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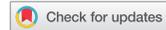
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## Beyond venue shopping and liberal constraint: a new research agenda for EU migration policies and politics

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### ABSTRACT

European Union (EU) asylum and immigration politics and policies have witnessed a major change since their *communitarization* in the early 2000s. Studies on EU migration, however, do not agree on the impact that EU institutions now have on policy outputs and outcomes. While some argue that supranational institutions are able to impose 'liberal constraints' on member states, other studies consider them unable to shift the 'policy core' of EU migration policies. Many of these disagreements stem from unspecified theoretical assumptions and very different methods to assess influence and change. This research agenda demonstrates how drawing on new institutionalism and policy analysis literature can generate new insights in three important areas of migration policy research: the dynamics of preference formation of member states and EU institutions, the relative power and influence of member states and EU institutions, and their impact on the domestic politics and policies of member states.

**KEYWORDS** Migration; EU institutions; liberal constraint; venue-shopping; new institutionalism; policy analysis

### Introduction

From the 1990s until today, the dominant framework for understanding EU migration politics has been intergovernmentalist. This framework assumes that the EU serves as a venue to which member states with restrictive policy preferences can 'escape' to circumvent domestic constraints. However, this theoretical perspective has been challenged after the shift of power from member state governments to EU institutions brought about by the *communitarization* of EU asylum and immigration policies since the Treaty of Amsterdam (1997) and the introduction of Community law and policies since the early 2000s. Studies on EU migration, however, do not agree on the impact that EU institutions now have on policy-outputs (new laws) and outcomes (policies on the ground). While some argue in the tradition of

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Hollifield (1992) or Joppke (1998) that institutions such as the Court of Justice of the European Union (the Court), the European Commission (the Commission) and the European Parliament (EP) are able to impose 'liberal constraints' on national governments, other studies consider them unable to shift the 'policy core' of EU migration policies. Many of these disagreements stem from unspecified theoretical assumptions and the use of very different methods to compare influence and change.

The inability to agree on the nature and impact of EU migration policies is particularly relevant in the current context of an economic and migratory crisis. The fast-paced events that are now ensuing both at the national and EU level will most probably trigger a new wave of scholarship. Therefore, this agenda aims to guide future research by reflecting on the main theoretical and empirical debates of the last two decades and calling on a broader set of theoretical perspectives that can generate new insights in three important areas: first, the dynamics of preference formation of member states and EU institutions; second, the interaction between member states and EU institutions and their relative power and influence; and third, the expected policy outcome. Policy outcomes should be determined not only in terms of policies formulated at the EU level but also by their impact on domestic politics and policies of member states.

## State of the art

### *Venue shopping for fortress Europe: intergovernmentalist perspectives*

In the early years of its development, European cooperation on migration was almost exclusively intergovernmental in nature, with informal coordination and soft law characterizing not only early integration efforts in the 1980s, but also 'third-pillar' policymaking under the Maastricht Treaty in the 1990s. Reflecting the wider disposition of the field, scholarly accounts of European migration policymaking in that period were largely dominated by intergovernmentalist perspectives. Building on the work of scholars like Moravcsik (1993), these accounts conceived of European integration as a two-level game empowering national governments, since they were able to 'play' in both the European and the national arena, and thus gain advantage over purely domestic actors (Table 1).

Most influential among these intergovernmentalist accounts of European migration policymaking is the 'venue shopping' thesis put forward in 2000 by Guiraudon, who argued that national governments shifted policymaking to the European level because it allowed them to 'circumvent national constraints on migration control' (2000: 251). As 'judicial constraints' and 'opposition from other ministries, parliamentarians, or migrant aid groups' to

**Table 1.** Changes in theoretical assumptions on EU migration policies and politics.

	Preferences	Power	Policy Outputs
2000s: Venue Shopping Thesis	MS <sup>a</sup> : Restrictive (EU Institutions: Liberal)	MS <sup>a</sup>	More Restrictive
2010s: Liberal Constraints Thesis	MS <sup>a</sup> : Restrictive EU Institutions: Liberal	Shared between MS <sup>a</sup> and EU Institutions	Less Restrictive

<sup>a</sup>MS = Member States.

restrictive migration policies at the domestic level increased in the late 1970s and 1980s, national government officials sought ‘policy venues where the balance of forces is tipped in their favour’ (2000: 251–252). This explains why the institutional framework that member states created in the 1990s left them with maximum decision-making power and attributed very limited competences to EU institutions (Guiraudon 2000; see also Lavenex 2001).

This intergovernmentalist perspective is based on two primary assumptions – namely, that member state governments are in control of policy-development in the field of migration and asylum and that they have restrictive policy preferences. From this, follow two expectations: first, the process of integration is explained by member states’ quest for restriction; second, since it is assumed that member states get what they want, the *output* of European integration must be *restrictive* asylum and migration policies. The influential metaphor of ‘Fortress Europe’ reflects this intergovernmentalist view of European cooperation as a means for restriction-minded member states to close down their external borders.

More recently, however, an increasing number of scholars have come to claim that the major institutional changes in European migration governance call for new analytical perspectives. Already in 2006, Lavenex suggested that ‘the autonomy-generating effects of Europeanization are a transitory phenomenon and will be caught up by supranational dynamics suggested by historical institutionalists or neofunctionalists’ (2006: 1286).

### ***A new central claim: EU institutions as ‘liberal constraint’***

Since the late 1990s, successive treaty changes have substantially changed the rules of the game in European migration governance. As a result of gradual communitarization beginning with the Amsterdam Treaty (1999) and completed by the Lisbon Treaty (2009), member states have lost their veto power in the Council, the EP is fully involved in the legislative process on an equal footing with the Council and the Court exercises full judicial control over EU immigration and asylum law. The Commission has also gained more powers to propose legislation and oversee its implementation.

In view of these institutional changes, there appears to be broad scholarly support for the position that the *power* assumption of the ‘venue shopping’

thesis – i.e., that member state governments have full and exclusive control over European migration governance – no longer holds (Acosta and Geddes 2013; Block and Bonjour 2013; Ette *et al.* 2011; Kaunert and Léonard 2012). This observation of a significant power shift has given rise to the claim that newly empowered supranational institutions act as a liberal constraint, curbing member states' quest for restriction – a claim which, of yet, remains highly contested.

Although the basic logic of the 'liberal constraint' thesis is opposed to that of the 'venue shopping' thesis, when it comes to *preferences*, we see a significant level of continuity in the scholarship from the 2000s to the present. Within the 'venue shopping' perspective, the preferences of supranational institutions were not necessarily addressed, since these institutions were thought to play an insignificant role. However, when scholars did pay attention to the preferences of supranational institutions, they would often describe them as liberal compared to member states' restrictive preferences, mostly due to the 'relative "insulation" of technocrats and judges from the harsher glare of electoral politics' (Geddes 2000: 633). Likewise, proponents of the 'liberal constraint' thesis assume that member states have more restrictive policy preferences, while supranational institutions are deemed to have more liberal ones. The discontinuity then lays not so much in the claims about preferences, but rather on those about the EU's division of *power*.

The assumption that supranational EU institutions hold more liberal preferences has been prominent in recent studies. For instance, Kaunert and Léonard (2012: 1406) have stated that the Commission, the EP and the Court are 'more "refugee-friendly" than Interior ministers' (see also Thielemann and Zaun 2013). Likewise, Block and Bonjour (2013: 223) argue that the Commission and the Court 'are asserting themselves as strong protectors of family migration rights'. Several authors emphasize the role of the Court in particular; Acosta and Geddes (2013: 179) point out that 'an EU rule of law is now being upheld by the Court of Justice of the European Union (CJEU) in the area of immigration and that this limits the ability of Member States to adopt excessive rules' (see also Bonjour and Vink [2013]; El-Enany and Thielemann [2011]; Kaunert and Léonard [2012]).

Furthermore, proponents of the 'liberal constraint' thesis have observed more liberal *policy outputs and outcomes*. In the field of asylum, it has been argued that the introduction of EU law has limited a race to the bottom in national deterrence measures, curtailed free-riding opportunities and in some areas even raised the standards for refugee protection in member states (El-Enany and Thielemann 2011; Kaunert and Léonard 2012; Thielemann and El-Enany 2010; Thielemann and Zaun 2013). This has been explained by pointing out the influence of supranational institutions in formulating EU policies (by establishing minimum standards) and their influence in the implementation phase, i.e., on the role of the Commission and Court in

overseeing the implementation of EU migration law at the domestic level. They point out that both the Commission and the Court can be expected to take a more 'rights-oriented' role that strengthens the rights of migrants and reduces the room for restriction (see also Acosta and Geddes [2013]; Block and Bonjour [2013]; Bonjour and Vink [2013]). Thus, in the recent literature, the image of a restrictive 'Fortress Europe' has been turned upside down: the EU is characterized here as a venue where migrants' rights are protected against member states bent on restriction by more liberal-minded supranational institutions.

One of the criticisms of the 'liberal constraint' thesis relates to its claims about the nature of *preferences* of member states and EU institutions. Its assumption that all member states always have restrictive preferences has been characterized as an 'over-simplification'. Kaunert and Léonard, for instance, press the theoretical point that 'preference formation should be seen as endogenous of institutionalized co-operation' and that preferences 'may evolve' (2012: 1340). However, they do not provide any empirical examples of member states not pursuing restrictive policies. Bonjour and Vink (2013) do emphasize that member states' preferences change, but in their case study of the Netherlands, they only observed a shift toward even more restrictive preferences. Roos (2013) is a rare exception in pointing out that member states may strive for expansive EU policies when it comes to admitting immigrants who they expect might benefit their economies and welfare states.

Likewise, the notion that supranational EU institutions invariably pursue liberal policy preferences has been contested. Lahav and Luedtke (2013: 111) observe that the Commission wants to show itself an 'ally [to member states] in tougher border control and immigration enforcement'. Scipioni (2015) has emphasized how the position of the Commission varies according to policy fields; while the Commission may take a liberal stance on asylum issues, it tends to support the restrictive preferences of the Council with regard to visa and border policies. Different scholars have argued that the EP has tended to adopt much less liberal positions since it has been granted full legislative power. In search of legitimacy in its new role, the Parliament has tended toward 'more consensual behaviour *vis-à-vis* the Council' (Trauner and Ripoll Servent 2016; see also Ripoll Servent [2015]; Lopatin [2013]).

Finally, the claim that the policy *outputs* of more communitarized EU migration governance have been more liberal has also been contested. Ette *et al.* (2011: 31) observe that, while European migration and asylum governance is no longer characterized by venue-shopping, there is 'evidence of the continued dominance of restrictive and control-oriented policies'. Ripoll Servent and Trauner (2014: 1153) find that the second wave of EU asylum law adopted in 2013 was 'slightly more harmonized and less restrictive'

than the original legislation adopted in the early 2000s. However, they emphasize that this does not warrant the conclusion that European asylum governance has become more liberal, because recent legislative reforms have left the restrictive core of existing asylum laws untouched. Building on this finding, Trauner and Ripoll Servent (2016) argue that those sub-policy fields where member states had the opportunity to define the main constitutional pillars tend to be characterized by policy stability.

### **Moving forward: challenges, limitations and prospects for future research**

The nature of contemporary EU migration governance has been subject to high levels of contestation in academic debates. However, many differences in the evaluation of policy processes and outcomes stem from the increasingly compartmentalized and policy-oriented nature of the field. Often, we suffer from either too much theory that has not been tested empirically or too many empirics with weak theoretical foundations. In order to move the research agenda forward, the field would benefit from more clarity on the implicit assumptions held, and levels of analysis adopted, by researchers. The paths we propose in the following are geared toward enabling a constructive dialogue: we want to encourage researchers to overcome theoretical divides and rather think about the contested concepts that lay at the core of these debates.

### ***Preferences: opening up the black box of preference formation***

There is more work to be done in order to theorize rather than just observe or assume the preferences of actors in EU policymaking. This has often proved to be methodologically challenging, but we consider that it remains a major gap in studies of EU migration policymaking. When it comes to examining preference formation in the Council, we have often used domestic policymaking as a proxy for member states' positions; this can be highly problematic, since government positions at the EU level might not mirror those they hold at the domestic level. For example, they might be more restrictive at the EU than at the national level due to the central role played by Justice and Home Affairs officials who are used to framing issues of immigration in terms of security rather than in terms of human rights (cf. Huysmans 2006). In some cases, national elites in the Council might have policy preferences on immigration that are more liberal than those of the average voter, who may be more concerned about potential competition effects from immigration (e.g., Hooghe 2003). Alternatively, conflicts may arise between those in favour of more or less EU integration. For instance, national officials might seek to 'upload' existing national policies to the European level in order to

minimize adaptation costs in the implementation process (Börzel 2002). Different migration scholars have indeed observed that the positions of national policymakers in EU negotiations seem to be guided by the preference to maintain an existing domestic *status quo* (Bonjour and Vink 2013; Zaun 2016).

To explore these dynamics, we can use liberal intergovernmentalism as a starting point to examine how governments aggregate domestic preferences (cf., Cerna 2014). There, we can pay more attention to the role of interest groups, party competition and the role of administrations and expertise (Bale 2008; Boswell 2007; Kaunert *et al.* 2013). The same criteria apply to the analysis of policy formation inside EU institutions, which should be seen as dynamic and multifaceted actors with shifting preferences. For instance, we can expect some effects of bureaucratic politics ('you stand where you sit'), which might explain why different units in the Commission see migration policies differently (Hooghe 1999; Scipioni 2015).

We should also open up EU institutions and explore the influence of ideological conflicts and external pressures. To this effect, we may need to integrate theoretical approaches that understand preferences as endogenous and susceptible to change over time. For instance, we could use policy analysis tools such as the Multiple Streams Framework to pay more attention to processes of agenda-setting, (strategic) framing or the emergence of policy narratives (Boswell *et al.* 2011; Princen 2015; Rhinard 2010; Zahariadis 2014). They can help us make sense of changes in our broader environment, such as unexpected events or influences from outside the EU. We can also combine them with new institutionalism to examine the logics of social action and the institutional constraints that inform processes of preference formation (March and Olsen 1998; Ripoll Servent 2015).

### ***Power: opening up the black box of power sharing in the EU***

Beyond the general observation that supranational institutions have gained power *vis-à-vis* member states, we need to ascertain when, how and why different actors exert different degrees of influence in migration policymaking processes. We need to pay more attention to the institutional conditions under which policies are (re-)formulated and how this happens (that is, which actors and mechanisms drive or hinder policy emergence and change).

Although, as seen above, studies of decision-making are not absent from the field, we have not always paid enough attention to theorizing the conditions under which policies develop: when do conflicts emerge, under what conditions do conflicts become salient, what formal and informal rules play in favour or against specific actors, etc. This may be achieved by a better integration of the tools provided by policy analysis approaches with institutionalist theories. Rational-choice institutionalism can tell us more

about formal rules and how they constrain actors' choices or shape their relative influence. For instance, it can highlight how principal-agent relationships shape policy outputs and outcomes (Thielemann 2013; Thielemann and Zaun 2013). It may underline how domestic and European courts cast a shadow over policymaking if certain issues can be 'judicialized', since the probability that they might be declared invalid by a court in the future raises costs in the present (Farrell and Héritier 2007: 233). Historical institutionalism can help us understand the importance of time in processes of policy change, looking at how past decisions explain present conflicts or the difficulties faced by policymaking actors in effecting changes that go beyond secondary aspects. We have seen, for instance, how the legacy from the intergovernmental period has determined the shape of most policies in the AFSJ and given member states a more advantageous position in recent negotiations (Trauner and Ripoll Servent 2016). Similarly, sociological or constructivist institutionalism can provide a deeper understanding of the broader conditions under which policymakers operate, notably institutional norms such as the growing weight of consensus and compromise in EU policymaking, which may constrain the ability of policymakers to force wide-ranging changes.

Assessing relations of influence and power within and between institutions requires opening up the 'black-box' of policymaking, paying attention to conflicts over both procedure and content; the degrees of access, inclusion and voice of different actors; and the presence of less visible actors such as experts, assistants and supporting staff (Ripoll Servent and Busby 2013). 'Actor-centred constructivism' reminds us that relative power and influence are shaped by both cognitive and material factors, as well as by the strategies that actors deploy (Saurugger 2013). With this, we can profit from advances in methodological tools, such as process tracing and certain branches of discourse and content analysis (e.g., Bennett and Checkel [2014]; Schmidt [2010]).

### ***Policy outputs and outcomes: improving our analysis of policy change***

Many of the academic disagreements in the area of EU migration policies are closely related to the different methods used to define and measure change. In a field where legal scholars have left a deep imprint, normative agendas have often dominated the debate, at times at the expense of systematic empirical analysis. Translating this disagreement into productive dialogue requires more transparency about how we conceptualize and measure both the *extent* and the *content* of change.

In order to analyse change systematically, an option would be to draw on the policy analysis literature. For instance, Hall (1993) and Sabatier and Jenkins-Smith (1993) stress the importance of defining what features of a

policy area have changed – i.e., looking at whether changes affect only secondary aspects such as the calibration of instruments; whether they touch upon core features of a specific policy, or whether they actually produce (paradigmatic) changes to their core beliefs and norms. A more careful operationalization of change can inject transparency in our research designs and clarify the lines of conflict, whether they change (or even disappear) over time and which aspects of the policy area are affected by change.

As to the *content* of change, the first question worth posing is whether change concerns procedures and institutions or substantive policies. When dealing with substantive change, a better understanding of where policy definitions come from – member state practices? International norms? Other EU policy areas? – might help us understand why some policies become more restrictive than others. For instance, the difference between the Single Permit or Seasonal Workers Directives on the one hand and the Blue Card or the Intra-Corporate Transferees Directives on the other can be determined by the existence of wider international norms on non-discrimination and equal treatment, which heavily informed the former two directives, while the latter reflected existing rights and practices in member states (Roos 2013; Roos and Zaun 2014).

Moreover, while the question whether European integration leads to restriction or liberalization of policies has always been at the heart of EU scholarship on migration, little attention has been paid to the conceptualization and measurement of ‘restriction’ and ‘liberalization’. Therefore, the question is still: liberal or restrictive *compared to what?* To pre-existing national policies (Block and Bonjour 2013)? To pre-existing EU policies (Kauert and Léonard 2012; Ripoll Servent and Trauner 2014)? To international norms (Roos and Zaun 2014)? Or to another ethical or normative standard? While this diversity of approaches is both inevitable and beneficial to the field, more reflection and transparency would be conducive to productive dialogue.

We do have examples that may help us in assessing and comparing change in methodologically accurate and transparent ways. The IMPALA project codes national migration laws according to their relative restrictiveness or openness in order to compare the ‘stringency’ of migration policies over time, across countries, and across different sub-policy fields (Beine *et al.* 2015). A similar project is the MIPEX database (2015), which assesses national migrant integration policies in relation to ‘equality standards’ derived from EU and international law. We might also draw inspiration from the party politics literature, for instance from the ‘Nativist Immigration and Integration Policy Index (NIIP)’, developed by Akkerman (2012).

Finally, we need to expand the temporal scope of our assessment of policy outputs. We are analyzing complex processes embedded in a system of multi-level governance, with multiple possibilities for feedback effects over time. Therefore, our assessment of policy outputs should not stop at the

formulation of laws and policies at the EU level, nor at their transposition into national law; it should also include the interaction of EU and domestic actors over longer periods of time. We have often seen how, in the implementation process, policy outputs become irrelevant or are changed in ways unforeseen by the original decision-makers. Indeed, some have noted that many of the texts that seemed to go into a more liberal direction have proved to be only loosely implemented or have not had any practical effects. For instance, the 2001 Temporary Protection Directive has never been used and, therefore, can be considered to be largely ineffectual (Kaunert and Léonard 2012). Conversely, directives that initially appear to leave member states lots of leeway may be turned into precise and constraining legal instruments through Court jurisprudence (Bonjour and Vink 2013). At the same time, national political actors may rhetorically use EU law to justify either restriction or liberalization (Block and Bonjour 2013). Assessing policy outputs requires analyzing implementation in its full complexity, i.e., disaggregating the domestic level and examining how EU policies are defined and modified by courts, governments, parliaments, civil society as well as street-level bureaucrats (cf., Boswell and Rodrigues 2016).

## Conclusion

The evolution in the scholarly field of EU migration policies has closely followed real-world processes of integration: from predominantly intergovernmentalist ‘venue shopping’ explanations, we have seen recognition of a growing role of EU institutions, resulting in a ‘liberal constraint’ thesis which is both broadly supported and highly contested. Scholars diverge substantially in their assessment of both policy outputs/outcomes and the main mechanisms to explain processes of policy emergence and change. This might not be a bad thing in itself – without lively scholarly debate our field cannot progress. However, we may need to bring some order into our field so that we all know where we stand and can communicate more effectively. We have defined three main axes of analysis of EU migration governance that currently structure the scholarly debate: preferences, power, and policy outcomes. We advocate transparent and reflexive theoretical and methodological choices on these three axes, drawing on wider political science methods and theories, so as to engage in a more productive debate and collectively work toward gaining greater insights into the multiple puzzles of EU migration governance.

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No potential conflict of interest was reported by the authors.

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