



## Authoritarian liberalism and the transformation of modern europe: Rejoinder

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### Abstract

This response to critics gives me the opportunity to develop some aspects of the argument in *Authoritarian Liberalism and the Transformation of Modern Europe*. I do so by foregrounding the concept of political freedom, articulated by Franz Neumann. Authoritarian liberalism operates by suppressing political freedom and democracy. First making its mark in late Weimar, authoritarian liberalism is constructed in a more passive fashion in the decades after the Second World War. Although it is contested by social movements in the 1960's and 70's, it is ultimately reinforced in the turn to neoliberalism. This reaches its apogee at the Treaty of Maastricht, with the de-politicization of economic and monetary union and the deepening and widening of the European Union. German ordoliberalism, which functions as an ideological support to authoritarian liberalism, is instructive, but is only a part of this story; Germany is at most 'semi-hegemonic' in Europe. Authoritarian liberalism operates instead through limiting the constitutional imagination in all member states of the Union. I end with some reflections on Walter Benjamin, whose philosophy of history inspired the cover of the book.

**Keywords:** authoritarian liberalism; de-politicisation; passive revolution; ordoliberalism; neoliberalism; semi-hegemony

### Introduction

In 'The Concept of Political Freedom', published in 1953, Frankfurt School theorist and exile Franz Neumann wrote that citizens' alienation from democratic political power was increasing in Europe at a 'tremendous speed'.<sup>1</sup> Identifying this psychologically with three types of apathy – literal apathy, as an attitude of political indifference; the Epicurean approach; and a total rejection of the possibility of alternatives – Neumann suggests that this combination would likely lead to a return of demagoguery and Caesarism. Various symptoms and causes of political alienation are offered, including the 'growing complexity of government', the 'growth of bureaucracies in public and private life', the 'concentration of private social power' and 'the hardening of political parties into machines'.<sup>2</sup> It is notable that his concern is levelled at many of the proposed cures as much as the diagnosis itself. Corporatism, economic democracy, bureaucratic and administrative reforms, functionalism, interest group representation, and technological progress are all rejected as either insufficient or deleterious, the danger lying in their tendency to weaken spontaneous political response:

<sup>1</sup>Franz Neumann, 'The Concept of Political Freedom' 53 (1953) Columbia Law Review 901–35, 932.

<sup>2</sup>*Ibid* 932.

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Political action in a democracy is the free election of representatives and the preservation of spontaneous responsiveness to the decisions of the representatives. This, in turn, requires that social bodies such as political parties and trade unions remain free of the state, open, and subject to rank-and-file pressure; and that the electorate, if faced with serious problems, be capable of spontaneously organizing itself for their solution.<sup>3</sup>

Democracy, Neumann notes, is unlike any other political system; it can be integrated only through social changes that maximise man's freedom. If, on the contrary, politics is motivated by 'fear' or by the concept of an 'enemy', as in fascism, democracy is impossible, and dictatorship beckons.<sup>4</sup> The psychological restraint of fear 'ranks first' among the fetters that must be lifted in order for democracy to flourish. Neumann offers a clear and simple statement, 'the theory of democracy is valid only for the organization of the state and its territorial subdivisions, never for any specific function. There is but one democracy, political democracy, where alone the principles of equality can operate'.<sup>5</sup>

Written in the middle of the 20th century, a pivotal moment in European constitutional history, Neumann's essay looks both forwards and backwards. In its look forwards it foreshadows the bureaucratisation, technocracy and decline of parliamentarism that will characterise the next few decades of European constitutional history, along with the concomitant loss of political freedom. Even though he underestimated the durability of cold war liberalism and the post-war settlement, and overestimated how near was a return to fascism and dictatorship, his diagnosis of late modern political disenchantment is remarkable. In its glance backwards, notably his dismissal of economic democracy as 'too modest' a cure, it is also arresting in certain respects, particularly given his own involvement with this project as a labour lawyer in early Weimar.

What is so significant about these reflections is that Neumann (along with Hermann Heller and others) had experienced at first hand the collapse of political freedom. He had seen not only conservatives and liberals but also social democrats turn away from parliamentary democracy and, in a spirit of toleration or celebration, acquiesce or embrace the judicial, executive and extra-parliamentary exercise of power that would lead to its erosion in the interwar era. This turn, in a different context and a distinct form, would be the route taken by the Bonn Republic,<sup>6</sup> and it would have a decisive impact in the formation of the European Union (EU) and ultimately the unravelling of constitutionalism across the whole continent.

In *Authoritarian Liberalism and the Transformation of Modern Europe* I track the fortunes of this authoritarian displacement of democracy, in its ebbs and flows in defence of economic liberalism, as it transpires in softer and harsher variants and in various constitutional and geopolitical configurations.<sup>7</sup> I also trace the various countermovements that emerge, oppositional forces, practical as well as rhetorical, in defence of democracy, of solidarity, or in furtherance of a non-liberal worldview. In conclusion, I suggest that authoritarian liberalism ultimately remains a weak formation, dependent less on coercion from without than on fear from within. Neumann's message remains pertinent, and perhaps increasingly so, as authoritarian liberalism now adopts distinct forms in response to the pandemic crisis.<sup>8</sup>

<sup>3</sup>*Ibid* 934.

<sup>4</sup>Schmitt is the named target here, *ibid* 935.

<sup>5</sup>*Ibid* 932.

<sup>6</sup>On the specific continuities between conservative jurists in early Weimar and the post-war liberal *Rechtsstaat*, see Clara Maier, 'The Weimar Origins of the West German *Rechtsstaat*, 1919–1969' 62 (2019) *The Historical Journal* 1069.

<sup>7</sup>Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 129–30 (henceforth, *Authoritarian Liberalism*). It is not, as suggested by Goldoni, a 'solid continuity'; there are, as I recount, continuities as well as discontinuities.

<sup>8</sup>See Hjalte Lokdam and Michael A Wilkinson, 'The European Economic Constitution in Crisis: A Conservative Transformation' in G Grégoire and X Miny (eds) *The Idea of Economic Constitution in Europe. L'idée de Constitution économique en Europe* (Brill, Legal History Library forthcoming 2022).

I am very grateful to the contributors to this special issue for engaging with the book and giving me an opportunity to clarify some aspects and develop others. I begin in section 1 where the book begins, in Weimar, when, as Ruth Dukes notes in her response, authoritarian liberalism first made its mark and was greeted by a certain ambivalence on the left, including by Neumann himself. I then turn in section 2 to the post-war era, when authoritarian liberalism is recast in a softer manner through what might be called, adopting Gramscian terms, a ‘passive revolution’, a transformation of state form from above. This gives me the opportunity to address Marco Goldoni’s objection that my narrative in Part II of the book underplays the intensity of class struggle in the 1960s and 1970s, and therefore misses the significance of the neoliberal revolution. I next turn in section 3 to the issue of depoliticisation, a leitmotif of the book, which, Graziella Romeo argues, may be a legitimate constitutional move, provided that it emanates from an act of explicit popular will. Although I can see the normative temptation in such a claim, it does not affect the argumentation in the book, which adopts a different register of analysis. In section 4 I look at counter-movements, picking up Goldoni’s response again, but now considering the impact of the antagonisms ‘from below’. I suggest that although this admits a slight qualification to my narrative, the upshot of the struggles was ultimately the reinforcement of changes imposed from above. Finally, in section 5, I take up Christian Joerges’s response and his suggestion that my diagnosis errs in its focus on the ordo-liberalisation and ‘Germanisation’ of Europe. This is something of a misreading, first, since ordoliberalism is only a part of the story told in the book and, second, because in the final chapters I develop the notion of ‘semi-hegemony’, with the stress placed on the limits in the constitutional imagination of all EU Member States. I end with some reflections on Walter Benjamin.

### 1. Weimar: failing to act politically

Ruth Dukes’s book *The Labour Constitution* was one of the formative influences on my reading of the interwar era, of the promise and pitfalls of Weimar social democracy, and of the failures of the project of economic democracy.<sup>9</sup> In her contribution to this symposium she brings out some of the similarities between the left-leaning labour lawyer Hugo Sinzheimer and social democrat and constitutional theorist Hermann Heller, despite their distinct orientations and disciplinary backgrounds. These similarities are instructive, particularly when placed alongside the work of Franz Neumann, who, despite his later commitment to parliamentary democracy, had also – along with Sinzheimer and Heller – supported a policy of toleration towards the authoritarian liberals in late Weimar.

In 1932, the year before the Nazi seizure of power, Dukes notes, ‘in the midst of economic crisis, mass unemployment and the use of Emergency Decrees by the Brüning and von Papen Governments’ to impose lower wages, Sinzheimer wrote *Die Krisis des Arbeitsrechts (The Crisis of Labour Law)*.<sup>10</sup> Although having ‘devoted much of his life to the institution of social democracy and economic democracy in Germany’, Sinzheimer ended up more critical of the ‘economic liberalism’ of the Brüning and von Papen regimes ‘than of their authoritarianism’.<sup>11</sup> Specifically, he was more concerned with ‘the ends to which public power was being deployed – namely to suppress rather than bolster claims for redistribution – than of the deployment of public power itself’.<sup>12</sup>

Since 1930, public power in Germany had been deployed in a highly discretionary and dictatorial manner, bypassing Parliament and repressing spontaneous public debate, with the presidential Cabinets ruling via emergency powers granted by the Constitution against a backdrop of

<sup>9</sup>Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014).

<sup>10</sup>R Dukes, ‘Authoritarian liberalism: A labour law perspective,’ 1 (1) (2022) *European Law Open* 150.

<sup>11</sup>*Ibid.*

<sup>12</sup>She also notes that Article 165 was meant to weaken parliament, *ibid.*

growing extra-parliamentary unrest on the streets.<sup>13</sup> As historian Hans Mommsen put it, Weimar's 'parliamentary constitution' had become 'an empty shell whose only function was to conceal the gradual transition to authoritarian government'.<sup>14</sup> This curtailment of Parliament and of political freedoms was the prelude to democracy's full-scale collapse soon after, with the Nazi seizure of power in 1933 marking the end of the Weimar Republic, not, it should be noted, and contrary to a dominant constitutional myth, in conditions of democratic excess, but democratic suppression.<sup>15</sup>

Liberals and conservatives had turned to authoritarian government to manage the political and economic turbulence of the period, in an attempt to maintain the illusion of the separation of the political and economic realms. It was this formation, in which the Catholic Centre Party (*Zentrum*) played a decisive role, that Heller would describe as authoritarian liberalism. But Heller, like Sinzheimer, had been too late to diagnose its ills.

In the mid 1920s, Heller had still imagined the Weimar state as a *neutral* state, equally open to different governmental regimes, socialist as much as capitalist.<sup>16</sup> He had soon speculated, however, by 1928, that the path to dictatorship might be taken by the working class due to the severe socio-economic disparities that were emerging.<sup>17</sup> If we put it in terms associated with Karl Polanyi (whose *The Great Transformation* would be first published in 1944), Heller thought that the 'countermovement' would occur through the turn to an authoritarianism led in the first instance by the proletariat.

By late 1932, however, Heller realised that it would in fact be the ruling class that would first defect from the principles of parliamentary democracy.<sup>18</sup> Both Heller and Sinzheimer saw the grotesque hypocrisy of the authoritarian liberal cabinets. Sinzheimer, as Dukes puts it, saw 'billions of Marks of public money' spent in 'propping up the private sector', at the same time as the government neglected unemployment and severe poverty.<sup>19</sup> Heller too saw the state's claim to maintain its distance from the free economy, to uphold the separation of the political and economic spheres, to be an illusion, a matter of political ideology of the worst sort, fighting against the welfare state with one hand 'whilst subsidising large banks, large industry, and large agricultural enterprise' with the other.<sup>20</sup>

But Heller and Sinzheimer had both been focused on ends rather than means, steadfast in their misplaced faith in the neutrality of the Weimar republic, and had therefore been tolerant of its political authoritarianism. As Dukes puts it, 'Having welcomed the creation of the Republic and the end to the *Kaiserreich* so passionately, many were reluctant to admit the often undemocratic nature of action taken by their ostensibly democratic government'.<sup>21</sup> This distorted lens extended to an analysis of the economy. Social democrats centred around Rudolph Hilferding, who served as Finance Minister 1928–9, had seen the concentration of capital and heavy industry in the late 1920s as potentially of instrumental value in the turn to socialism, more easily taken over and controlled by the 'class-neutral' state than a multitude of smaller enterprises.<sup>22</sup>

<sup>13</sup>Hermann Heller, 'Autoritärer Liberalismus', 44 (1933) *Die Neue Rundschau* 289–98 (in English translation 'Authoritarian Liberalism?' 21 (2015) *European Law Journal* 295–301 (translated by S Paulson)).

<sup>14</sup>Hans Mommsen, *The Rise and Fall of Weimar Democracy* (University of North Carolina Press 2007) 317.

<sup>15</sup>For a recent recycling of this myth, see, for example, JHH Weiler, 'The European Circumstance and the Politics of Meaning: Not on Bread Alone Doth Man Liveth (Deut 8:3; Mat 4:4)' 21 (2020) *German Law Journal* 96–9 ('Hitler and Mussolini were hugely popular at their time and came to power democratically').

<sup>16</sup>Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (Oxford University Press 2019 [1926]).

<sup>17</sup>Hermann Heller, 'Political Democracy and Social Homogeneity' in Bernhard Schlink and Arthur J Jacobson (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000).

<sup>18</sup>He had foreseen this in 1929.

<sup>19</sup>Sinzheimer, quoted by Dukes, 'Authoritarian liberalism'.

<sup>20</sup>Heller, 'Authoritarian Liberalism' 16.

<sup>21</sup>Dukes, 'Authoritarian liberalism'.

<sup>22</sup>On Hilferding's vacillations, see Chris J Thornhill, *Political Theory in Modern Germany: An Introduction* (Blackwell 2000) 110.

The danger that Heller and Sinzheimer saw in the authoritarian liberal state, in other words, lay less in its authoritarianism than in its liberalism.<sup>23</sup> Heller's and Sinzheimer's sentiments reflected a broader position in the (Social Democratic Party) SPD, which had operated a policy of 'toleration' towards Brüning's cabinets, partly due to Heller's own counsel. For many in the SPD this strategy was justified as one of 'lesser evilism', based on a rational fear of National Socialism, which was gradually growing stronger.<sup>24</sup> Far from protecting the Weimar Republic from the 'greater evil', however, the toleration strategy laid precisely the path for the Nazi seizure of power. It fatally weakened the Social Democrats, with catastrophic consequences, severing their link with the working class, as the harsh austerity that the governing regime pushed through with the passive acceptance of the SPD generated high levels of unemployment, which in turn contributed to further weakening of the unions.<sup>25</sup>

The SPD's policy of tolerating authoritarian liberalism added an acute crisis of representation to the economic crises of the early 1930s, the final chapter of a longer story in its own depoliticisation. Despite the initial promise of extending political freedom into the economic realm, 'the economic constitution' advanced by the Weimar left after the birth of the Republic in 1918 had become marginalised.<sup>26</sup> The worker's councils were gradually hollowed out, hampered by a lack of legislative action, subsumed by the unions, lacking in support from left parties (including the Communist Party of Germany, which pursued its own disastrous strategy under direction from Moscow) and constitutionally weakened by the interpretation by the courts of Article 165 of the Constitution (providing for worker co-determination) as merely programmatic and not legally binding, in contrast to Article 153 defending the right to private property.<sup>27</sup>

This highlights a further point about the turn to the courts, which began in early Weimar as liberals and conservatives attempted to frustrate any moves towards socialism. As Dukes notes, via Kahn-Freund, it was not only the executive but the judiciary that had furthered the 'professed interests of the state' when deciding disputes, pursuing the 'maintenance of industrial peace and continued production'. The Weimar courts, Kahn-Freund argued, had acted according to a 'social ideal' identical to that of the fascist courts in Italy, specifically ascribing 'to industry and to the workplace a unitary aim defined in accordance with the state's interest'; and in furtherance of this aim, they had proscribed industrial action.<sup>28</sup> In the hands of the courts, Dukes adds, labour law, originally 'an instrument to assist the rise of the suppressed class', had been transformed into 'an instrument of the state to suppress class contradictions'.<sup>29</sup>

Franz Neumann, closely aligned to Sinzheimer in early Weimar, had also supported the policy of 'toleration' of authoritarian liberalism.<sup>30</sup> But he would later suggest that social democracy and the unions failed because, in the mistaken belief that economic democracy was possible without political democracy, they had restricted the working class to economism and gradualism, and failed to create a 'democratic consciousness'.<sup>31</sup> Instead of extending political freedom, the left surrendered the political state to the bourgeoisie and sought reconciliation and compromise within

<sup>23</sup>Thornhill, *Political Theory* 112.

<sup>24</sup>Ellen Kennedy, 'The Politics of Toleration in Late Weimar: Hermann Heller's Analysis of Fascism and Political Culture' 5 (1984) *History of Political Thought* 109.

<sup>25</sup>Dukes, *The Labour Constitution* 40.

<sup>26</sup>Dukes, *The Labour Constitution* 21–2.

<sup>27</sup>Dukes, *The Labour Constitution* 20 (examining the Decision of the *Reichsgericht* of 11 February 1926. This left the 1920 Work Councils Act as the main legislative frame).

<sup>28</sup>Dukes citing Otto Kahn-Freund, 'Social Ideal of the Reich Labour Court' (this issue).

<sup>29</sup>Dukes, 'Authoritarian liberalism'.

<sup>30</sup>Neumann's position was complex and changing (see Claus Offe, 'The Problem of Social Power in Franz L Neumann's Thought' 10 (2003) *Constellations* 211). According to Thornhill, Neumann's (and Heller's) support of the 'toleration policy' towards Brüning reflected the 'state-fidelity of the Weimar SPD in general' (Thornhill, *Political Theory* 113).

<sup>31</sup>Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (Ivan R Dee 2009) 29.

the economic system.<sup>32</sup> In other words, just when the ruling class was *politicising* its struggle in the early 1930s, social democrats and the unions were reduced to economic reformism, flatly refusing political strikes and political coalitions.<sup>33</sup> They permitted the effective destruction of the ‘constitutional platform for the emancipation of labour’, namely Weimar’s parliamentary democracy, long before the Nazi seizure of power.<sup>34</sup> The descent into National Socialism would then completely destroy the political sphere, mobilising the population for violence and imperialist expansion, even while aspects of legality remained, as Ernst Fraenkel laid out in *The Dual State*. It was, I conclude at the end of chapter 1 of my book, an anti-political mobilisation that ended the Weimar republic.<sup>35</sup> This is significant not least because it permits a sceptical view of the rationale for the softer depoliticisation that occurs in the post-war era.

## 2. The long passive revolution in the postwar era

After WWII, the political weakness and lack of conviction of the trade unions continued, Dukes noting their ambivalence (shared by the SPD) even on the most fundamental power, the right to strike. Rather than act straightforwardly in the interests of workers, they would sacrifice ‘some measure of their autonomy and freedom in collective bargaining in exchange for a leading role in the administration of industry’.<sup>36</sup> Several decades later, looking back at the so-called ‘Golden Age’ or *Trente Glorieuses*, in a lecture given in 1975, Dukes notes that Kahn-Freund ‘found fault with Sinzheimer’s placing of faith in the government and the law; with his Hegelian conception of the state as a unitary entity quite separate from society embodying the common interest’.<sup>37</sup>

The post-war turn to softer forms of authoritarian liberalism and corporate bargaining must be understood in conjunction with various political and social changes: the erosion in political representation of the working class, the move away from socialism led by social democratic parties, the dominance of Christian Democracy domestically and through transnational networks, including the project of European integration, and the later deradicalisation of the Euro-communist parties, particularly the Italian. This gradual resettlement is outlined in Part II of my book, along three dimensions, relating to changes in inter-state, state-society and social relations, covered in chapters 3, 4 and 5 respectively. In chapter 5, I deal with the changes to the material constitution, and it is subtitled ‘ordoliberalism, neoliberalism, and the deradicalization of political opposition’. Within chapter 5, in a section entitled ‘the economic constitution and ordoliberalism’ I address the significance of the ordoliberal tradition for understanding the domestic and supranational edifice gradually constructed in the period between Rome and Maastricht. Ordoliberalism is not, overall, the dominant part of the narrative; it does not, *pace* Joerges, figure on its own as *the* material constitution of the integration project (a point I will return to below).

But ordoliberalism is significant and instructive. The ordoliberal suspicion of democracy and fear of the masses is characteristic of a broader post-war worldview, running right through the mainstream of cold war liberalism, as outlined in a recent book by Kyong-Min Son.<sup>38</sup> Although more commonly associated with Hayek’s neoliberalism, the foundations of this suspicion of democracy, as Son shows, are much deeper and wider. In the European context, democratic

<sup>32</sup>Otto Kirchheimer appeared to be an exception, insisting that capitalism and democracy are ‘formally incompatible’ and arguing for an ‘mass participation’ in political will-formation, with the state ‘genuinely superseded by a worker’s democracy’ (Thornhill, *Political Theory* 119–21).

<sup>33</sup>Neumann, *Behemoth* 17.

<sup>34</sup>Neumann, *Behemoth* 34–7.

<sup>35</sup>This aspect of the book’s argument is not addressed by any of the commentators, so I will explore no further here.

<sup>36</sup>Dukes, ‘Authoritarian liberalism’.

<sup>37</sup>*Ibid.*

<sup>38</sup>Kyong-Min Son, *The Eclipse of the Demos: the Cold War and the Crisis of Democracy Before Neoliberalism* (University Press of Kansas 2020).

suspicion would be buttressed by myths about interwar collapse, such as the link between hyperinflation, the lack of an independent central bank and political collapse, or the link between statutory legal positivism and the turn to Nazism, or the story about democratic excess leading to democratic decay.

The pacification of the working class and of political revolutionary forces is part of this overall picture. But Goldoni is right to note a wrinkle that interrupts the smoothness of the narrative as it unfolds in Part II of my book. After a very insightful interpretative summary of the argument laid out in the book, he argues that the changes in the material constitution occurring in the 1960s and 1970s, although featured in my account, are not sufficiently highlighted in terms of their transformative nature. His objection, although limited, is important, and can be phrased as a question: if the reconstitution of authoritarian liberalism was so successful in the post-war era, why did capital need to effect a strike in the period commonly associated with neoliberalism? He supports this with another, related doubt, that if the post-war pacification of the working class was so successful, how do we explain the intensity of class struggle in the late 1960s?

In one respect, Goldoni's reading invites a further wrinkle in return: if working-class struggle was so strong in the 1960s, why was it so easily defeated? But we can put that to one side, for the moment and return to it later. His overall argument resonates with the more common claim that during the Golden Age, significant inroads into the normal run of capitalist inequality were achieved, resulting in a relative but exceptional equalising of conditions, as Thomas Piketty has documented.<sup>39</sup> Goldoni adds that in response to the turbulence of the 1960s and 1970s the capitalist class then effected a reorganisation of productive capital around finance, modifying productive relations, and in so doing displacing the factory floor from its previously central position, as well as re-joining the normal path of increasing the rate of return on capital relative to economic growth.

As Goldoni notes, examining the broader causal factors for the turn to neoliberal financialisation would require looking more closely at international political economy in general, and the role of the United States (US) in particular. The book only touches upon this, but it does note the material significance of US involvement in post-war reconstruction, particularly of the Marshall plan in the initial stages.<sup>40</sup> And it does discuss 'the material underpinnings' of the transformation from above that occurs in the Nixon era, with the collapse of Bretton Woods, the oil crises, and the dramatic increase in regional and global capital flows in the subsequent decade, as the US moves from a productive economy to one based increasingly on consumption.<sup>41</sup> It also tracks how a 'conservative monetarism' substituted a welfare-orientated fiscalism, not only in the US with the election of Nixon in 1972 but – more significantly for the European context – in the Federal Republic of Germany, in an 'unholy alliance with US conservatism'.<sup>42</sup> It was also in this period that 'national champions' of industry started to operate regional value chains across Europe, and increased the pressure towards productive and financial market integration.

From a constitutional perspective, however, what was remarkable was the way in which the crises of the 1970s would be turned by the ruling class into a 'crisis of ungovernability', when, in an echo of the post-war diagnosis, democracy was again blamed for the perceived economic excesses, famously in the Trilateral Commission's report of 1975.<sup>43</sup> This report would be mocked by a commentator shortly after as representing 'a return to the "prestigious tradition of the partisans of a strong state, of "law and order"' who care rather little about the flourishing of

<sup>39</sup>Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014).

<sup>40</sup>*Authoritarian Liberalism* 82–3.

<sup>41</sup>*Authoritarian Liberalism* 129–30.

<sup>42</sup>See Wilhelm Hankel, 'Monetary Stability and the Welfare State' (June 6 1976) *The German Tribune* 6–7 (reprinted in Peter Katzenstein, *Policy and Politics in West Germany: The Growth of a Semi-sovereign State* (Temple University Press 1987) 115–17, at 116).

<sup>43</sup>Michael J Crozier, Samuel P Huntington and Joji Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York University Press 1975).

democracy'.<sup>44</sup> But its message became politically hegemonic and conditioned the evolution of law and political economy into the 1980s and 1990s.

The language of the 'crisis of governability' projected the message that democratic politics had placed an excessive burden on the redistributive function of government, both through taxation and expenditure policies and through direct intervention in the market.<sup>45</sup> From this neoliberal perspective, the state was being asked to do more than it was able to accomplish, and this was linked to the claim that the Keynesian instruments of economic government, on which most capitalist democracies had to some extent relied since the end of WWII, were no longer working for capital. The McCracken report for the OECD, for example, co-authored by Robert Marjolin in 1977, which contributed to the global discrediting of what was left of Keynesianism, blamed a rise in social aspirations, union demands and public concerns over income distribution for the economic crises of inflation (albeit without the 'benefit of either information or research').<sup>46</sup> Just as in response to the interwar period, a myth emerges linking democracy, hyperinflation (now in the form of 'stagflation') and constitutional failure.

The gradual dominance of this 'top-down' perspective on the economic downturn of the 1970s enabled elites to restore any authority that they had lost through the social conflicts of the 1960s. In some contexts, their system of rule now came with a distinct inflection, based on regulation as much as on formal law. This new 'softer' version of the capitalist order would be identified and outlined at a conference in Vincennes in 1979,<sup>47</sup> and it would coincide and eventually merge with the harsher version associated with Margaret Thatcher in the United Kingdom (UK) and Ronald Reagan in the US. In an important sense, then, the crises affecting Western democracy towards the tail-end of the Golden Age of managed capitalism ultimately buttressed the political and constitutional status quo. I address this era in my book in chapter 5 under the heading of 'an economic constitution writ large and the transition to neoliberalism' and again in chapter 8, when underlining the constitutional significance of this transition for the foundations of the Economic and Monetary Union (EMU) at Maastricht.

The neoliberal transition, symbolised by the award of the Nobel Prize in 1976 to Milton Friedman, would be intellectually spearheaded by a second generation of Chicago-influenced thinkers. Neoliberalism incorporated an added element, a myth of economics occurring outside the control of national governments, or at least many among them. As such, it emphasised that the capacity for control was always already constrained by the conditions of the world market.<sup>48</sup> But, as the book stresses, loss of control accompanies a constitutional change, specifically through the turn to 'external' constraints, a feature that became more conspicuous in the run up to and following the Maastricht Treaty with the project of the EMU, particularly with the extension of free movement to the circulation of capital. Drawing on the work of Stefano Bartolini, I note in the book how the overall effect of various policies adopted into the 1980s in the name of undistorted competition was thus to open European economies 'towards the international market as much as (if not more than) it opened them with respect to each other'.<sup>49</sup>

And yet, the essential idea and impetus behind the neoliberal trends of market liberalisation had *already* been constitutionalised in theory and substantially effected, if not yet perfected, in political practice. Although initially the potential of the Treaty provisions had lain dormant, they

<sup>44</sup>See Michael C Behrent, 'The Origins of the Anti-Liberal Left: The 1979 Vincennes Conference on Neoliberalism' 35 (2017) *French Politics, Culture & Society* 44.

<sup>45</sup>Samuel Brittan, 'The Economic Contradictions of Democracy' 5 (1975) *British Journal of Political Science* 129–59.

<sup>46</sup>Robert Keohane, 'Economics, Inflation, and the Role of the State: Political Implications of the McCracken Report' 31 (1978) *World Politics* 108, 113.

<sup>47</sup>See Behrent, 'The Origins of the Anti-Liberal Left'.

<sup>48</sup>For a powerful counter-narrative, see Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014).

<sup>49</sup>*Authoritarian Liberalism* 130–1.

could quickly be brought to life, given the foundational logic (including with respect to the free movement of capital, foreseen in the Treaty of Rome) that had already been laid and then reinforced by the European Court of Justice (ECJ) in conjunction with domestic legal and political authorities.<sup>50</sup> This process is cemented in the later convergence around neoliberal ideology, as diagnosed by Michel Foucault already in 1979.<sup>51</sup>

The Common Market would then offer a substitute for inadequate domestic modernisation,<sup>52</sup> which would accelerate with the combination of Jacques Delors and Francois Mitterand, after which ‘a linear relationship’ would emerge ‘between the decline of socialist ideas and the increasing centrality given to Europe’.<sup>53</sup> This would be bolstered by the failure of Mitterand’s attempt at ‘Keynesianism in one country’ in the early 1980s and later by the social democratic turn to the ‘third way’ across the continent in the 1990s.<sup>54</sup> By that time, neoliberal financialisation had started to grow exponentially, and along with it, the narrative that ‘there was no alternative’ to structural reform, replacing a discourse of political ‘choice’ with natural necessity. But the turn to external constraints was a political and constitutional one, undertaken by a variety of agents, including judicial as well as political elites. In Gramsci’s terms, it was a ‘passive revolution’, a transformation of the state from above.<sup>55</sup>

### 3. Depoliticisation and its discontents

The thorny issue of the boundary between what is ‘necessary’ and what is ‘political’ raises a set of questions central to Graziella Romeo’s response, which focuses squarely on the phenomenon of depoliticisation. Romeo suggests that the narrative outlined in the book can be synthesised as reflecting a tension between the ‘cosmopolitanism of the economy’ and the ‘national character of politics’. I have some doubts about the particular labels here, specifically that ‘cosmopolitanism’ is the right word for the economy (the more usual label would be ‘globalisation’) or that ‘nationalism’ is the corresponding one for politics. Romeo herself is obliged to add the caveat that these are used without the usual moral connotations. But putting that to one side, I can see that this gestures to a fairly commonplace assumption that posits competing logics between state and the market or some other related dichotomy. This dichotomy is often a placeholder for the claim that the capitalist economy knows no borders, whereas the state is a territorially defined entity. Romeo suggests by ‘national character of politics’ a preference for political action to address a ‘homogeneous and clearly identifiable community of people’.<sup>56</sup> But I would immediately contest this on the basis that domestic politics is always about heterogeneity, not least due to the presence of class conflict.

Romeo’s response, however, is primarily about depoliticisation through the specific method of constitutionalisation. A certain form of depoliticisation, she argues, ‘is intrinsic to any process of constitutionalization understood as a reflex of a political will’.<sup>57</sup> She pursues this argument with a normative inflection, suggesting that the deliberate and explicit withdrawal of items from public debate by placing them beyond the ordinary political process is a legitimate form of

<sup>50</sup>See, for example, Colin Crouch, ‘Breaking Open Black Boxes: The Implications for Sociological Theory of European Integration’ in Anand Menon and Vincent Wright (eds), *From the Nation State to Europe: Essays in Honour of Jack Hayward* (Oxford University Press 2003) 207.

<sup>51</sup>Michel Foucault, *The Birth of Biopolitics – Lectures at the College de France 1978–79* (Palgrave Macmillan 2008).

<sup>52</sup>P Gremion, ‘State, Europe, and Republic’ in Menon and Wright, *From the Nation State to Europe?* 53.

<sup>53</sup>*Ibid* 54.

<sup>54</sup>See Gerassimos Moschonas, ‘Reformism in a “Conservative” System: the European Union and Social Democratic Identity’ in John Callaghan et al (eds) *In Search of Social Democracy: Responses to Crisis and Modernisation* (Manchester University Press 2009).

<sup>55</sup>On the various meanings given to this term, see Peter D Thomas, ‘Gramsci’s Revolutions: Passive and Permanent’ 17 (2020) *Modern Intellectual History* 117–46.

<sup>56</sup>Romeo, ‘What’s wrong with depoliticisation?’, 1 (1) (2022) *European Law Open* 168.

<sup>57</sup>Romeo, ‘What’s wrong with depoliticisation?’

constitutionalisation, to be contrasted with a more problematic version, when items are implicitly withdrawn because there is said to be no political alternative ('there is no alternative' or 'TINA'). In the first version, there is an 'act of political will of the people', which has 'settled conflicts over certain themes once and for all', whereas the second version purports to settle conflict surreptitiously or by pleading necessity.

As a normative matter, I can see some intuitive sense in the position Romeo sketches here. There is clearly a difference between agreeing to set some things aside from ordinary politics and having them set aside without discussion, by fiat or by force.<sup>58</sup> But even if we grant the validity of this schema for the sake of argument, we may entertain legitimate doubts about the so-called 'counter-majoritarian dilemma' raised by the inter-generational problem of implying consent to those who have not explicitly agreed, which is the staple diet of much constitutional debate, particular in the US literature.<sup>59</sup>

In the mode of enquiry pursued in my book, this dichotomy is too formal, however, and fails to capture the grey area between coercion and consent. This is made clear by Romeo's own suggested antidote to depoliticisation through constitutionalisation, namely that, since it can be easily reversed, the way back from such depoliticisation is simply 'a new act of political will' (so it is not in fact, 'once and for all'). It is also suggested by her interesting examination, using the Portuguese example, of how political parties and parliaments themselves may effect an informal depoliticisation, which unfortunately she does not pursue in the context of 'third way' social democracy in the 1990s, leaving it to sociologists and political scientists, when I think this is essential to understanding material constitutional change.<sup>60</sup>

The possibility of repoliticisation through a new act of popular will may be formally correct but is undermined if the notion of the constituent power has been eroded as a practical matter. As Romeo notes, depoliticisation is 'a complex phenomenon', but it does not result only 'from making choices that reflect the political deliberations of a ruling class'; it also may result from deradicalisation of political parties, and even from forms of cultural hegemony, dominant constitutional myths and political quietism. It may reflect, as I say explicitly in chapter 10, drawing on Martin Loughlin's work, the 'constitutional imagination' and the limits to what is deemed politically possible.<sup>61</sup>

The case of EU 'constitutionalisation' reveals the problem with any easy distinction between explicit depoliticisation and surreptitious withdrawal through pleading necessity. There is a sense in which EU membership is voluntary, ratification of the treaties is consensual, Member States explicitly agree to put things beyond the play of ordinary contestation. But of course the reality is much messier, with the ECJ effectively constitutionalising the treaties, on some accounts, over-constitutionalising them, and doing so largely by stealth, particularly in the early stages, when it was 'tucked away in the fairyland Duchy of Luxembourg'.<sup>62</sup> There is no suggestion, I take it, that this was forced by a genuine state of 'necessity'. But neither was there any explicit agreement to their judicial doctrines on the part of the Member States, even though their implicit consent may be construed.

<sup>58</sup>Romeo does not address the possibility of the eradication of the political through violence, which is the way that I characterise the transition into fascism in Nazi Germany in chapter 1.

<sup>59</sup>See, for example, Stephen Holmes, *Passion and Constraint: On the Theory of Liberal Democracy* (Chicago University Press 1997).

<sup>60</sup>See Moschonas, 'Reformism in a "Conservative" System'; Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013).

<sup>61</sup>Martin Loughlin, 'The Constitutional Imagination' 78 (1) (2015) *Modern Law Review* 1–25.

<sup>62</sup>On the doubtful normativity of the EU constitutionalisation project, see, for example, Marco Dani and Agustin Menendez, 'European Constitutional Imagination: A Whig Interpretation of the Process of European Integration' IMAGINE Paper No 17 Conference EU Constitutional Imagination: Between Ideology and Utopia.

Romeo acknowledges all this, and notes that a:

constitutionally problematic depoliticization takes place when it cannot be traced to a clear act of political will, but to a contingent combination of social and political forces, acting without mobilizing the political subject, that drive changes by reducing the space for political – and thus discretionary – deliberation.<sup>63</sup>

She also notes, somewhat cryptically, that there is ‘*something* within the European constitutional culture that may have, albeit unintentionally, provided some support to such problematic form of depoliticization’.<sup>64</sup> I am not sure what this *something* is, or that this is properly described as unintentional, but in any case it exposes a grey area between consent and coercion.

Romeo continues by suggesting that this form of European depoliticisation, which reflects a ‘universal, apolitical and to some extent ahistorical, agreement’, is what I refer to in the book as the ‘new constitutionalism’.<sup>65</sup> It ‘entrusts non-political institutions with the task of ascertaining the existence . . . of a coherent set of principles and rights’ to constrain the exercise of public powers. This understanding of constitutionalism rejects ‘any sense in which a constitution’s authority must be tied to the exercise of a popular constituent power’.<sup>66</sup>

This, again, is instructive in its suggestion of a ‘third alternative’, lying between consent and coercion; but in fact the disconnection of constitutional authority from constituent power is a story that far predates what I call the ‘new constitutionalism’. This disconnect goes back to post-war reconstruction, particularly in the German case, and becomes more generally predominant, reinforced by German reunification and then enlargement of the European union in the 1990s.<sup>67</sup> The story of the ECJ’s own ‘constitutionalisation’ of the treaties follows a similar pattern, upscaled from the domestic setting and in some sense radicalised due to its lack of embedding in a constitutional culture and the near impossibility of political reaction due to the constraints on treaty change (which requires unanimity). This has substantive effects that have been well documented by Fritz Sharpf, among others.<sup>68</sup>

But in the final part of the book, I also track how the European Central Bank (ECB) takes up a constitutive and lead role in pushing the project of integration forward through the euro crisis, without the normative claims of European legality, but with the coercive power of money. The ECJ, as many have observed, effectively acts as a rubber-stamper in legalising the expanding powers of the ECB, in cases such as *OMT* and *Weiss*, but in a way that brings it into open conflict with the German Constitutional Court.<sup>69</sup> In other words, as depoliticisation is pursued through the euro crisis, in setting aside parliamentary debate, other institutions, both public and private, are increasingly empowered. This may lead, of course, to a repoliticisation of the judiciary or of the Bank, causing renewed crises of legitimacy in light of their lack of accountability. In that sense, the term ‘depoliticisation’ has to be treated carefully. As the British constitutional scholar, JAG Griffith, put it many decades ago, ‘to require a supreme court to make certain kinds of political decisions does not make those decisions any less political’.<sup>70</sup> Depoliticisation is a heuristic for a process of *de-democratisation* (as I note in the book’s introduction) and is of course a highly political phenomenon.

<sup>63</sup>Romeo, ‘What’s wrong with depoliticisation?’

<sup>64</sup>Romeo, ‘What’s wrong with depoliticisation?’

<sup>65</sup>Romeo, ‘What’s wrong with depoliticisation?’

<sup>66</sup>Romeo, ‘What’s wrong with depoliticisation?’

<sup>67</sup>*Authoritarian Liberalism* 158–62.

<sup>68</sup>Fritz Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a Social Market Economy’ 8 (2010) *Socio-Economic Review* 211.

<sup>69</sup>Dani et al, ‘It’s the Political Economy! A Moment of Truth for the Eurozone’ 19 (2021) *International Journal of Constitutional Law* 309–27.

<sup>70</sup>JAG Griffith, ‘The Political Constitution’ 42 (1979) *Modern Law Review* 1–21.

What I call the ‘new constitutionalism’ in fact reflects something related but distinct, in some ways more peculiar than a straightforward depoliticisation through disconnect between constituted and constituent power. In chapter 10 of the book I call this a movement from Habermasian federalism to Schmittian federation and this transition requires a brief reprisal here.<sup>71</sup> The Habermasianism of the 1990s (a clear departure from his early work) represented the culmination of the depoliticisation thesis, with the naturalisation of the process of juridification and law offered up as the civilising force of European integration. This coincides in the Maastricht era with ‘post-sovereignty’ in theoretical enquiry, reflecting but also distorting a number of material developments – the ‘end of history’, the retreat of critical theory and the crisis of Marxism, the prioritisation of law over politics, and the dominance of discourse theory. Jürgen Habermas was a key intellectual figure in driving this ideological mix at the very moment when anti-systemic political and social forces started to return. To use Habermas’s own earlier terminology, there appeared to be a growing mismatch between ‘system’ and ‘lifeworld’; ironically, one which his own theoretical and political moves only aggravated, his ‘post-national constellation’ offering up the EU as a stepping stone to the federal constitution of a world society increasingly removed from any *demos*, just as the actual *demoi* appeared to be politically shaken from their post-war passivity. European integration, specifically in terms of the process of ‘constitutionalisation’, now represented ‘an important stage’, not any more to European unification, but along the route to a ‘politically constituted world society’.<sup>72</sup>

However, in the euro crisis phase, what in fact emerges is not only a growing disconnect, but – with constitutional and material conflicts reaching a head through the clashes in *OMT* and *Weiss*, and then the ‘rule of law crisis’ – a return to the Weimar question of ‘the guardian of the constitution’. The way the new constitutionalists approach the conflicts in this conjuncture are more reminiscent of a Schmittian federation than Habermasian federalism, in the sense that they no longer believe in constitutional pluralism but advance a monistic solution, ‘once and for all’.<sup>73</sup> Their turn to the ECJ as final arbiter suggests less a desire to open the path to constitutional discourse beyond the state than to signal its closure, with the possibility of exit from the EU offered as a central justification for the supremacy of EU law. Their call is not to democratise the EU but to repoliticise its terms of membership with a decisionistic twist: friend or enemy?<sup>74</sup>

The decisionism demanded of the ECJ is given renewed impetus by the ‘rule of law crisis’ or crisis of ‘constitutional degradation’, which in turn further reinforces the vocation of the new European constitutionalists.<sup>75</sup> Authoritarian liberalism could now turn to the task of rhetorically defending politically liberal values against what would be labelled ‘authoritarian populism’. The new constitutionalists even accused constitutional pluralists of complicity in the populist turn, pointing out that authoritarian populists were now invoking constitutional pluralism in an attempt to justify departure from EU norms.<sup>76</sup> What they failed to note about their anti-pluralism, ironically, is that anti-pluralism is often taken to be a (if not the) defining feature of populism itself.<sup>77</sup>

<sup>71</sup>The ‘new constitutionalism’ refers to the work of scholars such as Kelemen, Pech and Fabbrini. See *Authoritarian Liberalism* 242–3 for references.

<sup>72</sup>Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012) 2.

<sup>73</sup>On the theory of the federation, see Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021).

<sup>74</sup>See, for example, R Daniel Kelemen, ‘On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone’ 23 (2016) *Maastricht Journal of European and Comparative Law* 136, and R Daniel Kelemen and Laurent Pech, ‘The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the name of Constitutional Identity in Hungary and Poland’ 21 (2019) *Cambridge Yearbook of European Legal Studies* 59–74.

<sup>75</sup>For a survey of the literature, see Martin Loughlin, ‘The Contemporary Crisis of Constitutional Democracy’ 39 (2019) *Oxford Journal of Legal Studies* 1.

<sup>76</sup>Kelemen and Pech, ‘The Uses and Abuses of Constitutional Pluralism’.

<sup>77</sup>See Jan-Werner Müller, *What is Populism?* (University of Pennsylvania Press 2016).

#### 4. Countermovements

The discussion around authoritarian populism raises a further issue, which is the existence and nature of the opposition to authoritarian liberalism. At the end of her intervention, Romeo raises the spectre of the populist phenomenon, as a kind of unmediated attempt to realise the people's will 'without the need for further political assessment or appreciation', and contrasts it with the 'dialogical approaches' that resemble an 'exercise of public reason' but are unlinked from democratic circuits.<sup>78</sup> She concludes that neither of these options will arrest the progressive 'depoliticization of economic policies'. I agree with this conclusion, and would put it in even stronger terms – authoritarian populism and authoritarian liberalism are mutually dependent rather than fundamentally opposed. Which brings me squarely to the issue of countermovements and possible alternatives to authoritarian liberalism.

It is worth pointing out that authoritarian liberalism itself begins as a *bourgeoise countermovement*, moving against the threat, in an interwar era of class consciousness and mass parties representing the working class, that democracy might turn towards socialism. It is in fear of parliamentary (as well as extra-parliamentary) socialism that conservatives and liberals first turned to the courts, and then to the executive, and finally to the fascist movements themselves, in an attempt to shore up the liberal *Rechtsstaat* and the institutions of private property and free contract protected by it. Karl Polanyi argues that this phenomenon of authoritarian liberalism spread far and wide, weakening the possibility for democracy to respond to social inequality, and was the crucial determining factor in the advent of fascism.<sup>79</sup>

In the post-war era, economic liberalism is reconstructed in a different fashion, less reliant on harsh repressive measures and more on a combination of political passivity, technocratic authority, waning class representation and slow parliamentary decline, facilitated by relatively high levels of economic growth and liberal institution-building, including the European Economic Community (EEC). The geo-economic impact of the cold war was significant here, not just in terms of US involvement in the Marshall plan, noted above, but due to the presence of the Soviet Union, with its moderating effect on Western capital and chilling impact on Western Marxism.

German Marxist theoretician Wolfgang Abendroth documents in detail the post-war weakening and fragmentation of the working class, and the parties meant to represent them, right across the continent, albeit in a variegated manner. In the mid-1950s, the German SPD became 'an instrument for consolidating the influence of the ruling class on the workers' and in most European countries, by the 1960s, social democracy had 'given up the notion of representing the class interests of workers' and 'abandoned the idea that it must replace capitalist private property of the means of production with social ownership'.<sup>80</sup> This would be reinforced through the European project. Whereas the integration of Europe enabled increasing connections between large transnational corporations, the interests and organisation of workers could not be so easily upscaled.

To be sure, as Goldoni rightly points out in his response, there was also significant antagonism against the postwar settlement, and Goldoni highlights the intensity of class struggle and strikes led by labour in the 1960s and 1970s, demonstrating the continuing political subjectivity and initiative of worker's movements, particularly in Italy. Although these are noted in the book, Goldoni suggests that they are underplayed, and that this has, as a consequence, the underplaying of the neoliberal counter-offensive as well as a more general neglect of the contradictions between authoritarian liberalism and autonomous social and political movements.

Goldoni's response may require a qualification of the narrative in particular contexts, one that a more close-grained analysis of the mid-period between Rome and Maastricht would track. As

<sup>78</sup>In a recent paper, Alexander Somek and I track the latter as part of a more general move away from popular sovereignty and towards a dismissal of the unruly masses, see Alexander Somek and Michael A Wilkinson, 'Unpopular Sovereignty?' 83 (2020) *Modern Law Review* 955–78.

<sup>79</sup>As outlined in chapter 2 of *Authoritarian Liberalism*.

<sup>80</sup>Wolfgang Abendroth, *Short History of the European Working Class* (Verso 1972) 151.

Goldoni puts it, ‘the organisation of these struggles shows that, at least for a certain amount of time, authoritarian liberalism’s grip on society was not so strong to the point of quashing workers’ initiatives’.<sup>81</sup> There may be an interesting story to tell here about the specific role played in the Italian context by *operaismo*, and autonomous Marxism, as suggested by Goldoni’s reference to the work of Mario Tronti, although I suspect the political influence of this movement is limited beyond Italy and even within Italy quickly faded.<sup>82</sup>

My response to this is, in part, to underline my claim, made explicit in the book’s conclusion, that authoritarian liberalism’s grip on society is and ultimately remains weak rather than strong. But there are of course ebbs and flows of opposition, and the events of the late 1960s suggest a significant social inflection against the status quo. These are addressed relatively briefly in the book, and I am grateful to Goldoni for adding certain detail, particularly the legislative changes that, in his words, functioned to ‘resist commodification’, including those that were the result of feminist movements and that took place in the workplace, the family and the school.

In the book, I argue that, as an overall assessment, the changes wrought as a result of the turbulence ‘from below’ of the 1960s and 1970s were not constitutionally substantial, and I think that this point still stands, despite some possible qualifications in respect of the particular constitutional setting he outlines.<sup>83</sup> Indeed, in the book I argued that, in important ways, the upshot of the struggles of the late 1960s reinforced the changes imposed from above, which are commonly captured by the notion of a ‘neoliberal revolution’ and Goldoni’s Italian example does little to put this argument into doubt. In fact, this can be generalised more widely.

The reference above to Foucault helps to illustrate this broader point. Even as Foucault brilliantly diagnosed both neoliberal and ordoliberal post-war trends and the emergence of new forms of liberal governmentality in his lectures at the end of the 1970s these trends would be effectively reinforced by his own ambivalence towards them.<sup>84</sup> The crisis of political authority, diagnosed in a spirit of concern in the 1950s by earlier thinkers such as Neumann, Arendt and Kirchheimer, would now be neutrally observed or even celebrated by the new figures of critical theory and postmodern reaction. The spirit of cultural libertarianism left over from 1968 was, it transpired, entirely compatible with the new economic liberalism reasserting itself in the wake of the 1970s’ economic crises. As I note in the book, as the political importance of the ‘self’ acquires a mass following, and Freud replaces Marx ‘as an unlikely ideological sponsor of the politics of the younger generation’, political authority is abandoned.<sup>85</sup> The French intellectual turn away from Marxism and materialism in the 1970s under the influence of the *nouveaux philosophes*, presenting themselves as an anti-totalitarian political front against Marxism of all varieties, would reinforce the new liberalism.<sup>86</sup> It would politically combine a ‘second left’ associated with socialist politician Michel Rocard and the conservative technocrats Raymond Barre and Valéry Giscard D’Estaing.

<sup>81</sup>Goldoni, ‘From trauma to apathy: on the hegemonic force of European authoritarian liberalism’, 1 (1) (2022) *European Law Open* 158.

<sup>82</sup>As suggested by Tronti himself, see ‘Our Operaismo’ (2012) *New Left Review*. It seems that Tronti turned in a more political direction shortly after, see Davide Lassere, ‘Tronti’ in *Routledge Handbook of Marxism and Post-Marxism* (Routledge 2021). The work of Antonio Negri would be more widely influential at the beginning of the new millennium, and his material-historical approach on the constituent power was instructive, but appears to have been later abandoned in favour of a global ‘multitude’, as I address in chapter 7.

<sup>83</sup>Abendroth notes that although the strike wave ‘brought in its train a certain radicalisation at the base of the trade unions it did not produce a crisis in the bourgeoisie political regime or lead to any permanent changes in the political organisation of the working class’ (Abendroth, *Short History* at 158, in the postscript added in 1971).

<sup>84</sup>See Serge Audier, ‘Neoliberalism Through Foucault’s Eyes’ 54 (2015) *History and Theory* 404.

<sup>85</sup>Donald Sassoon, *One Hundred Years of Socialism: The West European Left in the Twentieth Century* (Bloomsbury Publishing 1996) 397.

<sup>86</sup>For a broad survey of the antecedents to this turn, as well as its legacy, see Göran Therborn, ‘After Dialectics: Radical Social Theory in a Post-Communist World’ 43 (2007) *New Left Review* 63.

European integration played an important role in this consolidation of economic liberalism, not only offering the prospect of a future utopia but reinforcing the same consumer society that ‘May 1968’ had called into question. It was in this period that an ideological Europeanism began to emerge among the middle classes, a point missed by Nicos Poulantzas in his focus on the continuing significance of the various domestic capitalist classes in conjunction with the impact of US capital, but captured brilliantly by British Marxist historian EP Thompson, just as the UK was ‘going into Europe’.<sup>87</sup>

The Italian Communist Party (PCI), from an initial position of hostility to the EEC, and more generally to a Euro-Atlantic capitalist bloc, would revise its position towards European integration through the 1960s, as it adopted a more favourable stance towards economic expansion and modernisation. This revision would eventually be swift and sharp, by the 1970s the PCI was rejecting anything other than Europeanism and the unity of the European left as a doomed attempt to return to a defunct ‘monolithism’.<sup>88</sup> To hold out instead for a mass movement at the European level would become an article of faith: the road to socialism would be through Europe, or not at all.<sup>89</sup> By the end of the 1970s the PCI had come to accept wage restraint, modernisation and austerity.

Goldoni contrasts the treatment of bottom-up antagonism to the post-war settlement with the right-wing and nationalist countermovements that occur after Maastricht. These, he says, emerge in opposition to the financialisation of the economy, but, rather than ‘bashed’ by the state, like the earlier leftist uprisings, are integrated into a reorganisation of the material constitution. While I am not entirely sure what he has in mind here, it is certainly the case that the post-Maastricht movements that might broadly be called euro-sceptic – including the formal constitutional challenges emanating from Karlsruhe, the challenge posed by parties such as the *Front Nationale*, and the challenge of people voting the wrong way in various domestic referenda – appeared relatively inconsequential in the period until the Lisbon Treaty. In Part III of the book I analyse the period in between Maastricht and Lisbon as raising a series of conundrums, ‘movements and countermovements’ and the title of each chapter is phrased as a question, suggesting an unsettling of the status quo but in an unresolved manner: the return of the German question, the rebirth of popular sovereignty and emerging social discontent with neoliberalism. Discontinuities abound. The constitutional background was set for the later euro crisis conflagration.

## 5. ‘Germanisation’

If it was clear enough in the 1930s that laissez-faire had failed and could not be resurrected, what was remarkable was how quickly economic liberals of various stripes would regroup in order to reconstruct an ‘economic liberalism 2.0’. Several strands of this attempted renewal are identified in the book: Carl Schmitt’s 1933 address to the *Langnamverein*, the interwar emergence of corporatism, Freiburg ordoliberalism and the neoliberalism associated with the Walter Lippman colloquium and Mont Pelerin society (prominently featuring Austrian school liberals such as von Mises and von Hayek). These disparate threads shared significant affinities in their suspicion of democracy and socialism as well as a vehement anti-communism, and I use ‘authoritarian liberalism’ as an umbrella term to capture these various movements. There is no suggestion in the

<sup>87</sup>EP Thompson, ‘Going into Europe’ 27 April 1975, Sunday Times.

<sup>88</sup>Donald Sassoon, ‘The Italian Communist Party’s European Strategy’ (1976) 47 *The Political Quarterly* 253.

<sup>89</sup>See also the writings of Belgian Marxist and Trotskyist activist, Ernest Mandel, *Europe versus America? Contradictions of Imperialism* (New Left Books 1970). Cf Nicos Poulantzas, ‘Internationalisation of Capitalist Relations and the Nation-State’ 3 (1974) *Economy and Society* 145, reprinted in Nicos Poulantzas, *The Poulantzas Reader: Marxism, Law and the State* (James Martin ed) (Verso 2008) 220 (accusing Mandel of going along with ‘bourgeois propaganda about the “united Europe”’, *ibid* 247).

book that Heller's essay itself referred to ordoliberalism.<sup>90</sup> And although an understanding of ordoliberalism is highly suggestive in terms of explaining the post-war trajectory, the role of Christian Democracy was more politically salient. What was remarkable was the wider migration of ordoliberal ideas, beyond Germany, in other domestic contexts such as France and Italy, and also through the micro and macro-economic constitutions of the EU.<sup>91</sup>

Joerges says that his differences with my argument are directed more at the later qualification of the EU's crisis response as ordoliberal, and there is something to this objection, given the highly discretionary interferences in the crisis-phase and the rubber-stamping of measures of dubious constitutionality. On one account, the rule-book wasn't just bent, it was ripped up. As I say in the book, there was and is no pristine application of ordoliberalism; as there rarely is of any set of abstract ideas. What was striking was the way that ordoliberalism became a discursive weapon in the EU's armoury in its negotiations with Greece and other debtor countries, after having been for so long a neglected tradition.<sup>92</sup> But it is worth repeating that ordoliberalism is but one branch in the tree of authoritarian liberalism; nothing more, nothing less. And Joerges is correct to note the ideological convergence in the Maastricht era had as much to do with neoliberal monetarism and French and Italian elite orchestration as with ordoliberalism and the German ruling class, just as chapter 8 of the book argues.<sup>93</sup>

And yet, despite, or perhaps because of this ideological convergence, cemented by the turn of social democracy to the centrist 'third way' of Tony Blair, Gerhard Schroder and Lionel Jospin, and in the academy by Habermas's abandonment of critical theory, the constitutional trajectory at the turn of the millennium is in significant respects *less clear* than in the period from Rome to Maastricht. This is so for a number of reasons. The end of the cold war changes the geopolitical configuration of the European space: German reunification shifts the balance of power with France, and the collapse of the USSR opens up enlargement of Europe to the east and with it the shock of neoliberal transition and potential for massive foreign direct investment. Domestically, anti-systemic politics begins to mark its return, specifically with the stirrings represented by the *petit oui* in France (the referendum on the Maastricht Treaty winning by a whisker of 51 per cent) and the return of sovereignty discourse associated with the rulings of the German Constitutional Court. Maastricht signposted less 'the end of history', than 'the end of the end of history'. This is a view that is perhaps not widely shared, but is argued at length in Part III of the book.

Goldoni (along with the other commentators) skips over the Maastricht phase, but then notes, following the post-2008 social movements, including the rise to power of an anti-austerity government led by Syriza in 2015, that a 'memorandum which formalised harsher conditions of austerity was ultimately imposed over Greece'.<sup>94</sup> On this occasion, he says, 'the forces of authoritarian liberalism had a stronger hold over social and political movements'. But the term 'imposed' here needs qualification. In the book I argue that in the final analysis it was Varoufakis not Schäuble who acted as the stabiliser. The absence of a credible 'plan B' in Greece and Syriza's unwillingness

<sup>90</sup>This conflation appears only to have been made by Christian Joerges, following Philip Manow, as he notes himself (this issue).

<sup>91</sup>See, for example, Arnaud Lechevalier, 'Why and How has German Ordoliberalism Become a French Issue? Some Aspects about Ordoliberal Thoughts we can Learn from the French Reception' in J Hien and C Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017); Francois Denord, 'French Neoliberalism and Its Divisions: From the Colloque Walter Lippmann to the Fifth Republic' in Mirowski P and Plehwe D (eds), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009); Kenneth Dyson and Kevin Featherstone, 'Italy and EMU as a "Vinculo Esterno": Empowering the Technocrats, Transforming the State' 1 (1996) *South European Society and Politics* 272; Thomas Biebricher, *The Political Theory of Neoliberalism* (Stanford University Press 2019). These are all extensively cited in the book.

<sup>92</sup>See, for example, 'The Donald Tusk interview' ('Greece: Donald Tusk warns of extremist political contagion') London 16 July 2015, Financial Times <<https://www.ft.com/content/ff50e5a9-7b15-3998-a9f1-c11359dc01b8>> accessed 31/01/22.

<sup>93</sup>*Authoritarian Liberalism* 179–83.

<sup>94</sup>Goldoni, 'From trauma to apathy'.

to harness the social mobilisation that followed the global financial crisis, was partly due to the pressures from above, but Syriza's capitulation to the creditors was also due to the depth of attachment to the ideology of Europeanism and the fear of alternatives.<sup>95</sup>

To what extent, therefore, is authoritarian liberalism a German imposition? This question is raised directly by Christian Joerges in his response. Joerges, like Goldoni, skips over the political economy of the euro crisis period, which is central to what I call the new *nomos* of austerity. He suggests looking at the work on the 'varieties of capitalism' literature, which he says I did not take into account. But in fact I do mention this literature,<sup>96</sup> only to argue that I find more persuasive the work by Scharpf, Streeck, Bieler, Baccaro, Lapavistas and others, which stresses different factors: the flattening of the varieties under pressures of neoliberalism, the divergence of growth models between export-led and demand-led economies in the run up to the crisis period and thence further polarised, the increasing centrality of core-periphery dynamics and the Atlanticisation of continental capitalism.<sup>97</sup> The export strategy of a German-led bloc of countries was certainly significant in the various resulting disequilibria, and this is related to a term that Joerges employs in order to reject, namely 'Germanisation'. But this is not a term that appears anywhere in my book. When I discuss Ulrich Beck's account, entitled 'a German Europe', it is only to reject it as insufficiently nuanced.<sup>98</sup>

Instead of 'Germanisation', I offer the notion of 'semi-hegemony', drawing in part on the work of Hans Kundnani, to capture the complexity of the situation: post reunification, Germany is too powerful for a balance of power in Europe, particular in view of French decline, but not powerful enough to become the benign hegemon.<sup>99</sup> I also stress that to be fully grasped in terms of its effects as well as its *limits*, German power must be understood in relation to domestic and EU constitutional constraints. It is through these constitutional frameworks that German power is exercised and mediated. Membership of the EU more broadly is the framework through which the ruling class of other Member States also exercise their own power, which is why the political constitution, including the constitutional imaginary of the Member States, remains a crucial and perhaps even determinative issue in the final analysis.

### Coda

The cover of the book features the 1920 print by Paul Klee, 'Angelus Novus', which was acquired by Walter Benjamin in 1921 and famously inspired his *Theses on the Concept of History*. Benjamin's theses were completed in 1940, his last major work before fleeing Paris and suffering a tragic fate on the French-Spanish border. Thesis XI begins, '[t]he conformism which has been part and parcel of Social Democracy from the beginning attaches not only to its political tactics but to its economic views as well'.<sup>100</sup> Nothing has corrupted the working class, Benjamin continues, 'so much as the notion that it was moving with the current'.<sup>101</sup> Since the *Gotha Program*, social democracy, in Benjamin's view, has confused technological advances with political achievements, adopting a conformist view of historical progress, a vulgar Marxist conception that 'recognises only the progress of the mastery of nature, not the retrogression of society'.<sup>102</sup> In his wonderful reading of this text, Brazilian

<sup>95</sup> *Authoritarian Liberalism* 287.

<sup>96</sup> *Authoritarian Liberalism* 156.

<sup>97</sup> *Authoritarian Liberalism* 156–7, 190–1, 200, 252.

<sup>98</sup> *Authoritarian Liberalism* 228.

<sup>99</sup> Hans Kundnani, *The Paradox of German Power* (C Hurst & Co 2014) and drawing on the earlier scholarship of Ludwig Dehio.

<sup>100</sup> Walter Benjamin, 'Theses on the Philosophy of History' in Hannah Arendt (ed) *Illuminations* (The Bodley Head 2015) 250. The theses were completed in Spring 1940 and first published in *Neue Rundschau* in 1950.

<sup>101</sup> *Ibid* 250.

<sup>102</sup> *Ibid* 251.

Marxist Michael Löwy presents Benjamin's attack on the ideology of progress not in the name of backward-looking conservatism, but, as a romantic revolutionary *and* historical materialist, in the name of arresting impending catastrophe.<sup>103</sup>

Through the last decade, 'Europe' increasingly seemed to offer an 'empty signifier' into which the political left would channel its utopian energies, holding out for the emergence of a pan-European social democracy to come, if only given the time to mature.<sup>104</sup> As commitment to European integration became political and culturally entrenched across the political spectrum, to the extent that there remained little, if any, alternative to EU membership in the constitutional imagination, a functionalist 'progressivism' came to dominate, in continuation of much earlier trends. This was sometimes expressed by functionalist metaphor, that the project of integration can move in only one direction, and must continue forward if not to collapse, as a bicycle falls over once the cyclist stops pedalling. In a play that resembles Walter Benjamin's automaton, seen and unseen forces will move the pieces into a winning position, and in a process that is presented as 'irreversible'. Political freedom disappears.

We can return in conclusion to where the story begins, with Hermann Heller. As Heller put it in 'Authoritarian Liberalism', just before the Nazi seizure of power, social democrats had made the cardinal error of thinking that means and ends could be severed, detaching their normative values of social equality from the actual experience of political freedom. Substituting formal agency for real autonomy, they had neglected the necessity of acting *politically*.<sup>105</sup> This informs the message that Franz Neumann conveys with such urgency in his final works in the 1950s. It is one that continues to resonate.

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<sup>103</sup>Michael Löwy, *Fire Alarm: Reading Walter Benjamin's 'On the Concept of History'* (Verso 2005).

<sup>104</sup>Perry Anderson, 'Situationism a l'envers' (2019) *New Left Review* (a review of Adam Tooze's work).

<sup>105</sup>Heller, 'Authoritarian Liberalism'.