discuss with your neighbor

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# What do judges bring to the table?

## What do judges bring to the table?

**Zhang, Liu, and Garoupa (2018) seek to explain variation in outcomes in competition cases**

- ▶ link this to judges individual backgrounds
  - ▶ uses delegation decisions within the Court (next week)
  - ▶ draws on the agenda setter *reporting judge* and panel of judges
- ▶ argue that legal background impacts likelihood of supporting the Commission

## Differing views of the role of courts

**Judges from French civil law tradition – in particular – are likely to defer to the political branch (the executive)**

- ▶ leads to deference to the Commission, as the EU executive

## The study

- ▶ procedure: annulment cases before the General Court:
  - ▶ private and public actors contest Commission decisions
- ▶ policy area: competition and state aid cases
  - ▶ state aid is in principle banned by EU Treaties
  - ▶ competition relates to antitrust legislation
- ▶ outcome: support for Commission or business
- ▶ predictor: legal tradition of judge
- ▶ controls: ideology ++

# Class discussion 1:

## Discussion of the **reading questions**

- ▶ According to Zhang, Liu, and Garoupa (2018), what are the different legal traditions in Europe and what are their main differences?
- ▶ Why do the authors control for judges' ideology with respect to left-right policies and European integration?
- ▶ If you were to draw on Posner (2010)'s overview of different approaches to judicial politics, where would you place Zhang, Liu, and Garoupa (2018)?
- ▶ What are the different delegation decisions internal to the General Court, and – according to Zhang, Liu, and Garoupa (2018) – why do they matter?



## Class discussion 2:

- ▶ According to Zhang, Liu, and Garoupa (2018), what explains the variation in the Court's case law on competition?
- ▶ How convinced are you?
- ▶ take 5 minutes to discuss with your neighbor

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## Literature

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