Special Issue: *Regeneration Europe*

The Limits of Social Europe: EU Law and the Ordoliberal Agenda

By Gareth Dale[*] *& Nadine El-Enany*[**]

A. Introduction

Since the global economic crisis began in 2007, the EU's response has been an attempt to muddle through, but it is generally recognized that more far-reaching changes to its structures are inevitable in the long term. One possible trajectory is towards disintegration; another is towards an increasingly "multi-speed" Europe—possibly accompanied by a splintering of the Eurozone whereby one or more smaller countries depart. A third possibility is closer union. Many would agree with the proposition that if destructive centrifugal forces are to be kept at bay, the next step for the EU must be political union, including a fiscal and transfer union—one that requires countries of the developed core supporting their brethren struggling at the periphery. Through this fraternal process, the EU will be able to achieve a new constitutional moment, a moment of refoundation in which its "social" soul is rediscovered. No longer will corporate lobbies be granted privileged access to the offices of Brussels. Powerful and democratically accountable institutions will be constructed, and geared around one of the EU's defining values: Solidarity.[1]

The vision is beguiling, but the test of its realism depends upon identification of the mechanism by which the requisite solidarity will be created. And that is unclear. Let us approach the issue by looking at two forms of solidarity. One, *market solidarity*,[2] is written into the EU's genetic code. Derived from Durkheim's *organic solidarity*—the forms of trust and social cohesion that develop on the basis of the interdependencies involved in the division of labor, market solidarity in the EU centers upon "the rights and obligations which

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[1] Birgit Mahnkopf, The Political State of the Union, Plenary Discussion at the 17th Workshop on Alternative Economic Policy in Europe (Sept. 16–18, 2011), *available at* http://www2.euromemorandum.eu/uploads/plenary_mahnkopf_the_political_state_of_the_union.pdf (last visited May 6, 2013).

[2] Floris De Witte, EU Law and the Question of Justice (June 2012) (unpublished Ph.D. thesis) (on file with the London School of Economics), *available at* http://etheses.lse.ac.uk/452/1/DeWitte_EU%20law%20and%20the%20question%20of%20justice.pdf (last visited May 6, 2013).

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emerge from the interdependencies generated by the European single market."[3] In the market for health services, for example, market solidarity allows EU citizens to "enforce the terms of the contract of healthcare" by receiving treatment in other Member States in instances where their own is unable to adequately provide it.[4] Such solidarity may buttress the transnational enforcement of contracts but hardly seems capable of forming the basis of the social refoundation of the EU. For that, a much thicker form of solidarity would be required. Could *communitarian solidarity* fill this role? This seems unlikely. In the sense given to it by De Witte—the solidarity that grows from the extension of the geographical scope of the rights and entitlements enjoyed by EU citizens[5]—it is too weak. Of its stronger sense—the sort of collective identity formation that accompanied state-building projects in the nineteenth and twentieth centuries—there is little sign.

This paper argues that the EU cannot be regenerated or recreated as a social Europe through law. It takes as its focus a number of theses put forward by authors who are critical of the EU's response to the economic crisis and considers that a reformulation or reinterpretation of EU law, whether by the Court of Justice or EU legislative institutions, provides a possible solution to the EU's crisis of social legitimacy.[6] We argue however that the EU's undemocratic response to the economic crisis, which takes the form of the Fiscal Treaty, does not reflect a departure from the EU's *modus operandi*. Rather, in its response, the EU has displayed familiar characteristics: A lack of democratic method and a commitment to a neoliberal (or ordoliberal) doctrine. Not only does the form of the EU's response evidentially militate against the idea that a socially just Europe can emerge from the crisis, but reliance on law, an intrinsically depoliticizing institution, to prop up or create a new political settlement in Europe is destined to be unsuccessful. Through a Marxist analysis of law, we demonstrate the way in which law functions ideologically to uphold social order. In cloaking an unjust capitalist system with the appearance of equality, justice, and neutrality, law aids in legitimizing a fundamentally marketized social order. It is law's duality in appearing to uphold the interests of those whose lives are dislocated by marketization whilst perpetuating an unjust capitalist system that leads many to mistakenly conclude that EU law may be commandeered as a vehicle for delivering a more socially just Europe.

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] See this special issue of the *German Law Journal*. Moritz Hartmann & Floris de Witte, *Regeneration Europe: Towards Another Europe* (in this issue); *see also* 18 EUR. L. J 607–737 (2012).

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B. Slippages of the Social

The dominant understanding of the relationship between *market Europe* and *social Europe* is that the two go hand in hand: The *social* requires continued marketization in order to yield economic growth, prosperity, and jobs; the *market* requires continued attention to social cohesion in order to compensate for its exclusionary excesses. According to some, the EU's social component is what gives it its identity—it is what defines and justifies the project, in opposition to the US, with its free-market *model of capitalism*.[7] László Andor, the EU Commissioner for Employment, Social Affairs and Inclusion, speaks of the "European social model," which belongs with the German concept of "social market economy."[8] In Andor's exposition, the social market economy was born in the aftermath of the Second World War, when the socioeconomic constitution of the Federal Republic of Germany (FRG) was being drawn up. The term denoted a *third way*—a "halfway house" is Andor's phrase—"between a laissez-faire market-based economy and one that was centrally planned."[9] The Freiburg School's "'social market economy' was the compromise term selected."[10]

The social market economy is embraced by social democrats such as Andor, but also by supporters of Christian Social parties, such as Viviane Reding, Vice-President of the European Commission, and by neoliberal technocrats—such as former EU Competition Commissioner Mario Monti. Whereas for Andor the term serves to encapsulate a political compromise, for Monti its middle term is the decisive, hegemonic one. The concept "'Social Market Economy,'" he observes, "was designed with care. In it the word 'market' takes the central position."[11] That, Monti contends, was intended.[12] "The concept of Social Market Economy stands for reliance on the market mechanism . . . . It calls for a maximum

[7] Detlev Albers, Stephen Haseler & Henning Meyer, *Social Europe: An Introduction*, *in* SOCIAL EUROPE: A CONTINENT'S ANSWER TO MARKET FUNDAMENTALISM 1 (Detlev Albers, Stephen Haseler & Henning Meyer eds., 2006).

[8] László Andor, Building a Social Market Economy in the European Union, Speech at Manchester Business School (Oct. 20, 2011), *available at* http://europa.eu/rapid/press-release_SPEECH-11-695_en.htm (last visited May 6, 2013); For the European Commission, the "European social model" is defined in fundamentally liberal terms: "It is characterized by democracy and rights of the individual, absence of tariffs, market economy, equal chances for each and everybody as well as social security and solidarity." *See* Von Walter Baier, *On the European Social Model*, TRANSFORM!, 2009, *available at* http://transform-network.net/de/blog/archiv-2009/news/detail/Blog/on-the-european-social-model.html (last visited May 6, 2013).

[9] Andor, *supra* note 8.

[10] Andor, *supra* note 8.

[11] Mario Monti, Competition in a Social Market Economy, Speech at the Conference of the European Parliament and the European Commission: Reform of European Competition Law (November 9–10, 2000), *available at* http://ec.europa.eu/competition/speeches/text/sp2000_022_en.pdf (last visited May 6, 2013).

[12] *Id.*

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of free market, for reliance on competition wherever possible."[13] As such, Monti adds, it is "one of those basic concepts to which many policy choices can be traced back."[14] It is "strikingly modern"—in the euphemistic manner in which *modern* has come to mean *neoliberal*.[15]

The term itself was coined by a senior Christian Democrat and member of the Mont Pèlerin Society, Alfred Müller-Armack. He was one of a group of ordoliberal economists who gained positions in the governing circles of the FRG in the 1940s and 1950s. The best known of the ordoliberals was Ludwig Erhard, Minister of Economic Affairs; others included Walter Eucken (an advisor to the U.S. and French occupying forces), Franz Böhm (minister of cultural affairs in Hesse), and Wilhelm Röpke (an advisor to the Chancellor, Konrad Adenauer). In 1948, Müller-Armack's *social market economy* made the leap from economic theory to political propaganda when it was adopted as a Christian Democratic Union (CDU) electoral slogan. He was then appointed as "chief organizer of the strategically important planning section" in Erhard's Ministry, in which capacity he contributed to German policy papers that fed into the drafting of the Treaty of Rome.[16]

Ordoliberalism was born of a particular conjuncture. Its political roots lay in a rightist-liberal reaction against Weimar welfare-state interventionism, regarded as having fatally weakened the state and, with it, the conditions propitious to the proper functioning of the market mechanism.[17] Behind the ordoliberal program, writes Ralf Ptak, "lurked the promise of a hierarchically structured society" committed to the protection and expansion of private property and intolerant of any popular influence over political decision making.[18] Redistributive social and wage policies were their *bêtes noire*. Notwithstanding the Nazi Party membership of Müller-Armack and one or two other prominent ordoliberals, the lesson, as it appeared to them in 1945, was that the evils of National Socialism should be laid at the door of anti-liberal policies and a state—Weimar—that had been grievously weakened by concessions granted to trade unions and other vested interests.[19] Herein,

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Alexander Ebner, *The Intellectual Foundations of the Social Market Economy: Theory, Policy, and Implications for European Integration*, 33 J. OF ECON. STUD. 206, 216 (2006).

[17] Ralf Ptak, *Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy*, *in* THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE 98–138 (Philip Mirowski & Dieter Plehwe eds., 2009).

[18] *Id.* at 104–5.

[19] *Cf.*, THOMAS LEMKE, EINE KRITIK DER POLITISCHEN VERNUNFT: FOUCAULTS ANALYSE DER MODERNEN GOUVERNMENTALITÄT 242 (1997) (detailing Michel Foucault's lecture at the Collège de France on neo-liberal governmentality).

according to Michel Foucault, is found the source of their divergence from the classical liberal and "Chicago-neoliberal" canons. Unlike the former, the ordoliberals were not engaged in the task of persuading the existing state to widen the scope of market freedoms but considering how to build a new state upon principles of economic liberty. Unlike the latter, the ordoliberals conceived of the economy in institutionalist terms. The role of states is not merely to correct or secure a "natural" market order but to construct and continually support market competition by decreeing an "order policy,"[20] as well as by overseeing a range of social interventions (housing policy, unemployment benefits, health insurance, etc.).[21] Social justice, in the ordoliberal view, is a valuable principle, so long as it does not conflict with the higher principle of free-market competition.[22]

What, then, did the ordoliberals mean by social market economy? Their usage of the term was unambiguously neoliberal. For Erhard, it meant, "that the market economy as such is social," as opposed to the supposition "that it needs to be made social."[23] However, with its emphasis upon social policy as a means of reconciling market forces with social cohesion, and, relatedly, upon the "cultural and religious embeddedness of the economic sphere,"[24] the ordoliberals' social market economy possessed crossover appeal. It rendered a neoliberal approach acceptable to social democracy. The crossover that began in West Germany in the late 1940s harked back to a similar process half a century earlier, during the Second Reich. In the late nineteenth century, the trade union movement and Social Democratic Party (SPD) were on the rise. They were countered by a mix of repression and social policy. Advocates of social policy congregated in the Historical School of Political Economy (GHS). The Historical Schoolmen were market liberals, with links to the Social Catholic movement. Against the British liberal economists' postulation of the market economy as a natural phenomenon they stressed its constructedness, together with the indispensable role of states in engineering conditions conducive to market formation. Against the SPD, with its diagnosis of the pathologies of capitalism and its aspiration for democratization of the economic and social spheres, they advocated a market economy bolstered by measures to support social cohesion. Between the Historical School and the SPD no punches were pulled—at least not at first. In the 1890s, however, the workers' party came under GHS influence, channeled through social reformers such as Lujo Brentano and Eduard Bernstein.

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[20] Naoshi Yamawaki, *Walther Eucken and Wilhelm Röpke: A Reappraisal of Their Economic Thought and the Policy of Ordoliberalism*, *in* THE GERMAN HISTORICAL SCHOOL: THE HISTORICAL AND ETHICAL APPROACH TO ECONOMICS 188–201 (Yuichi Shionoya ed., 2001).

[21] LEMKE, *supra* note 19, at 247.

[22] Yamawaki, *supra* note 20, at 192.

[23] Ptak, *supra* note 17, at 107 (quoting Erhard).

[24] Ebner, *supra* note 16, at 207.

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The crossover that occurred in postwar Germany followed similar lines. In much of the working class, anti-capitalist sentiment was in the air. Even within Christian Democracy, a vigorous social wing arose. Between 1947 and 1948, the Bizone was shaken by strikes involving over nine million workers—almost four fifths of the workforce—in support of demands for co-determination and the nationalization of industries. In this context, ordoliberals stepped in to replicate the role of the Historical Schoolmen. They elaborated a program and a discourse that could appeal to left-leaning liberals and conservatives, and even some social democrats, with commitments to social policy, social cohesion, and *embeddedness*. Like the Schoolmen, they scrupulously avoided the emotionally loaded term capitalism, substituting it with *(social) market economy*—a concept that refers to mechanisms of exchange to the exclusion of relations of property and power.[25]

The occupation powers and their Christian-Democrat deputies countered the strike wave by means of repression and social policy. Street protests were prohibited, with tanks and military police deployed on the streets, while social concessions were granted in the form of price controls on a range of consumer goods.[26] Most of the movement's demands were anathema to the ordoliberals who were in the process of taking the reins of West German economic policy, for they posed a threat to market competition, including labor markets, and to managerial prerogative. Demands for nationalization and planning headed the list of cardinal evils. Price controls were further down, so long as they were temporary expedients. Collective wage bargaining was frowned upon but not intolerable. What, though, of the movement's core demand: Co-determination in industry? Within the SPD and social Catholic constituencies, pressure to introduce some form of co-determination was intense. The strong form that co-determination had taken in the early Weimar years was, in the ordoliberals' narrative, a dragon whose assassination was their vocation. However, given that some concession would have to be granted if aggravated social tensions were to be avoided, perhaps a weak form of co-determination could be devised, one that would only marginally interfere with labor market competition? Or even one that,

[25] Gustav Schmoller, leader of the GHS, rejected use of the term capitalism and proffered his own, hardly more elegant, substitute: "die modernen geldwirtschaftlichen, unter dem liberalen System der Gewerbefreiheit, der freien Konkurrenz und des unbeschränkten Erwerbtriebes ausgebildeten Betriebsformen." GUSTAV SCHMOLLER, HISTORISCH-ETHISCHE NATIONALÖKONOMIE ALS KULTURWISSENSCHAFT. AUSGEWAEHLTE METHODOLOGISCHE SCHRIFTEN 211 (Heino Heinrich Nau, ed., Metropolis 1998). Commenting on the preference for the term, "market economy," in recent times, J.K. Galbraith remarks: "When capitalism, the historical reference, ceased to be acceptable, the system was renamed." JOHN KENNETH GALBRAITH, THE ECONOMICS OF INNOCENT FRAUD 6–8 (2004). The term "market system" took its place, but this term was "without meaning, erroneous, bland, benign . . . It emerged from the desire for protection from the unsavory experience of capitalist power and from Marx, Engels and their disciples." *Id.* In the new term, history is absent, and so is power. "No individual or firm is dominant. No economic power is evoked. There is nothing here from Marx or Engels. There is only the impersonal market, a not wholly innocent fraud . . . [i]t would have been hard, indeed, to find a more meaningless designation—this is a reason for the choice." *Id.*

[26] JÖRG ROESLER, MOMENTE DEUTSCH-DEUTSCHER WIRTSCHAFTS- UND SOZIALGESCHICHTE 1945 BIS 1990: EINE ANALYSE AUF GLEICHER AUGENHÖHE (2006); GERHARD BEIER, DER DEMONSTRATIONS- UND GENERALSTREIK VOM 12. NOVEMBER 1948 (1975).

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by empowering works councils, might at times weaken the trade unions? Affirmative answers were given to these questions, and the 1952 Works Council Constitution Act was born. It formalized the rights of works councils and guaranteed employees' representatives a third of seats on company supervisory boards; it thenceforth formed a cornerstone of a modified form of social market economy in the FRG.

In this way, the social market economy did not live up to the ordoliberal ideal. It came into being as a compromise between the ordoliberals' doctrine, Social Catholicism, and the right wing of the SPD. Organized labor maintained a significant presence in the FRG's labor market, with rights granted to works councils to negotiate over training, redundancies, and shift patterns, and with employees' representation on supervisory boards. Industrial policy confirmed the sense that, in practice, *Modell Deutschland* was no ordoliberal utopia. Nevertheless, its basic framework was a market society, almost entirely owned by private capitalists and with ordoliberal doctrine enjoying a hegemonic position within policymaking circles. In many respects, the FRG became the most market-friendly system in Europe, and social policy was crafted to some degree on ordoliberal lines, with a rejection of universal benefits and of free healthcare. The CDU governments of the 1950s introduced social reforms (health insurance, child benefit, and social housing), stealing the SPD's thunder. To be sure, the concession of co-determination put ordoliberal teeth on edge, but this was a small price to pay. It helped to divert the union movement "from an exclusive concern with distributive politics and wage bargaining,"[27] as well as to smooth the way for the SPD's march to Bad Godesberg, where it was to embrace a market economy with "as much competition as possible."[28]

Under Chancellors Adenauer, Erhard, and Willy Brandt, the FRG enjoyed rapid economic growth, thanks in large part to factors unrelated to domestic economic policy—Marshall Aid, inward migration from the East, accelerating global demand, and the "London Agreement" that forgave much of Germany's external debt. The FRG's "economic miracle" permitted goldilocks servings of wage growth and income redistribution: Not too much to discomfit the ordoliberals, yet sufficient to ensure the wholehearted support of trade unions and the SPD for the market-capitalist framework.[29] If, already in the 1940s, the

[27] Wolfgang Streeck, *Works Councils in Western Europe: From Consultation to Participation*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 313, 313–350 (Joel Rogers & Wolfgang Streeck eds., 1995).

[28] *Godesberg Programme of the SPD (November 1959)*, *available at* http://germanhistorydocs.ghi-dc.org/docpage.cfm?docpage_id=3341 (last visited May 6, 2013).

[29] Following World War II, writes Purdey, Keynesianism and social democracy came to be identified with a "grand bargain that rested on a shared expectation that regulated national economies within a liberal world market would enable economic growth, the fruits of which would be shared reasonably among the deserving sectors of the populace—not least, thanks to the welfare state." STEPHEN PURDEY, ECONOMIC GROWTH, THE ENVIRONMENT AND INTERNATIONAL RELATIONS 5 (2010). With entry into the age of abundance, social democrats no longer needed to focus upon questions of social class and inequality—economic growth would ensure that access to the good life is

right-wing of the labor movement shared common ground with the ordoliberals—for example in the priority given to restoring competitiveness—as the decades wore on, the area of convergence grew. Today, Germany's trade union congress has forgotten the traditional distinction between social democracy's *Sozialstaat* and ordoliberalism's *Soziale Marktwirtschaft*. It champions the latter as eminently suited to achieving trade-union goals,[30] and is delighted that the European Union has nailed the concept to its mast.

C. The European Social Market

If there was little that was distinctively ordoliberal about the early economic institutions of West European integration (such as the European Recovery Programme[31] and the European Coal and Steel Community), the same cannot be said of the European Economic Community (EEC). The Common Market, according to Commissioner Andor, embodied "a balancing act between the market and the social dimension."[32] If so, this was a balance in a distinctly ordoliberal sense. The Treaty of Rome has been described, with only a modicum of hyperbole, as "a triumph for German ordoliberalism."[33] In its political-juridical form the EEC betrayed an unmistakable affinity to ordoliberalism. It represented the creation of an economic constitution for Europe, one that closely followed ordoliberal prescriptions for "a law-based order committed to guaranteeing economic freedoms and protecting competition."[34] It was driven forward by judge-made law, intergovernmental bargaining, and technocratic institutions. This too was in the ordoliberal spirit—for which democracy is not regarded as essential to legitimacy[35]—and in the spirit of post-war conservatism more generally, with its restrictive understanding of democracy, whereby power is to be delegated as far as possible to unelected bodies such as constitutional courts, and not to

available to all. *Id.*; *Cf.* Gareth Dale, *The Growth Paradigm: A Critique*, 134 INT'L SOCIALISM (2012), *available at* http://www.isj.org.uk/index.php4?id=798&issue=134.

[30] Herbert Schui, *Soziale Marktwirtschaft, SPD und Gewerkschaften* (Arbeitspapier Arp. 14, 2008), *available at* http://www.herbert-schui.de/uploads/media/Soziale_Marktwirtschaft__SPD_und_Gewerkschaften.pdf (last visited May 6, 2013).

[31] However, on ordoliberal influences upon the ERP, see TAKESHI ITO, SEARCHING FOR THE ORDOLIBERAL ORIGIN OF EUROPEAN INTEGRATION: LESSONS FROM THE POLITICS OF THE EUROPEAN RECOVERY PROGRAM (2011), *available at* http://euce.org/eusa/2011/papers/7f_ito.pdf (last visited May 6, 2013).

[32] Andor, *supra* note 8.

[33] Bernard Moss, *The European Community as Monetarist Construction: A Critique of Moravcsik*, 8 J. OF EUR. AREA STUD. 247, 260 (2000).

[34] Christian Joerges, *What is Left of the European Economic Constitution? A Melancholic Eulogy*, 30 EUR. L. REV. 461, 461–489 (2005).

[35] Michael Wilkinson, *The Spectre of Authoritarian Liberalism: Reflections on The Constitutional Crisis of the European Union* (in this issue).

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sovereign parliaments.[36] The Treaty of Rome advanced the aim of creating "a single competitive market under conditions of monetary stringency on the German model," with far-reaching provisions for the removal of national barriers to trade—as the Dutch and Germans demanded—with the elimination of import quotas, as well as low external tariffs, the restriction of state aids and other national policies that distorted competition, rules against monopoly abuse, and the coordination of fiscal and monetary policy.[37] Although the treaty recognized the principles of a common agricultural policy with minimum prices and high external tariffs, "it left in abeyance the level of prices, means of financing, and organization of production and distribution," and ensured that "the Social Fund and Investment Bank, which the French and Italians had counted on to aid poorer regions and develop industry, were severely limited in scope and resources."[38]

From the 1950s onwards, guided by an increasingly activist European Court of Justice (ECJ) and with a competition policy that owed much to German ordoliberal lawyers and economists,[39] integration centered upon repeated pushes toward market disembedding with freedom of trade in goods and services, and capital, increasingly treated as fundamental rights. Particularly after the ECJ's seminal ruling in *Van Gend en Loos*, individuals and firms came to be viewed as fully-fledged subjects endowed with rights and duties under EU law.[40] Henceforth, the supremacy of EU law over national law was assured, with EU treaties taking the shape of a *de facto* constitution rather than a set of international agreements and the achievement of the "four freedoms" as the *ne plus ultra* of integration.[41] Member states were still able to maintain their own particular "varieties of capitalism," including employment and industrial relations regimes,[42] but their ability to do so was eroded under the impact of the Single Market.

Since the 1990s, a period that has seen global neoliberalism at its meridian, the aims and strategies of European integration have continued to evolve. There has been, according to Martin Höpner and Armin Schäfer, a concerted attempt by the European Commission and the ECJ to transform the institutions of Member States "and bring them into line with the

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[36] Jan-Werner Müller, *Beyond Militant Democracy?,* 73 NEW LEFT REV. 40 (2012).

[37] Moss, *supra* note 33, at 259.

[38] *Id.* at 259.

[39] WOLFRAM KAISER, CHRISTIAN DEMOCRACY AND THE ORIGINS OF EUROPEAN UNION 305 (2007).

[40] Case C-26/62, Van Gend en Loos v. Nederlands Administratie der Belastingen, 1963 E.C.R. I-1.

[41] Gustav Peebles, *"A Very Eden of the Innate Rights of Man?" A Marxist Look at the European Union Treaties and Case Law*, 22 L. & SOC. INQUIRY 581, 588 (1997).

[42] Richard Hyman, *Trade Unions, Lisbon and Europe 2020: From Dream to Nightmare* (LEQS Discussion Paper Series, Paper No. 45, 2011), *available at* http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper45.pdf (last visited May 6, 2013).

Anglo-Saxon model of capitalism."[43] Is this an accurate description? Certainly, some of the policies and regimes that combine to form what Höpner and Schäfer term *national models of capitalism* have come under pressure—for example aspects of Germany's supervisory-board codetermination, discussed below. And one cannot deny either that the EU's economic regime has shifted closer to a US-style regulatory-neoliberal model or that Britain has eagerly encouraged the neoliberalization drive. However, to label it "Anglo-Saxon" is misleading. Neoliberalism emerged as a response to a structural crisis of capitalism in which the policies and institutions that had facilitated profit-making during the *trente glorieuses* no longer seemed to work. Their inadequacy was itself the consequence of a sea-change in the world economy that had occurred during the long boom. With economic globalization, large industrial and financial corporations came to press for lower taxes and attenuated regulatory constraints, regarded as crucial to furthering their interests in a more competitive global market.

At the center of the neoliberal ascendancy in the 1990s was the opening up of capital markets in the EU and across the world. This policy shift, in Mark Mazower's provocative view, owed more to the "Paris consensus" than to its Washington twin.[44] At the heart of the Paris club were three mandarins. Michel Camdessus, Managing Director of the IMF, was one. Henri Chavranski, who oversaw the drafting of the Code of Liberalization for the OECD, was another. The third was Jacques Delors, who arrived at the European Commission as a monetarist convert, fresh from his role as architect of the Mitterand government's *tournant de la rigueur,* and took charge of pushing forward market and monetary integration in the EU. Delors represented a bruised French social-democracy, one that was in the process of embracing neoliberalism and ordoliberalism. He was a critical figure in turning the European Single Market as well as the Monetary Union from blueprint into reality. The Single Market was a milestone in the global ascendancy of neoliberalism. Its declared aim was to restore Europe's global competitiveness by way of the commodification of previously protected sectors (services, utilities, and telecommunications), supplemented by further rounds of privatization—capital concentration. It elevated market expansion to a qualitatively new level, enabling corporations based in the Northern "core" to expand their presence throughout the Southern and (after 1989) Eastern periphery, taking over or supplanting local industries. It ramified throughout the social fabric, such that social changes across the continent would increasingly appear to be "Made in EU." As to the Monetary Union, its motivation and design, like that of the Single Market, drew inspiration from "Anglo-Saxon" economics, notably the Optimum Currency Area (OCA) theory of the Chicago economist Robert

[43] Martin Höpner & Armin Schäfer, *A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe*, 33 W. EUR. POL. 344, 344 (2010).

[44] Mark Mazower, *What Remains: On the European Union*, THE NATION, Sep. 24, 2012, http://www.thenation.com/article/169756/what-remains-european-union# (last visited May 6, 2013); *See also* RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE (2007).

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Mundell. For Mundell, a fundamental advantage of currency union is that it puts monetary policy out of the reach of elected politicians and prevents them from using Keynesian monetary or fiscal policies to yank an economy out of recession. Currency union "wasn't about turning Europe into a powerful, unified economic unit."[45] Rather, it "was about Reagan and Thatcher," specifically—in his words—in the sense that "monetary discipline forces fiscal discipline on the politicians as well."[46] With a unified currency, Mundell concluded, politicians will be obliged to prioritize "the competitive reduction of rules on business"—slashing taxes, reducing welfare, privatizing state assets and tearing up labor laws and environmental regulations.[47] If these postulates and policies are Anglo-Saxon, they are cut from the same cloth as the Paris Consensus, and indeed of ordoliberalism. Mundell's argument is indistinguishable from that of the guardians of the euro in Frankfurt. In the words of the former Chief Economist of the European Central Bank (ECB), what is decisive during EU economic crises is that member economies respond to asymmetric shocks "with a high degree of flexibility in the markets for goods and services."[48] This, he emphasizes, is required

> [A]bove all in the labor market, that is, wages must adjust to changing market conditions. . . . The more the price system (in the widest sense) bears the burden of adjustment, the less important is the loss of the national exchange rate and monetary policy instruments, and the greater the benefit of using a single currency.[49]

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[45] Greg Palast & *Robert Mundell, Evil Genius of the Euro*, GUARDIAN, June 26, 2012, http://www.guardian.co.uk/commentisfree/2012/jun/26/robert-mundell-evil-genius-euro; Paul Krugman, *Mundell and the Euro*, N.Y. TIMES, May 28, 2012, http://krugman.blogs.nytimes.com/2012/05/28/mundell-and-the-euro/.

[46] Palast, *supra* note 45.

[47] *Id.*

[48] Fritz Scharpf, *Monetary Union, Fiscal Crisis, and the Pre-Emption of Democracy* (Max Planck Institute for the Study of Societies [MPIfG] Discussion Paper No. 11/11, 2011).

[49] If this is indeed the underlying theory of the 2011–12 reforms to EMU, Fritz Scharpf has ventured, it would begin to make sense of the fact

> [T]hat many of the requirements imposed by the "Memoranda of Understanding" for Greece and Ireland appear unlikely to reduce public-sector deficits over the short or medium term. Instead, they will impose a wide range of liberalizing and market-making 'structural reforms' that will weaken union power, privatize public services, liberalize the professions and open public health care and education to commercial service providers.

Id.

These are not the only respects in which European Monetary Union (EMU) is aligned with ordoliberal doctrine. Another is its economic aim—to consolidate the single market by removing barriers, reducing transaction costs, and facilitating capital mobility, and to preclude member states pursuing disruptive monetary policies by implementing a currency union. A third is its design and doctrine: A central bank with absolute independence (it is not even required to interact with Eurozone governments),[50] and a restrictive monetary policy that functions as a stick to force Eurozone states to reduce public spending. In addition, EMU's rules are designed not to privilege markets over states—as libertarian variants of neoliberal doctrine would seek to do—but to strengthen the EU's liberal political constitution, in the process buttressing the ability of the EU and member states to suppress demands from labor, ensuring that government act as a market-facilitating authority in the interests of capital.

In the design of EMU, ordoliberal positions were adopted in two central facets. First, French arguments for a mercantilist framework were overcome, as Germany feared that they would legitimize hidden protectionism in the form of subsidies for ailing firms. Instead, ordoliberal competition policy became the main tool for regulation of the internal market.[51] Second, the prioritization of price stability was written into the Maastricht Treaty, ensuring a monetarist orientation. These represented a shift closer to the mode in which Germany's political economy has been run in the post-war period. Although born on the Maas, the EMU's headquarters were domiciled on the Main, where a sternly ordoliberal *Geist* had long held sway, with its emphasis upon price stability precisely synchronized to the needs of German exporters. With the euro, German exporters gained a stable currency and improved access to economies of the EU periphery, including several that, with Berlin's acquiescence, entered the euro at overvalued exchange rates.[52] The same ordoliberal spirit animated the Stability and Growth Pact of 1997, the aim of which was to cement the strength of the euro, and thereby its bid to become a global currency, by providing for continued oversight of national budgets, with penalties for states that ran excessive deficits.[53] The upshot, argues Costas Lapavitsas, was to place Eurozone fiscal policy in a straightjacket, one that was to "torment" the peoples and states of the region for decades to come.[54]

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[50] Michel Aglietta, *The European Vortex*, 75 NEW LEFT REV. 15 (2012).

[51] Christakis Georgiou, *The Euro Crisis and the Future of European Integration*, 128 INT'L SOCIALISM (2010), *available at* http://www.isj.org.uk/?id=682.

[52] Costas Lapavitsas et al., *Eurozone Crisis: Beggar Thyself and thy Neighbour* (Research on Money and Fin. [RMF], Occasional Report Mar., 2010).

[53] *Id.*; Georgiou, *supra* note 51.

[54] Lapavitsas, *supra* note 52.

For the EU, the 2000s was the decade of the Monetary Union but also of Lisbon. The Lisbon agenda was touted as a solution to the EU's economic and social problems, defined as low productivity growth, high unemployment, and an aging population. In a familiar pattern, the measures proposed advanced ordoliberal/neoliberal policies, with accompanying exhortations to "convergence" and loudly proclaimed measures to further "social cohesion." Many observers took heart from the inclusion of a commitment to create a "European social market economy" into the hard letter of Art. 3(3) of the Lisbon Treaty.[55] Leading organizations of the labor movement, too, backed the Lisbon strategy, with the European Trade Union Confederation (ETUC) hailing it for its advocacy of a "balanced and integrated approach between economic, social and environmental policies."[56]

The social promise that Lisbon represented was, however, hollow. In part, this was because the Lisbon agenda encouraged the erosion of public welfare by promoting the privatization of public services. In addition, the *social* was defined strictly on ordoliberal/neoliberal lines. Social policy is formed under pressures both from below—from workers *qua* human beings struggling to expand their needs and increase their social security—and from above, as reforms introduced to forestall the growth of social movements and as policies to manage society in the interests of market competition: to protect and cultivate workers in their capacity as variable capital—maintaining its supply, health and skills, maintaining a reserve army through social security schemes, and so on.[57] In the ordoliberal vision, pressure from below, in particular when it issues in demands for collective forms of welfare provision, should be stubbornly resisted. Social policy should instead be directed to constructing conditions propitious to market competition, including not least the inscribing of entrepreneurial forms of behavior into the basic grammar of society.[58] In the words of Alfred Müller-Armack, the aim of social policy is not to "redistribute wealth" but to forge a connection between "human beings and private

[55] Fritz Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot be a "Social Market Economy*,*"* 8 SOCIO-ECON. REV. 211, 211–250 (2010). In this, Scharpf is followed by Alexander Somek, *What Is Political Union?* (in this issue). Somek argues that "Member States with a "social market economy" encounter grave difficulties in sustaining the institutions underpinning their political economy." The ECJ has been putting "social market economies under pressure to alter their institutional arrangements and systems of industrial relations." In other words, and paradoxically, "the Union threatens to push Europe out of the European Union." In our reading, by contrast, Europe continues to evolve as a social market economy, albeit in an increasingly ordoliberal sense of the term.

[56] Bastiaan van Apeldoorn, *The Contradictions of "Embedded Neoliberalism" and Europe's Multi-level Legitimacy Crisis: The European Project and its Limits*, in CONTRADICTIONS AND LIMITS OF NEOLIBERAL EUROPEAN GOVERNANCE: FROM LISBON TO LISBON 21, 31 (Bastiaan van Apeldoorn, Jan Drahokoupil & Laura Horn eds., 1999).

[57] IAN GOUGH, THE POLITICAL ECONOMY OF THE WELFARE STATE ch. 4 (1979).

[58] LEMKE, *supra* note 19.

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property."[59] By making "competition socially effective," a "competitive economic order" can be created, one that gives individuals, including workers, greater choice and therefore greater liberty.[60] Similarly, for Eucken, its overarching aim is, in Alexander Ebner's paraphrase, "the subordination of workers and other employees to a bureaucratic-administrative system of regulation, allocation, and distribution of resources and incomes by the state, involving labor contracts, labor allocation and social insurance as an expression of a gradual socialization of life."[61] Defined thus, social policy is a form of *Wirtschaftsordnungspolitik, "*that is, policy for maintaining a competition-oriented economic order aimed at the preservation of the market process as the decisive precondition for the productive solution of all actually existing social problems."[62]

In this, law has a prominent part to play. It is a central part of society's economic-institutional base and a vital tool by which to generalize entrepreneurial forms of behavior.[63] The understanding of the "social" that guided the Lisbon process was essentially in the ordoliberal mold. It equated social policy with modernization, understood as the conversion of workers into agents of their own market opportunities by way of the enhancement of employability and the acquisition of new skills.[64] Social policies were understood not as aimed to protect people from the effects of markets but to help them adjust to the market.[65] In short, "the social" came to refer to "the adaptability of the labor force to the exigencies of competition in a globalized world economy."[66]

Today, ordoliberal ideology and policy is, at the EU level, all but indistinguishable from its neoliberal sibling. In Germany, however, a more specifically ordoliberal doctrine remains influential—across most of its party-political spectrum,[67] and on the government of Angela

[59] Müller-Armack, *quoted in* Volker Berghahn and Brigitte Young, *Reflections on Werner Bonefeld's "Freedom and the Strong State: On German Ordoliberalism" and the Continuing Importance of the Ideas of Ordoliberalism to Understand Germany's (Contested) Role in Resolving the Euro Zone Crisis,* NEW POL. ECON. (forthcoming).

[60] Müller-Armack, *quoted in* Werner Bonefeld, *Freedom and the Strong State: On German Ordoliberalism*, 17 NEW POL. ECON. 633, 635 (2012).

[61] Ebner, *supra* note 16, at 213. *See also* Walter Eucken, *Die Soziale Frage*, *in* GRUNDSÄTZEN ZUR SOZIALEN MARKTWIRTSCHAFT VOL. 2 (Gustav Fischer ed., 1988).

[62] Ebner, *supra* note 16, at 213.

[63] LEMKE, *supra* note 19.

[64] Van Apeldoorn, *supra* note 56, at 29.

[65] Hyman, *supra* note 42.

[66] Van Apeldoorn, *supra* note 56, at 29.

[67] This applies less to *Die Linke*, although at least one of its leading thinkers sees herself as a follower of ordoliberalism. *See* SAHRA WAGENKNECHT, FREIHEIT STATT KAPITALISMUS: ÜBER VERGESSENE IDEALE, DIE EUROKRISE UND UNSERE ZUKUNFT (2012).

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Merkel. This is apparent with regard to Berlin's diagnosis of the debt crisis in the periphery as being the outcome of overspending by irresponsible governments exploiting the low interest rates offered after entry into European Monetary Union (EMU), as well as its emphasis on price stability, opposition to activist monetary and fiscal policies, skepticism toward bailouts and bond purchases by the ECB, and insistence that loans from the European Financial Stability Facility or European Stability Mechanism (ESM) should be expensive.[68] It is apparent, too, in the rule-based legal approach that the Merkel government has brought to handling the Eurozone crisis. Ordoliberalism, the French political scientist Antoine Vauchez reminds us,

> [M]akes constitutional regulation and judges the levers and principle guarantors of the construction of a political order founded on a strict respect for economic freedom and free competition. In the context of "a politics" that is deemed incapable of creating a stable and predictable environment for economic operators, constitutional regulation (the much vaunted "golden rule") is the sole instrument to combat the 'temporal incoherences' of democratic governments.[69]

Berlin's goal throughout has been to shift budgetary powers—normally a core competency of parliaments—into the hands of judges. The mechanisms it privileges center upon treaty changes at the supranational level that force Member States to adhere to strict fiscal discipline, with sanctions automatically applied if that constitutional framework is violated, and with a banking union as a watch-dog supervising the banks if they receive bail-out funds through the ESM.[70] In this connection, Merkel made a telling remark when the Eurozone crisis was at its height, during a speech given on ordoliberalism's home turf, in Freiburg: "Unfortunately there aren't Euckens in all the countries of the world," she lamented.[71] One presumes that the countries specifically of the Eurozone were uppermost in her mind. In the absence of an ordoliberal consensus among political elites in Madrid and Athens, the strategy of austerity would have to be locked in. To this end, Berlin, flanked by other Northern Member States, resolved to force the requirement of budgetary rectitude into the national legislation (and preferably into the constitutions) of all Eurozone nations, as well as *ex ante* reporting and approval of their budgets.

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[68] SEBASTIAN DULLIEN & ULRIKE GUÉROT, THE LONG SHADOW OF ORDOLIBERALISM: GERMANY'S APPROACH TO THE EURO CRISIS (Euro. Council on Foreign Rel., 2012), http://www.ecfr.eu/page/-/ECFR49_GERMANY_BRIEF_AW.pdf.

[69] Antoine Vauchez, *The Economic Order That Inspires Merkel*, LIBÉRATION, Dec. 6, 2011, http://www.liberation.fr/politiques/01012375841-ce-qu-ambitionne-en-verite-l-allemagne.

[70] Müller-Armack, *supra* note 60.

[71] Peter Coy, *Will Angela Merkel Act, or Won't She?*, BLOOMBERG BUSINESSWEEK, Nov. 30, 2011, http://www.businessweek.com/magazine/will-angela-merkel-act-or-wont-she-11302011.html.

Since the outbreak of crisis, EU integration has continued to progress, but increasingly the "'collegial' voluntary ceding of sovereignty" to EU institutions has given way to "EU mechanisms and hegemonic countries getting an increased ability to intervene and dictate policies."[72] The Fiscal Compact of 2012 is an update of the 1997 Growth and Stability Pact, but in harsher form, a regime of permanent fiscal surveillance. Its Preamble states that signatory governments, in the interests of maintaining "sound and sustainable public finances" and preventing excessive government deficits must include in their legislation "a balanced budget rule and an automatic mechanism to take corrective action."[73] In effect, the Eurozone has outlawed Keynesianism and made neoliberal/ordoliberal economic policy binding on participant states—with the ECJ accorded a central role in ensuring that countries adhere to the rules. This has involved explicit demands for peripheral countries to implement a regime of reduced sovereignty, most egregiously in Greece, where an elaborate supervisory mechanism has been erected, running in parallel to that of normal government. De Witte notes that, "the Fiscal Compact and the ESM" serve to "constitutionalize austerity" leading to the "somewhat perverse situation that the 'Greek social question' is currently answered by a troika composed of the ECB, Commission and IMF."[74] "In the upper floors of Greek ministries," writes Panagiotis Sotiris, "the representatives of the Troika, in collaboration with representatives of the respective ministries, are not just rewriting Greek laws but also redesigning the social fabric."[75] For Greece, and other countries on the EU's periphery, the dream of convergence and innovation-based growth has vanished, replaced by a new growth model based upon poverty wages, plummeting welfare budgets, the rescinding of protective environmental and social regulations, and fire-sale privatization.[76]

With the crisis, as Anderson has argued,

> Cohesion in the Eurozone could only come, not from social expenditure, but political dictation—the enforcement by Germany, at the head of a bloc of smaller northern states, of draconian austerity programs, unthinkable for its own citizens, on the

[72] Panagiotis Sotiris, *Austerity, Limited Sovereignty and Social Devastation. Greece and the Dark Side of European Integration*, LUXEMBURG: GESELLSCHAFTSANALYSE UND LINKE PRAXIS, June 28, 2012, http://www.zeitschrift-luxemburg.de/?p=2238.

[73] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Feb. 3, 2012, *available at* http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf

[74] Floris de Witte, *EU Law, Politics, and the Social Question* (in this issue).

[75] Sotiris, *supra* note 72.

[76] *Id.*

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> southern periphery, no longer able to recover competitivity by devaluation . . . . All but universally, the prescriptions applied to restore the faith of financial markets in the reliability of local intendancies include cuts in social spending, deregulation of markets, privatizations of public property: the standard neo-liberal repertoire.[77]

That Germany has been "the principal engineer" of attempts to make the weakest pay for the crisis is ironic, Anderson adds, given that it is "the ultimate author" of the imbalances that precipitated the Eurozone's crisis, by dint of simultaneous commitments to wage repression at home—on the part of Red-Green and CDU-led governments—and capital relaxation abroad.[78]

According to Vauchez, Merkel's "drive to impose discipline and sanctions in the Eurozone" should be understood as "an extension of 'ordoliberalism'" and *not* as "a bid to establish German hegemony."[79] The first claim is uncontroversial, but what of the second? If hegemony is framed narrowly, as a scenario in which Germany is able "to push through, *without restriction*, its own vision of European integration,"[80] as a recent contribution to *Foreign Affairs* suggests it should be, it will never be attained. If hegemony is understood in world-systems terms as the geopolitical leadership that flows from economic dominance of one state within an inter-state system, whereby a competitive head start in the productive sector provides the basis for dominance in international trade, advantages that combine to ensure that it will be the primary beneficiary of a maximally free market, Germany has been securely en route toward intra-EU hegemony for several decades—with intellectual justification provided by the ordoliberal assumption that free markets and free trade serve not only Germany's commercial interests but the wider European good. Finally, if hegemony is defined in the rudimentary, realist sense, as leadership, it would be remarkable if the EU's major state were not striving for it, notwithstanding its post-1945 disavowal of, and post-1990 coyness towards, a leadership role. As early as 1952, Adenauer was unabashedly declaring Bonn's mission statement in European affairs to be the pursuit of hegemony. "If we take the leadership in European questions," he effused to

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[77] Perry Anderson, *After the Event*, 73 NEW LEFT REV. 49, 56–57 (2012), *available at* http://newleftreview.org/II/73/perry-anderson-after-the-event.

[78] Perry Anderson, *Europe Speaks German*, Z COMMUNICATIONS, Dec. 5, 2012, www.zcommunications.org/europe-speaks-german-by-perry-anderson.

[79] Vauchez, *supra* note 69.

[80] Daniela Schwarzer & Kai-Olaf Lang, *The Myth of German Hegemony*, FOREIGN AFFAIRS, Oct. 2, 2012, http://www.foreignaffairs.com/articles/138162/daniela-schwarzer-and-kai-olaf-lang/the-myth-of-german-hegemony.

the executive board of the CDU, "we have a good chance of impressing the stamp of a Christian ideology on the making of Europe."[81]

Today, in the wake of Germany's "normalization," unification, and the incorporation in the EU of its *Mittel*-European hinterland, its leadership is no longer an aspiration but a fact. "The hour of a new European hegemon has arrived," Perry Anderson recently declared,[82] and its champions have begun to raise their voices. One is George Soros, the Hungarian émigré financier. Soros suggests that a fork in the road has been reached, in which Germany must choose between hegemony and empire. It should opt for hegemony, and "preserve the European Union as the fantastic object that it used to be."[83] If it does not, a "German empire" will result, with the EU periphery as its hinterland—"a Eurozone dominated by Germany in which the divergence between creditor and debtor countries would continue to widen," with the latter becoming a Mezzogiorno characterized by economic stagnation, long-term hemorrhaging of skilled labor, and an unceasing need for transfer payments.[84] A second is the Konstanz jurist Christoph Schönberger, who, with echoes of Kipling, asks Germany to assume the "burden" of hegemony, shrug off its stance of "self-provincialization," and model its position within the EU on that of Athens within the Second Athenian Empire or Prussia within Wilhelmine, Germany.[85] Finally there is Herfried Münkler, a theorist of empire—flagged by Anderson as one of the few intellectuals actually listened to in Berlin.[86] The Union, Münkler argues, urgently needs to counteract "the centrifugal forces arising from the ongoing sovereignty claims of the member states and the socioeconomic and cultural differences among the individual regions," and for this, "a strong and powerful center" is indispensable. He advocates further de-democratization of the EU since democracy "strengthens the capacity of anti-European players," and further marginalization of the periphery, because it "has too much power."[87] It is a prospectus that has been described as "a manual for an updated

[81] Hanns Jürgen Küsters, *West Germany's Foreign Policy in Western Europe, 1949-58: The Art of the Possible*, *in* WESTERN EUROPE AND GERMANY: THE BEGINNINGS OF EUROPEAN INTEGRATION, 1945-1960, 62 (Clemens Wurm ed. 1996) (quoting Konrad Adenauer).

[82] Anderson, *supra* note 78.

[83] George Soros, Remarks at the Festival of Economics at Trento, Italy (June 2, 2012) (transcript available at http://www.georgesoros.com/interviews-speeches/entry/remarks_at_the_festival_of_economics_trento_italy/).

[84] *Id.*

[85] Christoph Schönberger, *Hegemon Wider Willen: Zur Stellung Deutschlands in der Europäischen Union*, EUROZINE, Jan. 10, 2012, http://www.eurozine.com/articles/2012-01-10-schonberger-de.html.; *Cf.* Anderson, *supra* note 78.

[86] Müller, *supra* note 36.

[87] Herfried Münkler, *Democratization Can't Save Europe: The Need for a Centralization of Power*, SPIEGEL ONLINE, Jul. 8, 2011, http://www.spiegel.de/international/europe/democratization-can-t-save-europe-the-need-for-a-centralization-of-power-a-773071-2.html.

Germano-European imperialism": A "sub-imperial system" characterized by an internal power hierarchy, its frontiers "transformed into flexible zones of differentiated and retractable rights, policed by a Common Foreign and Security Policy," and with a strike force capable of intervening in its marchlands to the south and east.[88]

Of course, any thoroughgoing attempt to fulfill Schönberger's and Münkler's vision would inevitably encounter legitimation problems. Athens' hegemony was legitimized not simply with reference to the provision of economic public goods, such as the suppression of piracy, but to the organization of defense against Persia and Sparta. Prussia's was legitimized through pan-German nationalism. Neither device—security threat or pan-European nationalism—is readily available today. Perhaps this too helps to explain the attraction of ordoliberal doctrine: It provides a legalistic, and therefore seemingly non-political and non-national, rationalization for Berlin's preferred policies, such as the implementation of automatic sanctions when Eurozone members run up large deficits.

D. Reconstituting Social Europe: ECJ Case Law

In the above, we have offered our diagnosis of the history and current travails of the EU. In the rest of this paper, we turn from diagnosis to exploring the remedies that have been offered, specifically in the field of law. In what ways can ECJ case law and legal reform play a part in pushing back against the neoliberalization of the EU?

In recent years a number of arguments have been proposed as to how EU law could be adapted, or indeed is vigorously being exercised, in the interests of social justice or to "re-embed" markets in society. In 2009, James Caporaso and Sidney Tarrow advanced an influential argument along these lines. In "Polanyi in Brussels," they argue against those who believe that the EU is an "unalloyed agent of global neoliberalism" and that European integration has resulted in the unraveling of historical social compacts due to the decoupling of markets from their national political and social frameworks.[89] Following an era of economic liberalism, they suggest with reference to the ideas of Karl Polanyi and John Ruggie on the "social embedding of markets," the pendulum, in Europe at least, has begun to swing back toward social policy and the disciplining of market freedoms according to principles of social justice. Many of the apparent contradictions in the European integration project, they maintain, should be understood as the result of a *Polanyian duality*, whereby the "disembedding of European markets" comes to be

[88] Benno Teschke, *Imperial Doxa From the New Berlin Republic*, 40 NEW LEFT REV. (2006), *available at* http://newleftreview.org/II/40/benno-teschke-imperial-doxa-from-the-berlin-republic.

[89] James Caporaso & Sidney Tarrow, *Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets*, 63 INT'L ORG. 593, 593–620 (2009). See also the more appropriately titled draft by Caporaso: James Caporaso, *Polanyi in Luxembourg: Market Participation, Embeddedness, and Rights in the European Union* (Conf. of Int'l Pol. Econ. Soc'y [IPES], Working Paper, Nov. 7, 2006), *available at* https://ncgg.princeton.edu/IPES/2006/papers/caporaso_S300_16.pdf.

countered by "a re-embedding of social regulation at the supranational level."[90] Whereas Polanyi's "countermovement" was driven chiefly by governments and social movements, particularly labor, the countermovement identified by Caporaso and Tarrow is spearheaded by the ECJ. The Luxembourg court has played a similar role to the neo-Keynesian and social democratic shapers "of the great postwar compromise," in that it has not only engaged in market-making but also, simultaneously, in market modification through the creation of labor rights and social policy.[91] As a result, the EU bears an unmistakable resemblance to "the compromise of embedded liberalism that Ruggie saw in the founding of the Bretton Woods system."[92]

Caporaso and Tarrow garner their evidence from the case law of the ECJ regarding the free movement of labor, with a focus upon the *Acciardi* case.[93] If the process of market disembedding tends to treat the worker as no more than a commodity, they argue, the process of re-embedding markets in the social fabric insists upon their treatment as "human beings, with families, local commitments, and rights."[94] Three phases of European labor market policy formation are identified. In the first, the foundations for free movement were laid, while in the second, the scope of free movement was expanded. Now we have reached a new phase, characterized by a re-embedding of the labor market, whereby "the social standing of workers and people in general" is taken into account.[95] In this third phase, the jurisprudence of the ECJ and secondary legislation are ensuring that the design of labor markets is not determined simply by the principle of economic efficiency.[96] Rather, workers are understood as embedded within social networks, such that law on movement across borders takes into account their family members.[97] As a result, the economic aspects of EU labor market legislation have "become increasingly infused with social content," and worker rights have become progressively detached from mere movement of workers between Member States.[98] The ECJ, in short, has constructed an impressive edifice of rights that have filled EU citizenship with social content.

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[90] Caporaso & Tarrow, *supra* note 89, at 599.

[91] *Id.*

[92] *Id.*

[93] Case C-66/92, Acciardi v Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland, 1993 E.C.R. I-4567.

[94] Caporaso & Tarrow, *supra* note 89, at 599.

[95] *Id.*

[96] *Id.* at 605.

[97] *Id.* at 604–05.

[98] *Id.* at 610.

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Is there any substance to Caporaso and Tarrow's thesis that ECJ case law has served to re-embed labor markets? Let us begin with their core argument, that the extension of rights over recent decades has expressed a pronounced shift in the emphasis of ECJ practice from "marketizing" to "socially embedding." We find this utterly unpersuasive. Part of the problem is that it involves a misreading of the *Acciardi* case. The thrust of that case, as Ebner points out, was to promote "the institutional establishment of a common European labor market by means of a de-construction of the national limitations of welfare regimes" that was intended to benefit labor mobility.[99] It thereby contributed to the EU-wide commodification of labor. For the single market and monetary union to work as the textbooks say they should, the wheels of labor mobility must be well oiled. According to OCA theory, for a region to qualify as an optimum currency area, high levels of labor and capital mobility are indispensable.[100] At times of economic crisis, the same theory holds, labor mobility acts as an adjustment mechanism: Workers in areas of high unemployment move to booming regions. Hence, for Brussels, with only a limited budget available for other means with which to regionally ameliorate the consequences of crisis, the blockages to labor mobility pose a very considerable problem, and dismantling them is imperative.[101] Some of these obstacles, such as the multiplicity of European languages, are formidable, but some can more easily be tackled—an obvious one being the non-transferability of social entitlements.[102] If workers are reluctant to move because the rights they and their relatives enjoy in other Member States are constrained, that can be remedied by extending the list of transferable rights and entitlements. It is therefore perfectly plausible that the driving force behind the extension of social rights is not social in nature—consideration of EU citizens *qua* human beings—but economic: The commitment to make the Single Market and single currency more effective, in neoliberal terms. Or consider, similarly, the question of social rights to health service provision. Caporaso and Tarrow celebrate the granting of individual pan-EU rights to the receipt of healthcare as a case of the embedding of markets, one that attests to the movement of social policy "beyond the market"[103] and towards EU citizenship. The blind spot in this perspective is that this same extension of social rights follows in the wake of the creation of markets in health services by ECJ

[99] Alexander Ebner, *Transnational Markets and the Polanyi Problem*, *in* KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 19, 37 (Christian Joerges & Josef Falke, eds. 2011), *available at* http://www.gesellschaftswissenschaften.uni-frankfurt.de/institut_1/aebner/Downloads_Publikationen/2010_Transnational_Markets_and_the_Polanyi_Problem.pdf.

[100] *See, e.g.*, BEN EMONS, EVALUATING OPTIMUM CURRENCY AREAS: THE U.S. VERSUS EUROPE, PIMCO (Dec. 2011), *available at* http://www.pimco.com/EN/Insights/Pages/Evaluating-Optimum-Currency-Areas-The-US-versus-Europe-.aspx.

[101] MIHAI COPACIU, ASYMMETRIC SHOCKS ACROSS EUROPEAN MONETARY UNION: CAN LABOR MOBILITY ACT AS AN ADJUSTMENT MECHANISM? 53 (2004), *available at* http://pdc.ceu.hu/archive/00003395/01/asymetric_shocks_across_european_monetary_union.pdf.

[102] Klaus F. Zimmermann, *Labor Mobility and the Integration of European Labor Markets*, (Inst. for the Study of Labor [IZA], Discussion Paper No. 3999, Feb. 2009), *available at* http://ftp.iza.org/dp3999.pdf.

[103] Caporaso & Tarrow, *supra* note 89, at 603.

jurisprudence, representing a radical acceleration of the commodification of human livelihoods.[104] Far from being a countermovement serving to re-embed markets, it represents social rights being extended across the EU in order to facilitate marketization. With regard to the development of EU citizenship more generally, Marco Dani has made a cognate argument: "Far from having produced a reconfiguration of Europeans' political self-understanding and supranational politics," he argues, European citizenship was "used first in courts and then in legislation as a tool to extend free movement to noneconomic actors."[105] Rather than enabling individuals to learn to organize themselves collectively and raise their voices in the supranational arena, its impact has instead been to encourage a growing number of EU citizens to persist in the individualistic practices associated with the market, "such as shopping for the most convenient opportunities offered by national labor markets and welfare states."[106]

Höpner and Schäfer have identified additional shortcomings in Caporaso and Tarrow's thesis. They criticize its focus upon rights associated with the free movement of labor to the neglect of other aspects of ECJ case law. When these are brought into the frame, the "ECJ as agent of embedding" thesis appears in a different light. Consider, for example, the Court's ruling that protects foreign "letterbox firms" in which the company's seat has no practical relationship to its activities. This decision has, in Germany, transformed supervisory board codetermination from a mandatory to a voluntary institution.[107] Or consider the loopholes for tax avoidance that common market integration has opened up due to the enhanced ability of firms to transfer profits and losses across national borders. In a raft of decisions, including *Cadbury Schweppes* and *Marks & Spencer*,[108] the ECJ ruled that the common market logic legitimized practices of tax-avoidance and that Member States could not justify restrictions of such practices on grounds of public interest.[109] By handing down these decisions, the ECJ has facilitated intra-EU tax competition, with negative ramifications for the redistributive capacity of Member States. Finally, consider the ECJ's extension of the so-called "horizontal" or "third-party" effect of European market freedoms to private parties. Its consequence is that European law not only obliges

[104] Markus Krajewski, *Commodifying and Embedding Services of General Interests in Transnational Contexts: The Example of Healthcare Liberalisation in the EU and the WTO*, *in* KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 231, 231–54 (Christian Joerges & Josef Falke eds., 2011).

[105] Marco Dani, *Rehabilitating Social Conflicts in European Public Law*, 18 EUR. L.J, 607, 634 (2012).

[106] *Id.*

[107] Martin Höpner & Armin Schäfer, *Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration* (Max Planck Inst. for the Study of Societies [MPIfG], Discussion Paper No. 10/8, 2010), *available at* http://www.mpifg.de/pu/mpifg_dp/dp10-8.pdf.

[108] Case C-196/04, Cadbury Schweppes plc. v. Comm'rs of Inland Revenue, 2006 E.C.R. I-07995; Case C-446/03, Marks & Spencer plc v. David Halsey, 2005 E.C.R. I-10837.

[109] *Id.*

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Member States, but also non-state bodies such as trade unions, not to take actions that might restrict the fundamental market freedoms. The paradigm cases are legion: *Viking,*[110] *Laval*[111] *and Rüffert.*[112] Here the ECJ ruled that trade unions or collective bargaining may not in principle hinder the exercise of market freedoms protected in the Treaties. To the extent that ECJ judgments extended workers' rights, these were generally in the 1970s and 1980s. Since *Viking,* discussed further below, its tendency has been to treat national institutions of collective bargaining as illegitimate obstacles to market freedoms: The trend, *pace* Caporaso and Tarrow, is clearly toward disembedding.

E. Reconstituting Social Europe: Law and the Mediation of Social Conflict

We now look at a second position. It disagrees with the view that the ECJ has emerged as the institutional avatar of an EU-wide "double movement" pointing toward a new *embedded liberalism*. Instead it proposes that the EU's "social deficit" has arisen due to the subjugation of politics to the EU's economic constitution, a process in which supranational law has played a central part. Given law's pivotal role in causing the problem, reform of law must be key to its remedy. Addressing the EU's social deficit requires a reform of law, above all to enable political and social conflict to be legitimately institutionalized within EU bodies. This "conflicts law" argument has been advanced by Christian Joerges (and his co-authors), by Marco Dani and by Damian Chalmers, among others. We shall offer an exposition of their position before proceeding to critique.

With reference to Caporaso and Tarrow, Joerges suggests that the social deficit in the original design of the EEC, and the attempts to remedy it, can be usefully understood with reference to a Polanyian double movement.[113] Both the initial "decoupling of the economic from the social constitution in the design of the integration project" and the later drive for competitiveness "through the 'completion' of the internal market program" should be seen as disembedding moves.[114] In turn, these provoked "counter-moves directed at a re-embedding of the market," namely the establishment of an ever more encompassing "regulatory machinery" that was not only dedicated to managing the internal market but also attempted to address the EU's "social deficit more comprehensively, until it became a prominent part of the European agenda."[115] Where Joerges diverges from Caporaso and

[110] Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779.

[111] Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767.

[112] Case C-346/06, Rüffert v. Land Niedersachsen, 2008 E.C.R. I-01989.

[113] Christian Joerges & Florian Rödl, *Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval*, 15 EUR. L.J. 1, 1–19 (2009).

[114] *Id.* at 7.

[115] Christian Joerges, *Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, 9 COMP. SOC. 65, 71 (2010); Joerges & Rödl, *supra* note 113, at 7.

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Tarrow is that he deems these attempts to have failed, for the social dimension continues to be subordinated to the agenda of liberalization. This is problematic in itself and, in addition, so long as a credible response to the social deficit is not advanced, the wider issue of the EU's democratic legitimacy cannot be properly addressed. A remedy of the combined problem of the social-and-democratic deficit requires a thoroughgoing reform along the lines of conflicts law.

Let us look more closely at Joerges' argument. The principal logic of ECJ case law, he contends, is of a market-disembedding nature. It acts according to the principle that "European economic freedoms, rhetorically tamed only by an unspecified social dimension of the Union, trump the labor and social constitution (*Arbeits*- and *Sozialverfassung*) of a Member State."[116] But as this logic proceeded, it inevitably provoked Polanyian countermovements, located at the EU level and that of Member States. The result was an expansion of the competences of the ECJ, but this came into contradiction with the EU's foundational structure as a "dual polity," with an "economic constitution" posited as "non-political in the sense that it was not subject to political interventions" while "social policy was treated as a categorically distinct subject," one that "belonged to the domain of political legislation, and, as such, had to remain national."[117]

According to the EU's original division of competences, the locus for market disembedding processes was centered at the EU level while policies to "socially embed" the market belonged with the Member States.[118] This original division of labor could not remain stable once the movement to complete the Single European Market got underway in the mid-1980s. From this "Delorsian moment" onward, not law but economic rationality (in the neoclassical sense) came to operate "as Europe's orienting maxim, its first commitment and its regulative idea."[119] If ordoliberal strictures had been rigorously adhered to, Joerges points out, the EU would have continued as a market-oriented polity governed by an "economic constitution."[120] Yet they were not, due not least to the inevitability of Polanyian countermovements. Instead, the Single Market program gave rise to the entanglement of the EU in an expanding range of policy areas, such as environmental protection, and the health and safety of consumers and workers. It was obliged to develop its regulatory machinery in these fields, and to institutionalize the new competences in the Social Protocol and Agreement on Social Policy of the Maastricht Treaty. In this way, "the formerly distinct lines between Europe's (apolitical) economic constitution and the political

[116] Joerges & Rödl, *supra* note 113, at 18.

[117] Joerges, *supra* note 115, at 70.

[118] *Id.* at 71.

[119] Joerges & Rödl, *supra* note 113, at 5.

[120] *Id.*

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responsibility assumed by Member States in relation to social and labor policies" grew increasingly blurred.[121]

The ordoliberal school offers one solution to this constitutional mess. They advocate the reconstruction of "the legal essence of the European project as an 'economic constitution.'"[122] This solution would require no additional democratic legitimacy. Its legitimacy supposedly rests upon the "quasi-Schmittian 'decision'" to commit the signatories to the Treaty of Rome to work towards "a system of undistorted competition." The EU's economic constitution, in the ordoliberal credo, should be "a law-based order committed to guaranteeing economic freedoms and protecting competition by supranational institutions," with discretionary economic policies deemed illegitimate and unlawful.[123]

Against the ordoliberal vision, Joerges and his colleagues set their own, diametrically opposed, agenda. In their diagnosis, the crucial flaw of the Union is "the weakness of *politics*"—the fact that, despite being a resolutely political project, European economic integration has historically been vigorously protected from the effects of everyday politics and "entrusted to the medium of law instead."[124] But to compensate for the weakness of politics through resort to law is to overburden it, together with its legitimating potential.[125] The alternative conception is one that links "the rule of law with democracy and social justice,"[126] and in the transnational arena of the EU that requires the institutionalization of conflicts law.

By conflicts law Joerges refers to a legal framework that aspires to accommodate divergences between different jurisdictions. It is a form of *deliberative supranationalism*, but not of the kind that has become guilty by association with the manifold pathologies of EU integration: Technocracy, de-parliamentarization, bureaucratization, and judicialization.[127] Rather, its goal is to defend and develop "the notion of law-mediated democratic legitimacy at all levels of governance"; it offers "new visions of democratic

[121] *Id.* at 6.

[122] Joerges, *supra* note 115, at 69.

[123] *Id.*

[124] Michelle Everson & Christian Joerges, *Reconfiguring the Politics – Law Relationship in the Integration Project Through Conflicts—Law Constitutionalism*, 15 EUR. L. J. 644, 646 (2012).

[125] *Id.* at 645.

[126] Joerges & Rödl, *supra* note 113, at 1.

[127] Christian Joerges, *A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation*, *in* KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 465, 482 (Christian Joerges & Josef Falke eds., 2011).

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administration."[128] It does not seek to achieve unity in the sense of conformity to a norm, but to establish the most favorable platform for "mutual respect and toleration" to be exercised.[129] Its motto is not the emphatic *e pluribus unum* of the Age of Nations but a circumspect and postmodern *unitas in pluralitate.* The aim and rationale is moderate: To provide a fair and prudent mechanism for managing the continuous conflicts and tensions that emanate from Europe's irreducibly diverse social order.[130]

There is a certain utopianism at work in Joerges' argument, in respect both of law and the inner nature of the European project. The EU is praised as "a highly civilized polity," with its stable and fair procedures, participation opportunities, consensual problem-solving, transparency, and openness.[131] It provides a peculiarly favorable environment for implementation of conflicts law, for both EU law and conflicts law owe much to "the Kantian insistence on a *cosmopolitan* 'lawful condition' (*Rechtszustand*) as a regulative idea."[132] But the value added by conflicts law is that it offers to restore politics to EU law-making; in Joerges-speak: "[L]aw-mediated legitimate governance through the conditioned recognition of differentiated law-production processes in which legislature, courts, governmental bodies and non-governmental actors are continuously involved."[133]

On the question of social Europe, Joerges' prospectus is modest, even conservative. It is not to solve Europe's crisis, or even its "social deficit" but "to develop a legal framework which adequately reflects Europe's post-national constellation and through which it seems possible to strive for a survival of Europe's social legacy"—whatever that may be.[134] Yet, can a *sotto voce* radicalism be discerned in the proposition that striving for "survival" necessitates "a (re-)embedding of the economy through law"?[135] Certainly, Joergesian conflicts law entails a critique of the market fundamentalist cast of ECJ case law. The ECJ, he insists,

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[128] *Id.*

[129] *Id.*

[130] *Id.* at 467, 477.

[131] *Id.* at 483.

[132] *Id.* at 466. Joerges' interpretation of Polanyi, borrowed from Fred Block, is contentious. This is not the place to explore the point, but see GARETH DALE, *KARL POLANYI: THE LIMITS OF THE MARKET* 137–87 (2010); *see also* Gareth Dale, *Lineages of Embeddedness: On the Antecedents and Successors of a Polanyian Concept*, 70 AM. J. OF ECON. & SOC. 306, 306–39 (2011); Gareth Dale, *Social Democracy, Embeddedness, and Decommodification: On the Conceptual Innovations and Intellectual Affiliations of Karl Polanyi*, 15 NEW POL. ECON. 369, 369–95 (2010).

[133] Joerges, *supra* note 127, at 500.

[134] Joerges & Rödl, *supra* note 113, at 7.

[135] Joerges, *supra* note 127, at 466.

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> is not a constitutional court with comprehensive competences. It is not legitimated to reorganize the interdependence of Europe's social and economic constitutions, let alone replace the variety of European social models with a uniform Hayekian *Rechtsstaat*. It should therefore refrain from 'weighing' the values of *Sozialstaatlichkeit* against the value of free market access.[136]

This is its democratic aspect. In its accommodation of difference, conflicts law provides a platform for "the institutionalisation of transnational responses" which attain their legitimacy through a process of correcting the democracy failures of Member States.[137] Crucially, for Joerges, national welfare traditions are not to be considered representative of such failures. For him, the application of supranational law to dissolve welfare state traditions is unacceptable as a means of rectifying failures of national democracy. Instead, the dissolution of national welfare traditions is conceived as a dismantling of modern democratic self-determination without offering any kind of replacement.[138]

In Dani's account, the EU's supranational rules have been constructed upon market principles; they have established a **"**regulatory-style . . . market-based managerial regime" that is structurally tilted in favor of "mobile economic actors" and against policies of redistribution and principles of social justice, social equality, and solidarity.[139] Of the subjects that feature prominently "in democratic class struggles—trade unions, social movements, political parties," none has played an active role in EU integration.[140] Up until the early 1990s, Dani suggests, neither the exclusion of the demos nor the market-fundamentalism of the EU project were yet apparent. Supranational policy during this time was surrounded by an "aura of neutrality."[141] Yet with the eruption of social conflicts in the 1990s, and the rejection of the Treaty of Maastricht in a Danish referendum in particular, the aura began to vanish, and the "ideological foundations and social implications" of the EU came into view.[142] It became increasingly evident that the expansion of supranational law was serving to marginalize "social conflicts from European public law," with

[136] *Id.*

[137] *Id.* at 500.

[138] Joerges & Rödl, *supra* note 113, at 18.

[139] Dani, *supra* note 105, at 629–30.

[140] *Id.* at 629.

[141] *Id.*

[142] *Id.* at 636.

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disagreements tolerated only in respect of the means to achieve a set of predetermined goals that are market-liberal in nature. (Perhaps the most egregious example is the establishment of price stability as the overriding objective of monetary policy.) Questions regarding the goals themselves, meanwhile, are "removed from the horizon of parliamentary decision making, with the result that conflicts over their definition end up being managed outside the domains of electoral politics and representative democracy."[143] With the economic crisis of the late 2000s, the "consensus culture" that has pervaded European public law has been shaken by a radical challenge. The adoption of measures designed to redistribute wealth within Member States has come to constitute a real alteration of the EU's "original nature." This epochal shift, however, has not developed hand in hand with "a structural rehabilitation of social conflicts", which would require a substantive change in the method of supranational policy making.[144] In Dani's view, a radical reform of EU law is thus indispensable.

Chalmers, similarly, casts a critical eye over the role of law in the EU's response to the recent economic crisis. He shows that the new so-called "European redistributive State" has become in both effect and design an increasingly depoliticized order, with its legal regime insulated from democratic contestation in general and from the demands of disadvantaged social groups in particular. This is typified in its governance of the crisis. It has been characterized by an "absence of legal process" that has permitted it "to deploy the machinery with which it is most comfortable, that of the regulatory state."[145] Specifically, Chalmers' charge is that "the new regulatory supranational machinery straddling the Commission-ECOFIN axis . . . is marked by three lacks: A lack of political imagination, a lack of political voice for all but a few, and a lack of sense of distributive justice."[146] Exemplifying the problem are two documents, one from the European Council,[147] which led to the adoption of the 2011 Fiscal Treaty, and the other composed by Angela Merkel and Nicolas Sarkozy, which influenced the agreement of the Stability Treaty.[148] These and other similar documents demonstrate that EU fiscal reforms are designed to be insulated from social conflicts, with no serious contestation to be permitted *vis-à-vis* their three central goals—balanced budgets, limited deficits, and limited

[143] *Id.* at 635–36.

[144] *Id.* at 637.

[145] Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 EUR. L.J. 667, 693 (2012).

[146] *Id.*

[147] EUROPEAN COUNCIL, STRENGTHENING ECONOMIC GOVERNANCE IN THE EU: REPORT OF THE TASK FORCE TO THE EUROPEAN COUNCIL (2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117236.pdf.

[148] Chalmers, *supra* note 145, at 693.

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macroeconomic imbalances.[149] There is little democratic involvement in the methods of the regulatory state, with, in the case of responding to the Eurozone crisis, everything being done "to detach parliamentary and civil society from any *ex ante* engagement with Commission-ECOFIN decision-making."[150] In this form of depoliticized supranational lawmaking, rules and values to do with empowerment, civility, and respect are completely absent. Chalmers draws attention in particular to the system's "intense focus on changing identified behaviours through frequent interaction and the classic regulatory 'compliance pyramid' model of escalating responses (discussions, warnings, period for self-regulation, reversible sanctions, greater sanctions)."[151]

Despite their direct impact on the distribution of resources, most often in the form of curbed welfare provision, no requirement is placed on EU institutions to give reasons for or consider the effects of their decisions, nor any requirement on national governments to ensure the protection of even the most vulnerable members of society.[152] Conflicts over social issues, in particular over the use of regulatory techniques in the fields of economic and budgetary policy making, are likely to intensify, and the concern is that they will be "external to the political system."[153] As harbingers, Chalmers cites the street protests in Greece, and those in Hungary in early 2012 after EU sanctions were applied.[154] The danger he sees in such movements is that protest can find expression only on the streets "rather than as a voice of co-determination within political institutions."[155] The remedy he proposes is a new institutional settlement, one that, informed by a "law of struggle," would be able to provide a "matrix" of deliberation capable of illuminating the deficiencies of the existing regime and pathways to its reform.[156]

To us, it appears that the enhancement of deliberation through conflicts law (or law of struggle) is not a strategy capable of addressing the EU's social or democratic deficits. Deliberation refers simply to the ability to say or suggest something, not to actually and tangibly influence a decision-making process. Democracy is hollow in the absence of identification of a constituent power—some sort of sovereign people. As to the social deficit, here, too, the creation of collective subjects is decisive. It is generally through

[149] *Id.* at 676–77.

[150] *Id.* at 692.

[151] *Id.* at 690.

[152] *Id.* at 692.

[153] *Id.* at 693.

[154] *Id.* at 690.

[155] *Id.* at 693.

[156] *Id.* at 685.

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conflicts, as Dani puts it, "that members of a group become fully aware of their distinctive goals and conscious of their capacities and resources."[157] To the degree to which Europe has a "social legacy," it arrived courtesy of conflict and struggle (and not law of struggle or law of conflict). The "social state" was born of pressure from labor and other social movements, and for the EU's neoliberal trajectory to be seriously countered, similar force will be indispensable.

Rather than being a cause for anxiety, it is the reappearance of conflict that holds the potential for the politically imaginative outcome Chalmers so desires. Those who are mobilizing resistance against the effects of the EU-wide austerity drive are the very people who have long been disenfranchised, and their lives dislocated, by the market ethos of EU law. We can therefore reasonably argue that those demanding social justice today do not depend on EU law to realize their aspirations. Indeed, it may be that it is the struggles *against* hegemonic law that will ultimately empower Europe's unfree. In the final section we turn to consider the difficulties associated with the use of law *per se* as an instrument for achieving social justice in Europe.

F. Contradictions of Europe and Contradictions of Law

How are we to interpret the drawbacks of the legal accounts and prospectuses for EU reform that we have summarized and critiqued above? We suggest that it is crucial to consider the relationship of the terms of debate—Europe and law—to the evolution of capitalism, and that a Marxist analysis can provide insight here. Let us briefly consider Europe. Its idealized self-image is as a bastion of liberal civilization, a defender of democracy and human rights. The architects of European unity, it is sometimes said, "aspired to create a common European space that would reflect the continent's best political traditions, rather than its worst."[158] This is to look in a rose-tinted rear mirror. Many of the architects were drawing up blueprints that were undemocratic, neoliberal (or ordoliberal), Christian-supremacist, and imperialistic. They were drawing from deep wells—Europe's long history of militarism and colonial violence. The colonial garrison was where the European identity was first forged. As Gerard Delanty has shown, in its confrontation with non-Christian civilizations, Europe sought to construct a hegemonic identity as one "representing Freedom, Progress, Civilization and Christian Humanism."[159] By portraying the Orient as despotic and morally backward, the "Christian West was able to justify its imperialist drive."[160] Racism in general and Islamophobia in particular was not

[157] Dani, *supra* note 105, at 623 (citing LEWIS A. COSER, THE FUNCTIONS OF SOCIAL CONFLICT 34 (1956)).

[158] Matthew Carr, *Europe's Hard Borders*, RED PEPPER, Dec. 2012, http://www.redpepper.org.uk/essay-europes-hard-borders/.

[159] GERARD DELANTY, INVENTING EUROPE: IDEA, IDENTITY, REALITY 96, 99 (1995).

[160] *Id.*

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something incidental to Europeanism but close to its heart.[161] Yet Europe is also the land of the Reformation and the Enlightenment, of Voltaire and Kant, and of a number of great revolutions, each of which inscribed progressive and universalist goals, such as *liberté, égalité, fraternité*, on its banners. What underlies both these dark and light sides of European modernity is the fact that capitalism arose in this corner of the planet. It depended upon particular institutions, markets and law, which embodied norms of universalism, equality, neutrality, and rationality. At face value, the market appears to be a neutral mechanism for exchange of commodities; it appears as fair and rational because market exchange respects and embodies qualities of equality, freedom, mutual respect and mutual need.[162] At face value, law appears to be a neutral mechanism for the resolution of claims. If considered as mere mechanisms, abstracted from actual social relations, both institutions appear to embody unimpeachable rules of equality, freedom, and fairness, and to represent the public interest. In the case of law, its principal "utopian truth-moment"[163] is its universality, the egalitarian ideal. As the embodiment of universal rights, it appears to be a general and accountable power, as contrasted with, or even opposed to, the diffuse, fragmented, and unaccountable realm of the market.

The formal character of freedom and equality of market exchange conceals substantive inequality in the "hidden abode of production," a realm of (economic) despotism in which the buyer of labor power becomes the "master," the "boss," while the seller is transmuted into the "worker," or the "wage slave."[164] An essentially homologous contradiction is manifested in law. It embodies norms of universalism, equality, neutrality, and rationality. In order for law to legitimize a particular social order, it has to appear to be just. If it were evidently partial and unjust it would contribute little to sustaining and legitimating a hegemonic social order. It is through this legitimating process that the law makes concessions to the ideals of neutrality, universality and fairness. As E. P. Thompson has observed:

> [T]he essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just.[165]

[161] *Id.* at 98.

[162] ROBERT FINE, DEMOCRACY AND THE RULE OF LAW: MARX'S CRITIQUE OF THE LEGAL FORM 108 (2002).

[163] *See* THEODOR W. ADORNO, NEGATIVE DIALECTICS (1973).

[164] Colin Barker, *Some Reflections on Two Books by Ellen Wood*, *in* 1 HISTORICAL MATERIALISM 22, 36 (1997) (explicating Karl Marx).

[165] EDWARD P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263 (1975).

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But the sphere of human rights is indissolubly linked to a realm of (political) despotism: State power and domination. Just as markets exist in many societies but within capitalist society they become a mechanism geared to the self-expansion of capital, law exists in many societies but in capitalist society it becomes integrated into the alienated public power that is the state apparatus.

The law's universalist-egalitarian aspirations and ideals do not mean that the capitalist structures it works to sustain do not ultimately prevail. Indeed, the ideals are crucial to the ideological effect. Capitalism's appeal to notions of universality and fairness means that it demands sophistication in its legitimizing of social order–greater sophistication than, say, in the age of slavery when there was no imperative to justify slavery to the slaves. Unlike slave societies, capitalism's prevailing ideology centers upon ideas of freedom, equality, fairness, and universality, and therefore needs in some way to appeal to these ideas in its functioning. According to Thompson, "the forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless. Only to the degree that it is seen to be so can law be of service in its other aspect, as ideology."[166]

The question, then, becomes to what extent can the law realize the ideals of universality and fairness to which it is committed? We would suggest that the question can best be approached by understanding law as a contradictory social practice; its progressive aspect exists in tension with, yet inextricable from, its determination by, and its rationalization of, structures of social domination.[167] The formal character of equality before the law means that it engenders substantive inequality: "Equal right is in principle bourgeois right," as Marx put it; "it is a right of inequality in its content, like any right."[168] The very categories of law—the legal person, responsibility, liability, rights, and duties—function ideologically to reproduce a particular, individualistic conception of society, one that systematically hides class power.[169] When passed through the legal process, the aspect of the exercise of power that entails the subjection of particular individuals or groups to others is depoliticized and veiled, appearing as the "realization of reason and humanity."[170] In its reduction of social behavior to a grammar of rights and duties, treating individuals as

[166] *Id.* at 266.

[167] *See* CRAIG REEVES, THE IDEA OF CRITIQUE (forthcoming 2013).

[168] Fine, *supra* note 162, at 124 (quoting Karl Marx).

[169] *See* ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW (2d ed. 2001); Evgeny Pashukanis, *The General Theory of Law and Marxism*, MARXISTS' INTERNET ARCHIVE, 1924, http://www.marxists.org/archive/pashukanis/1924/law/index.htm.

[170] Fine, *supra* note 162.

monadic legal persons, abstracted from their social realities, law erodes the social basis for collective action—which is the starting point for any struggle for social justice.[171]

Those who argue for law as an agent of social justice due to its utility in mediating social conflicts sometimes underestimate or indeed overlook law's depoliticizing effect. Through its legitimating character, law contributes to processes of depoliticization and therefore cannot replace politics in mediating social conflicts. In critiquing the ECJ's approach in *Viking and Laval* for its depoliticizing outcome, De Witte writes that this case

> led to the absurd situation where trade unions had to not only take account of the interests of mobile capital, but also restrict their exercise of the right to strike so as to cause as little harm to the company making use of free movement rights as possible (which, needless to say, is the exact opposite of the social function of the right to strike). Especially in areas that fall outside the competences of the Union itself, then, this type of proportionality approach not only depoliticizes the social question, but answers it in a manner that directly contradicts the electorate's voice.[172]

In suggesting a solution to this instance of depoliticization, De Witte suggests a "new approach to proportionality" that would "take this effect into account, and give more leeway to the national articulation of the social question."[173] While the objective is a sound one, can we imagine a "new approach to proportionality" in a social order which values capitalist interests above all others? Law plays an important role in reproducing capitalist structures of domination, perfectly illustrated in the *Viking and Laval* case. The right to strike has long been targeted by the state, curbed and limited, making it increasingly difficult to exercise. Law has played an important role in this process. In this way, *Viking and Laval* can be seen as merely a continuation or an affirmation of the established social order. In the absence of radical change from below restructuring that social order, law cannot merely be "asked nicely" to change its ways.

We therefore argue that achieving social justice and responding to the demands of those contesting the EU social order through popular struggle on the streets and in the workplaces across Europe today, cannot be found through a reinvigoration, re-packaging, or re-thinking of the nature and purpose of EU law. Those who elevate ECJ case law as the

[171] *Id.* at 206.

[172] De Witte, *supra* note 74, at 13.

[173] *Id.*

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agent of progressive change, such as Caporaso and Tarrow, discussed above, appear to be bedazzled by the utopian aspiration of law to the neglect of its ideological function: Its role in cloaking a gravely inequitable social order with the appearance of equality, justice, and neutrality. In order to legitimize a fundamentally marketized social order, law has to appear to uphold the interests of those whose lives are dislocated by marketization. This duality leads some, such as Caporaso and Tarrow, to infer that EU law represents, or has the potential to represent, a balance between social embeddedness and market interests.

Further, it matters from which institution social policy emerges. Not only are courts generally far from ideal social policy makers, lacking in training and expertise, but the docket of the ECJ in particular is skewed towards deep-pocketed litigants and repeat players. Also, its distinctive style of formal reasoning with its emphasis on logical deduction from "self-postulated" legal principles "rather than analysis of substantive economic or social problems or policy goals that might justify the particular interpretation" is ill suited to dealing with questions of social policy.[174] Ironically, Scharpf has noted that "[t]he strategy of using law 'as a mask for politics'" has "also helped immunize judicial legislation against political objections."[175] If social policy is essentially being constructed in the courts, this represents a disempowering of the more democratically representative arms of the state. It is dangerous to present an activist court with "good" outputs as progressive, least of all due to the risk of creating a false impression that the EU is making sufficient progress towards becoming a more socially just polity. Despite the absence in the EU of democratically representative institutions striving towards achieving social justice goals, this should not make us any more inclined to vest our hopes for change in the ECJ. Whether the outputs of activist courts are deemed good or bad from a social perspective, the activism itself is symptomatic of a deeper problem: A shift of social policy making away from democratic process. With social policy pressed ever further into the realm of jurisprudence, rights become divorced from obligations, with a resulting tendency to diminish the capacity for redistribution. In most European countries, Höpner and Schäfer remark, "politics against markets" has been the result of collective political struggles rather than of lawsuits. Courts are "ill-equipped to create schemes for redistribution."[176]

This is not to say that we can comfortably look to more democratic arms of the EU legal system for answers to the social question. Progress in social policymaking depends upon the political pressure, and ideas, that arise from social movements. As discussed above, their voice is either absent, marginalized or drowned out in the EU, for example by lobbyists for big business. The traditionally more democratic institutions of the state have historically been at best fickle friends to the disempowered. As Dani observes, the poor

[174] Scharpf, *supra* note 55, at 216.

[175] *Id.*

[176] Höpner & Schäfer, *supra* note 107.

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have historically been "disenfranchised from legislatures" and "prevented from voicing their interests and aspirations into the political process."[177] It is only when the poor threatened to challenge the power of their rulers that "constitutions notice[d] their existence but just for granting governments the emergency powers necessary to suppress social uprisings."[178] In much the same way, anti-austerity protests across the Union today have been countered with anti-democratic responses from political elites. In Italy we have seen the installation of an unelected technocrat as prime minister and in Greece, citizens "have no meaningful control over the nature, scope or direction of the distributive criteria that govern their lives."[179] Meanwhile, we have witnessed brutal crackdowns on protests on streets across the EU, such as that against student demonstrators resisting a rise in tuition fees and cuts to higher education funding in Britain in 2010.

By privileging law as the source of solutions to Europe's crisis of social legitimacy, we limit what can be imagined, and what counts as change for societies embroiled in struggle. Attempts to mobilize law as a means of delivering on demands for social justice potentially short-circuit what might otherwise be achieved through collective struggle. Law's appeal to neutrality and objectivity and its denial of the relevance of the political mean that political battles rarely take place openly, and are hardly ever won, in the courtroom. Law's predisposition to depoliticize and individualize inevitably contributes to the marginalization, and ultimately the subjugation, of solidarity.

G. Conclusion

When the world economy pitched into recession in 2008 and 2009, it seemed for a brief but startling moment that the neoliberal model was on the cusp of implosion. With asset prices collapsing, Keynesian deficit spending was rediscovered globally—if only momentarily in Europe. Yet, while the present crisis is placing pressure on the neoliberal paradigm, the world that it has wrought—a globally integrated, heavily privatized, trade exposed, financialized, and socially segregated capitalism—is more deeply entrenched than any specific set of neoliberal policies.[180] This is as evident in the EU as anywhere else. Indeed, the EU, in its institutional design has proved to be peculiarly accommodating to the neoliberal agenda, its structures representing a form of what Stephen Gill terms the *new constitutionalism*, with a regulatory form of authority and with no formal space for the

[177] Dani, *supra* note 105, at 626 (citing Luca Nogler, *Cittadinanza e Diritto del Lavoro: Una Storia Comune*, *in* DIRITTI E LAVORO NELL'ITALIA REPUBBLICANA 85, 85–86 (Giovanni Cazzetta & Gian Giudo Balandi eds., 2009)).

[178] Dani, *supra* note 105, at 626 (citing R. Bin, *Che cos'è la Costituzione?*, *in* 27 QUADERNI COSTITUZIONALI 11, 17 (2007)).

[179] De Witte, *supra* note 74, at 5.

[180] Jamie Peck, Nik Theodore & Neil Brenner, *Postneoliberalism and its Malcontents*, 41 ANTIPODE 94 (2010).

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constitution of political opposition, and thus for effective contestation over issues of supranational economic policy.[181]

Those who have delved into the record of the EU's official labor organizations in the search for signs of a countermovement to neoliberalism have returned empty handed. Admittedly, there are those, such as Ebner, who suggest that the "European social dialogue"—bi-partite and tri-partite negotiations involving employers' associations and the ETUC that are institutionalized in EU processes and treaties—has offered "promising traces of a European counter-movement."[182] It is, he ventures hopefully, "a modest attempt at establishing an adequate representation of labor in the discourse on the European social model."[183] Yet even he concedes that such dialogue is little more than a neo-corporatist program saddled with the usual "problems of inclusiveness and legitimacy."[184] Against this backdrop it is to be expected that critics of neoliberalism look elsewhere for bearers of a countermovement capable of re-embedding markets. In this article we have shown that ECJ case law cannot represent that alternative. Further, those who take courage from signs of social embeddedness in ECJ case law risk lending legitimacy to a system of social policy making by unelected judges, and mistake law's propensity to dispense justice in individual conflicts for a general trend towards the emergence of a social Europe. We also take issue with those legal scholars who, while astute in their critique of the EU's response to the economic crisis for its subordination of democracy to elite interests, seek remedies in a redesign of the EU legal regime, with facilitation of deliberative elements of democratic contestation and social justice.[185] The social legacy that conflicts law advocates such as Joerges wish to restore was the achievement principally of social and political movements—as discussed above for the cases of late nineteenth and mid-twentieth century Germany. Of course, the juridical regime helped to shape the process and outcome of such struggles, but it was not their efficient cause.

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[181] Stephen Gill, *European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe*, 3 NEW POL. ECON., 5–26 (1998); Ben Rosamond, *The Discursive Construction of Neoliberalism: The EU and the Contested Substance of European Economic Space*, *in* EUR. REGIONALISM AND THE LEFT 40 (Gerard Strange & Owen Worth eds., 2012).

[182] Ebner, *supra* note 99, at 37.

[183] *Id.*

[184] *Id.* Indeed, according to one study, only eight cross-sectorial agreements have been reached within the social dialogue framework since 1992, and none of them have been of great significance. The same study concludes that this is not unrelated to the fact that the social dialogue is conceived of as "deliberation" rather than as collective bargaining backed by the threat of industrial action. For the European Commission, this "deliberative" emphasis belongs explicitly to a strategy of persuading Europe's trade unions to adopt a moderate identity, one that envisages their role as one of partnership with employers. *See* RUTH DUKES & EMILIOS CHRISTODOULIDIS, HABERMAS AND THE EUROPEAN SOCIAL DIALOGUE: DELIBERATIVE DEMOCRACY AS INDUSTRIAL DEMOCRACY? (2011), *available at* http://www.labourlawresearch.net/Portals/0/Habermas_and_Trade_Union_Rights_FINAL.pdf.

[185] See this special issue of the *German Law Journal*; *see also* 18 EUR. L. J 607–737 (2012).

If solidarity is to arise in Europe, in this conspectus, it will not emanate from an alleged European essence but will take the form of the allegiances and collective identities that are fashioned when individuals from disadvantaged groups act in unison, in recognition of common interests and aims. Recent years have witnessed periodic upwelling of grassroots mobilization across the EU, from some of which transnational social-movement organizations have crystallized. We have in mind for example the anti-globalization movement of the early 2000s, which culminated in the European Social Forum (and in related anti-war mobilizations). We have in mind the coalition of trade unions and social movements that came together in 2005 and 2006 to campaign against the Services Directive, which intended to liberalize the provision of services across borders in the EU.[186] We have in mind the mobilization against the EU Constitution Project in 2005, and more recently against the imposition of austerity across Europe, exemplified in the mobilizations of November 2012. Even a brief glance at this list reminds us that none of these movements gathered sufficient force to shake the existing European regime. That said, is it not social movements based upon those who possessed little in the way of political power that have underpinned the world-historical social and democratic breakthroughs hitherto? The institutional reforms of a Cleisthenes or Pericles would have been unthinkable without the prior uprising of Athens' *banausoi,* in their besiegement of Cleomenes. Similar logic applies to the inauguration of democratic government in the modern era, the widening of the franchise to workers and women, the extension of social rights, and the self-liberation of colonial peoples. Is there any reason to believe that the crisis of social legitimacy facing Europe today will not be overcome in the same way?

[186] Andreas Bieler, *Co-option or Resistance? Trade Unions and Neoliberal Restructuring in Europe*, *in* EUROPEAN REGIONALISM AND THE LEFT (Gerard Strange & Owen Worth eds., 2012).

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