Bounded Neofunctionalism

Assessing European Integration in the Context of the European Court of Justice

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I. Introduction

This essay aims to assess the evolution of the composition and powers of the European Court of Justice (ECJ) to determine which mainstream theory of integration (liberal intergovernmentalism or neofunctionalism) holds the most explanatory power. With respect to the evolution of powers, this essay focuses on evolution which has occurred through the Court itself, rather than that which has occurred by explicit treaty modification. This is for two reasons: Firstly, as an institution charged with oversight, not policy creation, the ECJ generally gains power in an area as an inseparable by-product of another institution gaining policy power. A discussion of the Court's gaining of power in this way would thus be a discussion of the evolution of another institution. Secondly, by far the most significant evolutions in the ECJ's power have come through court judgements, and thus, any attempt to claim that a given theory has strong explanatory power considering the ECJ must necessarily heavily focus on this aspect.

II. Theory

A. Composition

The primary way the ECJ's composition evolves is in the changing of its membership. An intergovernmentalist prediction of this process

would allow states significant power in determining those who sit on the court and for that power to be exercised to promote national interests. This promotion would manifest in the appointment of judges that hold views on integration aligned with what is most favourable to key interest groups in the appointing polity – following Moravcsik's (1993) contention that such groups are the primary driver of state policy on integration.

By contrast, neofunctionalism would predict an evolution of ECJ membership that is increasingly shaped by the institution itself. Here, Haas' (1968) theorisation of spillover by technocratic automaticity would be in operation, driving the court itself to establish mechanisms – formal or informal – by which it controls its composition.

ECJ composition also evolves through the jurisprudence of the judges themselves. Although neofunctionalism's notion of a transfer of allegiance is typically applied to broad social groups or elite circles, an argument could be made that the ECJ itself represents a community of individuals where it might also occur. The theory suggests that as supranational actors operate they generate support from members of society who believe that a supranational solution serves their interests better than a national one (Haas 1968). In the ECJ, this would be manifest in a shift towards increasingly 'pro-European' jurisprudence.

By contrast, although intergovernmentalism does not explicitly contend that the transfer in loyalties does not occur, it would likely expect that judges on the ECJ would continue to privilege the sovereignty of the state in their decision-making, and thus resist notions that further integration is inherently desirable.

B. Powers

The powers of the ECJ are delineated not only by the explicit power granted in the Treaties but by the court itself. As an apex court, the ECJ is capable of extending its power through the rulings that it promulgates.

An intergovernmentalist view might immediately take issue with an extension of authority by a supranational institution without express state consent, however, intergovernmentalist theory acknowledges that states may entrust institutions with such power to solve issues of incomplete contracting (Garrett 1992). States may fear that in certain areas of integration, there is the potential for novel circumstances to arise that would undermine their goals. Consequently, they empower courts to adapt the integration framework in service of the protection of these interests.

Intergovernmentalists would not, however, expect states to create institutions that can fundamentally alter the nature of the integration. This kind of alteration is anathema to the notion that states only engage in integration when they are assured it is in their interests. Should this occur, it would suggest strong explanatory power is held by neofunctionalism.

In short, the core factors in evaluating the explanatory power of the theories regarding the powers of the ECJ are twofold: whether states have intentionally created an institution that poses a substantial risk of acting in such a way as to threaten domestic objectives, and whether states can effectively control cases of 'runaway institutions' through the exercise of their power as national governments..

III. ANALYSIS

A. Which theory is most explanatory of evolution in the ECJ's composition?

As mentioned, the primary factor driving evolution in the composition of the ECJ is its actual membership. Each EU member state (MS) nominates one judge to the court, and that nominee is then subject to approval by the other MS (Hix 2005). Notably, none of the other

supranational EU bodies plays a role in determining the direct composition of the Court.

Furthermore, there is little institutional input into the process by which MS make their nominations – although the relevant treaty establishes that an advisory committee will provide an opinion on each nominee, only one of 7 members is a direct appointment of the European Parliament.[1] It thus seems clear that how the ECJ's direct composition (its judges) evolves is virtually entirely driven by the preferences of states, and thus, deeply in line with an intergovernmentalist narrative of the evolution of supranational institutions.

However, the ECJ itself does wield some influence over its procedural composition, that is, which judges rule on a given case. The Court has, over time, developed a system of smaller chambers to which individual cases may be assigned. Indeed, since the mid-1990s, less than 20% of all cases were decided by the full Court (Malecki 2012). The allocation of a given case to a particular chamber, according to Maleki (2012), has the potential to influence the outcome of that case, as certain views may be more prevalent in each combination of judges compared to another. The suggestion here, from a neofunctionalist perspective, is that the practices adopted by the Court can organise it in a way which might impact upon how integration proceeds, and thus there is some sort of technocratic automaticity occurring as the Court informally modifies itself to be more (or less) pro-integration than intended by its member states. The counterpoint in this instance is that the Court is restricted to 'playing with the hand it is dealt' by the member states – it may choose to set itself up in a way in which the most pro-integration judges deal with matters of a particular area, but those judges have still been appointed by the earlier-discussed highly intergovernmental appointment process.

[1] "Treaty on the Functioning of the European Union," signed March 25, 1957, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

A further way in which the Court's composition evolves is in the individual jurisprudence of its constituent judges. As explained when discussing the relevant theory, neofunctionalists would hope to see a gradual transition of national loyalties by judges towards a pro-European stance. Broadly, there is evidence to support this dynamic being present. Larsson and Naurin (2016) have found in an analysis of MS positions submitted to the ECJ in argument, and the ECJ judgements themselves, that the Court consistently takes a more 'pro-integration' view than that of the member states. Furthermore, Maleki (2012) finds that the ECJ has sided with the Commission in about 75% of matters. These findings suggest that at a broad level, the ECJ as an institution serves to advance supranationalism at a greater rate than that would be expected if it merely served as a vassal for MS. This would support a neofunctionalist characterisation of the evolution of the ECJ, where judges, handpicked by MS, grow loyal towards the furtherance of the institution they are a part of.

There is some evidence that judges continue to retain a loyalty to their nominating nation's interests, however. Frankenreiter (2017) finds that ECJ judges tend to refer more often to decisions from their home legal system than others and that this may indicate a preference for promoting interpretations which are closely aligned with their national legal arrangements. However, this preference for national cases may be simply a by-product of the judges being most familiar with cases from their nominating state. If this is accurate, then this weighs against a possible intergovernmentalist counterpoint that ECJ judges resist a neofunctionalist transfer in domestic allegiances.

In summary, then, an analysis of the explanatory power of neofunctionalism and liberal intergovernmentalism suggests that while at the most immediate level, states retain significant control over the evolution of ECJ composition, there are several indirect ways in which the institution itself may shape its composition. These self-shaping mechanisms seem to have the effect (at least to some extent), of limiting the practical application of formal control over the evolution of the

Court's composition that MS wield. Therefore, while intergovernmentalism cannot be rebutted comprehensively, there is clear cause to suggest that the ECJ is indicative of several neofunctionalist elements' presence.

B. Which theory is most explanatory of the ECJ's powers?

The most significant changes in the ECJ's powers have come because of actions taken by the ECJ itself. As explained in the earlier discussion of theory, this itself does not suggest one theory offers more explanatory power in this area. To determine which does, an analysis of the character of such evolutions in power needs to be undertaken.

Two seminal cases stand out in the history of the ECJ. The first of these, *Van Gend en Loos,* concerns the principle of direct effect (Van Gend en Loos v Nederlandse Administratie der Belastingen 1963). The Court's judgment in *Van Gend en Loos* recognised for the first time that an individual within the EEC may bring enforce a right conferred by Community law in a domestic court. Prior to this point, only states could avail themselves of the rights afforded by EEC law, and as such, the decision widened enormously the exposure of national governments to enforcement actions under European law. This decision is extremely troubling from an intergovernmentalist perspective, as the ECJ has acted without prompting from national governments to cause a "genuine revolution in European law", in a manner that was "unexpected by the key observers". (Rasmussen 2014). This is clearly at odds with the intergovernmentalist view that states will avoid endowing an institution with power beyond that which is explicitly necessary to achieve a domestic policy goal. Put simply, intergovernmentalism would not predict states would create an ECJ that had the capability to 'change the deal they signed up to'. And yet, the *Van Gend en Loos* case shows they did exactly that.

The issues for intergovernmentalism continue when considering the case of *Costa*. *Costa* saw the ECJ recognise that in the case there was a divergence between national and European law, European law would prevail (Flaminio Costa v ENEL 1964). With respect to the position of a state vis-à-vis an institution, this is highly significant; without primacy, a national government might have expected (as the Italian government did in *Costa*) that any aspect of European law could be ignored with the passage of a domestic law to the contrary. As such, the *Costa* judgment fundamentally reshaped the relationship between the EEC and the MS.

Costa and *Van Gend en Loos* are thus highly characteristic of how neofunctionalism would expect institutions to behave. The institution, over time, uses its power not only to protect integration, but to unilaterally effect it. Liberal intergovernmentalism struggles to explain why MS would willingly enter an arrangement where this would occur – the core tenet of the theory is that states remain in control of the course of integration, and yet, the two cases demonstrate that they are not. This strongly indicates that the evolution of the powers of the ECJ is best explained by neofunctionalism.

However, so far only the official evolution of the ECJ's power has been considered. It might be possible that, in a *de facto* sense, states retain considerable control over how the ECJ's power and competencies evolve. Carrubba, Gabel and Hankla (2008) have noted that threats of noncompliance and override from MS "restrict the Court's ability to push an agenda contrary to the preferences of the member-state governments". Larsson and Naurin (2016) go further, illustrating how in issue areas in which an override is easier to achieve through intergovernmental mechanisms, the Court is statistically more likely to align with the preferences of member states. These findings weigh against a neofunctionalist characterisation of the evolution of ECJ power, suggesting that MS retain substantial influence over how the Court furthers integration – as much is acknowledged by Larsson and Naurin (2016) in their findings.

Reassessing *Costa v ENEL* and the following German case of *Solange I* provides an interesting illustration of the dynamics at play when states attempt to fight back against ECJ extensions of its own power. Following the aforementioned *Costa* decision, which substantially expanded the extent to which MS were compelled to act by European law, the German Constitutional Court (FCC) held that it would not enforce European law so long as the European legal framework lacked a comprehensive human rights protection system (Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel 1970). Here, the FCC, a national institution, is pushing back against the ECJ's expansion of its authority by attempting to impose a condition on the extension of integration that the ECJ promulgated with *Costa*. This attempt was somewhat successful – in subsequent ECJ cases, the Court increasingly incorporated elements of the European Convention on Human Rights (ECHR) into the European legal framework, and in the case of *Rutili*, ruled based on an ECHR provision (Davies 2012).

The *Solange* saga thus demonstrates that there are practical examples in which national courts have checked the growth of power promoted by their supranational peer, the ECJ. The German FCC seems to have prompted the ECJ to make substantial changes to the legal order as a precondition to the acceptance of EU law primacy, and in doing so, exercised the type of control that intergovernmentalists would expect MS to wield. Neofunctionalists might respond to this however, by pointing out that during the *Solange* sage, the German government was actually more aligned with the ECJ position, perhaps evidencing a transition of national loyalties as having occurred in Germany, wherein key interest groups begin to place their faith in supranational institutions over national equivalents (Davies 2012).

This discussion of the evolution of the powers of the ECJ has thus yielded two findings. Firstly, the ECJ wields a significant amount of *de jure* power to shape the development of its own powers and role, and from this neofunctionalist theory draws strong support. Secondly

however, *de facto* implementation and recognition of the use of this power is at least to some extent checked by national institutions, suggesting that MS retain substantial control over their destiny as a member of a supranational institution. On a continuum between neofunctionalism and intergovernmentalism, this second observation shifts the ECJ's evolution of powers towards the latter. However, it is impossible to ignore the enormous power wielded by the ECJ to reshape its power as an institution, even if it sometimes must make concessions to do so (as in *Solange*). An analysis of the evolution of the ECJ's powers thus, on balance, lends more support to a neofunctionalist framing than an intergovernmental one.

IV. Conclusion

This essay has seen two inverted narratives emerge: the composition of the ECJ is primarily intergovernmental, however, is challenged by some neofunctionalist mechanisms in its operational sense, with the opposite dynamic at play concerning the evolution of powers. But this notion of two separate threads is a construct; the composition and the powers of the institution are tightly linked. The way the ECJ has independently advanced the level of European legal integration is inseparable from the Europhile jurisprudence that its composition has generally espoused. An appropriate conclusion, therefore, fuses the aspects of composition and powers.

The ECJ best fits with the notion of 'bounded neofunctionalism'. This notion of binding refers to the intergovernmental mechanisms existing at both ends of the 'pipeline' that produces further integration. At the earliest stage, MS shape the composition of the court through the appointment process, and at the latest stage (the implementation of ECJ rulings), MS can resist and push back. But the core driver of the evolution of the ECJ is the institution itself. It shapes its jurisprudence, and crucially, promulgates judgements that fundamentally reshape its role within the EU system. The reality is that member states play a

largely reactive role in the evolution of the composition and powers of the ECJ, and thus at its core, this reality is a neofunctionalist one.

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