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# European Economic Constitution and the Transformation of Democracy: On Class and the State of Law



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| Abstract: | In the context of contemporary analyses of Europe Union as a post-democratic form of economic governance, the paper explores the (ordo)liberal character of monetary union as a regime of imposed liberty. The argument holds that rather than forcing the member states into retreat, the economic constitution of Europe strengthens their liberal foundation, securing their utility as the organized force of a mode of social reproduction founded on free labour. It develops the character of the liberal state as the political form of a free market economy with reference to Adam Smith's classical political economy and the German ordoliberal tradition, which calls for a rule-based system of federated forms economic governance to secure a free labour economy in conditions mass democratic aspirations for a freedom from want. It explores the rationale of the ordoliberal distinction between the liberal character and the democratic character of the state and in this context, assesses the meaning of liberal democracy in a post-democratic Eurozone. |

# European Economic Constitution and the Transformation of Democracy: On Class and the State of Law[1]

AUTHOR

'The class character of the state is not "defined in national terms". Rather it derives from the world market, 'the capitalist law of property and contract transcending national legal systems, and world money transcending national currencies' (Clarke, 1992, p. 136).

'A free market economy is a basic principle of the Treaty of Rome. Such a liberal economic system … does not exclude state intervention. On the contrary, it presupposes that the state provides a framework for the operation of such a system; for only an appropriate framework allows each section of the economy to exercise its freedom of action, in fact compels it to exercise that freedom' (Hallstein, 1972, p. 110).

'To diminish national sovereignty is most emphatically one of the urgent needs of our time. But the excess of sovereignty should be abolished instead of being transferred to a higher political and geographical unit' (Röpke, 1955, p. 250).

'A market economy is not a vaccination against [the democratic] disease…Even if the [member] States have not succeeded in setting up a proper economic constitution internally, one is imposed on them from the outside. The Member States come under a regime of imposed liberty' (Engel, 2003, p. 431).

'This kind of executive federalism of a self-authorizing European Council [is a] template for a post-democratic exercise of political authority' (Habermas, 2012, p. vii).



## Introduction

The paper explores the argument that the Europe that has come to pass over the last few years is an exception to the democratic idea of the rule of law. In this argument, the Eurozone is governed by an unbound executive, that is, the European Council comprising the Euro-club countries (on this, see Habermas, 2012, Jörgens, 2015; Wilkinson, 2014). Within this identity, broad-based social movements, comprising elements of the political left and an invigorated extreme right, have come to the fore as contestants to the 'faceless exercise of rule behind closed doors by the European Council' (Habermas, 2012, p. 102). In distinction to what Habermas identifies as the transformation of Europe into a post-democratic regime of economic crisis-mangement, I hold with Müller (2014, p. 251) that the process of European integration

[1] Acknowledgments:

has been characterised from its inception by the 'inbuilt distrust of both popular and parliamentary sovereignty' and by the eagerness of cross-border elites to constrain mass democracy to the liberal rule of law. The paper puts Habermas' diagnoses of a post-democratic Union into theoretical and historical perspective to give context to, and explore the veracity of, his claim.

I argue that European economic governance embeds national systems of mass democracy into a supranational structure of economic freedom, tying the democracies of member states to a market liberal foundation. Furthermore, I argue that this containment of national sovereignty does not in any way curtail the state as 'society's [independent] power' (Marx, 1987, p. 438). On the contrary, it emphasises its character as the concentrated power of a free labour economy[2]. In Europe, fundamental policy-decisions are made by a council of national executives and the member states have the sovereignty of politics, implementing EU policy. In the words of Vivien Schmidt (2006, p. 33), 'while the EU has policy without politics, the member state end up with politics without policy'. Schmidt's notion, however insightful, is potentially misleading. Her account implies that member state 'end up with' a politics that they would not have chosen had they been able to determine policy by themselves. The member states appear thus to lose out from the arrangements that they themselves entered into. Schmidt seems thus to suggest that the Union forces the member states into 'retreat'. In distinction, I hold that the EU provides a supranational anchor for the domestic pursuit of market freedom. In a free labour economy, the attempt to remove impediments from commodity markets, including especially so-called restrictive labour practices, is not at all alien to its concept. In fact, it belongs to it and is innate to its existent reality, that is, a free labour economy entails the freedom of labour within its conceptuality. In the market liberal account, mass democratic systems of parliamentary law making prevent the achievement of efficiency competition on labour markets.

The often-lamented democratic deficit of European governance is, I argue, not a design fault. Rather, the market liberal constitution of Europe identifies democracy as an impediment to a free labour economy. In distinction to majoritarian democratic theory, according to which voting 'is a method for citizens to participate directly in making law, which is then the will of the people', the liberal-rights view of democracy holds that it a method of circulating governing elites (Riker, 1982, p. xi; Schumpeter, 1950). In the liberal economic argument, democratic majorities are not entitled to do what they want to. Rather it argues for constrains on parliamentary law making by the constitutionally enshrined rights of property and of the freedoms of property. In the European case these rights and freedoms are supranational in character. Europe is an economic and monetary union but not a political union. Habermas' verdict about the EU as a post-democratic regime recognises that at the Eurozone's critical

[2] On the meaning of a free labour economy, see Smith (1976a, p. 87) and Bonefeld (2011).

moment the European Council of the Euro-club stepped into the vacant political space of the EU decision-making. Nevertheless, this assertion of political sovereignty belongs to those same political entities that founded the EU as a policy-maker for the domestic pursuit of politics. In cohort with the IMF and ECB, the European Council responded to the Euro crisis by replacing the formalism of the competencies of law and statuary regulation that prevails under normal circumstances by sovereign decision making on the exception, dictating austerity ostensibly in order to preserve the formalism of law and regulation in the long run (Jörgens, 2015; Wilkinson, 2014).

The paper develops its account of a post-democratic Europe in four steps. It first introduces Smith's classical argument about the state as the political form of the system of liberty to establish the liberal veracity of the state. It then examines the tradition of authoritarian liberalism that emerged towards the end of the Weimar Republic as a new mode of (ordo-)liberal response to the then crisis of capitalism. In distinction to laissez-faire liberalism, it assigned the task of ensuring the constitution of economic freedom to the state and argued that the premise of free economy is the strong state. Section Three introduces the (ordo-)liberal argument about the benefits of European integration for free economy. Section Four assesses the market enabling structure of European monetary union. For the market liberal constitution of monetary union, the principle of subsidiarity is fundamental – for the sake efficiency competition, it separates the conducts of labour market policy, fiscal policy and monetary policy into decentralised domains of governance (see Feld, 2012). The conclusion returns to the argument that the Euro club has transformed into a post-democratic regime of executive decision making.

## The System of Liberty and Political Form

Adam Smith's classical political economy makes clear that the magic of the invisible hand depends on undistorted competition in undivided markets. The invisible hand does not remove impediments from markets nor does it create and maintain the undistorted order of liberty. Order is a political category. Indeed, for Smith, the invisible hand and the order-making state do not compete with each other. On the contrary, he conceives of the state as the political form of the system of liberty. He thus defines political economy not as a science of the invisible hand. Rather, he defines it as a 'science of the statesman or legislator' (Smith, 1976a, p. 428).

Smith specifies a number of indispensable state functions. Apart from defending the country against external threats, the state is indispensable also for the provision of public goods that are required for the operation of the market but which cannot be provided for by the market itself for lack of profitability (cf. Smith, 1976a, p. 723). Furthermore, it has to provide for an exact administration of justice in order to resolve clashes of interest between property owners. For him, 'justice…is the main pillar that holds up the whole edifice' (1976b, p. 86). It safeguards the rights of the individual to liberty and property, guaranteeing the framework of civil society. Finally, the state is charged with facilitating the law of private property by, for example, removing various institutional and legal impediments, and by confronting those private interests that impede the perfect liberty of the market. This responsibility also entails the state in achieving the 'cheapness of provision' (Smith 1978, p. 6), facilitating the progressive development of accumulation on the basis of increased labour productivity. Smith thus argues that the 'system of private property necessarily requires the establishment of civil government…Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor', and he maintains that the defence of private property against the poor is in fact undertaken in the interest of the poor (Smith 1976a, p. 770). According to Smith, the unimpeded system of liberty benefits the poor as wealth once accumulated in the hands of the rich, tends to trickle down – the bigger the cake, the bigger the slice for the poor.

For Smith, the purpose of the state is to secure for the invisible hand that perfect order upon which the progress of society is said to depend. It eradicates disorder, establishes the rules of justice, facilitates the achievement of greater labour productivity and protects 'those who have some property against those who have none at all' (ibid., and Smith 1978, p. 338). He introduces the class struggle between capital and labour arguing that 'wages depend upon contract between two parties whose interests are not the same'. That is, the 'workmen desire to get a lot, the master to give as little as possible. The former are disposed to combine to raise, the latter to lower the wages of labour'. In this struggle, the masters have the upper hand because they 'are fewer in number, and combine much more easily; they can live for longer without getting their profits, the workers are starved' (Smith 1976a, p. 83). That workers rebel is understandable given their 'desperate conditions'. Yet, their action is foolish because 'the masters react with purpose and force the worker back and that is, the workmen very seldom derive any advantage from the violence of those tumultuous combinations'. The only way to raise wages and improve conditions is by sustained accumulation. 'Workers do well not to struggle, because with the increase of surplus, stock accumulates, increasing the number of workers, and the increase of revenue and stock is the increase of national wealth. He argues thus that 'the demand for those who live by wages…increases with the increase in national wealth'. This, then, is the famous trickle-down effect - accumulation, he argues, increases national wealth and 'occasions a rise in the wage of labour' (Smith 1976a, pp. 84, 85, 86-7, 87). Smith calls this the 'liberal reward for labour', and one consequence of his argument is, of course, that if there are poor, then this is an indication that 'things are at a stand', requiring state action to facilitate 'the cheapness of goods of all sorts', that is, to facilitate by means of police the of increase labour productivity, improving the price competitiveness of stock in a world governed by the magic of the invisible hand and the promise of a liberal reward for labour.

However, although according to Smith 'national wealth' and 'workers' benefit from progressive accumulation, the owners of stock might not because 'the increase in stock, which raises wage, tends to lower profit' (Smith 1976a, p. 105). He argues that the owners of stock might therefore be inclined to maintain the rate of profit artificially, impeding the natural liberty of the market by, for example, price fixing or protectionism. According to Smith, this assertion of private power 'produces what we call police. Whatever regulations are made with respect to the trade, commerce, agriculture, manufactures of the country are considered as belonging to the police' (Smith 1978, p. 5). Effective policing entails a strong state, a state where it belongs: over and above the egoistic interests and class struggles, ostensibly not governing in the interest of either but in the interest of the beauty of the well-ordered whole, securing its propriety. The state thus governs in the interests of the bonum commune of what he calls commercial society. It intervenes into the behaviour of individuals to restrain their passions that are governed by 'self-love' and short term class interests. Concerning the poor, police is needed to make the worker accept that 'if he is frugal and industrious, [s/he] may enjoy a greater share of the necessaries and conveniences of life than it is possible for any savage to acquire'. There is thus need, also, for a public system of education to promote 'the instruction of the people' to secure the order of liberty in the (govern)mentality of the poor (Smith 1976a, pp. 10, 723).

However, the liberal character of the state is not defined in national terms. It derives from world market relations. He argues that the owners of stock in some countries might achieve higher rates of return on their investment than owners in other countries, 'which no doubt demonstrate[s] the redundancy of their stock' (Smith 1976a, p. 109). In order for their stock to be maintained, competitive adjustment at home is required, and its facilitation is a matter of 'police' (Smith 1978, p. 5). Furthermore, 'the proprietor of stock is properly a citizen of the world, and is not necessarily attached to any particular country. He would be apt to abandon the country in which he was exposed to a vexatious inquisition, in order to be assessed to a burdensome tax, and would remove his stock to some other country where he could either carry on his business, or enjoy his fortune more at his ease' (Smith, 1976a, pp. 848-49). That is to say, the world market transcends national legal systems and national currencies. It is the categorical imperative of the political economy of capital. Smith penned his work in critique of the then mercantilist state. But by the beginning of the 19thC it had become the ideological orthodoxy of a liberalising state (see Clarke, 1988, chap. 1). It was in this context that Marx (and Engels) speaks in the Communist Manifesto about the cosmopolitan character of the bourgeoisie, the world market reality of the price mechanism, and defines the national state as the executive committee of the bourgeoisie. In sum, the Smithean state restrains the quarrelsome nature of commercial society, prevents the political assertion of the private interests, quells social unrest, suppresses the class struggle, and prevents illiberal manifestations of freedom on the basis of a law governed, perfectly civil constitution of social interaction, in which the individuals are free because they are only governed by the law of private property. In this community of equals, as Marx put it, 'each pays heed to himself only, and no one worries about the rest. And precisely for that reason, either in accordance with the pre-established harmony of things, or under the auspices of an omniscient providence, they all work together to their mutual advantage, for the common weal and in the common interest' (Marx 1990, p. 280). Smith's account makes clear that the sociability of economic regulation by the invisible hand 'must assume the form of the state and must gain expression as the will of the state, as law' (Marx and Engels 1976, p. 180).



**Liberty, Democracy and the Force of State**

In our time, Milton Friedman has provided a cogent definition of the state as the executive committee of the bourgeoisie. Friedman argues that the state is 'essential both as a forum for determining the "rules of the game" and as an umpire to interpret and enforce the rules decided upon' and enforcement is necessary 'on the part of those few who would otherwise not play the game' (1962, pp. 15, 25). That is, 'the organisation of economic activity through voluntary exchange presumes that we have provided, through government, for the maintenance of law and order to prevent coercion of one individual by another, the enforcement of contracts voluntarily entered into, the definition of the meaning of property rights, the interpretation and enforcement of such rights, and the provision of a monetary framework' (p. 27). The state has to 'promote competition' (p. 34) and do for the market what the market 'cannot do for itself' (p. 27). Liberals, he says, 'must employ political channels to reconcile differences' because the state is the organisation that provides the means 'whereby **we** can modify the rules' (p. 23, emphasis WB). However, what happens when **they** interfere?

In his Road to Serfdom Hayek (1944, p. 58) focuses on this simple point of law making by (unconstrained) democratic majorities. He invokes Kant's notion that 'man is free if he needs to obey no person but solely the law', and goes on to argue that the unlimited character of mass democracy imperils this freedom by subjecting the rule of law to the democratic majority principle, transforming it, he argues, into an instrument of mass opinion, mass emotions, and mass demands. Instead of the rule of law governing society, society governs through the rule of law. Once the rule of law becomes subject to unpredictable parliamentary majorities and mass opinion, the germ of tyranny takes hold as egalitarian and collectivist forces triumph to the detriment of free economy (for a recent restatement see Bernholz, 2013). For Hayek, then, society is either governed by the liberal rule of law securing individual freedom or it is governed by the democratic principle of majority rule, leading to tyranny and planned chaos.[3] In the face of the democratic idea that law is made by, and in the interest of, democratic majorities, the protection of liberty is said to demand the provision of a constitutional structure to restrict the 'set of considered issues' that come before a democratic assembly (Riker, 1982, p. 2).[4] The liberal rule of law is thus not 'co-determinous with democracy'. In fact, it is meant to restrict the scope of democratic government, give direction to policy-making, and 'protect against the excess of democracy and its dangers', that is, the so-called tyranny of the democratic majorities to legislate for the satisfaction of their – illiberal – interests in employment protection and welfare provision (May, 2014, p. xxix).[5]

Hayek's Road to Serfdom is in parts a fine résumé of ordoliberal ideas, which emerged towards the end of the Weimar Republic.[6] Ordoliberalism was the first serious attempt at addressing the challenges of collectivism and mass democracy to the system of economic liberty. For the ordoliberals Weimar stood for the seizure of the liberal state by the Fourth estate, which had gained entry into its institutions, transforming the party system and the systems of parliamentary representation and government into one of mass representation by mass parties leading to mass politics and government on the basis of mass convictions, to the detriment of the system of liberty.[7] Herman Heller (1933) characterized ordoliberalism as an authoritarian liberalism, one which 'denotes the primacy of the political for [the conduct of free economy]' (Jörgens, 2015, p. 3). The ordoliberal response to the challenge of mass democracy to the system of liberty dismisses the argument for a weak night-watchman state as a dangerous doctrine. In fact, in their view, the weak state is the Achilles-heel of free economy. It is unable to defend itself against the unbound demands of a mass society with the consequence that it loses its 'independence' from society. Instead of governing over the 'demos' the demos governs through the state, which imperils the capacity of the state to facilitate the system of liberty. Instead, an unlimited mass democracy tends to transform the state into a 'self-serving unlimited-liability

[3] Hayek (1944) explores this distinction with unrelenting passion. He was a post-war addition to the ordoliberal Freiburg School.
[4] This last point paraphrases Riker's dictum that constitutional restriction and direction is about the structuring of the world so that you can win. See Riker (1993).
[5] In May's account the liberal rule of law is one amongst a number of different conceptions and possible manifestations of the rule of law. Indeed, 'the rule of law is not a well-defined concept' (van Gerven, 2005, p. 104). Is the rule of law a manifestation of parliamentary democracy, which would entail a rule of law by shifting parliamentary majorities, or does it designate a Rechtstaat that is bound by the rule of law as the basic constitutional norm that frames the scope, content and direction of democratic law making? In the last century the battle over the meaning of the rule of law was fundamentally one between the proponents of the liberal rule of law and the proponents of majoritarian democracy, which substitutes political accountability to the demos for the rule of law. This article argues that European Union secures the liberal rule of law as the constitutional framework of a federated system of mass democratic governments. On the social mechanism of legal revolutions, see Brunkorst (2014). In a free labour economy, the freedom of labour holds sway in the conceptuality of law. On this, see Pashukanis (1987) and Bonefeld (2014).
[6] The founding ordo-liberal manifestos are Eucken (1932), Rüstow (1932), and Müller-Armack (1932). On ordoliberal thought see Haselbach (1991) and Bonefeld (2012a).
[7] For an account, see Weber (1994)

insurance company, in the business of insuring all social interests at all time against every conceivable risk', from the cradle to the grave.[8]

Ordoliberalism thus dismisses the weak state for being unable to set itself apart from the preying social interests. Instead, it succumbs to the 'attacks of pressure groups…monopolies and…unionised workers' (Rüstow, 1942, p. 276). The weak state does not set limits to the contesting social forces and fails to depoliticise the socio-economic relations on the basis of a rule-based system of market interaction. Instead of governing over society, the state is 'being pulled apart by greedy self-seekers. Each of them takes out and secures a piece of the state's power for himself and exploits it for its own purposes…This phenomenon can best be described by a term used by Carl Schmitt – "pluralism". Indeed, it represents a pluralism of the worst possible kind. The motto for this mentality seems to be the "role of the state as a suitable prey"'. For the sake of liberty, what is therefore needed is a state that 'governs, that is, a strong state, a state standing where it belonged, above the economy and above the interest groups' (Rüstow 1932/1963, pp. 255, 258). Only the strong state can distinguish itself from society. It prevents government from becoming the 'target' of the powerful private interests and class specific demands. For the sake of liberty, a strong state is therefore needed to secure the liberal veracity of government in the face of unbound mass democratic 'rent seeking' by the special interests (Vanberg, 2014, p. 7).

For the ordoliberals, liberalism has always to focus on the 'whole', and this whole 'is the state' (Röpke, 1959, p. 45). For the sake of free economy, the distinction between society and state is not negotiable. On the threat of 'ungovernability', the liberal rule of law can therefore not be subjected to shifting democratic parliamentary majorities and unrestrained assertion of political pluralism. If indeed there has to be democracy, it must be 'hedged in by such limitations and safeguards as will prevent liberalisms being devoured by democracy. Mass man fights against liberal-democracy in order to replace it by illiberal democracy' (Röpke, 1969, p. 97). For the sake of liberty, democracy has thus to be limited. The liberal state is the state of limited democracy.

In the ordoliberal account, state and economy are innately connected. Ordoliberalism does not define the state in relationship to the economic. The perennial question about such a conception is whether the market has autonomy vis-à-vis the state, or the state vis-à-vis the market, leading to arguments about the 'retreat' or the 'return' of the state as dominant actor in relation to the economy.[9] Rather, ordoliberalism conceives of the state as the concentrated force of a society,

[8] The argument about the state as an insurance company quotes from King's (1976, p. 12) diagnosis of the 1970's crisis of the (British) state as a crisis of ungovernability.

[9] On the alleged retreat of the state in so-called neoliberal globalization see, for example, Strange (1996). On the apparent return of the state in the context of the crisis of 2007 see Blyth (2013). For critique see Bonefeld (2010).

which in its concept contains both 'greedy self-seekers' (Rüstow, 1942, p. 255) and a 'tendency towards proletarianisation' (Röpke, 2009, p. 218). In the first case, if unfettered, the society of 'greedy self-seekers' destroys the 'ethical and social forces of coherence' of free economy (Rüstow, 1942, p. 255). In the second case, the class tied to work 'might systematically do poorly', and might therefore struggle for higher wages and full-employment at the expense of free economy (Vanberg, 1988, p. 26). They dismiss the redistribution of wealth as violating the principle of a free labour economy and reject a policy of full-employment as contrary to its logic. Rather than solving the problem presented by quarrelsome workers, it would stall economic development, creating unemployment. They accept that the struggle between the traders in labour power, the one buying the other selling, is innate to the character of a free labour economy. Within this zone of conflict, ordoliberalism declares for the strong state as 'the guardian of enterprise' (Vanberg, 2001, p. 50). It is charged with depoliticising the socio-economic relations as relations of contract, governed by the liberal rule of law.

In the ordoliberal account laissez-faire is a category of economic order. Order is not an economic category, but a political one. They thus argue that laissez-faire is not only 'a highly ambiguous and misleading description of the principles on which a liberal policy is based' (Hayek, 1944, p. 84). It is also a dangerous idea if it is allowed to organise society as a whole. Competition 'tends more to dissolve than to unite. If competition is not to have the effect of a social explosive and is at the same time not to degenerate, its premise will be a correspondingly sound political and moral framework' (Röpke, 2009, p 181). For the sake of laissez-faire as the principle of economic constitution, it can therefore not be a principle of political organisation and policy-making. Instead, laissez-faire amounts to a political practice of socio-economic organisation. Laissez-faire is no 'answer to riots' (Willgerod and Peacock, 1989, p. 6). It is neither an answer 'to the hungry hordes of vested interests' nor to an unlimited mass democracy that does not know how to limit itself to the pursuit of free economy (Röpke, 2009, p. 181). The viability of a free labour economy is a political matter. That is, as Martin Wolf (2001) argued in a different context, free economy cannot be built on 'pious aspirations'. It rests on 'organized coercive force'.

Liberalism does therefore not demand 'weakness from the state, but only freedom for economic development under state protection', to prevent 'coercion and violence' by the private interests (Hayek 1972, p 66). What is protected by the state is not independent from it. On the contrary, its independence is an eminently political practice of government that is charged with achieving the 'complete eradication of all orderlinessess from markets and the elimination of private power from the economy' (Böhm, 1937, p. 150). The economic order of freedom is a depoliticised order, that is, it is a state-less sphere under state protection. Paraphrasing Franz Böhm, the state-less sphere of the free economy amounts to a political practice of 'eradicating disorder' from the economy, removing impediments to market competition. The state therefore really is 'the mistress of the economy in its totality as in its parts…and the state must master the whole of economic development both intellectually and materially' (Böhm, 1937, p. 10).[10] In Thomas Balogh's (1950) succinct characterisation, ordoliberalism amounts to an attempt at planning 'by the free mechanism'.[11] The meaning of the strong ordoliberal state lies in this construction of a rule-based system of economic freedom.

Ordoliberalism recognises economic freedom as a political responsibility. In its account, the economic sphere and the political sphere need to be conceived together interdependently and have to operate interdependently to maintain the system of liberty as a whole.[12] There is thus a need for coordinating the economic, social, moral and political spheres, to achieve and maintain systemic cohesion. The organisational centre of a free labour economy is the state; it is the power of interdependence and the force of liberal coherence. The economic constitution of liberty amounts therefore not only to 'an eminently political decision' but, also, to a continuing practice of government (Böhm, 1973, p. 39). Its success appears in the form of a functioning market system in which the economic agents respond to price signals in the civilised and entirely self-responsible manner of the entrepreneur who, rather than rebelling against the movement of the free price mechanism as welfare seeking proletarians do, adjust his utility calculations to the movement of prices. For the ordoliberals, then, the strong state is the limited state. It secures the possibility of spontaneous action in the behaviour of the economic agents by limiting itself to the organisation of the market as the sphere of a state-less freedom that, unimpeded by mass democratic demands for collective provision, regulates individual preference calculations of the entrepreneur, including the entrepreneur of labour power.[13]

I have argued that ordoliberal political economy recognises unlimited mass democracy as an impediment to liberty and conceives of the strong state as a force of liberty. It proclaims for the establishment of an economic constitution in which the acting economic agents 'come under a regime of imposed liberty' (Engel, 2003, p. 431). That is, the viability of an economy that is governed by supply and demand is a matter 'beyond supply and demand'.[14] The achievement of

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[10] In a later publication Böhm (1969, p. 171) makes the same point when he argued that free economy requires the 'etatisation of society' to secure the responsible pursuit of freedom on the part of the economic agents, preventing its illiberal misuse by the social forces. Böhm contrasts the 'etatisation' of society as a force of freedom with the 'socialisation' of the state by the social forces, which, in the form of the Keynesian welfare state, institutionalises 'special interest rent seeking' (Vanberg) to the detriment of free economy.

[11] Balogh was an important Keynesian economist and advisor to the British Labour Party during the 1950s and 1960s.

[12] Interdependency is Eucken's term (2004).

[13] The entrepreneur of labour power is an investor in human capital.

[14] See Wilhelm Röpke's (1998) book A Human Economy. The German title of his book is Jenseits von Angebot und Nachfrage (Zürich: Rentsch, 1958), that is, Beyond Supply and Demand. The German title

a free-market order is therefore more important than growth in GDP, inasmuch as GDP does not provide for liberty that socio-economic order, upon which it feeds. Laissez-faire is a function of order. For the ordoliberals, the strong state is the political power of that order.

In conclusion, the familiar 'no demos' that is part of European construction is at the heart of ordoliberalism. 'Organisation through competition requires no more than the clearing away of obstacles' (Möschel, 2003, p. 287), including the obstacles of mass democratic interference with the rules that govern a free economy. Government by unpredictable parliamentary majorities entails discretionary policy making to the detriment of the liberal rule of law, which is the foundation of efficiency competition. In the late 1920, the liberal argument that unlimited democracy leads to the tyranny of the majority was part of the rightist reaction against democratic government. In the 1950s, it became part of the 'anti-totalitarian' idea that an unlimited mass democracy leads to tyranny and that for the sake of stable democratic government, an open society and individual freedom, democracy needed to be limited and constrained, and that political participation by the demos needed to be dampened down (Agnoli, 1990; Müller, 2014).

The next two sections set out the case that European integration provides a supranational means for limiting democracy to the pursuit of economic liberty. De Gaulle (1971, p. 143) recognised this benefit of the Treaty of Rome most clearly when he argued that 'international competition...offered a lever to stimulate our business sector, to force it to increase productivity...hence my decision to promote the Common Market which was still just a collection of paper'. The other side, then, of the domestic reality of mass democratic incorporation into the post-war political system of government was the de-democratisation of economic governance by means of supranational structures of law that established the rule of undistorted competition in an undivided common market. The lucid prophet of the benefits of this project was Hayek.

**Hayek and the idea of a *Stabilitätsgemeinschaft***

During the 1930s, Hayek advocated that national states should combine to create a federal interstate system. This arrangement he argued would prevent inflationary demands which, for him, were a consequence of the unlimited character of mass democracy at the national level. He endorsed supra-nationalism as a means of encouraging competitiveness, against a national politics of economic protectionism; supported the de-politicisation of economic relations, against the power of 'special interests' to subject the national state to commit to material concessions and inflationary demand management; and called for the removal of restrictions on

focuses the locus of market integration on its political form, the form of the state, whereas the English title, A Humane Economy, focuses the liberal objective of state intervention.

the movement of capital, labour and commodities. Furthermore, supranationalism would allow 'the creation of common rules of law, a uniform monetary system, and common control of communications' (Hayek, 1939, p. 255), which would narrow the scope for illiberal political interference into economic life and discourage collective responses to social pressures. Supranationalism was thus endorsed as a means of placing society under a supranational regime of imposed liberty. It would thus limit the effect of mass democracy on political decision making by curbing the power of the dispossessed sellers of labour power to force governments to commit to welfare and employment guarantees associated with Keynesianism.[15]

For Hayek supranationalism would provide 'a rational framework within which individual initiative will have the largest possible scope' (ibid., p. 268). Nothing would stand in the way to what, today, is termed the de-regulation of labour relations. As Hayek saw it 'even such legislation as the restriction of child labour or of working hours becomes difficult to carry out for the individual state' (ibid., p. 260). Within a supranational union, individual states 'will not be able to pursue an independent monetary policy' (ibid. p. 259). Politicians, he suggests, are always governing with the next election in mind. This perverts even those committed to free economy to give in to 'popular pressures', leading to the politicisation of economic relations, thereby impeding free economy and thus harming the capacity of the invisible hand to regulate the spontaneous actions of the market participants within the framework of the system of liberty. Furthermore, monetary policy always requires an element of judgement and thus discretion that government might abuse to retain legitimacy. A supranational operation of monetary policy, with an independent bank removed from domestic considerations, would thus insulate economic policy-making in member states from distorting democratic pressures on policy. Monetary policy would instead be rule-based and out of reach of parliamentary majorities. The independence, then, of monetary policy from democratic influence would accord its conduct a quasi-judicial status. In short, domestic politics would be anchored in a supranational policy regime that, in the view of Müller-Armack (1971), came into being with the European Economic Community, which for him created a European <u>Stabilitätsgemeinschaft</u>. In this community a rule-based system of undistorted market competition facilitates the labour market's adjustments in member states. Instead of adjusting national prices to world market conditions by meddling with monetary conditions and depreciation of currency exchange rates, the achievement of greater labour productivity becomes the means of competitive adjustment.

[15] For a similar account in the context the political economy of the US, see Riker (1987). Riker had started out as a supporter of Roosevelt's New Deal and in this context he saw federalism as an obstacle to the New Deal. Later in his career he turned against what he decried as' big government', which he identified with Johnson's Great Society. Riker's libertarian turn let to a re-evaluation of the system of federalism, which he now as a protection against democratic tyranny. In distinction to Riker, Hayek did not advocate the creation of a federal state system. He advocated a supranational system of law and money.

Müller-Armack - 'probably the most influential German at Brussels' (Moss, 2000, p. 258) - was opposed to economic dirigisme but not to a 'consciously steered market economy' (Müller-Armack, 1947, p. 95) and, as Secretary in the Economics Ministry of the FRG, argued that centrifugal forces had become 'visibly greater in the situation of prosperity', necessitating 'an additional effort towards social integration' to achieve efficiency competition (see Müller-Armack, 1960).[16] The purpose of political 'steering' is 'planning for competition' (Hayek, 1944, p. 31). However, by the late 1970s, Hayek had renounced his youthful views of the 1930s. Fearful that a single European currency would be prone to interference by the weak member states of the European Community, he advocated that money was to be issued by competing private banks (Hayek, 1978).[17] Hayek thus distinguished between an entirely de-democratised monetary union as the gold standard of asserting economic discipline and a political union, in which the conduct of monetary policy is subject to illiberal political interference and meddling, including fiscal free-riding by weak member states and supranational systems of fiscal redistribution (Feld, 2012).

In the late 1980s and early 1990s, the architects of monetary union were most emphatically agreed on keeping the Euro at arms lengths from political pressures and forms of democratic accountability. The Euro was to diminish political sovereignty at the national level without transferring it to 'Brussels'. They thus accepted that a supranational system of monetary discipline was preferable to political union. The market liberal watchword for both Hayek's interstate-federalism and the established institutional structure of European monetary union is subsidiarity. Subsidiarity entails a system of 'relative sovereignty' (Röpke, 1954, p. 38), in which the fundamental freedoms of a free labour economy, including monetary conditions and 'anti-trust rules and institutions for the supervision of state aid', are regulated by supranational institutions that are not 'directly controlled by the electorate' (Engel, 2003, p. 430). However, the 'disciplinary effect[s]' (Feld, 2012, p. 410) of the supranational rules of the game do not come about automatically. They depend on the capacity of the member states to translate European policy decisions into effective national policy, from fiscal retrenchment to removal of protectionist measures, and from the achievement of higher labour productivity to the abandonment of state aid. For Engel (2003, p 430), this system of supranational policy decision on the rules of the game and national politics of implementing the rules agreed upon makes 'Europe the stronghold of the fight to save the Member States' civil society'. In the context of Europe, subsidiarity reinforces the liberal foundation of the system of liberal-democracy,

[16] Müller-Armack worked for the German Economic Ministry under Erhardt in the 1950s and was a member of the German Delegation to the Intergovernmental Conference on the Common Market and Euratom (Treaty of Rome).

[17] Hayek's disapproval of monetary union occurred in the 1970s, which the neoliberals view as a decade of lamentable political weakness. The states of Western Europe, they argued, had become ungovernable as a consequence of unlimited mass democracy (see Crozier, 1975).

fettering its democratic element to transcendent structures of the liberal rule of law and money (see Agnoli, 2000). Although, and following MacCormick's idea of best democratic practice, 'combined and divided state-and-community sovereignty seems the enemy of popular democracy', subsidiarity is a 'better vision of democracy than all-purpose sovereignty ever did' (MacCormick, 1999, p. 126). It consists of a set of entities, principally the 'no longer fully sovereign' states of Europe and the still not sovereign Union (ibid., p. 142), confining mass democracy into a 'denationalised' system of economic governance. The following section on monetary union sets out the case that subsidiarity holds the key to the economic constitution of Europe. It asserts the liberal utility of the state as 'market police' (Rüstow, 1942, p. 289).



**EMU and the System of Subsidiarity**

Padoa-Schioppa (1994, p. 191) characterises EMU as a system of governance that curtails parliamentary democracy by a supranational regime of market enabling rules. As he puts it, 'subsidiarity, not the Leviathan, is the catchword for European political union'. He explains that in EMU monetary policy is ruled-based and denationalised, and that it stimulates competition between territorially segmented labour markets. Monetary policy as a means of adjusting labour productivity to world market conditions has ceased as an option of economic policy in member states; in EMU adjustment is a matter solely of achieving greater labour productivity. The institutional structure of EMU combines the supranational conduct of monetary policy with national state responsibility for competitive labour markets. Padoa-Schioppa's neo-Machiavellian view of EMU as a depersonalised 'collective prince' (p. 151) is therefore apt. EMU appears indeed to reduce government to governance, to the sphere of technical control and implementation of supranational rules that, despite proclamation of the sovereignty of a -territorialized –people, are founded on the sovereignty of supranational law and money, that is, the regulative institutions of bourgeois property rights.

Padoa-Schioppa's depersonalised 'collective prince' appears to govern in the absence of a Republic and without government – seemingly, it is a prince of economic governance that, founded on the rule of European law, replaces politics with policy and the routines of administration. It ostensibly removes the political character of decision making and entrusts the politics of implementation to the member states.[18] According to EMU rules, the European Central Bank (ECB) cannot be given instruction by any conventionally conceived political body. It appears as if it were a court of law rather than an instrument of public policy. Its objective is to enhance the credibility of monetary policy. 'One way to bolster credibility...is to assign the responsibility for monetary policy to an institution that is not subject to political influence' (Padoa-Schioppa, 1994, p. 188). Its conduct belongs to bankers, not law-making

[18] On Padoa-Schioppa's depersonalised prince, see also Müller (2014).

parliamentarians. The ECB's conduct of monetary policy appears thus impartial as an expert-led non-political exercise of technical fine tuning, granting no privileges and extending no special favours to the economic agents, political pressure groups, and antagonistic social interests, including the democratic member states that have become accountable to supranational structures of money and law.

Expanding on Padoa-Schioppa's metaphor about EMU as a depersonalised Prince without Republic, fiscal policy is its court and the territorialized European working classes its Fourth Estate. EMU places the responsibility of economic adjustment squarely on competitive labour markets. The responsibility of labour market adjustment is the preserve of the member states. Fiscal policy is the forte of neither the national state nor the Union – it is located in the twilight zone between the member states and the Union.[19]

The EU has a monetary union but not a fiscal union. Fiscal policy remains a national responsibility, which is shared with the Union. That is, national fiscal policy is to take place within limits imposed by the Stability and Growth Pact (1996) and the Fiscal Compact (2013) that strengthened the Pact's resolve in response to the Euro Crisis. The Compact did not in any way change the structure of subsidiarity nor did it change the position of fiscal policy within the governance structure of EMU. According to this structure, EMU excludes the transfer of fiscal policy to the Union, at the same time as which the Union requires member states to achieve balanced budgets.[20] The Union has the power of coordination and surveillance, and the ability to recommend modifications of fiscal policy and apply sanctions against member states that breach agreed rules. Continued national fiscal responsibility within an overall supranational – rule-based - system of coordination, recommendation, surveillance and punishment of fiscal offenders, is designed to undercut fiscal free-riding at the national level and prevent the possibility of 'non-market' intervention at the supranational level.[21] EMU is thus endorsed as a 'framework of incentives and constraints' that will 'condition national budgetary policies, for which the keywords will be autonomy (to respond to country specific problems), discipline (to avoid excessive deficits), and coordination (to assure an appropriate overall policy-mix in the Community)' (Emerson, 1992, p. 11). In sum, fiscal policy rules are meant to support the monetary union as a robust means of economic discipline and to ensure its resilience. For this

[19] For a detailed account on the twilight of fiscal policy, see Bonefeld (2001).

[20] Economic theory does not tell us what a balanced budget is. Its determination is a political decision, which, for the sake of appearing credible, needs to eliminate any doubt in its veracity to forgo adverse market reactions. Financial markets feed on deficits and react with herd-like runs if confidence is dented. The Euro club decided that a balanced budget amounts to a budget deficit of less than 3% of GDP, requiring Greece to renegotiate her basic social contract, for the sake of confidence in the Euro. On the political decision of what counts as a deficit, and its enforcement, see Radice (2014).

[21] A fiscal rule breaking state can be fined up to 0.1% of its GDP. On this see Macartney (2013). The fine is a matter of legal judgment that is delivered by the Court of Justice in the EU. It will have to decide on the policy intensions of 'imbalanced' member states.

reason, fiscal policy could not be entrusted to member states nor could it become a Union responsibility.

The positioning of fiscal policy as a national policy instrument within a supranational framework of balanced budget rules was meant to contain the 'risk' of fiscal free riding by weak member states. Indeed, the fiscal rules of EMU remove anti-cyclical fiscal policy responses to economic downturn as a means of economic adjustment. Instead, at a time of crisis fiscal retrenchment is a requirement as budgets have to balance on the basis of receding tax bases. The Union fiscal rules entail thus not only a huge redistribution of wealth from labour to capital but, also, a robust framework for labour market reform. In the context of the crisis of 2010, the IMF (2010) saw this clearly. It argued that the strengthening of fiscal governance, including mechanisms for enforcing compliance with rules and surveillance to secure fiscal sustainability, requires for its success key labour market reforms, 'making the labour market more effective, removing disincentives to work embedded in various public policies, enhancing wage bargaining flexibility, and further liberalizing services sectors' (p. 7). Indeed, EMU has all along focused adjustment on 'two primary [channels]: a) workers can move; b) wages can change' (Currie, 2000, p. 124). Within the structure of subsidiarity, economic adjustment falls on labour markets. Increased competition within the EU was to 'result in an increased responsiveness of wages to unemployment', with 'labour market flexibility, and most importantly wage flexibility...the most important adjustment instrument' (Emerson, 1992, p. 149). The 'wage-price flexibility remains the basic adjustment channel as a substitute for the nominal exchange rate' (ibid., p. 102). In addition, labour migration is expected to adjust the burden of unemployment on national budgets. That is, 'wage bargainers will be affected by a credible monetary union' as they will realise that excessive wage rises will not be underwritten by devaluations (ibid., p. 24). Lower labour costs are 'a condition to the relative price decrease needed to restore the competitive position of [member states] and to bring output and employment back into equilibrium' and 'factor mobility, in particularly labour mobility, may solve the problem through migration' (ibid., p. 147). In other words, the cost in terms of output and employment might not be high for as long as the sellers of labour power respond flexibly to market pressures and requirements. In the absence of competitive adjustment of the labour markets, unemployment might result and the 'need' to migrate arise. That is, an unemployed worker is in fact a worker in transit, up and down the wage-scale, from this activity to that activity, from this labour market to that labour market. Employment and unemployment converge in the form of the employable worker as embodiment of, and investor in, human capital.[22]

[22] On this issue in the context of ordoliberal social policy, see Bonefeld (2013).

The architecture of monetary union vindicates Padoa-Schioppa's view of EMU as resembling a modern version of Machiavelli's prince. This prince is, however, not a Leviathan – it has no Republic to call upon and its rule is depersonalised. The Union does not possess political sovereignty. It is a prince of sound money and rule-based conduct. Courted by fiscal policy, it governs its subjects through the democratic member states. Its subjects are the territorially regimented European working classes who comprise the mass democratic subjects of the member states. Their allocated position is that of the democratic plebes, i.e. democratically accepted in the republic of the market that, facilitated by free price mechanism, is governed by Say's (in)famous democracy of demand and supply.

**Conclusion**

I have argued that European integration institutionalises the rule of money and law at a de-nationalised level of policy making. I further argued that this institutionalisation strengthens the liberal state purpose, undercutting mass democratic systems of parliamentary law making in member states. Europe ties the democratic element of the liberal-democratic state to its liberal foundation. Padoa-Schioppa's notion of EMU as a modern prince is therefore emblematic. It focuses liberal state purpose in supranational rules of law and money, which have come about by the decisions of law-making national executives meeting behind closed doors, and which are administered by apolitical experts of administration, including a cabal of central bankers ostensibly fine-tuning monetary aggregates but in reality conducting monetary policy. Within the structure of supranational money and domestic responsibility for the achievement of competitive (labour) markets, fiscal policy is the hinge upon which the functioning of this structure of economic governance depends.

The solidarity shown by member states to prevent the collapse of monetary union has been immense. In the case of Greece her commitment has put a whole political economy on the brink, and in the case of Italy led to the appointment of a technocratic government. Attempts at resolving the Euro crisis has brought the European Council comprising the Euro club to the fore as the political lynch-pin of Euro solidarity. It has overseen the strengthening of the entire system of fiscal rules to achieve balanced budgets, including the requirement that member states submit their budgets to European assessors before they are presented to national parliaments and to report to the European Council and Commission their plans for borrowing on capital markets. In response to the Euro crisis the economic constitution of Europe that binds member states to agreed commitments appears to have hardened into a system of economic governance led by a central agency. The central agency is the European Council of the Heads of the Euro countries. Habermas' identification of the new 'Europe' as a state of exception brings this change from a law governed economic constitution to executive managerialism into sharp focus (see also Wilkinson 2014). The state of exception characterises the coming to power of an 'unbound executive' (Jörgens, 2015, p. 16) that makes law by executive decision, from fiscal retrenchment to loss of fiscal sovereignty.

Traditionally, the European Council lays down policy guidelines but is authorised neither to pass legislation nor to direct the Commission. Notwithstanding the attempts by the Lisbon Treaty to recognise the institution of the European Council, its power is extra-constitutional. It is a body that governs not on the basis of the rule of law. It governs by decisions that have far reaching implications for parliamentary law-making in member states. The European system of imposed liberty has its political place in a system of executive decision-making that is akin to a medieval conclave of rulers (Anderson, 1997; Bonefeld 2001). The 'pact for Europe' is a pact without demos.[23] It is also a pact without political sovereignty, which remains federated into territorialised political entities, each enjoying the status of democratically constituted monopoly holders of the legitimate use of violence for the enforcement of the 'rules decided upon', as Friedman put it in his account of the liberal state as the executive power of the rules of the game.

In the Eurozone, the liberal notion that a properly ordered 'commonwealth' has to limit the democratic excesses of the Fourth Estate manifests itself through the system of subsidiarity. It is designed to remove democratic pressures from monetary policy, fetter fiscal policy to the pursuit of tight money, and enable the freedom of competition between territorialised labour markets. The figure of the demos appears enfeebled as mere election fodder. Euro government by monetary discipline, fiscal retrenchment, competitive labour markets, and law- and policy-making by executive decisions entails two interrelated manifestations of democracy. The first was articulated by Schumpeter (1950), who endorsed the liberal utility of democracy as an incomparable system for the peaceful circulation of rival teams of political managers by means of competitive elections. The second belongs to the demos, which has assembled on the streets in noisy protest and refusal. The democracy of the streets might well put paid to Schumpeter's appraisal – not because of its power of 'horizontalism' but because of its national leanings. The system of subsidiarity not only stimulates competition between territorialised labour markets. It also tends to nationalise the rejection of austerity. Not every Down is Golden (Bonefeld 2012b).

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[23] On this see, Macartney (2014) and Wilkinson (2014).

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