



# Authoritarian Liberalism, authoritarian managerialism and the search for alternatives: Comments on Michael A. Wilkinson's *Authoritarian Liberalism*

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## Abstract

Michael Wilkinson's *Authoritarian Liberalism* is an important, and, in many respects, praiseworthy contribution to the debates on the present state of the European Union (EU) and its highly problematical future. Its recourse to political economy in the re-construction of the integration project contrasts innovatively and instructively with the usual, if subtle, stories told about the history of Europe's "integration through law" and its promotion of an "ever closer union among the peoples of Europe". The spectre of "authoritarian liberalism" is a counter-narrative which exhibits the socio-economic dimensions and forces us to consider the political quality of European rule, in which Europe's "material constitution" is a key concept of these analyses. "Authoritarian liberalism" is more than just a catchy characterisation of Europe's constitutional constellation. The resort to this notion ties in with a conceptual history that definitely deserves to be remembered and continued.

**Keywords:** private law society; competition as discovery procedure; neoliberalism; Maastricht (Brunner) judgment, strong state; economic constitutionalism; financial crisis

## 1. Introductory remark

Michael Wilkinson's *Authoritarian Liberalism* is an important, and, in many respects, praiseworthy contribution to the debates on the present state of the European Union (EU) and its highly problematical future. Its recourse to political economy in the reconstruction of the integration project contrasts innovatively and instructively with the usual, if subtle, stories told about the history of Europe's 'integration through law' and the promotion of an 'ever closer union among the peoples of Europe'. The spectre of 'authoritarian liberalism' is a counter-narrative which exhibits the socio-economic dimensions of the integration project and forces us to consider the political quality of European rule.

My comments cannot cover the entire range of this book, its challenging contributions to legal and transdisciplinary theorising and the debates on the present state of the Union. The following comments have to be selective. Their focus, however, is not an arbitrary choice. After decades of benign neglect in European studies, Germany's ordoliberal school of thought and in particular its conceptualisation of national and transnational 'economic constitutionalism' has made a formidable career, significantly more outside than within, German borders. Numerous commentators in media and universities have identified it as a variable that should explain the position of

Germany during the European sovereign debt crisis.<sup>1</sup> Ordoliberalism is of obvious importance for the argument of the book. The term is used no fewer than 197 times as a key to the understanding of ‘authoritarian liberalism’. Pertinent analyses of the book cover the emergence of ordoliberal theorems since the 1920s in the Weimar Republic, the foundational manifesto of 1936 with its synthesis of economics and law represented by the lawyer Franz Böhm and the economist Walter Eucken, the ordoliberal flirtation with the Nazis and their crown jurist Carl Schmitt, the post-war ideational and political renewal by the Freiburg School, and above all the move of the ordoliberal school from the Federal Republic to the European Economic Community under the leadership of Böhm’s disciple Ernst-Joachim Mestmäcker. Particularly intensive is the perception of the so-called ordoliberalisation of Europe by the establishment of the Economic and Monetary Union (EMU) in the Treaty of Maastricht and the later ‘Germanisation’ of Europe in the course of Europe’s responses to the financial crisis.

The following discussion will proceed in three steps. The first section will reconstruct briefly the conceptual history of ordoliberalism, point to the transformation of its theoretical framework, criticise the undifferentiated use of the notion and plead for more analytical precision. The second section will concern the prime target of Wilkinson’s critique, namely the impact of ordoliberal theorems on the course of integration project, the design of EMU by the Treaty of Maastricht and thereafter the responses to the financial crisis. A concluding section will address Wilkinson’s plea for a theoretical reorientation of integration research and Europe’s chances to overcome its entrapment in the present crisis constellations.

## 2. How do you know it is ordoliberalism when you see it? Varieties in the conceptual history and praxis of the ordoliberal tradition

A tradition cultivated over a century is bound to revise its theoretical frameworks (2.A). Ordoliberalism has also experienced a reception in political contexts which follow a logic of their own (2.B).

### A. The theoretical project

Ordoliberalism embodies a theoretical project with challenging ambitions. Rudolf Wiethölter has characterised it in his typical and intractable density:<sup>2</sup> Ordoliberalism is a ‘social theory (*Gesellschaftstheorie*) with law as its core (*Rechtstheorie als Gesellschaftstheorie*)’, a transdisciplinary school of thought, synthesising law and economics, which promises that, on the basis of this synthesis, a good society can be established. This is a reconstruction which captures well the core messages of the leading representatives of the ordoliberal tradition. It is important, however, to be aware of the transformations of this tradition which is now over a century old. Wiethölter’s characterisation is not outdated but written in the shadow of the ordoliberal founding father, the jurist Franz Böhm (whom Wiethölter succeeded in Frankfurt in 1962) and the economist Walter Eucken whose main work was published only posthumously in 1954.<sup>3</sup> The two founding fathers were clearly committed to the kind of transformation of their disciplines which Wiethölter outlines.<sup>4</sup> Walter Eucken’s defence of a competitive ordering of the economy was a

<sup>1</sup>See references cited in the ‘Introduction’ in J Hien and C Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017) 1–10; J Hien and C Joerges, ‘Dead Man Walking? Current European Interest in the Ordoliberal Tradition’ 24 (2018) *European Law Journal* 142.

<sup>2</sup>R Wiethölter, ‘Wirtschaftsrecht’ in A Görlitz (ed), *Handlexikon zur Rechtswissenschaft* (Ehrenwirth 1972) 531.

<sup>3</sup>*Grundsätze der Wirtschaftspolitik*, ed E Eucken and K Paul Hensel (J.C.B. Mohr/Paul Siebeck 1952).

<sup>4</sup>This was well understood by Michel Foucault, *Naissance de la biopolitique, Cours du Collège de France 1978–1979* (Gallimard 2004), lectures 6–8.

political project.<sup>5</sup> The same holds true for Franz Böhm's critique of Germany's tradition of organised capitalism, his lifelong crusade against economic power<sup>6</sup> and his vision of a 'private law society'.<sup>7</sup> These projects have to be understood in their contexts; post-war Germany's constitutional democracy required adaptations, which did not, however, affect the ordoliberal commitment to 'economic' constitutionalism.<sup>8</sup>

The theoretical project of the two founding fathers underwent a transformation of nothing less than paradigmatic importance. This transformation was initiated and dominated over decades by Böhm's most successful disciple, Ernst-Joachim Mestmäcker. Michael Wilkinson refers approvingly, and rightly so,<sup>9</sup> to Quinn Slobodian's assessment of Mestmäcker as 'the most important figure in combining Hayek with Böhm'.<sup>10</sup> This transformative move is widely neglected in the critique of ordoliberalism. Its importance is nevertheless obvious. The commitment to 'perfect competition' was replaced by Hayek's theorem of 'competition as a discovery procedure',<sup>11</sup> the objective of a control of private economic power shifted to the control of 'anti-competitive' public regulation.<sup>12</sup>

There is a 'third generation' of ordoliberal scholarship which has redefined the concept of the economic constitution. Its master thinkers are the American economist James M. Buchanan, whose work on public choice earned him the Nobel Prize in 1986, and in Germany, Lars P. Feld Member since 2011 and in 2020/21, Chairman, of the German Council of Economic Advisors, and since 2010 Director of the Walter Eucken Institut in Freiburg. All three generations kept the linkages of law and economics alive, albeit in very different ways. Feld's innovation is committed to Buchanan.<sup>13</sup> His understanding of economic constitutionalism is informed by this theoretical framework.<sup>14</sup>

<sup>5</sup>See the instructive 'Contextualisation' in T Biebricher and F Vogelmann (eds), *The Birth of Austerity. German Ordoliberalism and Contemporary Neoliberalism* (Rowman & Littlefield International 2017) 41–108.

<sup>6</sup>Suffice it to mention F Böhm, *Wettbewerb und Monopolkampf. Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung* (Carl Heymann 1933); F Böhm, 'Das Reichsgericht und die Kartelle. Eine wirtschaftsverfassungsrechtliche Kritik an dem Urteil des RG v. 4. Februar 1897, RGZ 38, 155' 1 (1948) ORDO 197; F Böhm, 'Kartellauflösung und Konzernentflechtung: Spezialistenaufgabe oder Schicksalsfrage?' 2 (1947) *Süddeutsche Juristen-Zeitung* 495 (English translation by M Everson as 'Decartelization and De-concentration: A Problem for Specialists or a Fateful Question?' in Biebricher and Vogelmann (eds) (n 5), 121.

<sup>7</sup>F Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' 17 (1966) ORDO 75–151 (English excerpts entitled 'Rule of Law in a Market Economy' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* [Macmillan 1989] 46).

<sup>8</sup>In view of the widespread equation of ordoliberalism with the German model of a 'social market economy' it may suffice to cite a passage, from the 1947 essay ('Kartellauflösung und Konzernentflechtung' n 6, at 500): 'Market prices are compound articulations of necessity, justice and reason. In its own peculiar manner, market-price-creation is a voting process, taking place, by the day, hour and even minute. The free market economy is the most perfect expression of mass democracy; its degree of precision is impossible to reproduce within political life' (translation M Everson).

<sup>9</sup>Authoritarian Liberalism and the Transformation of Modern Europe, Oxford: OUP 2021, 20.

<sup>10</sup>Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 208; on Mestmäcker's scholarship, so rarely mentioned by the critics of ordoliberalism, see C Joerges, 'Review Essay: "The Jurist as True Teacher of Law"' 56 (2019) *Common Market Law Review* 843.

<sup>11</sup>FA v Hayek, 'Wettbewerb als Entdeckungsverfahren', reprinted in Hayek, *Freiburger Studien. Gesammelte Aufsätze* (Mohr Siebeck 1969) 249; FA v Hayek, 'Competition as a Discovery Procedure' 5 (2002) *The Quarterly Journal of Austrian Economics* 9.

<sup>12</sup>See C Joerges, 'What Is Left of the European Economic Constitution? A Melancholic Eulogy' 30 (2005) *European Law Review* 461 at 472–4 with references.

<sup>13</sup>On this background, see VJ Vanberg, 'Market and State: The Perspective of Constitutional Political Economy', Freiburg Discussion Papers on Constitutional Economics, no. 04/10, available at: <<http://hdl.handle.net/10419/4342>> accessed 1 March 2022.

<sup>14</sup>LP Feld, 'Eine Europäische Verfassung aus polit-ökonomischer Sicht' 54 (2003) ORDO 289; LP Feld, 'The European Constitution Project from the Perspective of Constitutional Political Economy' 122 (2005) *Public Choice* 417. He does not engage explicitly with legal debates.

### B. Evaluating the praxis of ordoliberalism

In the observation of political, economic and legal developments through ordoliberal lenses, the yardsticks and evaluations vary considerably.

Theoretical and practical guidance in the realms of economic policy and important areas of legal decision-making. This ambition has been upheld in principle throughout all three generations. It is nevertheless difficult to defend. According to economic historian Alexander Nützenadel, *Ordnungökonomik* has lost much ground in academic circles and had slipped into the margins of the discipline by the turn of the millennium.<sup>15</sup> Similarly, it has become difficult to identify proponents of ordoliberalism in the younger generation of private and economic law, formerly a stronghold of ordoliberal scholarship.<sup>16</sup> How likely is it that ordoliberal theorising will dominate German politics? It is nevertheless true that institutions with an ordoliberal profile such as the Walter-Eucken Institute in Freiburg, the Stiftung Marktwirtschaft in Berlin<sup>17</sup> and the Kronberger Kreis<sup>18</sup> defend the ordoliberal legacy. Such accounts content themselves mostly with the designation of principles enshrined in the ordoliberal tradition. Walter Eucken himself did so when he defined the core elements ‘of an order that is both economically functional and humane’.<sup>19</sup> Often ordoliberalism is thereby downgraded or reconceptualised as an ‘economic culture’.<sup>20</sup>

A third quite deplorable group of references to ordoliberalism can best be characterised as political small talk. A horrible example is the reading of Angela Merkel’s reference to the virtues of the Swabian housewife in her comments on the collapse of Lehman Brothers in 2008 as an indication of her commitment to ordoliberalism.<sup>21</sup> Hardly less deplorable are the invocations of ordoliberal theorems in the countless Bundestag speeches of Wolfgang Schäuble, then Germany’s Finance Minister.<sup>22</sup>

There is every reason, as we can summarise this section, to examine the viability of references to ordoliberalism.

### 3. What is authoritarian about ordoliberalism? On the conceptual history of ordoliberalism and its impact since its beginning

The notion ‘authoritarian liberalism’ was coined by Weimar’s constitutional theorist Hermann Heller in his response to an infamous talk of the ‘Dark Lord’ of German Constitutionalism.<sup>23</sup> We owe the rediscovery of this piece and the publication of an English translation in the

<sup>15</sup>A Nützenadel, *Stunde der Ökonomen, Wissenschaft, Politik und Expertenkultur in der Bundesrepublik 1949–1974* (Vandenhoeck & Ruprecht 2005) 33 ff.

<sup>16</sup>See R Wiethölter, n 2.

<sup>17</sup>See <<https://www.stiftung-marktwirtschaft.de/>> accessed 1 March 2022.

<sup>18</sup>See <<https://www.dialog-kronberg.de/>> accessed 1 March 2022.

<sup>19</sup>W Eucken, ‘Competition as the Basic Principle of the Economic Constitution’ [‘Wettbewerb als Grundprinzip der Wirtschaftsverfassung’] in G Schmolders (ed), *Der Wettbewerb als Mittel volkswirtschaftlicher Leistungssteigerung und Leistungsauslese* (Duncker & Humblot, 1942), 26–46, cited after the translation by K Tribe in Biebricher and Vogelsang (n 5) 81 at 97. The principles are listed in B Young, ‘Is Germany’s and Europe’s Crisis Politics Ordoliberal and/or Neoliberal?’ in Biebricher and Vogelsang, *ibid.* 221–38 at 235 n 38.

<sup>20</sup>See, eg, K Dyson, ‘Ordoliberalism as Tradition and as Ideology’ in J Hien and C Joerges (eds), *Ordoliberalism, Law and the Rule of Economic* (Hart Publishing 2017) 87–102. He characterises, on p 87, ordoliberalism as ‘a distinctive way of thinking about the economy [ . . . ] that is normatively grounded in ethics, law, and the shaping role of the state in securing an orderly competitive market economy governed by rules that protect individual rights’. For a systematic discussion of the notion of economic cultures, see J Hien, ‘A Cultural Political Economy Approach to the European Crisis’ in J Hien and C Joerges (eds), *Responses of European Economic Cultures to Europe’s Crisis Politics: The Example of German-Italian Discrepancies* (European University Institute, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole 2018) 108–19 <<http://cadmus.eui.eu/handle/1814/59884>> accessed 1 March 2022 80–98.

<sup>21</sup>See, eg, *Frankfurter Allgemeine Zeitung* (faz.net) of 14.07.2016.

<sup>22</sup>See the summary in J Hien and C Joerges, ‘Dead Man Walking?’ 142, text accompanying notes 119–34

<sup>23</sup>H Heller, ‘Autoritärer Liberalismus’ 44 (1933) *Die Neue Rundschau* 289.

European Law Journal to Agustín Méndez,<sup>24</sup> who dedicated a special section of the journal to the promotion of Heller's essay.<sup>25</sup> This was a wake-up call in the midst of Europe's authoritarian austerity politics in the financial crisis with a considerable resonance in critical quarters, including Michael Wilkinson, who refers to Heller in his explanation of the notion in the introduction of his book and many times thereafter.<sup>26</sup> It seems worth mentioning that the reading of Heller's essay as a reference to ordoliberalism is obviously tempting, but is nevertheless a mistake. Even a connoisseur like Philip Manow has committed this error in a seminal article;<sup>27</sup> so did I when I referred to Manow some 15 years ago.<sup>28</sup> Heller never mentions anything that could be attributed to authors who were to establish the ordoliberal school. Heller was exclusively concerned with Carl Schmitt. This is not to be understood as an outright acquittal. Ordoliberalism deserves such inquiries.

### A. Franz Böhm in Weimar and the Third Reich

Any discussion on ordoliberalism has to pay tribute to Franz Böhm. His scholarly work is outstanding, his civic activities courageous.<sup>29</sup> He was born 1895, served as a lieutenant in the First World War and thereafter became a law student in Freiburg im Breisgau; from 1926 onwards he worked in the Cartel Department of the Ministry of Economics. In this position, he published an intriguing essay on the problem of private power.<sup>30</sup> He left the ministry and obtained his Ph.D. in Freiburg in 1932 and one year later his *Habilitation*.<sup>31</sup> Intensive co-operation with Walter Eucken and Hans Großmann-Doerth in the years thereafter led, in 1936, to the publication of 'Unsere Aufgabe' (Our Task).<sup>32</sup> Unfortunately, *quod non est in Breton, non est in mundo*. Only the 14-page manifesto<sup>33</sup> and another tiny piece<sup>34</sup> of Franz Böhm's rich oeuvre<sup>35</sup> numerous writings are available in English.<sup>36</sup>

'Economic constitutionalism' is the trademark of Böhm's entire work and the ordoliberal tradition. As Michael Wilkinson underlines, Böhm has with his understanding of the 'economic constitution', turned the original meaning of that notion upside down. The term was coined by leftist social democrats, in particular the foundational mastermind of German labour law, Hugo Sinzheimer. In the context of a project at the University of Liège on Economic

<sup>24</sup>H Heller, 'Authoritarian Liberalism?' 21 (2015) *European Law Journal* 295

<sup>25</sup>See AJ Méndez, 'Herman Heller NOW!' 21 (2015) *European Law Journal* 285.

<sup>26</sup>Wilkinson (n 9) 5 ff.

<sup>27</sup>P Manow, 'Ordoliberalismus als ökonomische Ordnungstheologie' 29 (2001) *Leviathan* 179–98, at 182.

<sup>28</sup>Joerges (n 12) at 467.

<sup>29</sup>The most sensitive personal and intellectual biography is R Wiethölter, 'Franz Böhm (1895–1877)' in B Diestelkamp and M Stolleis (eds), *Juristen an der Universität Frankfurt am Main*, (Nomos 1989) 209; more recently in lingua franca M Everson, 'Living "The Normative Power of the Factual": A Franz Böhm for Our Times' in Biebricher et al (eds), *Oxford Handbook of Ordoliberalism* (forthcoming)

<sup>30</sup>F Böhm, 'Das Problem der privaten Macht' 3 (1928) *Die Justiz* 324–45; for a full bibliography, see <<https://www.eucken.de/freiburger-tradition/franz-boehm/bibliographie/>> accessed 1 March 2022.

<sup>31</sup>F Böhm, *Wettbewerb und Monopolkampf. Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung* (Carl Heymann 1933).

<sup>32</sup>F Böhm, 'Unsere Aufgabe. Begleitwort der Herausgeber zur Schriftenreihe 'Ordnung der Wirtschaft' in F Böhm (ed), *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung* (roughly 'Economic Ordering as a Problem of Economic Policy and Challenging') (Kohlhammer 1937) vii–xxi (English translation of 'Unsere Aufgabe': 'The Ordo Manifesto of 1936' in AT Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan 1989) 15.

<sup>33</sup>The manifesto did not coin the later notion. The three underwriters did not operate in a vacuum, however. It is worth mentioning that Alexander Rüstow and Wilhelm Röpké attended the famous Walter Lippmann Colloquium in Paris in 1938.

<sup>34</sup>F Böhm, 'Rule of Law in a Market Economy', *ibid.* 46–62.

<sup>35</sup>The bibliography is available at <<https://www.eucken.de/freiburger-tradition/franz-boehm/bibliographie/>> accessed 1 March 2022.

<sup>36</sup>But see more recently 'Economic Ordering as a Problem of Economic Policy and a Problem of the Economic Constitution' (1937) and 'Decartelisation and De-concentration: A Problem for Specialists or a Fateful Question?' (1947), both in Biebricher and Vogelmann (n 5), 115 and 121 respectively (translations by M Everson).

Constitutionalism,<sup>37</sup> Guillaume Grégoire, one of the organisers, has reconstructed the two understandings of economic constitutionalism in great detail.<sup>38</sup> He adds, with apparent regret, that the original meaning fell into oblivion.<sup>39</sup> Michael Wilkinson points out<sup>40</sup> that the democratisation of the economy remained alive on the agenda of the trade unions and leftist intellectuals during the Weimar Republic.<sup>41</sup> We share Grégoire's regret; his concern will be taken up briefly in the concluding section.

For now, we continue with a discussion of Böhm's revision of the notion. We start with a quite incriminatory passage from his *Wettbewerb und Monopolkampf* (Competition and the fight against monopoly power):<sup>42</sup>

From a constitutional point of view, the system of freedom of trade and industry is a constitution of economic life in the positive [law] sense; the introduction of this system consequently means a 'complete decision' (*Gesamtentcheidung*) over the type and form of the economic-social cooperation process, in the same sense in which Carl Schmitt describes the state constitution as a 'complete decision over the type and form of political unity'.<sup>43</sup>

Here you have it all: the idea of economic constitutionalism and a strong Schmittian flavour together in one paragraph. And this is by no means the only delicate passage. Philip Manow has, in his seminal article of 2001,<sup>44</sup> untagged more of the same kind of authoritarian and 'volkszerzieherische' passages.<sup>45</sup> There are hence reasons to be concerned. We have nevertheless to be cautious. There is a lot of double talk in the German texts of the 1930s which is not so easy to decipher. Grégoire explains:

Franz Böhm carried out a real theoretical coup de force: he endorsed the conservative critique of the 'economic state', but subverted Schmitt's analysis to propose a truly liberal meaning of the concept of *Wirtschaftsverfassung*, where Böhm's reference to the Schmittian meaning of (political) 'constitution' and the concept of *Wirtschaftsverfassung* set the two notions against each other. This proves ultimately to be particularly subtle and astute. Böhm operated with Schmitt's concept, albeit against him.<sup>46</sup>

But what about the much-cited use of the metaphor of the 'strong state' which Schmitt has used in his 1932 'address to business leaders'?<sup>47</sup> Schmitt started that address with an emphatic call for 'courage of action'. 'Business leaders', so encouraged, are not expected to support and implement antitrust policies aiming at the control of economic power. There is a significant difference: while Schmitt's 'strong state' was to establish the primacy of the political over the economy, the ordoliberal 'strong state' was to tame the political, through a rule-bound commitment to

<sup>37</sup>L'idée de Constitution économique en Europe - The Idea of Economic Constitution in Europe', directed by G Grégoire and X Miny. A publication with Brill is in preparation.

<sup>38</sup>The "Economic Constitution" under Weimar: Doctrinal Controversies and Ideological Struggles.'

<sup>39</sup>*Ibid.*, 50 ff.

<sup>40</sup>Wilkinson (n 9) 34 ff.

<sup>41</sup>Noteworthy certainly F Naphtali, *Wirtschaftsdemokratie: Ihr Wesen, Weg und Ziel* (Verlagsgesellschaft des Allgemeinen Deutschen Gewerkschaftsbundes 1928).

<sup>42</sup>N 13.

<sup>43</sup>Böhm, at 120.

<sup>44</sup>Manow (n 27).

<sup>45</sup>Manow (n 27) at 180.

<sup>46</sup>See G Grégoire, n 38, unpublished script at 56.

<sup>47</sup>C Schmitt, 'Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern' (1933) *Volk und Reich* 81–94; English translation in R Cristi, *Carl Schmitt and Authoritarian Liberalism* (University of Wales Press 1998) 213.



the competitive ordering of the economy. I was happy to read the endorsement of this reading by none other than Wendy Brown.<sup>48</sup>

Manow has followed the ordoliberal traces up to the late 1930s. Immediately after the infamous Reichskristallnacht of 9 November 1938, the Freiburger Konzil (Freiburg Conciliatory) was formed. The group did not discuss economics, but the Bible and Martin Luther. This, so Manow submits, revealed the deeper protestant grammar (*Tiefengrammatik*) of the school.<sup>49</sup> The authors of the 1936 memorandum and the attendants of the Freiburg Conciliatory were not democrats,<sup>50</sup> and the ordoliberal strong state they envisaged was not a pluralist democracy. However, this does not mean that they were Nazis; they were in fact an opposition group. Franz Böhm and Walter Eucken were members of the Bekennende Kirche. Some members of the Freiburg School risked their lives in the resistance against Hitler. Großmann-Doerth, 42 years old in the Manifesto year of 1936, and drafted into the Wehrmacht in July 1939, died in 1944. Alexander Rüstow and Wilhelm Röpke, to mention two more sympathisers, had left Germany.<sup>51</sup>

### **B. Ordoliberalism in the Federal Republic and its move to Europe**

Post-war Germany is a later story with its own conflicts and contradictions. Ordoliberalism was regarded as an untainted, and hence praiseworthy, legacy. The school became remarkably well ‘embedded’ in Germany’s post-war society. Maurice Glasman,<sup>52</sup> by now Lord Glasman, told a wonderful, albeit all-too-euphemistic story of the post-war social market economy as a common project of the Christian Democrats, Social Democrats and both Christian Churches. This alliance was not sustainable, however. It has to be underlined in view of the career of the notion of the ‘social market economy’ outside Germany and at the European level,<sup>53</sup> that the early societal consensus in the Bonn Republic was fragile.<sup>54</sup> An important dissent concerned the social market economy as it had been conceptualised by Alfred Müller-Armack.<sup>55</sup> The ordoliberal core group identified ‘social interventionism’ in Müller-Armack’s project and rejected such ideas as rigorously as Hayek.<sup>56</sup> It should be furthermore noted that the ordoliberal concept of an ‘economic constitution’ was sustained mainly by private and economic law scholarship, whereas the resonance in public law remained quite marginal. Importantly, the Federal Constitutional Court rejected the theory of the economic constitution explicitly in two seminal judgments.<sup>57</sup> The impact of ordoliberalism on the legal order of the Federal Republic was limited. The same holds true in the realms of economic policy. Germany’s leading economic historian captures the simultaneity of

<sup>48</sup>W Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (Columbia University Press 2019) 82.

<sup>49</sup>Manow (n 27) 185 ff.

<sup>50</sup>See, eg, KW Nörr, *Die Leiden des Privatrechts. Kartelle in Deutschland von der Holzstoffkartellentscheidung bis zum Gesetz gegen Wettbewerbsbeschränkungen* (Mohr-Siebeck 1994) in particular at 174.

<sup>51</sup>On all this, see D Haselbach, *Autoritärer Liberalismus und Soziale Marktwirtschaft. Gesellschaft und Politik im Ordoliberalismus* (Nomos 1991).

<sup>52</sup>M Glasman, *Unnecessary Suffering: Managing Market Utopia* (Verso Books 1996) at 28 ff.

<sup>53</sup>See, for a critical account, C Joerges and F Rödl, ‘The “Social Market Economy” as Europe’s Social Model?’ in L Magnusson and B Stråth (eds), *A European Social Citizenship? Preconditions for Future Policies in Historical Light* (Lang 2005) 125, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=635362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635362)> accessed 1 March 2022.

<sup>54</sup>See, for an instructive analysis, P Manow, ‘Die Soziale Marktwirtschaft Als Interkonfessioneller Kompromiss? Ein Re-Statement’ 1 (2010) *Ethik und Gesellschaft* 1–22, <<https://open-journals.uni-tuebingen.de/ojs/index.php/eug/article/view/1-2010-art-1>> accessed 1 March 2022.

<sup>55</sup>See A Müller-Armack, ‘Die Wirtschaftsordnungen sozial gesehen’ (1948) reprinted in A Müller-Armack, *Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepte zur sozialen Marktwirtschaft und zur europäischen Integration* (Rombach, 1966), 411–5. See, in more detail, Joerges and Rödl (n 37).

<sup>56</sup>FA Hayek, ‘Der Atavismus “sozialer Gerechtigkeit”’ in W Kerber (ed), *Die Anmaßung von Wissen* (Tübingen: Mohr Siebeck 1976) 181–92.

<sup>57</sup>BVerfG, judgment of 20 July 1954, *Investment aid*, BVerfGE 4, 7; judgment of 1 March 1979, *Co-determination*, BVerfGE 50, 29.

official commitments to *Ordnungspolitik* and Germany's realpolitik well by its characterisation as '*Ordnungspolitik der sichtbaren Hand* (visible hand)'.<sup>58</sup> Ordoliberals had reasons to be concerned. The political economy of the Federal Republic experienced the revival of corporatist traditions and a return to the Bismarckian welfare state under Chancellor Konrad Adenauer in the 1950s.<sup>59</sup> Defeat before the Federal Constitutional Court and the resurrection of Germany's tradition of 'organised capitalism' have incentivised the ordoliberal move to Europe and the anchoring of the project of an economic constitution at the European level. This was the type of move that ordoliberals were to undertake repeatedly when confronted with a schism between their ideas and political realities. Such responses have become ever more urgent in the course of the integration project.

### C. Ordoliberalisation of Europe?

As suggested in Joseph Weiler's reconstruction of the legal history of the integration project,<sup>60</sup> it makes sense also to distinguish in an analysis of the impact of ordoliberalism between the stages of the integration project. The following section will first deal briefly with the foundational period, then proceed to the to its assumed 'consummation' by the Treaty of Maastricht and the establishment of the EMU, and, thereafter the responses to the financial crisis portrayed in the book as a 'Germanisation' of Europe orchestrated along ordoliberal ideational patters.<sup>61</sup>

#### *From Rome to the end of the foundational: Affinities*

The move of ordoliberal theorising to Europe was initiated and thereafter guided by Ernst-Joachim Mestmäcker,<sup>62</sup> Böhm's most successful disciple.<sup>63</sup> Mestmäcker's first professorial position was in Saarbrücken, a town which is a short distance from Brussels. This facilitated Mestmäcker's weekly trips to Direction Générale IV where his advice was very welcome as long as the Berlin *Kartellamt* was the one and only national cartel agency in Europe and for a good while thereafter. The short-term ordoliberal influence on European competition policy is well documented,<sup>64</sup> the stories about its long-term importance, however, are fake news. Mestmäcker experienced a replication of his disappointment within the Federal Republic. His vision of a European Constitution and the truly existing integration project drifted apart. Not only Böhm's ideas of perfect competition, but equally Mestmäcker's commitments to freedom as the core value of competition and to and to Hayek's 'competition as a discovery procedure',<sup>65</sup> were – step by step – set aside by Chicago

<sup>58</sup>W Abelschäuser and C Kopper, 'Ordnungspolitik der sichtbaren Hand. Das Bundeswirtschaftsministerium und die Kunst der Wirtschaftspolitik' in W Abelschäuser (ed), *Das Bundeswirtschaftsministerium in der Ära der Sozialen Marktwirtschaft. Der deutsche Weg der Wirtschaftspolitik*. Wirtschaftspolitik in Deutschland 1917–1990, vol 4, (de Gruyter 2016) 22

<sup>59</sup>See KW Nörr, *Die Republik der Wirtschaft. Teil I: Von der Besatzungszeit bis zur Großen Koalition* (Mohr Siebeck 1999) 58 ff, 82 ff.

<sup>60</sup>J Weiler, 'The Transformation of Europe' 100 (8) (1990–1) *Yale Law Journal* 2303 at 2012–43.

<sup>61</sup>The notion was coined by U Beck, *German Europe* (Polity Press 2013).

<sup>62</sup>For an account of Mestmäcker's work, see C Joerges, 'Ordoliberalisation as Ordo-Tragedy? Ernst-Joachim Mestmäcker's Vision of European Economic Constitutionalism' in T Biebricher et al (eds), *Oxford Handbook of Ordoliberalism* (forthcoming).

<sup>63</sup>See C Joerges, n 62.

<sup>64</sup>See, eg, with adequate care KK Patel and H Schweitzer, 'EU Competition Law in Historical Context: Continuity and Change' in H Schweitzer and KK Patel (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 207; A Wigger, 'Competition for Competitiveness. The Politics of the Transformation of the EU Competition Regime', Ph.D. VU Amsterdam 2008; but see also her recent essay (n 66).

<sup>65</sup>See C Engel, 'Imposed Liberty and its Limits — The EC Treaty as an Economic Constitution for the Member States' in T Einhorn (ed), *Spontaneous Order, Organization and the Law: Roads to a European Civil Society: Liber Amicorum Ernst-Joachim Mestmäcker* (Asser Press 2003) 429.



economics.<sup>66</sup> Renewed hopes rested on the advent of ‘regulatory competition’ as a new form of transnational economic constitutionalism.<sup>67</sup> Such hopes could not materialise.<sup>68</sup> A later response was Mestmäcker’s pamphlet against the Chicago School.<sup>69</sup> Even the European commitment to the ‘system of undistorted competition’ as a bulwark of the European economic constitution faded away. The removal of this notion, once enshrined in Article 3(f) of the EEC Treaty and then in Article 3(1)g of the EC Treaty, from the ‘competition protocol’ of the Lisbon Treaty may be of no legal importance.<sup>70</sup> It is nevertheless indicative of its de facto downgrading to one policy objective among others, in particular industrial policy, officially recognised in the Treaty of Maastricht.<sup>71</sup> This distortion of the core concept of Mestmäcker’s economic constitutionalism may look marginal.

The core assumption and by the same token the Achilles heel of Mestmäcker’s commitments to economic constitutionalism can be explained with the help of one single passage of the seminal lecture which he gave in 1972 on the occasion of the 100th birthday of the Association of German Economists. There, Mestmäcker submitted what he then continued to defend for decades: economic constitutionalism ‘is not merely to recognise the common problems of definition of jurisprudence and economics. It is just as important to develop economic policy solutions susceptible of being bound by legal and constitutional rules.’<sup>72</sup> At the time of the lecture, the common currency was a project with an uncertain future. Mestmäcker was hopeful. He believed that a common currency would promote socio-economic convergence in the European Economic Community (EEC). This was the premise of his plea for ‘economic policy solutions susceptible of being bound by legal and constitutional rules’. The EEC of 1992 is not the EU of 1972, however; the 20 years make a difference. It is as easy as that: the project of an economic constitution with rules binding economic and monetary policy was bound to fail in an ever more heterogeneous Union.

### **Maastricht: the end of the ordoliberal dream**

It is, at this point, important to recall the distinction between ordoliberalism as a cultural tradition and convenient reference by politicians and journalists, on the one hand, and ordoliberalism as a serious theoretical endeavour, on the other.<sup>73</sup> Mestmäcker tried to be faithful throughout his life to the latter. And it is precisely this virtue that led him to a dead-end. The institutionalisation of this dead-end was the establishment of the EMU in the Maastricht Treaty of 1992. To be sure, the EMU is widely perceived as an ordoliberal accomplishment and Michael Wilkinson’s book endorses this view, albeit noting that, at the time, monetarism had become the dominant version of economic liberalism.<sup>74</sup> The matter is complex: Germany’s abandonment of the Deutschmark

<sup>66</sup>See the excellent analysis of A Wigger, ‘Debunking the Myth of the Ordoliberal Influence on Post-war European Integration’ in Hien and Joerges (n 1) 161.

<sup>67</sup>See Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft, *Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt* (Schriften-Reihe des Bundeswirtschaftsministerium 51, Bonn, 1986). This position paper was obviously inspired by the Head of the Advisory Council, E-J Mestmäcker.

<sup>68</sup>See C Joerges, ‘Sociological Shortcomings and Normative Deficits of Regulatory Competition’ in F Costamagna (ed.), ‘Regulatory Competition in the EU: Foundations, Tools and Implications’, European Papers 4 (1) (2009) 157–68, available at <[http://www.europeanpapers.eu/en/e-journal/sociological-shortcomings-normative-deficits-of-regulatory-competition?utm\\_source=European+Papers+-+Newsletter&utm\\_campaign=7502581a1d-European\\_Papers\\_Newsletter\\_2019\\_No\\_4&utm\\_medium=email&utm\\_term=0\\_8a90fc1b72-7502581a1d-178573717](http://www.europeanpapers.eu/en/e-journal/sociological-shortcomings-normative-deficits-of-regulatory-competition?utm_source=European+Papers+-+Newsletter&utm_campaign=7502581a1d-European_Papers_Newsletter_2019_No_4&utm_medium=email&utm_term=0_8a90fc1b72-7502581a1d-178573717)>.

<sup>69</sup>E-J Mestmäcker, *A Legal Theory without Law: Posner v. Hayek on Economic Analysis of Law* (Mohr Siebeck 2007).

<sup>70</sup>See P Behrens, ‘Der Wettbewerb im Vertrag von Lissabon’ 19 (7) (2008) Europäische Zeitschrift für Wirtschaftsrecht 193

<sup>71</sup>Industrial policy is by definition an intervention into competition. See the polemics of ME Streit and W Mussler, ‘The Economic Constitution of the European Community. From “Rome” to “Maastricht”’ 1 (1995) European Law Journal 5.

<sup>72</sup>E-J Mestmäcker, ‘Power, Law and Economic Constitution’ 11 (1973) The German Economic Review 177–92 at 183.

<sup>73</sup>See Section 1.B.

<sup>74</sup>See, in particular, Wilkinson (n 9) 178 ff.

was the price to be paid for the acceptance of its unification. The Bundesbank and hundreds of Germany's professors of economics criticised the introduction of a common currency.<sup>75</sup> Once the political deal had become irreversible, however, Germany's negotiators pursued what they understood as Germany's interest, shrouding this in ordoliberal terminology. The result was a hybrid: German substantive principles and French decision-making rules.<sup>76</sup> A very unfortunate role in all this was played by the Second Senate of the Federal Constitutional and its rapporteur Paul Kirchhoff.<sup>77</sup> In its Maastricht judgment of 12 October 1993, the German Court<sup>78</sup> held that the adherence to German stability principles was a pre-condition for Germany's signature of the Treaty.<sup>79</sup> The constitutional implication: the Member States of the Union, first and foremost Germany itself, were deprived of their authority in economic governance.<sup>80</sup> I have characterised this outcome as a pyrrhic victory of ordoliberalism and the later responses to the financial crisis as its Cannae defeat.<sup>81</sup>

### **The destruction of economic constitutionalism through the authoritarian managerialism in the responses to the financial crisis**

To reiterate the initial query of this section: 'How can you know it is ordoliberalism when you see it?' – instead of relying on hearsay evidence and more or less educated guesses, it seems safer to consult a renowned representative of the ordoliberal tradition such as Lars P. Feld.<sup>82</sup> Two of his contributions on the financial crisis deserve attention in the present context. The first is a talk (*Impulsrede*) on 'Ordnungspolitische Prinzipien der Europäischen Währungsunion' (Ordnungspolitical Principles of the EMU) given in 2011.<sup>83</sup> There, Feld explains that essential provisions of the EMU were inspired by ordoliberal principles and adds that they could never be implemented. The second is an essay that discusses the role of Germany in the financial crisis.<sup>84</sup> Feld and his co-author succinctly reconstruct ordoliberal legacies, discuss the recent critique of ordoliberalism by political scientists and conclude with the argument submitted in much brevity in the *Impulsrede* of 2011. Germany's officious talk is ordoliberal. Germany's realpolitik is something else. We have observed this discrepancy before. Can we nevertheless assume that Germany's crisis politics is guided by ordoliberalism?

Michael Wilkinson is far from proceeding on such assumptions. He engages instead intensively with political economy. There is no space left here to go into the details of his analyses. I will

<sup>75</sup>See F Heinemann, 'Zwischen "Kernschmelze" und "Fass ohne Boden" – zum Dissens deutscher Ökonomen in der Schuldenkrise' 60 (2013) *Zeitschrift für Politikwissenschaft* 207.

<sup>76</sup>This important tension is often neglected, but clearly spelled out by C B Blankart, 'The Euro Crisis: How We Got in and Why We Are Locked in', contribution to the Conference 'Wirtschaftskrise, technische Regierung, große Koalition: Italien und Deutschland im Vergleich', Villa Vigoni (It), 23/24 July 2012 (on file with author).

<sup>77</sup>Kirchhoff's colleague Dieter Grimm was to his own regret sitting on the Second Senate and therefore excluded from the adjudication of European matters. He would have written – to the best of Europe – another text.

<sup>78</sup>BVerfGE 89, 155; English translation: *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

<sup>79</sup>Para. 90 of the judgment reads: 'This conception of the currency union as a community based on stability is the basis and subject-matter of the German Act of Accession. If the monetary union should not be able to develop on a continuing basis the stability present at the beginning of the third stage within the meaning of the agreed mandate for stabilisation, it would be abandoning the Treaty conception.'

<sup>80</sup>See C Joerges, 'The Market without the State? States without a Market? Two Essays on the Law of the European Economy', EUI Working Paper No. 90/02, San Domenico di Fiesole, 1991, <<https://cadmus.eui.eu/handle/1814/125>> and also at <<http://eiop.or.at/eiop/pdf/1997-019.pdf>> accessed 1 March 2022, an argument which I have restated ad nauseam thereafter.

<sup>81</sup>C Joerges, 'What Is Left of the European Economic Constitution II? From Pyrrhic Victory to Cannae Defeat' in PF Kjaer and N Olsen (eds), *Critical Theories of Crisis in Europe. From Weimar to the Euro* (Rowman & Littlefield International 2016) 143.

<sup>82</sup>Section 1.A for some indicators of his prestige.

<sup>83</sup>Ein Scheitern ist nicht eingepplant. Oder: Ordnungspolitische Prinzipien der Europäischen Währungsunion, Impulsreden zur Sozialen Marktwirtschaft' (Berlin: Schriftenreihe des Wirtschaftspolitischen Clubs Deutschland e.V., 2011), available at <[www.wpcd.de/fileadmin/user\\_upload/Impulsreden\\_2011\\_und\\_20](http://www.wpcd.de/fileadmin/user_upload/Impulsreden_2011_und_20)> accessed 1 March 2022.

<sup>84</sup>LP Feld et al, 'Ordoliberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe', CESifo Working Paper Series No. 5368 (2015) <<https://ssrn.com/abstract=2613901>> accessed 1 March 2022.

instead summarise some works which he has not taken into account. My reading is unavoidably selective. It will be unsurprising in view of the many years I spent in Florence that I have paid particular attention to the impact of the crisis on Italy and Germany.<sup>85</sup> The analyses of the impact of the crisis on these two countries to which I refer depart from the varieties of capitalism studies initiated back in 2001 by Peter A. Hall and David Soskice.<sup>86</sup> This has by now become a contested approach.<sup>87</sup> It still helps to explain the striking discrepancies between Germany and Southern European.<sup>88</sup> To cite Philip Manow at some length:

... the common currency had indeed been conceived as a credible self-commitment device, especially by those who had heretofore lacked the possibility of credibly committing themselves to a low-inflation equilibrium (i.e., Italy and France, in particular). But this would offer a very ironic conclusion. Our focus on the fiscal consequences of EMU leads us to forget how much the independence of monetary policy had been directed as a signal towards market actors, rather than governments, namely, at those setting wages: monetary rules directed at wage discretion. Yet, the obsession of the Eurocrisis debate with the fiscal rules of allegedly ordoliberal origin that are said to have prevented an appropriate response to the crisis tends to obfuscate the main motivation behind the French or Italian push for a common currency, namely that European monetary rules should effectively discipline domestic wage discretion. Fiscal discipline, by the way, has to complement a non-accommodating monetary policy for this to work.

The upshot of his argument is only seemingly paradoxical. ‘It was not the austerity-obsessed German ordoliberals, but French and Italian political élites, besides the Commission of course, that had pinned all their hopes on *rules*.’<sup>89</sup>

#### 4. ‘There must be some way out of here, ...’<sup>90</sup>

Michael Wilkinson and I criticise the ordoliberal and other versions of economic constitutionalism for the same reasons: economic constitutionalism favours in all its varieties favours the ‘rule of economics’ without democratic legitimacy. We both sympathise with the understanding of economic democracy which ordoliberal economic constitutionalism has implicitly outlawed.<sup>91</sup> It is obvious to me in particular from the question mark behind Michael Wilkinson’s reference to Angela Merkel’s TINA (‘There is no alternative’)<sup>92</sup> that he is not at all prepared to abandon the ill-fated idea of economic democracy, at least not in the EU. How, then, can we find the way,

<sup>85</sup>See J Hien and C Joerges (n 20).

<sup>86</sup>See PA Hall and D Soskice, *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001).

<sup>87</sup>W Streeck, ‘E Pluribus Unum? Varieties and Commonalities of Capitalism’, MPIfG Discussion Paper 10/ 12, Cologne 2012.

<sup>88</sup>See J Hien, ‘A Cultural Political Economy Approach to the European Crisis’, in J Hien and C Joerges (eds), *Responses of European Economic Cultures to Europe’s Crisis Politus: The Example of German-Italian Discrepancies*, European University Institute, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole 2018, 80–98, available at <<http://cadmus.eui.eu/handle/1814/59884>>.

<sup>89</sup>P Manow, previous note, 305; Manow refers here to FW Scharpf, ‘Forced Structural Convergence in the Eurozone — Or a Differentiated European Monetary Community’, MPIfG Discussion Paper 16/15, Cologne 2015; for a concurring analysis, cf T Iversen, D Soskice and D Hope, ‘The Eurozone and Political Economic Institutions’, (2016) 19 *Annual Review of Political Science*, 163–83 and on the Italian malaise also A Mody, ‘Italy should have never joined the Eurozone, böopost of 06/11/2018, <<https://www.marketwatch.com/story/italy-never-should-have-joined-the-euro-and-the-ecb-cant-rescue-it-from-its-next-crisis-2018-06-11>>.

<sup>90</sup>Bob Dylan, ‘All Along the Watchtower’, John Wesley Harding, CBS 1968, copyright Dwarf Music. The spelling is how it appears in *Bob Dylan, Writings and Drawings* (Panther 1974).

<sup>91</sup>See also G. Teubner, ‘Transnational Economic Constitutionalism in the Varieties of Capitalism’ (2020) 1 *Global Perspectives* 1, <<https://doi.org/10.1525/gp.2020.13412>>.

<sup>92</sup>Wilkinson (n 9) 178.

which according to the heading of this section, must exist? A ready-made recipe is not to be expected. The ‘material constitution’ is the key concept on which Michael Wilkinson’s hopes rest. We read in the introduction: ‘The material constitution is a complex assemblage of ordering forces and structures: political unity, institutional power, social relations, and political-economic objectives.’<sup>93</sup> The material constitution operates behind the façades of legal formalism. This operation is essentially indeterminate and characterised by manifold tensions. The concluding chapter deals with crises not only of the formal, but also likewise of the material, constitution.<sup>94</sup>

The concept is fascinating. To expose it to the kind of questions legal analyses tend to pursue cannot do justice to its specifics. They can nevertheless be raised. (1) What can we find out about its content? Michael Wilkinson underlines his indebtedness to the early Antonio Negri.<sup>95</sup> As I understand the reference, constituent power constantly challenges the constituted order; it works against its institutionalisation. Institutional realities are constantly open so as to include the constituent power, and institutions are in a permanent state of becoming. Constituent power can therefore be an element of law, meaning an institution that must constantly create new institutions. ‘The constitutional order is always a process of becoming.’<sup>96</sup> Is it hence in vain to find out anything about these processes? By no means if and because ‘the material constitution is not “what happens” in the sense of sheer occasionalism; rather it delineates the conditions which make possible the emergence of a state of affairs as a constitutional order. These conditions can be identified and analysed as objects of juristic knowledge.’<sup>97</sup> The answer is puzzling. On the one hand, the idea of ‘juridical knowledge’ enriches the discussion of the law–society relationships precisely because of its rejection of a neat separation of legal a non-legal spheres. On the other hand, it seems to do away with all the efforts to get a deeper understanding of the functions and functioning of law with the help of social sciences and interdisciplinary exercises.<sup>98</sup> (2) The follow-up query may look somewhat naïve: Are we in a position to evaluate the moves within the material constitution and use such insights for, e.g., the promotion of democratic economic constitution?

In the context of the foregoing discussions of ordoliberalism a second look at Chapter 5 on the material constitution, ordo- and neoliberalism<sup>99</sup> suggests itself. What I read is a highly instructive account of these theoretical strands which includes analyses of their conceptual weaknesses and the resistance they encountered. Similarly, instead of ending with a ‘conclusion’, I add a speculative suggestion, inspired by the affinities between our despair over the state of the Union and our perceptions of its unruliness. I suggest that these affinities can be made visible and understood with the help of the works of the previously mentioned Rudolf Wiethölter,<sup>100</sup> the Hermann Heller of the Federal Republic. Suffice it to quote a passage from an essay published in 1977. There he diagnosed a constitution behind the Basic Law of the Federal Republic, namely

... novel – non-binding-binding – behavioural ‘contracts’ of institutionally and organisationally influential power representatives (‘state’ – ‘enterprise’ – ‘trade union’ – ‘Bundesbank’ – ‘antitrust agency’ etc.), less in the manner of concerted actions, planning

<sup>93</sup>Wilkinson (n 9) 2.

<sup>94</sup>Wilkinson (n 9) 249 ff.

<sup>95</sup>See, eg, Wilkinson (n 9) 12 and A Negri, *Insurgencies: Constituent Power and the Modern State. Theory out of Bounds* (University of Minnesota Press 2009).

<sup>96</sup>MA Wilkinson and M Goldoni, ‘The Material Constitution’ 81 (2018) *Modern Law Review* 567–#, cited after the LSE Legal Studies Working Paper no. 20/2016, available at SSRN: <<https://ssrn.com/abstract=2875774>>, 3, accessed 1 March 2022.

<sup>97</sup>Wilkinson (n 9) 26.

<sup>98</sup>This is by no means a recipe either. To indicate what is implied: ‘interdisciplinary work can be done. presupposes familiarity with the respective disciplines and an ability to “translate” the respective insights. It also requires an ability to examine critically the blind spots of each discipline by looking at them from the perspective(s) of the other(s)’, F Kratochwil, ‘How (II) liberal is the Liberal Theory of Law?’ 9 (2010) *Comparative Sociology* 120–45, at 122.

<sup>99</sup>Wilkinson (n 9) 118–46.

<sup>100</sup>Wiethölter (n 2).

councils, conversational rounds than in the manner of word-rich and silent mutual notifications of expectations and behaviour.<sup>101</sup>

Gunther Teubner comments:

Thus it was not the constitutional law of the democratic social that formed the Federal constitution of Germany: instead it was neo-corporatist power compromises between rival social groups, classes, strata organized interests, collective actors . . . and it would then no longer be plausible to restrict the constitutional concept to the political state constitution.<sup>102</sup>

The cited passage needs to be read on the background of Wiethölder academic *Heimat* in the somewhat forgotten discipline of private international law (conflicts law in the Anglo-Saxon parlance),<sup>103</sup> which remained a subtext of his moves to economic law,<sup>104</sup> constitutional law and, most notably, legal theory.<sup>105</sup> In the same year, 1977, Wiethölder generalised conflicts law thinking.<sup>106</sup> It was now to become

fruitful in conflicts between other norm complexes, areas of law, state and social constitutions . . . [it thereby becomes] possible to prioritise such general collisions of laws in the juridical reconstruction of social contradictions . . . [H]owever, the social contradictions do not appear as such, but rather in a specifically juridical transformation.<sup>107</sup>

In Gunther Teubner's reconstruction of Wiethölder's synthesis of conflicts law, social and legal theory affinities with both Wilkinson's material constitution and my plea for a reconstruction of European law as conflicts law<sup>108</sup> seem apparent. However, much more explicitly than Wilkinson, Wiethölder defends the law's normative *proprium*: "Reciprocity" and "impartiality" have to govern decision-making – and this requires appropriate "fora, procedures and criteria".<sup>109</sup> This, too, is no recipe, but an indispensable reminder.

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<sup>101</sup>R Wiethölder, 'Thesen zum Wirtschaftsverfassungsrecht' in P Römer (ed), *Der Kampf um das Grundgesetz: Über die politische Bedeutung der Verfassungsinterpretation* (Syndikat 1977) 158–70, cited after the reprint in M Amstutz and P Zumbansen (eds), *Rudolf Wiethölder, Recht in Recht-Fertigungen: Ausgewählte Schriften von Rudolf Wiethölder* (Berliner Wissenschafts-Verlag 2014) 47, at 49. R Wiethölder, 'Begriffs- oder Interessenjurisprudenz - falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm' in *Festschrift für Gerhard Kegel* (Metzner 1977) 213–63.

<sup>102</sup>G Teubner, 'From "Economic Constitution I, II" to the Self-justifying Law of Constitutional Law: On the Criticality of Rudolf Wiethölder Critical Systems Theory' 1 (2020) *Ancilla Iuris* <[https://www.anci.ch/articles/Ancilla2020\\_1\\_Teubner.pdf](https://www.anci.ch/articles/Ancilla2020_1_Teubner.pdf)> 8, accessed 1 March 2022.

<sup>103</sup>R Wiethölder, *Einseitige Kollisionsnormen als Grundlage des Internationalen Privatrechts* (first published 1956, de Gruyter 2017).

<sup>104</sup>R Wiethölder, 'Thesen zum Wirtschaftsverfassungsrecht' in P Römer (ed), *Der Kampf um das Grundgesetz: Über die politische Bedeutung der Verfassungsinterpretation* (Syndikat 1977) 158–70, reprinted in Amstutz and Zumbansen (n 100) 47.

<sup>105</sup>A few pertinent essays are available in English: 'Proceduralization of the Category of Law' in C Joerges and DM Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos 1989) 511–24; reprinted in 12 (2011) *German Law Journal* 465; 'Justifications of a Law of Society' in G Teubner and O Perez, *Paradoxes and Inconsistencies in Law* (Hart Publishing 2005) 65

<sup>106</sup>Wiethölder (n 101) 213–63.

<sup>107</sup>Teubner (n 102) at 21.

<sup>108</sup>See, eg, C Joerges, 'United in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form' in R Nickel and A Greppi (eds), *The Changing Role of Law in the Age of Supra- and Transnational Governance* (Nomos 2010) 125.

<sup>109</sup>Teubner, *ibid.*, 16 f, 21.

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