

# **Ordoliberalism Out of Order?**

## **The Fragile Constitutionality of Greek Austerity (Part One) —**

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The architecture of the European Monetary Union (EMU) has often been understood to be built on a fundamentally ordoliberal framework. [1] The precise characteristics of what constitutes an ordoliberal framework are often not clarified, and they have been widely debated in contemporary scholarship. But a crucial characteristic of ordoliberalism, and one that has received comparatively little attention, concerns the importance of grounding economic policy in a “constitutional order”: ordoliberal political economy insists on the necessity of framing economic policymaking within boundaries set by legal, particularly constitutional, rules. The May 2020 decision of the German Constitutional Court, challenging the European Central Bank’s (ECB) monetary policy as incompatible with German constitutional law, may, among other things, be understood as an illustrative example of this approach. [2]

The first part of this two-part post attempts to clarify what an ordoliberal framework entails, while also examining the historical and theoretical development of the concept of constitutional order and its relation to the political economy of the EMU (and the EU more generally). In the second part, I will provide a critical evaluation of the concept’s operationalization in the framework of the Eurozone crisis. Focusing on the example of Greece, I will appraise the apparent disregard of constitutional rules in processes of austerity and economic restructuring.

#### *Ordnung*

A significant number of analyses of the Eurozone crisis argue that its management revealed a strongly embedded ordoliberal bias [3], characteristic of German economic policy and predominant, due to Germany’s hegemonic role, in the whole EMU. This perspective is often supported by those in charge of formulating and implementing crisis management policies. ECB President Mario Draghi, for example, famously defended the central bank’s monetary policies by arguing that “the monetary constitution of the ECB is firmly grounded in the principles of ‘ordoliberalism’” [4], while both Wolfgang Schäuble and Angela Merkel have consistently argued that ordoliberalism and the teachings of Walter Eucken’s Freiburg School lie at the heart of their political economy. [5]

At the same time, though, Lars P. Feld, director of the Walter Eucken Institute and chair of the German Council of Economic Experts, has openly questioned the extent and effectiveness of ordoliberal influence. [6] Putting forward the idea that ordoliberalism played only a marginal role in the development of German economic policy in the post-war period (a period characterized instead, he claims, by the rivalry between Keynesianism and monetarism), he argues that while some of the key ordoliberal principles survived in the EMU constitution, the

crisis response demonstrated a pivot away from ordoliberal positions. Ordoliberal influence was, in his own words, “far too little rather than too much”.

Evaluating these differences cannot be performed without some elementary exposition of certain fundamental principles of the ordoliberal project. Elsewhere, I have suggested the existence of an ordoliberal framework that functions as an analytical tool for distinguishing certain invariant ordoliberal goals from the contingent ways through which these may be achieved. [7] Looking at the historical trajectory of ordoliberal thinking, such an approach appears justified: from staunch supporters of the gold standard to “foster parents” of central bank independence [8], and from advocates of authoritarian government to defenders of constitutional order, ordoliberals have demonstrated an impressively high degree of pragmatism and adaptation to historical change. But this pragmatism never sways far from certain anchored positions, reinforcing the historical and conceptual continuity of key ordoliberal convictions.

What is historically consistent about ordoliberalism draws as much from certain elements of classical political economy as it does from attempts to salvage the liberal state and free economy during the turbulent 1920s and 1930s. [9] Prioritizing the supremacy of competition, the safeguarding of the value of money (price stability and anti-inflation) and a defence of property, ordoliberals were among the first to acknowledge that so-called “laissez-faire” capitalism was bound to collapse under its own contradictions and its enemies. It is for this reason that the free economy was conceptualized as an order *of* the state, a “genuine and indispensable political task” [10], designating a departure from a classical liberalism that called for “the subordination of civil society *and* the state to the anonymous rule of money and the law”. [11]

For the state to be able to perform this indispensable task of “guarding the competitive order” [12], it can be neither a “night-watchman state” nor one weakened by pluralism, mass democracy, and social antagonism. Such a predicament leads to an irresolute state torn by competing interests, which, in turn, may lead to failed experiments like the Weimar Republic. Instead, what is needed is a strong state, capable of resisting social conflicts and the sirens of inflation that democracy brings. “Whereas the weak state gives in to the demands of recalcitrant social interests, the strong state is characterized by its capacity for independent decision-making.” [13] It sets the rules of the game and enforces the rules decided upon, including especially the rules of competition. [14]

For a short time, the gridlock generated by Weimar pluralism appeared to be overcome through Heinrich Brüning’s authoritarian rule by executive decree and enhanced use of Article 48 of the Weimar Constitution [15], a development that appeased an ordoliberal camp given to flirting with Schmitt. But the ease with which this predicament degenerated into the Nazi planned economy led them to reformulate the competence of the state beyond the grip of a single Kanzler or Reichspräsident. In terms of both state competency and economic policy, ordoliberals emerged out of the Second World War convinced of the necessity of establishing external anchors that could limit the market-distorting tendencies of *both* democratic pressures and the propensity towards autarkic nationalism. If the gold standard provided such an (automatic and pre-legal) function before its collapse, the institutional setup of central bank independence would soon be accepted as its closest and most realistic alternative, and a key anchor for economic policymaking. To reestablish the free economy as a “political practice of order and law” [16], the strength of the state would be enhanced through the adoption of a legal and constitutional order. In the post-war period, this appeared as the only way to remain faithful to Eucken’s insistence on the establishment of an “economic constitution”.

### ... And External Anchors

It was in this context that the Bundesbank came to represent one of these anchors, as an institution whose independence could protect against discretionary and inflationary government policies with a clear mandate of price stability. [17] But the establishment of the Constitutional Court (Bundesverfassungsgericht) in 1951 would come to signify the legal and judicial equivalent of central bank independence. In the same way that an independent central bank was a “strong counterweight against the unlimited power of governments over money” [18], increased judicialization would also serve as what political scientist Ran Hirschl has described as “a ‘hegemony-preserving manoeuvre’ by ‘risk-averse agents’ who seek to insulate themselves from the ‘vicissitudes of democratic politics’”. [19] The importance of both central bank independence and increased judicialization was repeatedly stressed as a key prerequisite for upholding the sanctity and value of money, shielding it from social and political pressures. [20] If the Bundesbank was tasked with protecting price stability, the BVerfG was responsible for upholding the German Constitution (Grundgesetz), both independent from a state suspected of bending to social pressures.

In her brilliant analysis of the historical foundations of the post-war West German constitutional order, Clara Maier shows that taking the post-war Grundgesetz at face value might indicate adherence to the “nineteenth-century liberal conception of the *Rechtsstaat* as a protected space for the individual in the absence of political self-rule”. [21] In this framework, the content of the Grundgesetz could potentially be viewed as a reiteration of mainstream democratic theory and its understanding of judicial review as an institutional counterweight to majoritarian power, a means of ensuring that “public power is ... limited and subject to some higher form of control by reference to law”. [22] But closer inspection indicates that “such an easy opposition between the private citizen and state order was in itself problematic” [23], especially given how the law is posited as an independent source of legitimacy outside the democratic process. Handing down basic rights as pre-political, the Grundgesetz positions the formal political structure of the state as secondary, after basic human rights. [24] Among other things, this means that political strikes may be deemed unconstitutional (in line with the demands of German employers’ associations).

As Eric Voegelin suspected at the time [25], this conceptualization corresponded to the belief that proper institutional forms can “correct” existing contradictions within the social order, a framework of understanding that is predominant in ordoliberal thinking. [26] Franz Neumann would go even further. [27] For Neumann the provision of fixed basic rights and judicialization conveyed the “Germans’ propensity to safeguard themselves against democracy”. [28]

Considered from this angle, the ordoliberal support for a constitutional order becomes more intelligible. Potentially influenced by the stance of the Reichsgericht (the German supreme court for criminal and civil matters until 1945) in the aftermath of the hyperinflation of the early 1920s, when the court rejected the government’s wish to inflate remaining debt, ordoliberals stood by the interpretation of James Goldschmidt, who saw in the Reichsgericht a safeguard against the absolutism of the “popular state” and the majority. [29] Instead of the constitutional arrangements of the Weimar Republic, the post-war constitutional order reflected the ordoliberal rejection of expanding the state’s social functions on the grounds that this would constitute an “infringement on personal freedom”. Against creeping collectivism and mass democratic frenzy, what was needed was “a political order which sidetracked democratic legitimacy and the institutional power of parliament in favour of a communal adherence to shared values and individual claims safeguarded by judicial authority”. [30]

This order’s establishment was not an attempt to bridge the gap between political will and political authority. It did not, in other words, establish a legal mechanism for mediating the

relation between the abstract “popular will” and the concrete political responsibility of rulers, at least not in the sense in which mainstream liberal theory tends to understand judicial review. Instead, this order sought to ensure the very opposite, namely that the gap between the executive and pressures from below would remain as wide as possible. From the ordoliberal perspective, the state’s role in guarding the competitive order could not be the result of “unlimited majoritarian rule”. [31] It required the establishment of powerful, non-majoritarian institutions such as central banks and constitutional courts.

This specific conceptualization of the constitutional order was endorsed (and reformulated) by other known figures of the ordo/neoliberal family tree. As Quinn Slobodian has shown, Hayek immersed himself in the project: “[Hayek’s] efforts at constitutional design from 1960 onward were attempts to discover an institutional fix for the tendency of democracy to stray from economic order toward particularist rent-seeking and, as Alexander Rüstow put it, the transformation of state policy and national budgets into the ‘prey’ of special interests.” [32] A decade later, Hayek would reaffirm his view that the main purpose of a constitutional order was to constrain the government: “For two centuries, from the end of absolute monarchy to the rise of unlimited democracy the great aim of constitutional government had been to limit all governmental powers.” [33] For those who did not get the memo, he added: “[The] sovereignty of the law and the sovereignty of an unlimited Parliament are irreconcilable.” [34]

This approach has remained central to contemporary proponents of ordoliberalism. In 2005 Feld reminded his readers that since “government and parliaments consist of individuals that are continuously tempted to misuse their powers ... a cautious treatment of the concentration of powers requires the separation of powers to different institutions *by the constitution*”. [35] More recently, prominent ordoliberal and ex-president of the Walter Eucken Institute Viktor Vanberg, who identifies “constitutional economics” as his main area of interest, reiterated that “[a] market order is not a ‘natural event’ but a legal–institutional order”. [36]

#### *From the EEC ...*

The creation of the European Economic Community (EEC) with the 1957 Treaty of Rome could be situated in a line of development that sought to “scale up” the concept of an economic constitution beyond the national terrain. [37] But this theoretical framework’s operationalization within the wider EEC project proved to be ambiguous. In his book *Globalists*, Slobodian dedicates an entire chapter to a split within the ordo/neoliberal thought collective around the question of the EEC. [38]

Fearful of what they conceived as the victorious march of state planning and market-distorting barriers in both the Soviet Union and Keynesian-influenced capitalist states, ordoliberal thinkers like Wilhelm Röpke and Michael Heilperin mounted significant opposition against the EEC, maintaining that it represented an obstacle to global free trade. This narrative stemmed from their conviction that the EEC was nothing but a means of reaffirming national boundaries, albeit on a different scale. The EEC’s member states (there were only six at the time) might have created a common market and customs union between them (and their colonies). But that would only provide them with a competitive advantage against those outside of the EEC’s borders, bolstering the view that a new form of protectionism was being constructed. None of the six member states had, in any case, shown any willingness to hand over national sovereignty, especially so with regard to monetary or fiscal policy. The prospect of a continuation of inflationary-prone governments determined to control social conflict remained a serious threat. However, for a different set of ordoliberals, those who belonged to the movement’s “second generation”, this was a crippling and premature assessment. The EEC might have been

objectionable on some counts, but it was a work in progress and the task of ordo/neoliberals was to engage with and push the project in their direction. With E. J. Mestmäcker and Hans von der Groeben at the fore, that is precisely what they did. Actively participating in various committees tasked with bringing the “economic constitution of the EEC Treaty to life” [39], this particular set of ordoliberal saw true potential in the EEC. Focusing especially on competition policy, which for them did not mean “laissez-faire, but the achievement of an order based on law”, Mestmäcker and von der Groeben tried to convince their skeptical ordoliberal colleagues that, however incomplete it might appear, the EEC represented the best attempt thus far to “scale up” the concept of the economic constitution to the supra-state level. [40] Overall, their vision was linked to the establishment of a constitutional order, with the European Court of Justice as “the guardian of the EEC (Rome) Treaty” and the treaty itself an expression of Hayek’s call to bind the state through “constitutionally guaranteed legal principles”. [41]

### *... to the EMU*

In part, the post-Cold War expansion of the EU and creation of the EMU may both be understood as attempts to address early ordo/neoliberal critiques of the EEC, institutionalizing control of monetary policy beyond the national sphere through the creation of a common currency while establishing strict regulations for member states’ fiscal spending. [42] In parallel, they could also be understood as belated fulfillments of Mestmäcker and von der Groeben’s visions. Like the 1992 Maastricht Treaty, which could be described as the EMU’s constitution, the 1999 Stability and Growth Package (SGP) and the 2007 Lisbon Treaty set out an economic rules-based order, spelling out both targets and punitive measures for member states that failed to comply. The direct control of the common currency by a central bank could also be seen as an institutionally embedded external anchor, far removed from unruly populations.

In the process, however, the conviction that such a setup would prove sufficient to maintain the general goal of restricting government discretion was undermined. The idea that monetary control was a form of discipline that would spill over into fiscal policies (which remained, at the end of the day, in the hands of member state governments) was impaired even before the 2010 European debt crisis. Some early critics of the EMU project had already examined the Maastricht criteria in relation to theories of “optimal currency areas”. They had found them lacking on this score, urging potential member states to focus on labour-market flexibility to a greater degree than inflation, debt, and deficits. [43] But perhaps the heaviest blow to the effectiveness of a constitutional order came from within, and at an early stage, when core EMU countries like Germany and France decided in 2003 to “pause” the SGP’s penalties for excessive deficits, arguing that the rules did not take into account periods of low growth. [44]

While core EMU countries neutralized their own regulations to deal with poor economic performance, peripheral member states recorded impressive levels of growth. But this growth did not reflect increases in what mainstream economics consider to be crucial: exports, competitiveness, and labour productivity. Rather, the recorded growth resulted from the drastic lowering of interest rates across the EMU (another effect of the divergence process of the late 1990s), which drastically reduced borrowing costs and fuelled a massive expansion of credit. It made little difference whether this cheap money was directed toward the banking sector (Ireland), the real estate market (Spain), or private/public debt (Greece). While the European Commission pretended to follow excessive deficit procedures and monitor fiscal spending closely, the banking sectors of core countries (mainly Germany and France) took advantage of interest rate differences between the core and periphery to make handsome profits, diverting attention from their increasingly leveraged balance sheets.

When the 2007–8 crisis revealed the full extent of European banks' exposure to US banks and markets, European states swiftly passed bailout programs to support them. But as the exposure of these banks to peripheral Eurozone states came to light, it became clear that another round of bailouts (equivalent in 2009 to €1.8 trillion for French, Dutch, and German banks together) would fail to secure parliamentary ratification. [45] Greece was the first state in which a different approach to securing the banking sector was tested, circumventing additional bailout demands from European states by pointing the finger directly at peripheral countries themselves.

Using the argument that peripheral countries had gone through the Eurozone's "golden years" by riding the wave of credit expansion and thereby avoiding fiscal discipline and "necessary structural reforms" [46], the mainstream European narrative was to pretend that financial difficulties stemming from the global freeze on inter-bank lending resulted from local laziness, corruption, poor management, and sub-par levels of productivity. Framing the situation as a "sovereign debt crisis", a characterization that obscured the fact that there is nothing "sovereign" about Euro-denominated debt, failures of the private sector were offloaded onto the public sector, prompting Mark Blyth to speak of the "greatest bait and switch in human history". [47] Adding moralistic insult to economic injury, the inability of the poorer peripheral member states to deal with mounting debt-repayment obligations (due mainly to market exclusion after their credit was downgraded by rating agencies [48]) and their collective request for financial assistance was swiftly portrayed as an attempt to demand "free money" from rich creditor countries.

In this context, the sidelined rules of the EMU treaties conveniently returned to the foreground. Among other things, these rules forbid any leniency towards debtor countries due to "moral hazard" concerns, a stance enforced to the letter by creditor countries and rating agencies and through international law. [49] Peripheral Eurozone members were not permitted to suspend compliance with EU rules limiting deficits, as Germany and France had done in the early 2000s. But what has often escaped the attention even of critical commentators is that they also did not *want* to do so. The opportunity that presented itself through their exclusion from international markets, the emergency nature of the situation (Greece's debt had a critical short-term maturity), and their initial perception of the conditionalities that would accompany any financial assistance, all helped to ensure that the ruling classes of the peripheral states agreed to the proposed "reforms". The structural adjustment programs that followed were concordant with their own targets and aims, only kept at bay by the prospect of serious social and political turmoil in the event of implementation. [50] By 2010 they could finally pursue an unprecedented economic and social restructuring, presenting such measures as enforced on them by the Eurozone and the International Monetary Fund—that is, *from the outside*. Inasmuch as their compliance was portrayed as an attempt to secure continued membership in the EMU, they could even claim that this restructuring followed from already concluded treaties, and therefore from direct legal obligations incurred by the Greek state towards its European counterparts. The original project of using the EMU as an external anchor that could pull digressing member states back onto the path of fiscal discipline did not just depend on a rules-based institutional order. It also needed the outbreak of a world-wide crisis and state of emergency.

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## Endnotes

- [1] Ordoliberalism has its roots in a group of economists, sociologists, and lawyers who, starting in the early 1930s, sought to salvage the liberal state and the free market from laissez-faire, collectivism, and planned economies. The prefix *ordo* (from *ordnung*, German for “order”) was only added after the Second World War. Until that point, these thinkers referred to themselves as “neoliberal”, distinguishing themselves from exponents of “paleo-liberalism”, whom they saw as neglectful of the crucial role of the state as a “market police”. In this post, the terms “ordoliberal”, “neoliberal”, and “ordo/neoliberal” will be used interchangeably, with these connotations in mind.
- [2] Bundesverfassungsgericht, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15.
- [3] Kevin Featherstone, “Le choc de la nouvelle? Maastricht, Déjà Vu and EMU Reform”, LEQS Paper No. 52 (2012); Kevin Featherstone, “Conditionality, Democracy and Institutional Weakness: The Euro-crisis Trilemma”, 54 (2016) *Journal of Common Market Studies* 48; Sebastian Dullien and Ulrike Guérot, “The Long Shadow of Ordoliberalism: Germany’s Approach to the Euro Crisis”, European Council on Foreign Relations Policy Brief (22 February 2012); Josef Hien, “The Ordoliberalism That Never Was”, 12 (2013) *Contemporary Political Theory* 349; Mark Blyth, *Austerity: History of a Dangerous Idea* (Oxford: Oxford University Press, 2013); Brigitte Young, “German Ordoliberalism as Agenda Setter for the Euro Crisis: Myth Trumps Reality”, 22 (2014) *Journal of Contemporary European Studies* 276; Thomas Biebricher, “Europe and the Political Philosophy of Neoliberalism”, 12 (2013) *Contemporary Political Theory* 338; Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*, 2nd edn (London: Verso, 2014); Peter Nedergaard and Holly Snaith, “‘As I Drifted on a River I Could Not Control’: The Unintended Ordoliberal Consequences of the Eurozone Crisis”, 53 (2015) *Journal of Common Market Studies* 1094.
- [4] “Does the fact that our operations entail some credit risk on the balance sheet of the central bank imply a violation of our ordoliberal principles? Does it imply that the ECB policy interferes with credit allocation? My answer is no.” Mario Draghi, “Opening Remarks at the Session ‘Rethinking the Limitations of Monetary Policy’” (18 June 2013).
- [5] Wolfgang Schäuble, “Noch nicht über den Berg: Zur Krise in der Eurozone” (12 July 2014); Wolfgang Schäuble, “Foreword”, in *Ordoliberalism and European Economic Policy: Between Realpolitik and Economic Utopia*, ed. Malte Dold and Tim Krieger (London: Routledge, 2020); Angela Merkel, “Rede von Bundeskanzlerin Angela Merkel anlässlich der Veranstaltung der Stiftung Ordnungspolitik” (23 February 2011).
- [6] Lars. P. Feld, Ekkehard A. Köhler, and Daniel Nientiedt, “Ordoliberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe”, Freiburg Discussion Papers on Constitutional Economics (2015).
- [7] Pavlos Roufos, “The Historical Origins of the Ordoliberal Framework” (2020, forthcoming).
- [8] Pavlos Roufos, “Foster Parents of Central Bank Independence: Ordoliberal Influence in the Formation of the Bundesbank” (2020, forthcoming).
- [9] Werner Bonefeld, “Adam Smith and Ordoliberalism: On the Political Form of Market Liberty”, 39 (2013) *Review of International Studies* 233.
- [10] Viktor J. Vanberg, “Ordoliberalism, Ordnungspolitik, and the Reason of Rules”, 2 (2015) *European Review of International Studies* 27.
- [11] Simon Clarke, *Keynesianism, Monetarism and the Crisis of the State* (Aldershot: Edward Elgar, 1988), 18 (emphasis mine).
- [12] Vanberg, “Ordoliberalism”.
- [13] Walter Eucken, “Staatliche Strukturwandlungen und die Krise des Kapitalismus”, 36 (1932) *Weltwirtschaftliches Archiv* 297. An English translation is available in Thomas Biebricher and Frieder Vogelmann (eds), *The Birth of Austerity* (Lanham: Rowman & Littlefield, 2017), 51.
- [14] Werner Bonefeld, “Economic Constitution and Authoritarian Liberalism: Carl Schmitt and the Idea of a Sound Economy” (2020, forthcoming), 3.
- [15] As Cristi observes, “Schmitt saw in the dictatorial faculties that [the Weimar constitution’s] Article 48 conferred on the Reichspräsident a procedure to dilute the revolution’s democratic design and to restore the strong authoritarian state that had been gratuitously dissipated by the revolution”. Renato Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy* (Cardiff: Wales University Press, 1998), 8.
- [16] Bonefeld, “Economic Constitution”, 2.
- [17] The Bundesbank was formally established in 1957, but its predecessor, the Bank deutscher Länder, was set up in 1948 to oversee the currency reform designed and implemented by Allied authorities and ordoliberal figures such as Ludwig Erhard. See Roufos, “Foster Parents of Central Bank Independence”.

- [18] Wilhelm Röpke, *2 Essays by Wilhelm Roepke: The Problem of Economic Order, Welfare, Freedom and Inflation*, ed. Johannes Overbeck (Lanham: University Press of America, 1987 [1951/57]), 51.
- [19] Ran Hirschl, "The Origins of the New Constitutionalism: Lessons From the 'Old Constitutionalism'", in *New Constitutionalism and World Order*, ed. Stephen Gill and A. Claire Cutler (Cambridge: Cambridge University Press, 2015), 95.
- [20] "Wer den monetären Machiavellismus verwerflich findet, wird der Zentralbank eine Stellung im Staatsganzen einräumen müssen, die derjenigen der Gerichte in ihrer 'Unabhängigkeit' und zugleich in ihrem Dienst am Ganzen nicht unähnlich ist." Wilhelm Röpke, *International Order and Economic Integration* (Dordrecht: D. Reidel, 1959), 284 ("Those who find monetary Machiavellianism reprehensible, will have to give the central bank a position in the state as a whole that is not dissimilar to that of the courts in its 'independence' or in its service to the whole." [translation mine])
- [21] Clara Maier, "The Weimar Origins of the West German Rechtsstaat, 1919–1969", 62 (2019) *Historical Journal* 1069, at 1076.
- [22] Yannis Papadopoulos, *Democracy in Crisis: Politics, Governance and Policy* (London: Palgrave Macmillan, 2013), 172.
- [23] Maier, "Weimar Origins", 1076.
- [24] This understanding of basic rights comes directly from Carl Schmitt, who insisted that "basic rights could within the framework of the *Rechtsstaat* only be conceptualized as rights 'prior to and above the state'". Carl Schmitt, quoted in Maier 2019.
- [25] A German political theorist who fled Nazi persecution for the United States, Voegelin gave a series of lectures in Munich in the early 1960s critical of the narrative that the post-war *Rechtsstaat* could "restore the integrity of the German people as a political community". Maier, "Weimar Origins". Among other things, Voegelin castigated the erasure of the systemic failure and collaboration of the German legal profession with the Nazi regime.
- [26] Eric Voegelin, discussed in Maier, "Weimar Origins", 1081.
- [27] Franz Neumann was a Marxist labour lawyer. Among other things, he wrote the epic legal and state analysis *Behemoth: The Structure and Practice of National Socialism 1933–1944* (Oxford: Oxford University Press, 1944).
- [28] Franz Neumann, discussed in Maier, "Weimar Origins", 1081.
- [29] Maier, "Weimar Origins", 1086. On the opposite side, Hermann Heller saw the strengthening of judicial review as an attempt to undermine the legislative processes of the Weimar parliament. "The preeminent political meaning of this change of position by conservative jurisprudence can only be understood in the context of the enormous increase in power which judges in Germany have acquired through an undoubtedly wrong decision by the *Reichsgerichtshof*, namely the decision of 4 November 1925. With this case the judicial bureaucracy has been able to claim successfully for itself the right to review the material content of all laws in accordance with the Reich constitution and has justified this claim with the blatantly false assertion that they have always had this right. For the time being the bourgeoisie has created an effective security against the possibility that the popular legislature would transform the liberal *Rechtsstaat* into a social *Rechtsstaat* through the right of judges—in their overwhelming majority from the ruling class—to review the laws." Hermann Heller, "Rechtsstaat or Dictatorship?" [1929], trans. Ellen Kennedy, 16 (1987) *Economy and Society* 127, at 131.
- [30] Maier, "Weimar Origins", 1091.
- [31] Vanberg, "Ordoliberalism", 31.
- [32] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press, 2018), 206.
- [33] Friedrich A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 1979), 99–100.
- [34] Hayek, *Law, Legislation and Liberty*, 102.
- [35] Feld, Köhler, and Nientiedt, "Ordoliberalism", 423 (emphasis mine).
- [36] Viktor J. Vanberg, "Ordoliberalism and Ordnungspolitik: A Brief Explanation", Aktionkreis Freiburger Schule, Initiative für Ordnungspolitik, 10.
- [37] Slobodian, *Globalists*.
- [38] This split informed the historical trajectory of different strands of ordo/neoliberal thinking, reaching all the way to contemporary neoliberal Eurosceptics, such as the Alternative für Deutschland (AfD) in Germany. See Quinn Slobodian and Dieter Plehwe, "Neoliberals Against Europe", in *Mutant Neoliberalism: Market Rule and Political Rupture*, ed. William Callison and Zachary Manfredi (New York: Fordham University Press, 2018).



- [39] Mestmäcker was special advisor to the European Commission from 1960 to 1970, while von der Groeben was in the European Commission for Competition, overseeing the regulations that would implement the Rome Treaty. Slobodian, *Globalists*, 205–8.
- [40] Slobodian, *Globalists*, 208.
- [41] Slobodian, *Globalists*, 214.
- [42] If the process of “scaling up” an economic constitution was to work, Röpke himself had argued, what was needed was to “create a free-trade zone and, eventually, a common ‘payment community’ or currency union that would gradually expand over time, absorbing other nations into an ever-growing territory of specialization and free-market competition. This form of integration ‘may begin in Europe’ but it ‘prepares for a transition into a universal world-economic integration.’” Slobodian, *Globalists*, 188.
- [43] Paul De Grauwe, “Monetary Union and Convergence Economics”, 40 (1996) *European Economic Review* 1091.
- [44] Mark Tran, “Germany and France Evade Deficit Fines”, *Guardian* (25 November 2003).
- [45] Bank for International Settlements statistics in Helen Thompson, “Germany and the Euro-Zone Crisis: The European Reformation of the German Banking Crisis and the Future of the Euro”, 20 (2015) *New Political Economy* 851, at 857.
- [46] Low interest rates allowed them to roll over their debt burdens at very low costs, relieving the pressure to reduce debt/deficit levels or make “necessary reforms”.
- [47] Blyth, *Austerity*, 31.
- [48] Jerome Roos, *Why Not Default?: The Political Economy of Sovereign Debt* (Princeton: Princeton University Press, 2019), ch. 16.
- [49] Roos, *Why Not Default?*, ch. 16.
- [50] George Pagoulatos, “The Political Economy of Forced Reform and the 2010 Greek Economic Adjustment Programme”, in *From Stagnation to Forced Adjustment: Reforms in Greece*, ed. Stathis Kalyvas, George Pagoulatos, and Haridimos Tsoukas (Oxford: Oxford University Press, 2013), 247; Catherine Moury and Adam Standring, “Going beyond the Troika’: Power and Discourse in Portuguese Austerity Politics”, 56 (2017) *European Journal of Political Research* 660; Pavlos Roufos, *A Happy Future Is a Thing of the Past: The Greek Crisis and Other Disasters* (London: Reaktion 2018).