Special Issue
Democracy and Financial Order—Legal Perspectives

Neoliberalism and Law: The Case of the Constitutional Balanced-Budget Amendment

By Thomas Biebricher[*]

Abstract

This Article discusses the significance of law in neoliberal theory and practice. Prefaced by a brief look at the role that law plays in the theories of the ordo- and neoliberal thinkers Franz Böhm and Friedrich August von Hayek, the subsequent chapters focus on the work of James Buchanan and his brand of neoliberalism, which combines constitutional economics public choice theory. Buchanan's core demand is a balanced-budget amendment to the constitution. The following Sections examine this measure in its various aspects before the final section switches to the world of "actually existing neoliberalism" with a discussion of the various reforms of the economic governance structure of the European Union in recent years, particularly the "Fiscal Compact", which amounts to the real world equivalent of a balanced-budget amendment.

[*] Goethe University Frankfurt, thomas.biebricher@normativeorders.net. A version of this Article was presented at the workshop on *The Politics of Legality in a Neo-Liberal Age* at the University of New South Wales in Sydney in August 2014. Ben Golder and Daniel McLoughlin, the organizers of the workshop, commissioned the piece for an edited volume forthcoming in 2017. The author would like to thank Mr. Golder and Mr. McLoughlin for granting their permission to publish in this special issue.

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

A. Introduction

This Article seeks to elucidate the significance of law for both neoliberal theory and practice, or what could be termed “juridical neoliberalism”. Conventionally, neoliberalism is understood as a set of economic doctrines that give rise to the unfettered dominance of markets in social life. Accordingly, one may doubt that there is a legal dimension to neoliberal theory and practice that is of any significance. Still, I will argue that neoliberal theory is a body of *politico-economic* thought that is not confined to purely economic reflections but is also – necessarily – interested in broadly political themes, among which law is particularly prominent. Furthermore, law is not just a matter of neoliberal theory; juridical norms are a key instrument used in the neoliberal restructuring of economic governance.

This Article begins with Section B defining neoliberalism. Before engaging questions related to neoliberalism, it is essential to clarify the term, not the least because one of the few things commentators can agree on is the highly contested nature of neoliberalism. My starting point in developing a working definition of neoliberalism will be a reconstruction of the context of the emergence of the term and the intellectual current it refers to.

Section C examines the significance of law in neoliberal thought, which is not a homogeneous current despite considerable commonalities between the various thinkers. Given this undeniable heterogeneity, it is useful to distinguish varieties of neoliberal thought and a more encompassing analysis of juridical neoliberalism would require an examination of all those varieties and the respective role(s) that law plays in each of them. This Article focuses on the commentary of James Buchanan, whose work represents a variety of neoliberal thought that draws heavily on public choice theory and is often referred to as constitutional economics, indicating the importance of constitutional law for its agenda. This will be the subject of Section C. Rather than attempting to summarize Buchanan’s immense oeuvre in its entirety and the various ways juridical norms figure in it, Section D focuses on one particular aspect crucial to the normative dimension of constitutional economics—the call for a constitutional balanced-budget amendment (BBA) that requires public expenditures be matched by public revenue.

Section F explores actually-existing neoliberalism in the context of the aftermath of the European financial crisis. In response to the sovereign debt crisis triggered by the original financial crisis, the European Union (EU) passed a series of reforms to curtail potentially unsustainable economic and fiscal policies pursued by member states. Among them is the Treaty on Stability, Coordination, and Governance (TSCG) dubbed the Fiscal Compact in public discourse, which is essentially the equivalent of Buchanan’s balanced-budget amendment (BBA). The discussion and critique of the TSCG will reference some of the theoretical concerns raised in the preceding sections. Additionally, this Article will place

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

the TSCG in the context of Stephen Gill's widely discussed criticisms of what one might consider an earlier incarnation of the TSCG, namely the Stability and Growth Pact (SGP) of 1997 that Gill considered an integral part of the "new constitutionalism".

In conclusion, Section G reflects on the role of juridical neoliberalism in Europe at the current conjuncture, which is characterized by a somewhat contradictory constellation. On the one hand, we witness what I consider a moralization of juridical norms regarding economic and fiscal policy intended to buttress the legal facticity of those norms, i.e. breaking these rules would not only be illegal but also immoral. On the other hand, this fixation on rules that must never be broken exists in an overall context of legal insecurity with regard to EU law or, more specifically, what commentators refer to as the EU's economic constitution. The legal validity of almost every aspect of the politics of the sovereign debt crisis, from the Fiscal Compact to the European Stability Mechanism (ESM) and the Outright Monetary Transactions (OMT) program by the European Central Bank (ECB), remains contested. Thus, the overall picture is paradoxical. Juridical norms are morally charged to make them almost sacrosanct, but they developed extra-legally during states of emergency.

B. What is Neoliberalism?

Terms used to group together intellectual and political traditions are inherently difficult to define. First, it is difficult to pin down the essence or the core of any tradition that includes a variety of thinkers, either because they are considered to be a part of this tradition by others and/or they themselves located their work within it. Second, the political stakes involved in defining a tradition as including or excluding certain elements and thinkers add to the difficulty. The question of what constitutes conservatism, to choose but one example, and who can or should count as a legitimate representative of this intellectual current, is far from purely academic. Referring to someone as conservative, let alone as socialist, is a highly political act of signification. The political stakes rise exponentially in the case of the intellectual tradition of neoliberalism.

Not only is liberalism a notoriously diverse tradition, at least in political discourse being a liberal in Europe has come to mean almost the complete opposite of being a liberal in North America. This is one of the reasons why neoliberalism is almost absent from political discourse in the United States,[1] although it shows no sign of disappearing from academic discourse in Europe. But even in European political discourse—and to some degree academic discourse—the term has become somewhat toxic because it is hardly ever put to

[1] Libertarianism is more prevalent in the United States, while it is rarely even mentioned in political discourse in Europe.

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

non-polemical use. Consequently, no one refers to themselves as neoliberal because characterizing a position as neoliberal immediately raises the suspicion that this characterization is just an oblique way of discrediting that position instead of engaging it substantively. Thus, there is a reluctance to apply the term to others' position because doing so may disqualify one's own position.

Given the complications associated with the term and its heavy political charge—at least in certain geographical areas—the most promising way to give it content is to reconstruct its emergence and study the project pursued by those who referred to themselves as neoliberals.[2] This requires going back to the interwar years of the last century, specifically the so-called *Colloquium Walter Lippmann* that took place in Paris in 1938. In the records of this meeting, attended by several first generation neoliberals, the term is first used to label of a common intellectual and political project.[3] The context from which this project arose was what appeared to the participants—as well as many other observers at the time—as an existential crisis of liberalism which manifested itself in phenomena ranging from the Great Depression and the ascent of Keynesianism to the rise of deeply illiberal political forces from Soviet Communism, to Fascism and National Socialism. Neoliberalism must be understood as a response to this crisis, the underlying roots of which the early neoliberals detected in the self-incurred decline of liberalism dating to the second half of the nineteenth century. According to the neoliberal diagnosis, liberalism unraveled into a quasi-social democratic strand on the one hand and a quasi-libertarian one on the other.[4]

Thus, the neoliberal project can be summed up in the following formula: It aims to revive liberal ideas against the illiberal *Zeitgeist* which requires critically revising the liberal agenda in order to clear it of both overly social democratic and libertarian elements—the twin legacies of the nineteenth century, so to speak. Neoliberalism is opposed to the merger of liberalism and progressivism but it is also adamant about the fallacies of a simplistic call for *laissez-faire*.[5]

Still, while these and many other views are shared among virtually all neoliberals—such as Friedrich August von Hayek, James Buchanan, Milton Friedman, Walter Eucken and Wilhelm Röpke—share these and many other views, this group does not form a

---

[2] *See generally* Jamie Peck, *Remaking Laissez-Faire*, 32 PROGRESS HUM. GEOGRAPHY 3 (2008); Ben Jackson, *At the Origins of Neo-liberalism: The Free Economy and the Strong State*, 53 HIST.J. 53 129 (2010).

[3] JAMIE PECK, CONSTRUCTIONS OF NEOLIBERAL REASON 51 (2010).

[4] *See* 5 FRIEDRICH A. VON HAYEK, *Liberalismus*, *in* GRUNDSÄTZE EINER LIBERALEN GESELLSCHAFTSORDNUNG: AUFSÄTZE ZUR POLITISCHEN PHILOSOPHIE UND THEORIE 88–119 (Viktor Vanberg ed., 2002) [hereinafter von HAYEK, *Liberalismus*].

[5] FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM 18 (1944) [hereinafter von HAYEK, THE ROAD TO SERFDOM]; JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE 83 (1999).

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

homogeneous intellectual current. The neoliberal "formula" already implies inevitable controversy because, even at the outset, the exact combination of revitalizations and revisions remains a matter of dispute. While it is useful to introduce the notion of varieties" of neoliberal thought in order to capture the irreducible heterogeneity built into neoliberalism, it is possible to sharpen the substantive contours of neoliberalism beyond this rather thin formula. The common denominator among all varieties of neoliberalism can be expressed in the following way. It is uncontroversial that neoliberal thought accords crucial societal importance to the economic sphere or, more precisely, functioning markets. It is important to note, though, that it is not a body of economistic thought that exhausts itself in exclusively economic reflections by implicitly detaching the economic sphere from its context. Rather, neoliberalism is explicitly concerned with the variable conditions of functioning markets. If the *laissez-faire* approach is no longer a satisfactory answer to this question, then neoliberalism must address questions about how states should be constituted so that they can engage in market-creating or market-maintaining politics, what actions they must abstain from, what public goods they have to provide, and how all of this might be complicated by the democratic character of a state. Neoliberalism is thus a body of thought engaged in political economy. Given this intersection of economics and the political structure, an inquiry into the significance of law in all of these matters is part and parcel of the neoliberal agenda, as further explained in the next Section.

C. Neoliberalism and Law: Von Hayek and Böhm

Although the discussion of the relevance of law to neoliberalism mainly focuses on James Buchanan's constitutional economics, the ideas of two other neoliberal thinkers, Franz Böhm and Friedrich August von Hayek, also provide important context for better understanding the role of law in neoliberalism.

Franz Böhm was a law professor in Freiburg and the inventor of a crucial element in ordoliberal thought, namely the "economic constitution" that would provide the fundamental legal framework for the economy. Böhm, together with Walter Eucken and Hans Grossmann-Doerth, formed the core of the so-called Freiburg School which in turn constituted the nucleus of a variety of neoliberalism called ordoliberalism. Thinkers such as Wilhelm Röpke and Alexander Rüstow are also counted among the ordoliberals. The *Ordo Manifesto*, authored by Böhm, Eucken, and Grossmann-Doerth, that entails something like a mission statement for ordoliberalism, displays the crucial importance of legal thought for this tradition. The authors deplore the decline of the societal influence of both jurisprudence and political economy and set themselves the task of reversing this trend:

> [I]t is true that in Germany these two sciences no longer exercise any appreciable influence on fundamental decisions of a politico-legal and economic

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

> nature . . . . Accordingly, the authors consider that the most urgent task for the representatives of law and political economy, is to work together in an effort to ensure that both disciplines regain their proper place in the life of the nation.[6]

But what exactly is the task of these "representatives of law and political economy"? "Men of science, by virtue of their profession and position being independent of economic interests, are the only objective, independent advisers capable of providing true insight into the intricate interrelationships of economic activity and therefore also providing the basis upon which economic judgments can be made."[7] Thus, law and political economy should provide scientific policy advice for political decision-makers, and the core project that they should be engaged in is the constitution of a market system: "[W]e wish to bring scientific reasoning, as displayed in jurisprudence and political economy, into effect for the purpose of constructing and reorganizing the economic system."[8] In other words, at the heart of the ordoliberal variety of neoliberal thought lies the assumption that the economic sphere in general—and markets specifically—are constituted through law. According to this theory, the most fundamental and encompassing set of legal rules in this regard is called the economic constitution, which encompasses "[t]he treatment of all practical politico-legal and politico-economic questions . . . ."[9] The economic constitution entails "a general political decision as to how the economic life of the nation is to be structured."[10]

One aspect of the economic constitution to which the ordoliberals must pay close attention is competition law. According to the ordoliberals, functioning markets are characterized by effective competition, and since market actors have an incentive to circumvent the respective pressures of competition, competition law—as part of the economic order enforced by the state—must prevent market actors from avoiding these pressures, thus ensuring "favorable conditions for the emergence of effective competition."[11] Especially in Böhm's later work, the benefits of effective competition,

---

[6] Franz Böhm, Walter Eucken & Hans Grossmann-Doerth, *The Ordo Manifesto of 1936*, *in* GERMANY'S SOCIAL MARKET ECONOMY: ORIGINS AND EVOLUTION 15–16 (Alan Peacock & Joachim Willgerodt eds., 1989).

[7] *Id.*

[8] *Id*. at 23.

[9] *Id.*

[10] *Id.*

[11] Franz Böhm, *Rule of Law in a Market Economy*, *in* GERMANY'S SOCIAL MARKET ECONOMY: ORIGINS AND EVOLUTION, *supra* note 6, at 57 [hereinafter Böhm, *Rule of Law in a Market Economy*].

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

safeguarded through a legal "competitive order," are not only found in the minimization of the economic power derived from institutions such as monopolies,[12] leading to the dependence of some market actors on others, but also in the proper, undistorted functioning of the price mechanisms. Böhm believed that only on the basis of price mechanisms could a non-coercive coordination of societal activities be possible.[13] Prices, he believed, "coordinate the partial plans of all participants on the basis of decisions which are made by these participants,"[14] and these partial plans formed important aspects of what he referred to as a "private law society",[15] i.e. a "plurality of people who are subject to a uniform order, indeed, to be more precise, a legal order."[16] Importantly, this legal system, although established and enforced by the state, is not one of public but private law.

Friedrich August von Hayek, the neoliberal with arguably the strongest interest in matters of law, expressed a preference for private over public law as the medium for the economic sphere of society and was also concerned about the increasing entanglement of both kinds of law. Von Hayek believed that the rule of law, correctly interpreted, was the key factor in ensuring what he called a catallaxy—a functioning market economy.[17] His position is informed by a narrative of the decline of the principle of the rule of law, the core elements of which are two interrelated notions. According to von Hayek, the first element is the separation of power between legislative, executive, and the judiciary branches of government, including the stipulation that the executive branch's ability to coerce is bound by the legislative branch.[18] Closely related to that is the second element that concerns the criteria that have to be met for a juridical norm to be considered a law in the proper sense. In his *magnum opus* titled *The Constitution of Liberty*, von Hayek wrote that "[l]aws in the substantive sense"—adhering to the principle of the rule of law—are "essentially long-

---

[12] Franz Böhm, *Das Problem der privaten Macht: Ein Beitrag zur Monopolfrage*, *in* GRUNDTEXTE ZUR FREIBURGER TRADITION DER ORDNUNGSÖKONOMIK 49–67 (Nils Goldschmidt & Michael Wohlgemuth eds., 2008).

[13] Böhm, *Rule of Law in a Market Economy*, *supra* note 11, at 53.

[14] *Id.*

[15] *Id*. at 49.

[16] *Id.*

[17] *See* 1 FRIEDRICH A. VON HAYEK, LAW, LEGISLATION, LIBERTY: RULES AND ORDER 94–144 (1973). A more encompassing exposition would also have to address the distinction between thesis and *nomos* that von Hayek discussed at length in *Law, Legislation and Liberty*. *Nomos* concerns the rules of conduct and is often equated with private law by von Hayek, while thesis is public law explicitly set by legislatures. In his diagnosis of the decline of the rule of law, the problem is clearly thesis and not *nomos.*

[18] FRIEDRICH A. VON HAYEK, THE CONSTITUTION OF LIBERTY 185 (1960) [hereinafter VON HAYEK, THE CONSTITUTION].

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

term measures, referring to yet unknown cases and containing no references to particular persons, places, or objects."[19] Part of the decline of the rule of law, according to von Hayek, is a tendency, fueled by radical republican thought and/or legal positivism, to consider juridical norms as laws as long as the legislature has passed them, largely irrespective of their form and content.

The rationale behind von Hayek's position resonated with many other thinkers in the liberal tradition and their concern about a legalized tyranny of the majority that could result in the legal discrimination against minorities. Von Hayek was particularly worried about the interventionist potential that the erosion of the rule of law opened up with regard to the economic sphere. As a *neo*liberal thinker, von Hayek's approach to the restoration of the rule of law in both of its key aspects, the separation of powers and the generality of law, was not aimed at establishing a *laissez-faire* system, but at limiting economic policy to a certain quality or kind of action—to laws in the substantive sense.

> The range and variety of government action that is, at least in principle, reconcilable with a free system is thus considerable. The old formulae of laissez faire or non-intervention do not provide us with an adequate criterion for distinguishing between what is and what is not permissible in a free system.[20]

Unfortunately, von Hayek has been unclear on how strictly the generality of law must be interpreted. To put it into context, consider the fact that liberal democracies routinely, and in line with most of our moral intuitions, discriminate between persons of a certain age—for example, such as with political rights. Von Hayek's lack of clarity on the matter leaves one wondering if he would be opposed to this discrimination. Yet, would a regulation that requires all car makers to meet certain exhaust standards be discriminatory because some manufacturers will find it costlier than others to comply with the regulation? If this were the case, states would be bereft of almost any steering capacity—economic or otherwise. Von Hayek, however, was clear about what would be impossible under the proper rule of law, namely any social policy that would aim at equality of opportunity and all other variants of social justice: "[T]hose who pursue distributive justice will in practice find themselves obstructed at every move by the rule of law."[21]

---

[19] *Id.* at 182.

[20] *Id.* at 202.

[21] *Id.* at 203.

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

D. The Constitutional Economics of Rent-Seeking: James M. Buchanan

Just as there are parallels and overlaps between von Hayek and Böhm, shared understandings regarding the significance of the rule of law exist between von Hayek and Buchanan.[22] But just as von Hayek and Böhm differ in some important respects—for example, with regard to the way an economic constitution should be spelled out in detail, as well as their respective faith in the expertise of jurisprudence and political economy in advising political decision-makers—Buchanan and von Hayek ultimately part ways when it comes to some of the interconnections of law and politics. Buchanan could certainly agree with von Hayek on the general importance of non-discrimination for a meaningful rule of law, but his approach to avoiding a potential tyranny of the majority does not view the reconstruction of a proper understanding of law as the crucial lever in this endeavor. Instead, Buchanan focused on constitutions that he views as the basic legal framework of a society. He analyzed the differing effects that various constitutional arrangements would have on economic matters.

Shifting to constitutions enabled Buchanan, among other things, to reformulate the problem of a tyranny of the majority as a matter of constitutional consent. Buchanan hypothesized that to the degree that the level of required consent to constitutional rules—not legislated law—approximated unanimity, the danger of tyrannical majorities could be averted. More generally and importantly for the present context, Buchanan moved away from questions of economic policy choices or other related matters towards a broadly contractarian perspective emphasizing how constitutions—institutionally ingrained legal rules—frame and structure the possibilities open to ordinary politics. Buchanan's central and best-known constitutional demand is the BBA.[23]

---

[22] James Buchanan is a particularly interesting neoliberal thinker because of the unique combination of ingredients to his thought. He was trained as an economist at the University of Chicago but then went on to pursue an original research agenda that contributed to the establishment of public choice theory as well as constitutional economics. Both theories are key influences for some contemporary varieties of neoliberal thought. In the present context, his significance derives from his focus on public finance and his specific approach to reining in fiscally undisciplined states and governments.

[23] *See* James Buchanan & Richard Wagner, *The Political Biases of Keynesian Economics*, *in* FISCAL RESPONSIBILITY IN CONSTITUTIONAL DEMOCRACY 79–100 (James Buchanan & Richard Wagner eds., 1978). Two prominent examples of countries, in which such amendments have been introduced, are Germany and Switzerland. The technical specifics differ in both cases. In Germany, the crucial parameter is net borrowing, which must remain below 0.35 per cent of GDP. In Switzerland, revenue and expenditure have to be kept in balance. Buchanan seems to have in mind the latter version: "With a balanced budget rule, any proposal for expenditure must be coupled with a proposal for taxation." *Id.* at 89.

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

He highlighted three core assumptions that underlie and inform his research agenda: Normative individualism, *homo oeconomicus*, and politics-as-exchange.[24] These assumptions separately are not original, but Buchanan's extension of the behavioral assumptions of *homo oeconomicus* beyond the economic sphere to politics and bureaucracy is unique and innovative. Accordingly, political actors—among them democratically elected representatives—are not considered to be exclusively devoted to realizing what is best for a political community as a whole, such as general interest or general welfare. With this theoretical move, Buchanan distanced the so-called public choice approach, not only from welfare economics and its attempt to construct a social welfare function intended to guide well-meaning politicians, but also the ordoliberal trust in the willingness of decision-makers to be informed by scientific expertise from jurisprudence and political economy. Buchanan assumes that individual and collective actors from society will regularly ask their elected representatives for special treatment, whether it be the recognition of special rights, some form of economic protectionism, or some other form of what public choice theorists refer to as "rent-seeking."[25] What the extension of the *homo oeconomicus* model to politics yields is the assumption that in the democratic market for rents there is not just demand but also supply. After all, if politicians value their reelection, they have an incentive to participate in the rent-seeking interaction in hopes of securing the support of the particular actor or group as part of a winning alliance at the next election.

The charge against rent-seeking per se is not that it is an undemocratic practice; it is only undemocratic under certain assumptions about its general practice, what it means to represent a constituency, and how encompassing this constituency is. Nevertheless, Buchanan argues that rent-seeking's adverse effects as a generalized practice make it imperative to rein it in. And let us note, as an aside, that the uneasiness about some societal actors' undue influence on the democratic political process—through lobbying or financial donations particularly in the United States—causes uneasiness among observers with widely varying ideological backgrounds. For Buchanan, rent-seeking as a generalized practice is a self-defeating endeavor because rents can be considered positional goods. These goods are only valuable if not everybody can attain them. Any actor that strives to achieve some kind of improvement of their own position vis-à-vis others through political action must assume that others—if they heed the maxims of *homo oeconomicus*—will try to do the same, which means that on balance any actor is likely to experience a worsening of his or her position relative to others. More importantly for Buchanan, though, rents

[24] James Buchanan, *The Constitution of Economic Policy*, 77 AM. ECON. REV. 243 (1987); *See* Hayek, *supra* note 4, 88–119.

[25] *See* for example James Buchanan, Robert Tollison and Gordon Tullock, *Towards a Theory of the Rent-Seeking Society* (1980).

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

typically incur costs, at least in the realm of economic policy. To put this into context, a decrease in tax rates for home owners must be financed some way or another.

In principle, there are three ways of financing incurred costs: Increase revenue, decrease expenditures, or run deficits, possibly in a combination with a dosage of inflation. The first two are inauspicious from a rational and public choice perspective—at least under many, if not most, imaginable circumstances. Financing a rent given to one group by burdening the entire electorate through taxation makes little sense. Even if it is possible to finance the costs by burdening one other particular group, unless politicians can be certain there will be no electoral retaliation from that group, this is not a winning strategy. Similarly, cutting certain benefits for particular groups or threatening to take measures that would affect the entire electorate—and thus decrease expenditure—also offsets the electoral advantage that politicians may hope to gain through compliance with rent-seeking demands. This is true in the world of rational choice, whereas the real world of widespread austerity conveys a very different image.

Consequently, by far the most appealing and only remaining political strategy turns out to be running deficits. After all, under most circumstances, public debt is politically intangible and typically only becomes an issue when it has to be paid off—a prospect which is supposedly in the distant future. Thus, according to Buchanan, running deficits amounts to an externalization of costs onto people who cannot vote at the moment and who may not even be born yet. Furthermore, the chances are that those who run deficit after deficit will no longer be in office when the accumulated debt inevitably forces governments to resort to either or even both of the first two strategies in order to avoid insolvency. Given that future generations have no way of having their voices heard in this regard, let alone exercise any countervailing influence on political-decision makers, the only effective way of curtailing the tendency of democracies to run permanent deficits and accumulate debt—that they can no longer unilaterally shrink through fiercely independent central banks who reign supreme in Western monetary matters—is to introduce a BBA.

E. The Balanced-Budget Amendment, Democracy, and Depoliticization

The BBA presents two sets of questions for analysis: The first set concerns the theories of sovereignty and representation; the second set expounds on the challenges of the BBA.

I. Representation and Sovereignty

The first set concerns matters of popular sovereignty and representation. BBA advocates could put forward two arguments here: First, a BBA provides a more encompassing form of representation than democratic politics without BBA. Without a BBA, there appears to be a

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

short-term bias to democratic politics that fails to give due consideration to the presumed interests of future generations.[26] This is not only the case with public debt but also includes, for example, environmental issues like climate change. Ensuring fiscal discipline through a BBA would preclude future generations having to pick up the tab for the current cohort's profligacy. A BBA could be understood as a device that gives advocatory representation to those unrepresented—the unborn, those unable to vote, etc.—assuming that they have an interest not to be born into a political landscape in which servicing the public debt—for which they bear no responsibility—crowds out alternative political options. The second argument that advocates could make in favor of a BBA refers to the restoration or maintenance of popular sovereignty. A country that accumulates unsustainable levels of public debt *de facto* loses its sovereignty because it is incapable of pursuing political projects, even if a majority of the population were in favor of it, simply because it does not have the financial resources. At some point, servicing the debt's interest will consume up more and more resources and financial markets will require higher risk premiums in order to borrow money. Conversely, only a fiscally disciplined country can take on financially ambitious political projects that a majority of the population favors. Finally, Buchanan would probably add a point reminiscent of Rousseau we will revisit later. No matter what specific policies we favor as private persons or *bourgeois*, as *citoyens* faced with a constitutional choice, we want to avoid ever rising levels of public debt.[27]

In response to representation and popular sovereignty arguments, BBA opponents offer several rebuttals. With regard to representation, opponents believe that it is highly conjectural to attribute interests to not-yet-existing persons. One can assume that future generations will prefer a low public debt over high public debt, but this is only uncontroversial if it is *ceteris paribus*—other conditions remaining the same. If fiscal discipline in the present means that public infrastructure investments from bridges and roads to schools and water supply works is put off, it is arguable that society would choose debt over fiscal savings. It is plausible that future generations will not only have one overriding interest in fiscal prudence but a mix of interests that includes public investments even if it means running deficits. In addition, debt is a strictly relational concept. For someone to owe money, somebody else must own the respective obligation. In other words, if we assume a closed economy—or even economies like Germany or Japan where most of the sovereign bonds are held by their citizens—the public debt that must be repaid

[26] JAMES BUCHANAN, LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980S, at 217 (1986) [hereinafter BUCHANAN, LIBERTY, MARKET, AND STATE].

[27] As an aside, the formulation of a constitutional choice designates the dividing line between Buchanan and von Hayek on the link between politics and law. The legal evolutionist von Hayek would have held strong reservations against such "rationalist constructivism" and the critique vice versa can be found in JAMES BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 167 (1975).

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

by future generations is being held by members of that same generation, which complicates the picture by creating relational conflicts.

With regard to the second argument on popular sovereignty, BBA proponents discuss the normative core of the issue of juridical neoliberalism. There is something intuitively appealing about the real—not just *de jure*—national sovereignty of a country that is supposedly restored through a BBA. It remains questionable, however, whether this is a chimerical goal to be pursued. After all, national sovereignty—let alone popular sovereignty—has always been as much fact as fiction, notwithstanding that it has powerfully captured and inspired political passions.[28] Today, at a time when commentators speak of a Post-Westphalian society, sovereignty seems more fictional than ever, despite all the qualifications that need to be added depending on the country and the policy field. Globalization has significantly reduced national sovereignty in many aspects of economic policy. The loss of "boundary control"[29] has been immense and, in an increasingly interdependent world, the option of going it alone—economically, politically, and militarily—is highly circumscribed. Finally, even inter-governmentalist scholars of European integration, who insist that sovereignty has only been delegated and not transferred to the supranational level of the EU, would acknowledge that the only realistic ways to regain national sovereignty are either withdrawal from the Union or the Union's collapse. Whether factual sovereignty would really increase in any of these scenarios must be viewed with great skepticism.

These considerations aside, the more important issue is whether the BBA can legitimately restore popular sovereignty, or whether it is either not capable of doing so or bound to achieve the very opposite. A radical republican will have to be weary of the sovereign's will being tied down to rules of strict fiscal discipline. This is in effect a circumscription of possibilities in economic policy; some options are taken off the political table irrespective of the considerable support they might enjoy in some segments of the electorate. I will not delve into the paradoxes of self-binding rules for sovereigns that are often spelt out with reference to Odysseus having himself tied to the mast of his ship so he could listen to the Sirens' song – and still survive.[30] My point is not that a sovereign can never effectively tie itself and be circumscribed juridically. The concern, however, is that the nature of this rule is such that it should not be written into a constitution. Whether fiscal prudence or deficit-financed investment is the better political strategy in a given conjuncture should not be a

---

[28] *See generally* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

[29] FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 121 (1999).

[30] *See generally* Thomas Biebricher, *Sovereignty, Norms, and Exception in Neoliberalism*, 23 QUI PARLE 77 (2014) (providing reflections on the paradox of sovereignty).

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

matter of constitutional fiat. The choices and trade-offs in this question are inherently political in the sense that they have inevitably redistributive effects because this re-shifting of burdens produces both winners and losers.

In a widely-discussed argument for the legitimacy of delegating certain tasks to regulatory authorities, Giandomenico Majone distinguishes between the political modes of regulation and redistribution.[31] Regulation is aimed at the realization of Pareto-efficiency, which benefits at least one of those affected by the regulation and does not put anyone at a disadvantage. Therefore, the requirements of democratic accountability and legitimation can and should be relaxed for these regulatory authorities. Or, to put it more strongly: Some matters are better kept out of the hands of parliamentary majorities. Aside from the fact that critics have rightly stressed that few examples fit this description of regulatory politics,[32] the effects of BBA can hardly be described in terms of Pareto-efficiency. I therefore assume that Majone would be opposed to leaving this matter to a regulatory authority[33] and, by analogy I would argue that such a political issue—after all, the requirements of the BBA may trigger politics of austerity—should not be a matter of constitutional rules. Despite the concerns about the lack of a long-term sense of responsibility on behalf of elected politicians, it is for those politicians and the public at large to debate these issues and for parliament to decide on it. The pernicious effect of juridical neoliberalism lies in precluding the possibility of this debate and a more or less informed choice that results from it.

II. Challenges of the BBA

The second set of questions deals not with BBA's normative justifiability but with whether Buchanan's theory can explain how to best implement a BBA. The two challenges that exist in implementing a BBA are whether it has practical applicability and who is best qualified to implement it. This point is not particularly original—even Buchanan himself acknowledged the theoretical difficulties. Still, the implications are worth considering.

Recall that politicians are supposedly rational utility-maximizers, if not satisfiers/optimizers. Therefore, securing their re-election looms large in their considerations and the ability to grant rents to groups and/or individuals supposedly contributes to this goal. If this is an adequate way of describing the incentive structure,

---

[31] Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 WEST EUR. POL. 77 (1994).

[32] *See* Andreas Follesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533, 542–44 (2006).

[33] Giandomenico Majone, *From Regulatory State to a Democratic Default*, 52 J. COMMON MKT. STUD. 1216, 1222 (2014) [hereinafter Majone, *Democratic Default*].

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

then it is highly improbable that these politicians will pass a BBA, depriving themselves of one crucial strategy of shoring up their chances of re-election. This is inconvenient for Buchanan's brand of neoliberalism because there is no easy way to escape the theoretical corner he has backed himself into with the extension of the *homo oeconomicus* assumption. Buchanan's call for a "constitutional revolution,"[34] flounders on the lack of a revolutionary subject.

There are three arguments that have been introduced to overcome this impasse in Buchanan's agenda: First, there is the appeal to a "veil of uncertainty" reminiscent of Rawls' veil of ignorance.[35] Due to their general and abstract nature, the impact of constitutional norms on any given individual or group over time is difficult to ascertain. Whether it is overall beneficial or detrimental to someone's plans cannot be determined *a priori*.[36] While this may mitigate the problems of explaining constitutional reform in general, it is less convincing in the case of the BBA. The effect the BBA has on politicians who want the possibility of offering costly rents seems straightforward enough. Second, what if politicians could be assumed to acquire a truly constitutional mindset? What this is can be inferred *ex negativo* from Buchanan's characterization of those who are constitutionally illiterate: "It becomes impossible to ask such persons to think of their long-term interest, and certainly it remains folly to ask them to think of the interests of the more inclusive community."[37] But if politicians could be assumed to broaden their considerations and inculcate the presumed interests of the more inclusive community, including future generations, why could they not be trusted to pursue a prudential fiscal policy without the BBA? Finally, Buchanan suggested the possibility of passing the BBA by circumventing what might be seen as a cartel of elected politicians through direct democratic channels; through referenda that would mandate the BBA.[38] But it seems that this way out is blocked as well. If citizens' mindsets were more constitutional and future-oriented, then pursuing a frugal fiscal policy would be a winning electoral ticket. Most public choice theories, however, suggest the contrary; hence, there is a need for the BBA. "Fiscal prudence simply cannot be made to pay off in democracy."[39] Furthermore, Buchanan himself has conceded that ordinary citizens do not systematically differ from

---

[34] GEOFFREY BRENNAN & JAMES BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 134 (1985).

[35] *Id.* at 31.

[36] *Id.* at 140.

[37] BUCHANAN, LIBERTY, MARKET, AND STATE, *supra* note 26, at 56.

[38] *See* James Buchanan, *The Potential of Taxpayer Revolt in American Democracy*, 59 SOC. SCI. Q. 691, 693–96 (1979).

[39] Buchanan, LIBERTY, MARKET, AND STATE, *supra* note 26, at 217.

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

elected politicians in their being torn between constitutional considerations and the incentive to engage in rent-seeking.[40] Consequently, Buchanan has to hope that something might happen that his own theoretical assumptions suggest could never happen: "To hold out hope for reform in the basic rules describing the sociopolitical game, we must introduce elements that violate the self-interest postulate."[41]

Rather than pursuing the eschatological motives of a *deus ex machina* underpinning that statement, it is necessary to explore one more option that will segue to the next Section. After all, despite the explanatory difficulties of public choice neoliberalism explained above, the empirical fact remains that various versions of a BBA have been passed. The only explanation available for this seems to be that the rule may have been passed but it is either watered down or ignored whenever political expediency necessitates. The Stability and Growth Pact (SGP) and what Stephen Gill has called the new constitutionalism.

F. Juridical Neoliberalism in Practice: From the Stability and Growth Pact to the Treaty on Stability, Coordination, and Governance

If someone unfamiliar with Stephen Gill's widely cited "European Governance and New Constitutionalism" read it today, they would probably be surprised that it was published back in 1998. This observation tells us two things: First, we must be careful not to overstate the uniqueness of the present transformations of EU governance, significant as they are, and second, we must not overstate the originality of the diagnosis to follow. All existing differences notwithstanding, the aspects and effects of juridical neoliberalism are not entirely dissimilar from what Gill attributed to the new constitutionalism.

> New constitutionalism is an international governance framework. It seeks to separate economic policies from broad political accountability in order to make governments more responsive to the discipline of market forces and correspondingly less responsive to popular-democratic forces and processes. New constitutionalism is the politico-legal dimension of the wider discourse of disciplinary neoliberalism.[42]

---

[40] BUCHANAN & MUSGRAVE, *supra* note 5, at 126.

[41] BRENNAN & BUCHANAN, *supra note 34,* at 146.

[42] Stephen Gill, *European Governance and New Constitutionalism Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe*, 3 NEW POL. ECON. 5, 5 (1998).

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

Gill's primary examples of the new constitutionalism are the European Economic and Monetary Union and the SGP passed in 1997. Their aim sounds familiar to contemporary ears as "[t]hey seek to institutionalize the new currency and mandate a strict fiscal discipline as part of new practices of economic governance that will give credibility to governments and confidence to investors."[43] The four main aspects of the new constitutionalism are listed as a monetary policy of sound money: (1) Low inflation with the ECB as the sole guardian, (2) debt sustainability to keep the Euro stable and preclude speculation against it, (3) surveillance mechanisms to ensure that member states honor their fiscal commitments in this regard and, (4) the attenuation of democracy as a consequence.[44] A skeptic might argue that this was a premature and overly alarmist account of the governance restructuring taking place over the course of the introduction of the Euro. After all, the SGP undoubtedly served to discipline Eurozone member states and aspiring candidates to a certain degree. But when push came to shove, the new constitutionalism turned out to be a fairly toothless.

In the early 2000s, both France and Germany, the economic and political heavy-weights of the Eurozone, ran deficits in violation of the three per cent of the GDP rule of the SGP for consecutive years. The European Commission in charge of implementing and enforcing the SGP wanted to sanction both countries according to the procedures of the SGP, but the Council of European Economic and Finance Ministers (ECOFIN) voted against it. The Commission challenged the vote, but The European Court of Justice (ECJ) confirmed its legality.[45] This scenario was exactly what the theoretical discussion in the preceding section suggested. In the somewhat unlikely case that government entities adopt rules prohibiting "excessive" deficits and debt are passed, their more powerful addressees are bound to disregard the rules whenever they find it to be necessary or in their self-interest. This is an important part of the prelude to the reforms of 2011 to 2013 that are aimed at tightening the SGP in a number of ways as a response to the sovereign debt crisis that followed the financial one.

The reforms in question are the so-called Six-Pack (2011), the Two-Pack (2013), and the already mentioned TSCG (2012).[46] They aim to ensure that Eurozone member states

---

[43] *Id.* at 8.

[44] *Id.* at 15–17.

[45] Dermot Hodson & Uwe Puetter, *The European Union and the Economic Crisis*, *in* EUROPEAN UNION POLITICS 374 (Michelle Cini & Nieves Pérez-Solórzano Borragán eds., 4th ed. 2013).

[46] For concise explanations of the rationale and functioning of these reform measures, *see Evaluating the Efficiency of the Two-Pack and Six-Pack*, EUROPEAN COUNCIL, http://www.consilium.europa.eu/en/policies/six-pack-two-pack-review/ (last visited Sept. 13, 2016).

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

achieve balanced budgets, avoid excessive deficits and prevent and/or correct macroeconomic imbalances. The instruments range from preventive ones—for example, states have to submit draft budgets to the Commission before national parliaments even deliberate over them—to corrective ones. In the case of excessive deficits or macroeconomic imbalances, the Commission issues rectifying recommendations that become binding unless there is a qualified majority against it in ECOFIN. If states do not comply in due time, they may be fined up to 0.1 per cent of GDP. The core of these measures is the Fiscal Pact. Almost the exact equivalent of the BBA, the Fiscal Pact stipulates that its 25 EU signees—excluding the UK and the Czech Republic—pass the pact on a national, preferably constitutional, level. In a way, what could be considered the prime manifestation of juridical neoliberalism in practice—evidenced by the various reforms passed in recent years—amounts to new constitutionalism, similar in its aims but tightened in its implementation and enforcement procedures. This leads to an even greater attenuation of democracy—at least on the nation-state level. After all, the Commission and ECOFIN now wield considerable influence over what used to be considered a core competence of parliaments, namely fiscal policy. While inter-governmentalists are quick to point out the democratic legitimation of ECOFIN as members of national governments, the Commission has seen an increase in its power vis-à-vis ECOFIN, not the least through the already mentioned reverse majority principle.[47] It is not likely that a qualified majority of ECOFIN, which would have to include countries that might have to act as creditors for indebted countries, will form a majority against the Commission's recommendations.

Needless to say, the fate of the SGP should caution against overly alarmist diagnoses. The newness of the rules, the recent entanglement between the Commission and France over the draft budget, and the Commission's leniency towards Portugal and Spain clearly demonstrates political leeway. When the President of the Commission thinks of his apparatus as a "political Commission," as Jean-Claude Juncker has indicated at the very beginning of this tenure and confirmed in his State of the Union in September 2016, this leeway is even more apparent.[48] The concluding Section reflects on the current state of juridical neoliberalism in Europe.

---

[47] Michael Bauer & Stefan Becker, *From the Front Line to the Back Stage: How the Financial Crisis Has Quietly Strengthened the European Commission*, *Public Money & Management*, 34 PUB. MONEY & MGMT. 161, 161–63 (2014).

[48] Jean-Claude Juncker: State of the Union 2016: Towards a better Europe: A Europe that protects, empowers and defends. http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm.

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

G. Conclusion

This Article ends with three diagnostic observations concerning juridical neoliberalism as it is on display in the reformed governance structures of the EU.

I. Depoliticization

National governments' overarching aim is to use various legal rules and regulations that circumscribe the more or less discretionary decision-making space in economic policy in order to depoliticize the respective policies. Once a BBA has been passed, as stipulated in the Fiscal Compact, the question of whether it may be expedient or reasonable to run a deficit of four per cent to fund an anti-cyclical Keynesian economic policy is largely off the table because it is simply illegal.[49]

Still, this attempt at depoliticizing fiscal policy is likely to fail although it is a matter of speculation how exactly this will manifest itself. The reason is that the matters that are to be depoliticized are inherently political in a double sense. First of all, there is no scientific consensus about the causal connection between austerity, inflation, and economic growth, to name the more important variables underpinning the BBA. This makes it extremely problematic to treat these questions as purely technical ones to be decided exclusively based on scientific expertise. Secondly, these rules produce more or less clearly identifiable winners and losers. In this respect, they are the opposite of the regulatory politics that commentators like Majone considered appropriate for delegation to independent regulatory agencies. Majone himself has written that "the risk of a complete normative failure—a default rather than a simple deficit of democracy at the European level—is by now quite concrete."[50] Given the emphatically political nature of the matters at hand, from a purely functional perspective, it remains doubtful whether juridical norms can sustainably depoliticize them. Repoliticizations from the rise of Syriza and Podemos in Greece and Spain to the confrontations between member states and the Commission—such as in the case of France—will likely occur and are desirable to avoid an increasingly technocratic form of rule on the European level. Whether it is Syriza or alternative political forces—on the left or the right of the political spectrum—they are bound to continue to challenge the status quo. In addition, the European refugee crisis has led to some significant changes in European power relationships. For example, Greece's geopolitical position as a key entry point to Schengenland has given it new leverage within the

[49] To be precise, it is not entirely off the table because in cases of natural disasters or grave recessions exceptions to the BBA can be made.

[50] Majone, *Democratic Default*, *supra* note 33, at 1221–22.

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

European Union. The brief episode of German hegemony within the European Union may already be fading.

II. Moralization

The second observation is best understood when prefaced with a quick look at Wendy Brown's permutations of law's characterization under neoliberalism, albeit in the context of the United States around 2005.[51] Brown analyzed the interplay between neoliberalism and neoconservatism and wrote: "And, as law is tacticalized or instrumentalized, it is radically desacralized, producing the conditions of its routine suspension or abrogation, and paving the ground for what Agamben, drawing on Schmitt, has formulated as sovereignty in the form of a permanent state of exception."[52] Thus, the second point is that the overall thrust of the discourse surrounding juridical neoliberalism in Europe about ten years after Brown's assessment points in the opposite direction.[53] Brown describes the desacralization of law and its bending for tactical purposes,[54] whereas the official discourse in Europe aims at maybe not a resacralization of law in a strictly religious sense but certainly a moralization that aims to immunize law against critique and to further deter potential violators. Not only will those breaking the law have to reckon with being sanctioned quite stringently, but they also have to bear the moral burden of a lack of solidarity vis-à-vis other EU countries that might eventually have to pay for bailouts through the European Stability Mechanism or other channels. Moreover, if one subscribes to the necessary link between the common currency and the EU as political project, then the moral burden is even more significant. Aside from solidarity requirements, a fiscal policy violating the BBA rules might be in itself immoral because it is the equivalent of "living beyond one's means" and burdening future generations with debt. This immoral practice is rightfully punished with economic calamities by anonymous but seemingly moral forces." We have turned the politics of debt into a morality play," writes Mark Blyth,[55] and even someone as sympathetic to the Eurozone crisis management as Mario Monti famously remarked that economics was still considered a branch of moral

---

[51] *See generally* Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690 (2006); *see also* Biebricher, *supra* note 30, at 100–03.

[52] *Id.* at 695. More recently, Brown has expanded upon her diagnosis with a critique of some landmark Supreme Court rulings, especially the now infamous *Citizens United* case. She highlights the neoliberal logic of markets and capital underlying the ruling. Still, the neoliberalization of law she describes in the contemporary American context remains different from the kind of juridical neoliberalism in the European context. *See* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 151–74 (2015).

[53] Brown, *supra* note 51, at 696.

[54] Brown, *supra* note 51, at 695.

[55] MARK BLYTH, AUSTERITY: THE HISTORY OF A DANGEROUS IDEA 13 (2013).

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

philosophy in Germany.[56] Rather than discussing the role Germany is playing in the moralization of Europe's economic constitution in the (re-)making, let us focus on the relation between the two diagnostic theses formulated so far. If the aim of a juridification of economy policy is the latter's depoliticization, then what are the respective implications of a moralization of these juridical rules? This question, along with the relationship between morality and law, deserves a more thorough treatment than this Article can provide. To address the ambivalence, one can argue that the moralization of law serves to immunize it even more from challenges but, at the same time, this moralization negates the strictly technocratic character of the BBA, which are supposedly merely an expression of pure and sober economic reason. Charging these rules with moral implications might inadvertently rekindle the flames of political passions that the strategy of juridification put out.

III. Depoliticization v. Moralization

The final observation concerns the overall context in which both the depoliticization of fiscal policy and the moralization of the respective juridical rules occurs. The EU has been in crisis mode ever since the outbreak of the financial crisis in 2008. Initially, however, it was mostly the nation states that dealt with the fallout, such as bailing out banks and stimulating faltering economies. Then, the sovereign debt crisis hit and put the common currency in jeopardy, triggering the barrage of reforms mentioned above. What is striking about almost every aspect of the ensuing politics of EU crisis management since 2011 is their ambiguous legal status. To be sure, national and European adjudication so far have confirmed the legality of the measures[57]—although one might suspect that political reasons played a significant role. Still, there is plenty of controversy surrounding European crisis management. Consider the following examples: (1) the Six-Pack is questioned with regard to the possibility of far-reaching recommendations to overcome deficits and imbalances and affect policy domains that are exclusive to nation states; (2) the Fiscal Pact's use of the Commission and European Court of Justice for implementation and enforcement—despite the fact that it is not part of EU law but an international treaty; and (3) the recently launched ECB's Outright Monetary Transaction Program that seriously pushes the envelope of the bank's mandate. Therefore, Europe is not just faced with an economic and political but also a legal-constitutional crisis.[58] Of course, this raises specters

[56] Mario Monti, *Charlemagne: The Other Moral Hazard: Charlemagne*, THE ECONOMIST (September 29, 2012) http://www.economist.com/node/21563741.

[57] When the Portuguese Supreme Court ruled against the implementation of reforms demanded by the Troika, lawmakers responded with a constitutional reform.

[58] *See* Michael Wilkinson, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14 GERMAN L.J. 527 (2013); Christian Joerges, *Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration*, 21 CONSTELLATIONS 249 (2014).

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press

of extra-legal states of emergency and Wendy Brown's concerns mentioned above come to mind.

At this point, it is enough to simply note the contradictory tendencies in the politics of legality in Europe. There exists a potential tension between the attempt to depoliticize issues through a particular form of juridification and the moralization of the rules in question. Furthermore, the insistence on the inviolability of legal rules that are arguably further immunized by the moralization of their contents stands in stark contradiction to the embattled legal status of those very rules. Future research aiming at a critical understanding of juridical neoliberalism in theory and practice will have to take these tensions and contradictions into account.

https://doi.org/10.1017/S2071832200021489 Published online by Cambridge University Press