Journal of European Public Policy 13:8 December 2006: 1302–1307

Comment: Shaming the shameless? The constitutionalization of the European Union

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The European Union (EU) has experienced a remarkable process of constitutionalization, which has transformed it from a treaty-based international organization into a quasi-federal polity based on a set of treaties which is a constitution in all but name. In this special issue, Schimmelfennig, Rittberger and their collaborators seek to explain how this occurred, focusing on two dimensions of constitutionalization – the establishment of human rights protections at the EU level and the empowerment of the European Parliament (EP). They argue that neither existing rationalist nor constructivist perspectives provide adequate explanations. They propose an alternative explanation built on the notion of strategic, rhetorical action in a community environment and suggest conditions under which such action will be most effective.

As a whole, this special issue is extremely theoretically coherent. The articles are empirically rich, exploring the development of a wide variety of EU level rights and the growth of parliamentary power in both the contemporary EU and the failed European Communities of the 1950s. Given the limited space allotted to me, I cannot give the individual articles the attention that they deserve. What I can do, briefly, is to address the theoretical framework on which all of the articles draw. The first section of this article discusses strengths and important limitations of the theoretical framework underlying this special issue. The second section argues that Rittberger and Schimmelfennig were too quick to dismiss rationalist-institutionalist explanations for the constitutionalization of the EU and explores their explanatory power.

RHETORICAL ACTION AND ITS LIMITS

Rittberger and Schimmelfennig's argument is premised on the causal power of shame: constitutionalization occurs when some political actors (either sincerely or cynically) appeal to shared, community-wide norms in order to shame

Journal of European Public Policy
ISSN 1350-1763 print; 1466-4429 online
http://www.tandf.co.uk/journals
DOI: 10.1080/13501760601000199

reluctant political actors into enhancing EU level rights and empowering the EP. Shame is generated by differences between 'ought' and 'is'. Where differences emerge between shared norms of how political institutions 'ought' to be structured (i.e. norms concerning the importance of parliamentary oversight or human rights protections) and how they are structured in practice, proponents of deeper constitutionalization can persuade reticent actors to do something to address that inconsistency. The effectiveness of such pressure will vary depending on several contextual conditions that the authors identify. Rittberger and Schimmelfennig present their argument as a synthesis of rationalism and constructivism, combining the emphasis on strategic action of the former with the causal role for norms emphasized by the latter.

Like the best of the literature on the role of ideas in EU politics (see, for instance, McNamara 1998; Parsons 2003; Schimmelfennig 2003; Rittberger 2005; Jabko 2006),[1] this special issue goes beyond vague notions that ideas matter and presents testable hypotheses concerning the role of ideas and attempts to assess these against rival explanations. Their argument concerning how shared norms serve as resources that political actors can manipulate to further their political objectives is highly plausible, and the case studies go some way toward demonstrating that strategic rhetorical action can affect political outcomes. In a broader sense, their approach suggests openings to literature on the politics of symbols (Edelman 1985), the strategic use of culture (Swidler 1986), and strategies of rhetoric (Riker *et al.* 1996).

Few would disagree with the notion that policy-makers prefer to avoid being accused of violating cherished norms and that they may be shamed by 'community' pressures into changing institutions or policies that make them vulnerable to such accusations. Shame may have a causal impact in politics, but how much impact? Contributors to this special issue want to argue that such community shaming is a major, perhaps the most significant, driving force behind the constitutionalization of the EU. In this, they have overplayed their hand. The explanatory power of shame is limited for at least three reasons.

First, any seasoned student of politics will have observed, sadly, that many policy-makers have a remarkable tolerance for glaring and persistent differences between ought and is. Indeed, the political landscape of European democracies (and of all democracies for that matter) is littered with formal institutions, policies and informal practices that are affronts to the norms of democracy, equality and the rule of law to which these nations profess commitment. If politicians so often act shamelessly in domestic contexts, where community norms and bonds are far stronger, why should we expect shame to exert a powerful force at the EU level?

Second, in a community bound together by many shared norms, there is great potential for conflicts of norms. While some members of the community may call on a resonant idea in order to shame others into accepting their position, their opponents may themselves call on a rival norm.[2] Indeed, the two norms on which this special issue focuses – accountability to an elected

parliament and judicial protection of human rights – often find themselves in conflict in domestic settings. In the EU context, opponents of the strengthening of the EP or the extension of EU level rights can draw on a number of alternative shared norms including subsidiarity, national sovereignty or the need to place limits on 'activist' judges. Parliamentary accountability and human rights protection are powerful norms, but the authors do not offer a convincing explanation as to why actors relying on these norms should consistently prevail.

Finally, on the whole, this special issue's approach to strategic rhetorical action discounts power too heavily. The contributors suggest that any EU actor (e.g. member states, Members of the European Parliament, lobby groups), regardless of their resources or institutional position, can generate pressure for constitutionalization by pointing out inconsistencies between ought and is.[3] While ideas may sometimes serve as weapons of the weak against the strong, generally power will have a great impact on an actor's success in invoking norms for strategic ends.

THEORETICAL ALTERNATIVES

The more significant shortcomings of the volume concern not the argument it advances, but its premature dismissal of explanations provided by rationalist-institutionalism. First, Rittberger and Schimmelfennig's treatment of rationalist explanations for the establishment of human rights is unconvincing. They acknowledge that supranational institutions might have a self-interest in establishing EU level rights, but argue that member states would not. Given that member states have nevertheless supported the establishment of human rights, Rittberger and Schimmelfennig conclude that this cannot be explained through a rationalist-institutionalist analysis. Here they are wrong. The prevalence of a rights ideology in post-World War II Europe has certainly encouraged the constitutionalization of rights and rhetorical action may have played a role, but rationalist explanations for the institutionalization of rights also explain much of what has transpired in the EU.

The EU's fragmented institutional structure provides many opportunities for rights creation but presents serious impediments to rights curtailment (Kelemen 2006). This fragmentation encourages a 'virtual logroll' (Eskridge and Ferejohn 1995) in which the European Court of Justice (ECJ), national courts and the EU 'legislature' defer to one another's rights creating preferences, encouraging the proliferation of rights. The ECJ's incentives to create rights are obvious, as the interpretation and enforcement of rights are the primary means through which courts exercise power. As Stone Sweet (2000), Alter (2001) and others have noted, the ECJ has been a primary driver in the expansion of EU level rights, using the steady flow of cases generated by the preliminary ruling procedure to strengthen existing EU rights and divine new ones. National high courts too have incentives to see the rights they favour protected at the EU level. Though many high courts long resisted the supremacy of EU law, after accepting supremacy (see Alter 2001), they had incentives to see that the ECJ

would prevent national governments from evading, at the supranational level, the rights protections that high courts had established domestically. National governments too may have incentives to see rights protections adopted at the EU level. In the EU's quasi-federal system, rights often generate regulatory competition dynamics. If a government has in place or is considering adopting a rights protection that is in some sense 'costly' (i.e. equal treatment for the disabled, rights for asylum seekers, various social rights), it will have strong incentives to see its neighbours adopt the same right, so as to ensure a 'level playing field'. The best way to achieve this is through supporting the institutionalization of this right at the EU level, such that it will be imposed on all members.

Often by the time member states formally catalogue rights in an EU Treaty, these have already been established in the case law of the ECJ. In the absence of the coalition necessary to eliminate such rights (unanimity for Treaty based rights and qualified majority voting for statutory rights), the choice for member state governments is not between EU level rights and no EU level rights, but between EU level rights determined by the ECJ and ones that they can shape to some extent.

Rittberger and Schimmelfennig's dismissal of rationalist explanations for the growth in the EP's power is also unconvincing. In discussing principal–agent analyses, they accept that 'evidence supports the claim that member states follow a rationalist "logic of consequentialism" when they bargain over the participation of the EP in individual policy areas' (2006: 1154) but they ultimately reject principal–agent analysis because it is unable to explain why the EP was given a role in the first place. Here they have thrown the baby out with the bathwater. Even if one accepts that rationalist accounts cannot explain the original delegation of power to the EP, it does not follow that one should dismiss rationalist explanations for the subsequent extension of EP powers. As Pollack (2003), Jupille (2004), Hix (2002) and others have demonstrated, much of the growth of the EP's power can be explained as the product of self-serving 'rule interpretation' by the EP backed up by the ECJ in the periods between Treaty revisions. By the time of the next intergovernmental conference (IGC), member states find themselves facing a new status quo, and, typically, they will lack the unanimity necessary to undo the EP's 'mischief'. Thus, many of the so-called extensions of the EP's powers undertaken during IGCs are better understood as efforts to ring-fence extensions of EP powers that are by then *faits accomplis*. Shame may matter here, but not so much in the sense that states are shamed into extending the EP's power, as in the sense that they do not dare unwind it.

Rittberger and Schimmelfennig may be correct in arguing that there is no rational explanation for initial establishment of the EP and that, in a broad sense, the 'perceived necessity by political actors to inject the EU with a dose of parliamentary democracy' (2006: 1154) has played an important role in the empowerment of the EP. However, there are very powerful explanations for subsequent steps in the empowerment of the EP, and the persistent efforts of some governments to restrict EP powers in sensitive policy areas suggest limits to the causal impact of normative pressures.

CONCLUSION

This special issue makes a useful contribution to the study of the strategic use of norms in EU politics, but there are important limits to the causal impact of strategic rhetorical action. Do governments acquiesce in the extension of EP powers or creation of human rights, at least in part, in order to address the EU's supposed democratic deficit? Certainly. But this does not mean that strategic rhetorical action is a driving force behind constitutionalization. 'Shame' concerning the difference between ought and is may inspire governments to acquiesce in institutional reforms that they would otherwise oppose, but not if they expect such reforms will greatly damage their interests. Puzzlingly, governments often seem to miscalculate, conceding to what they believe will be very modest and innocuous 'strengthenings' of human rights or EP powers, but which eventually take on a powerful life of their own. There is one very simple and tempting answer to this puzzle, but as Stephen Krasner (1976) once observed, 'Stupidity is not a very interesting analytic category.' Short of invoking the 'cognitive deficits' of political actors in Europe, how else might we explain their recurrent failure to control the constitutionalization of the EU in areas where they oppose it? Rationalist-institutionalist analyses of the EU provide much of the answer, highlighting how the institutional structure of the EU both creates opportunities for advocates of deeper integration to extend EU rights and EP power and makes it difficult for opponents of such constitutionalization to resist.

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NOTES

1 See Moravcsik (1999) for a forceful critique of less rigorous constructivist literature.
2 See, for instance, Krasner (1993) on how the range of available ideas mediates the impact of ideas.
3 To be fair, some articles, such as Lavenex's, emphasize that actors' success in deploying rhetorical action will depend greatly on their position within formal organizational structures.

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