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Between Rules and Discretion: Thoughts on Ordo-Liberalism

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Abstract

The paper examines how efforts to design a policy regime governed by rules may lead on the contrary to recurrent and far-reaching political discretion. Where re-orientations of policy are formally excluded, as in the ordo-liberal perspective, unforeseen situations will typically provoke last-minute unconventional actions, whether in the form of temporary exceptions to the existing framework or moves to constitute a new one. In order to preserve the ideal of a rule-governed order, such actions must be cast as extraordinary measures for exceptional times – as the politics of emergency, that is. Whereas modern political thought of various stripes tends to defend constitutional rules as the condition of policy discretion, here one sees the converse scenario of constitutional discretion pursued in the name of policy rules. These themes are elaborated in connection with the ongoing crisis of the European Union.

Keywords: Ordo-liberalism, Germany, Euro Crisis, European Union

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Between Rules and Discretion: Thoughts on Ordo-liberalism

Introduction

The politics of the Euro crisis, and Germany's role within it, are commonly described in two diverging ways: on the one hand, as displaying new heights of executive discretion, on the other, as exhibiting an extreme attachment to the imposition of constraining rules.¹ How are we to account for these apparently contrasting depictions?

Currently, the most popular interpretation seems to be this: that the prominence of rules both in discourse and practice derives from the influence of ordo-liberal thought, while the prominence of discretion results from the incomplete application of these ideas.² Ordo-liberalism is the structuring ideal, but remains only partially realised. There is at least one further possibility, of course, which is that the combination of discretion and rules is itself characteristic of ordo-liberalism. On this reading, both rules and extraordinary

¹ See, on the one hand, Fritz Scharpf, "Political Legitimacy in a Non-optimal Currency Area", in: Sara Hobolt and Olaf Cramme (eds), *Democratic Politics in a European Union under Stress*, (Oxford: Oxford University Press, 2014), and, on the other, Kalypso Nicolaidis and Max Watson, "Sharing the Eurocrats' Dream: A Democratic Approach to EMU Governance in the Post-crisis Era", in: Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge: Cambridge University Press, 2016), pp. 50-77, especially p. 52: "rules now reign supreme".

² See, for example, Lars P. Feld, Ekkehard A. Köhler and Daniel Nientiedt, "Ordoliberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe", CESIFO WORKING PAPER NO. 5368, 2015.

measures have their place in the ordo-liberal outlook, and the presence of both in the contemporary EU is consistent with the structuring influence of ordo-liberalism. This is the possibility that I would like to explore here.

The idea of an economic constitution

If there is a core idea in the ordo-liberal tradition, present in one form or another throughout its various incarnations, it is the commitment to a stable system of rules for socio-economic activity. *Ordnungspolitik* evokes an ideal of political order in which agents of the state design an enduring framework to underpin the functioning of market society.³ As is well known, ordo-liberals have typically referred to this framework as an “economic constitution” (*Wirtschaftsverfassung*), drawing on ideas already in circulation by the early 1900s and fashioning them into the cornerstone of their construction.⁴

Adjacent to this concept in the ordo-liberal tradition are a range of more abstract ideas informing it, as well as a set of more specific prescriptions. Amongst the former is the assumption that the economy forms an integrated system, that the market and the state can exist in a complementary relation,⁵ and various underlying ethical ideas including the view that fairness requires the alignment of risk and responsibility, an emphasis on individual freedom,

³ For historical and analytical overviews, see David J. Gerber, “Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the ‘New’ Europe”, (1994) 42 *The American Journal of Comparative Law*, pp. 25-84; Viktor J. Vanberg, “The Freiburg School: Walter Eucken and Ordoliberalism”, Paper 04/11, 2004 (Freiburg: Walter Eucken Institut); Werner Bonefeld, “Freedom and the Strong State: On German Ordoliberalism”, (2012) 17 *New Political Economy*, pp. 633-56; Thomas Biebricher, “Europe and the Political Philosophy of Neoliberalism”, (2013) 12 *Contemporary Political Theory*, pp. 338-75.

⁴ On the history of the concept before its adoption by Franz Böhm, see Knut Wolfgang Nörr, “‘Economic Constitution’: On the Roots of a Legal Concept”, (1994) 11 *Journal of Law and Religion*, pp. 343-54.

⁵ That the market-economic and the constitutional are, as one might say, “co-original”; let us set aside the question of whether this interdependence is conceptual or empirical.

and a corresponding current of scepticism towards democracy. Amongst the more concrete prescriptions are a range of policy commitments, such as the endorsement of private ownership, opposition to monopoly power, and the central importance ascribed to price stability, as well as evolving views on the monetary policies that can foster this and the institutions conducive to upholding them in a given time and place.⁶ The idea of *Ordnung* expressed in an economic constitution mediates all these features of ordo-liberal thought: it is a central concept in the tradition, notwithstanding the tradition's evolution.⁷

This commitment is commonly understood to express deep opposition to executive discretion, as ordo-liberal thinkers themselves have emphasised. Franz Böhm wrote warmly of an “automatically functioning coordination system” that would “restrict [the state] to the task of defining the structural framework” and “severely limit political discretion”.⁸ Walter Eucken, in a discussion of monetary policy, evoked the ideal of “rational automatism”.⁹

⁶ See, for example, on competition law, Gerber, note 3 above, pp. 52-3.

⁷ See Vanberg, note 3 above, p. 6.

⁸ As Böhm writes: “the individual plans of members of society would be controlled with the help of an automatically functioning coordination system. This would relieve the state of the task of central economic control and would restrict it to the task of defining the structural framework which would preserve and enforce observance of the control laws. Moreover, the role of the state in the overall enforcement of this system would be so constituted that it would severely limit political discretion. If a political decision was taken to adopt such a system, then the rules would be laid down as to: (i) the task of the legislator, (ii) the role and duties of the government and (iii) the principles by which the courts would interpret the law. This system is based upon an instrumental and procedural ‘score’ of a predominantly standard character which has been worked out to the last detail. The margin of discretion given to the autonomous members of society is limited by the peculiarity of their coordinated actions and by the consequent special feature of objective mutual interdependence. The margin of discretion given to persons with political authority is limited by the compulsion to submit to the mechanism of control which is laid down as in a musical score, as a modest – I should like to say both socially and politically harmless – minimum. This minimum, though it leaves many options open to the creative imagination which conforms to the system, nevertheless severely restricts the possibilities of ignoring the score and acting in a manner which does not conform to the system by setting the furies of economic and political disaster on the heels of the sinners.” (See Franz Böhm, “Rule of Law in a Market Economy”, in: Alan T. Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution*, (London: MacMillan, 1989), pp. 62-3 (a translation of Böhm, “Privatrechtsgesellschaft und Marktwirtschaft”, (1966) 17 *ORDO Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, pp. 75-152.)

⁹ Walter Eucken, *Grundsätze der Wirtschaftspolitik*, (Reinbek: Rowohlt, 1965), p. 263.

Political agents were to operate within sharply demarcated parameters. Partly as a function of a technocratic concern for the coherence of economic policy,¹⁰ partly the consequence of fears of state capture by private interests, as, for ordoliberalism, the point has been to constrain political action with rules. Following a foundational moment of adoption – the point at which a market economy, by “an explicit and uncompromising decision”,¹¹ was embraced by the community and thereby put beyond further contestation – things were to unfold in a closely-constrained fashion.

To be sure, this was never a model of social order without the state. There is a class of initiatives that political agents *were* expected to engage in – those “formal” actions which serve to maintain, to perfect and to update the economic constitution. These were to be formal in the sense that they did not serve particular economic ends, but established the conditions under which such ends could be pursued. They would shape the “framework” of economic activity, but not entail efforts to “control the productive process itself”.¹² They were to be indifferent to the substantive outcomes to which they led, and were certainly not to be responsive to public opinion.¹³ Thus, there was a category under which significant state action could be envisaged – but always on behalf

¹⁰ See Walter Eucken in: Peacock and Willgerodt, note 8 above, p. 32. Note also the religious inspiration behind Ordo-liberalism which further promotes the holistic outlook: see Philip Manow, “Ordoliberalismus als ökonomische Ordnungstheologie”, (2001) 29 *Leviathan*, pp. 179-98.

¹¹ Wilhelm Röpke, “Is the German Economic Policy the Right One?”, in: Horst Frierich Wünsch (ed), *Standard Texts on the Social Market Economy—Two Centuries of Discussion*, (Stuttgart-New York: Gustav Fischer, [1950] 1982), p. 39.

¹² Eucken 1986 / 1948, p.275.

¹³ Franz Böhm, Walter Eucken and Hans Großmann-Dörth, “The Ordo Manifesto of 1936”, in: Peacock and Willgerodt, note 8 above, p. 23; see, also, Röpke, note 11 above, on the difference between “market-conforming” and “non-conforming” measures. See, also, Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-9*, (Basingstoke: Palgrave Macmillan, 2008), p. 171.

of *constraining* discretion in conformity with the principles of the economic constitution.¹⁴

The reluctance with which political agents should consider breaking with the principles of their economic system – though also the suggestion that sometimes they may have to – was well expressed by Wilhelm Röpke:

Any emphatic call for a homogeneous national economic policy implies that the various segments of this policy (prices, marketing, foreign trade, agriculture, money and banking, the capital market, etc.) must correlate with each other so as to present a uniform whole rather than various parts reciprocally cancelling each other out. [...] It seems a cheap argument to designate this demand and its concomitant policy 'doctrinaire'. Naturally, economic policy ought to remain flexible in regard to its details and guard against the danger of tarring everything with the same brush. A systematic consistent policy such as that recommended here does not signify that no exceptions should or could be made. Nevertheless, it must at the same time always be dominated by the fear that concessions on the crucial points or even a series of concessions will militate against the overall system which will disrupt it and finally generate further concessions in the direction of government controls.¹⁵

The approach chimes well with a conception of the market economy as something that, if sufficiently well-ordered, achieves a measure of equilibrium.

¹⁴ It is noticeable that in some of the earliest formulations of these ideas, the scope for legitimate state intervention was drawn quite inclusively. In the proto-Ordoliberal thought of Alexander Rüstow, the state is bound in its actions simply by the "laws of the market": "I think there exists a third type of attitude, which would be the correct and modern mode of production. If we were agreed that every new condition of equilibrium which arose in the normal way was the most appropriate solution even though many frictional losses and disagreeable phases had to be overcome en route, it would seem highly advisable to try to achieve this condition without delay and to reduce to zero the interim period which would otherwise slowly pass until a new and durable set of circumstances could be established – an interim period marked by hopeless struggle, by decline and by distress. That would be interference in precisely the opposite direction to that in which we have hitherto proceeded, *i.e.* not contrary to the laws of the market but in conformity with them: not to maintain the old situation but to bring about a new one, not to delay the natural course of events but to accelerate it. With this in mind, our recommendation is for a form of liberal interventionism under the motto 'fata volentemducunt, nolentemtrahunt' [*the fates lead the willing and drag the unwilling*]." Alexander Rüstow, "Liberal Intervention", in: Wunsch, note 11 above, pp. 184-5.

¹⁵ Röpke, note 11 above, p. 38.

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If one can assume that such an economy does not feature endogenous tendencies towards periods of extreme upheaval and unacceptable social costs, it may be tenable to conceive good policy as purely “formal” in the sense described.¹⁶ What, though, if there are destructive forces in the economy that threaten moments of great instability and distress? The work of Keynes and others has long emphasised the volatile aspects of the market economy – the centrality of “confidence”, the problem of “speculation”, and so on.¹⁷ An economic model committed to *constraining* the sphere of state action may clearly face a distinctive set of challenges should it ever have to confront these more volatile tendencies in the market economy – features all the more visible in more recent forms of financial capitalism, where contagion has become a thematic problem.

Moreover, the ordo-liberal policy regime is only ever likely to be applied in a world that is not wholly ordo-liberal – where other countries pursue different models, that is, or imperfectly execute the same. The context of Ordo-liberalism’s enactment is likely to be one that, if not outright hostile, is at least liable to present frictions. Where rival powers pursue policies that deviate from ordo-liberal precepts, an important source of uncertainty is introduced into the economic system. How then does the ordo-liberal declared aversion to political discretion fare in the context of the pathologies and distortions of a market economy, and what options does it leave available in the face of an economic shock?¹⁸

¹⁶ Leaving aside for now the question of democracy.

¹⁷ See John Maynard Keynes, *The General Theory of Employment, Interest and Money*, (London: MacMillan, 1936), especially Chapter 12. The emphasis is on tendencies that depart from what might be viewed objectively rational – how, for instance, assessments of value involve predictions of how others will assess the same, introducing a degree of uncertainty that detaches behaviour from the economic fundamentals and creates the potential for great fluctuations (see pp. 100 *et seq.*).

¹⁸ This is often said to be a weak point of Ordo-liberalism: see Mathias Siems and Gerhard Schnyder, “Ordoliberal Lessons for Economic Stability: Different Kinds of Regulation, Not More

The question carries added relevance given the prospect that the ordo-liberal emphasis on stable rules of policy itself contains the seeds of instability, at least when applied in certain settings.¹⁹ An accent on strictly “formal” interventions alone arguably entails a degree of blindness to contextual variations in economic conditions. This may be true cross-spatially, as numerous critics of “one-size-fits-all” policy-making in the EU have observed.²⁰ Rules intended to be neutral in their treatment of actors always carry the risk of treating unequals equally, with difficult implications, both economically and politically. The point holds also cross-temporally: an emphasis on a stable policy regime inevitably faces the problem of how to adapt to changing conditions. It has long been argued that the proliferation of policy rules leads to rigidity, and where periodic major shifts in policy are excluded, unforeseen situations will typically provoke last-minute unconventional actions. Even if the idea of an economic constitution admits the possibility of periodically introducing new rules, it may suggest a reluctance to expunge old ones, with similar challenging implications. I do not wish to suggest that ordo-liberals are without resources to address these questions, but it remains the case that the prospect of disequilibrium must be reckoned with for reasons *internal* as well as external to the core commitments of ordo-liberalism.

Regulation”, (2014) 27 *Governance: An International Journal of Policy, Administration, and Institutions*, pp. 377-396, at 386 & 389, on “doubts about whether a rigid Ordoliberalism can help to address severe financial crises”. See, also, the sympathetic analysis in Feld *et al.*, note 2 above, p. 14, where contagion – undiscussed in the founding texts of Ordo-liberalism – is noted to be at the heart of the mismatch between responsibility and liability that Ordo-liberals abhor.

¹⁹ Given that ideas are never perfectly instituted in practice, this idea is more an intuition than a testable hypothesis.

²⁰ Christian Joerges, “What is Left of the European Economic Constitution II? From Pyrrhic Victory to Cannae Defeat”, in: Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crisis in Europe: From Weimar to the Euro*, (Lanham MD: Rowman & Littlefield, 2016), pp. 143-60; Wolfgang Streeck, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus*, (Berlin: Suhrkamp Verlag, 2013).

The place of the extraordinary in the ordo-liberal tradition

For the committed Ordo-liberal, clearly one response to difficult times is to stand by the existing rules framework. The advice to political agents will be to restrict themselves to actions regarded as merely formal, preserving thereby an order in which discretion is highly constrained.²¹ This may be rationalised with the idea that more harm than good is done by putting the integrity of the framework in question, combined with efforts to downplay the negative outcomes arising.

There are a number of reasons why this response may be unsatisfactory, even from within the ordo-liberal outlook. Not only may it involve ignoring high socio-economic costs, but it may sit badly with other ordo-liberal commitments, including the ethical principle that actors be held responsible for their actions (the *Haftungsprinzip*). Upholding this principle may require interventions hard to conceive as merely “formal”: indeed, it may require reconfiguring economic relations precisely so as to influence substantive outcomes. When mechanisms such as contagion are in play – or simply when they cannot be excluded – interventions may need to be targeted at particular actors if these wider principles are to be maintained. Clearly, the point is only further underlined if one accepts that an ordo-liberal preference for stable rules may itself be a contributing factor to economic instability.

Is there scope then for more radical actions? One possibility is to declare an exception to the rules framework, thereby seeking both to uphold the framework and to stave off the effects of its dogmatic application.²² This is the kind of response implied by Röpke in the passage cited above, and is mirrored

²¹ Such a position may in practice look rather similar then to Austrian neo-liberalism and its avowed wariness of all kinds of political intervention in the market.

²² See David M. Woodruff, “Governing by Panic: The Politics of the Eurozone Crisis”, (2016) 44 *Politics & Society*, p. 97, on exceptionalism as the implication of Ordo-liberal rule consequentialism.

in other more recent ordo-liberal writings.²³ Importantly, such a move is likely to depend on casting the situation as a wholly exceptional one in which the usual constraints on political discretion do not apply.²⁴ The ordo-liberal presumption that the state's relations with the market can be founded on stable rules requires that difficult times be framed as moments of emergency. Precisely because the model is so wary of permitting exceptions, the situations in which discretionary initiatives are pursued must be cast as exceptional – situations in which actions are grounded in necessity. In this way, the ordo-liberal emphasis on a constitutional framework of policy-making would seem to invite the escalation of political rhetoric – a politics of emergency – when interventions hard to subsume under the heading of “formal” are pursued.

A second coherent response from within the ordo-liberal viewpoint is to deny that a genuine rules framework is in existence, previous impressions notwithstanding, and to assert that it now needs to be *established*. The present generation may be repositioned, in other words, not as the inheritor of an economic constitution but as being back at the founding moment when a decision for the (ordo-liberal) model is to be taken. As we have noted, ordo-liberal thought has tended to cast this moment as one of legitimate political discretion – the moment of discretion to end discretion.²⁵ Also a form of “extraordinary” politics,²⁶ it is not quite the same as exceptionalism: the rules to which it is oriented are those-to-come rather than those already in force. But

²³ See, for example, Viktor J. Vanberg, “Ordnungspolitik, The Freiburg School and the Reason of Rules”, (2014) 14 *Freiburger Diskussionspapiere zur Ordnungsökonomik*, p. 15: “prudence does indeed require us to acknowledge that there may be emergency situations in which we need to temporarily disband rules that in ordinary times we consider binding.”

²⁴ For a closer discussion of ideas of exceptionalism and emergency powers in Röpke's thought, see Werner Bonefeld, “Authoritarian Liberalism: From Schmitt via Ordoliberalism to the Euro”, (2016) *Critical Sociology*, online early.

²⁵ This is how the West German currency reform of 20 June 1948 tends to be portrayed in the ordo-liberal tradition: see, notably, Ludwig Erhard, “The New Facts”, in: Wunsch, note 11, especially p. 35.

²⁶ Andreas Kalyvas, *Democracy and the Politics of the Extraordinary*, (Cambridge: Cambridge University Press, 2008).

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like the exceptionalist response, it invites the framing of the situation as one of urgent necessity. To commit decisively to a new framework of rules generally requires viewing the *status quo* as wholly unsustainable, as a state of disorder to be contrasted with the order-to-come.

It is in the nature of arguments from *exception* and *foundation* that they are difficult to ward off. Deciding whether a situation warrants extraordinary action is clearly a matter of judgement – nothing in the objective nature of the circumstances themselves or in the political apparatus that confronts them can settle this. A departure from the rules framework is therefore a *persistent* possibility, not one restricted to a particular context. Moreover, as those with a privileged vantage-point on political developments, and typically with claims to expertise in the socio-economic issues at stake, decision-makers are well placed to make this judgement in a way that others may struggle to refute.

It is worth emphasising in this context that both scenarios of extraordinary politics are well in keeping with the technocratic tendency in ordo-liberalism. Already in its early formulation by the Freiburg thinkers, the approach was consciously conceived as a project to be advanced by the “men of science” of law and political economy as those able to stand back from private interests and take an objective view of the economic system in all its complexity.²⁷ The very idea of an economic constitution, as a project of finding the technical means to institutionalise principles taken as agreed and settled, reflects this general inspiration. If the ordo-liberal aspiration in times of uncertainty is to stick with the existing rules framework, this demands that initiatives be cast as simply technical adjustments to existing constitutional commitments (as

²⁷ See the Ordo-liberal manifesto of 1936, with its explicit aim to combat fatalism and relativism and to renew confidence in what science could achieve (in Peacock and Willgerodt, note 8 above, p. 16 & 21). The position of the Austrian neo-liberals was, of course, quite different, with von Hayek tending to denounce such aspirations as “scientism”.

“formal” in the sense described). Standards of democratic political justification, involving comparison of competing options and the acknowledgement of competing values, are likely to be deliberately eschewed. To the extent, on the other hand, that adhering to the rules framework is deemed unfeasible, and the ordo-liberal encounter with crisis leads to exceptionalism and/or re-constitution, the technocratic tendency is again undergirded. Suspending rules, as well as adopting new ones as an indivisible package, typically relies on a claim to special insight – not just the knowledge of how rules are to be followed, but an understanding of the ideas that inform them (the “spirit” of the rules) so that the decision to waive them can be presented as authoritative. It is exactly in such moves that the claim to expertise is performed.

I have suggested that the ordo-liberal tradition invites economic situations to be approached in a dichotomous fashion: either as part of the “normal” conditions which can be handled by the merely formal state interventions associated with the economic constitution; or – should such efforts prove unworkable – as exceptional situations warranting an extraordinary response of some sort. Being strongly committed to a certain understanding of order encourages any challenge not easily absorbed within that framework to be cast as the threat of far-reaching disorder, to be staved off by radical means. The attempt sharply to constrain political discretion heavily paradoxically makes thinkable the possibility of far-reaching discretion unconstrained by the usual norms of politics and political justification. Missing, we might say, is the third position, in which it is recognised that even the best policy regimes will always be challenged by difficult situations necessitating discretion (not to mention the democratic rationale for change), and that the question is therefore how to ensure such situations are *not* cast as wholly exceptional but rather are handled in accordance with political norms.

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The ordo-liberal emphasis is, one may note, on an *economic* constitution rather than a political constitution structuring the procedures of the polity more generally.²⁸ It primarily seeks to constrain the *kinds* of economic policy that political agents can pursue rather than the ways in which they may initiate and enforce policy. This is an important distinction, since there is nothing in the idea of fidelity to a certain set of economic principles that implies constraints on political discretion more generally. Indeed, it may be that a strong commitment to upholding rules of policy may invite great latitude in the procedures by which this is achieved. The early phases of ordo-liberal thought famously emphasised the importance of a strong state that was, as it were, (legally) unencumbered to do what (economically) it must – hence the familiar depiction of it as tending towards authoritarian liberalism.²⁹ Even if we acknowledge that later iterations of the tradition were more interested in questions of an overarching rule of law,³⁰ it remains true that these larger aspects of constitutionalism have been relatively neglected in ordo-liberal thought.

Discussion: rules and discretion in the Euro Crisis

Has the handling of the Euro crisis been consistent with the picture described?

Certainly we have seen major departures from existing policy regimes pushed

²⁸ Although the notion of an “economic constitution” looks something like a bid to draw on the prestige of constitutional terminology to describe what is ultimately a policy regime, the distinction is additionally blurred in English by the use of the same word to translate *(Wirtschafts)verfassung* and *Grundgesetz*.

²⁹ Classically, see Hermann Heller, “Autoritärer Liberalismus”, (1933) 44 *Die Neue Rundschau*, pp. 289-298; see, also, Dieter Haselbach, *Autoritärer Liberalismus und Soziale Marktwirtschaft: Gesellschaft und Politik im Ordoliberalismus*, (Baden-Baden: Nomos Verlag, 1991). See, also, Bonefeld, note 24 above.

³⁰ See, also, Volker Berghahn and Brigitte Young, “Reflections on Werner Bonefeld’s ‘Freedom and the Strong State: One German Ordoliberalism’”, (2013) 18 *New Political Economy*, pp. 768-78, (*contra* Werner Bonefeld, note 3 above).

through by executive discretion. Some have been defended as temporary measures intended to restore short-term stability, such as the European Financial Stability Facility. Such instances are consistent with the logic of *exception*: understood as responses to exceptional circumstances, they are treated as restorative moves, intended merely to reset the existing rules framework. Often their proponents have gone to great lengths to avoid actions that might resemble a decisive break with the pre-crisis order – the reluctance to approve debt write-offs, or even bail-outs, being a well-known example.

Other measures on the other hand – the later ones especially – instead look rather more like efforts to initiate a substantially *new* rules-based regime. Prominent amongst these are the Fiscal Compact, the Six-Pack and the Two-Pack. These moves have typically been coupled with the portrayal of the pre-crisis regime as essentially dysfunctional, as rules-based only in name. Emblematic in this respect was the blueprint for the future of the Eurozone released by the head of the European Council in 2012, entitled “Towards a Genuine Economic and Monetary Union”.³¹ Exactly by suggesting that the existing rules-order was bogus, its authors invoked the licence needed to wield far-reaching discretion in the service of establishing a new one. The creative re-deployment of EU institutional powers (notably of the Commission), the circumvention or compression of national-parliamentary debate, as well as the use of extra-EU mechanisms to marginalise the European Parliament, are just some of the actions taken to this effect.

By framing the economic situation as one of emergency, unconventional moves at odds both with a commitment to stable rules of policy and with basic

³¹ “Towards a Genuine Economic and Monetary Union”, Report by President of the European Council Herman Van Rompuy, 5 December 2012, available at: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf.

constitutional norms have been adopted as last-minute responses to urgent problems.³² To the extent that these problems are indeed pressing, arguably they arise in significant part from a reluctance to confront the pathologies of financial capitalism, with structural problems of state capture, speculation and contagion overlooked in favour of the localisation of blame and an insistence on the avoidance of moral hazard.³³ The new policy regimes arising are intended to bind decision-makers more tightly to “responsible” economics by giving it the status of a constitutional commitment.³⁴

In short, using the only justifications that ordo-liberals could accept, interventions anathema to their instincts have been employed, to handle challenges that their own ideas allowed to develop, with the aim of re-constituting the economic system to be immune to such threats in future.

One line of argument treats the actions of the German government in the context of the Euro crisis as directly inspired by ordo-liberal thinking. As one author puts it, “The crisis initially got worse as a result of too close an adherence to ordo-liberalism, and it only started to go away as those same ideas were partially deserted”.³⁵ Compelling as this thesis may be, the risk is that it overstates the influence of one agent – the German government – in a situation characterised by the interplay of multiple agents not always with converging

³² Jonathan White, “Authority after Emergency Rule”, (2015) 78 *Modern Law Review*, pp. 585-610, idem, “Emergency Europe”, (2015) 63 *Political Studies*, pp 300-18, and idem, “Politicizing Europe: The Challenge of Executive Discretion”, in: Sara Hobolt and Olaf Cramme (eds), *Democratic Politics in a European Union under Stress*, note 1 above, pp. x.

³³ See, for example, Matthias Matthijs, “Powerful Rules Governing the Euro: The Perverse Logic of German Ideas”, (2016) 23 *Journal of European Public Policy*, pp. 375-91.

³⁴ On the relevant aspects of the Fiscal Compact, see White, “Authority after Emergency Rule”, note 32 above.

³⁵ See Matthijs, note 35 above, p. 380. See, also, David Schäfer, “A Banking Union of Ideas? The Impact of Ordoliberalism and the Vicious Circle on the EU Banking Union”, (2016) 54 *Journal of Common Market Studies*, pp. 961-80, and supporting quotations therein concerning Schäuble’s own Ordo-liberal convictions; see, also, Peter Nedergaard and Holly Snaith, “As I Drifted on a River I could not Control’: The Unintended Ordoliberal Consequences of the Eurozone Crisis”, (2015) 53 *Journal of Common Market Studies*, pp. 1094-1109; for critical discussion, see Feld *et al.*, note 2 above.

agendas.³⁶ Also, it understates the influence of other brands of liberal-economic thought, particularly the Chicago-School neo-liberalism that has been a major influence on the ECB and branches of the Commission in recent decades. If anything, these ideas are *more* conducive to the politics of emergency, since they foresee large scope for executive discretion in the service of an agenda of “competitiveness”.³⁷ There is a problem of over-determination, in other words, that should make us cautious in linking the EU’s crisis management too closely to one body of thought alone.³⁸

But one does not need to evoke unity of programme in this way, and attribute to it causal status, in order to concede the relevance of ordo-liberalism to recent EU decisions.³⁹ The significance of this set of ideas, it can be said, lies rather in encouraging the avoidance or postponement of certain lines of action, in suggesting certain kinds of justification for actions once undertaken, and in prompting limited resistance to such manoeuvres from others (be they parliamentary figures in the political mainstream or opinion leaders in the media). Ordo-liberalism establishes a sensibility, possibly largely tacit, for certain kinds of response. If the EU’s politics of emergency in this period has sources well beyond the influence of one ideological tradition, it remains possible that, at least in this sense, ordo-liberalism was an enabling factor.

Importantly, and as I have tried to argue, it is *not* plausible to discount the influence of ordo-liberalism simply by observing that the Euro crisis has been as much about acts of executive discretion as about the constraining force of

³⁶ See the IMF and ECB as two agents whose actions are hard to subsume under the ordo-liberal label.

³⁷ See, for example, William Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition*, (London: Sage Publications, 2014).

³⁸ Though, on this, see Biebricher, “Europe and the Political Philosophy of Neoliberalism”, note 3 above, and, idem, “The Return of Ordoliberalism in Europe – Notes on a Research Agenda”, (2014) 9 *I-lex*, pp. 1-24.

³⁹ I take some inspiration here from Quentin Skinner, “Moral Principles and Social Change”, in: idem, *Visions of Politics Vol I: Regarding Method*, (Cambridge: Cambridge University Press, 2002).

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binding rules. Certainly, the emphasis in the ordo-liberal tradition has always been on this latter aspect – on a system sufficiently structured by rules that it becomes “automatically functioning” – and the recurrent calls to strengthen the rules of the Eurozone are the features of the crisis period most in tune with the ordo-liberal outlook.⁴⁰ The fact that the exercise of discretion has in no sense been banished from the emerging Eurozone regime⁴¹ is testament certainly to its imperfections from an ordo-liberal perspective. But the larger observation, I suggest, is that the very commitment to the idea of a stable and binding economic constitution has always implied the prospect of challenging situations being handled in far more discretionary fashion (in the service, of course, of strict rules), coupled with their framing as matters of high emergency. It is exactly the dialectical *combination* of rules and extraordinary discretion which is arguably characteristic of ordo-liberalism in its “actually existing” form.

The distinctiveness of the EU setting, as a post-sovereign order, is that it makes this entwinement more pronounced and visible. Although at one level there would seem to be a special affinity between the ordo-liberal tradition and the transnational context – the voluntarily-embraced rules of an “economic constitution” promise to substitute for the absence of political hierarchy, and to establish order without popular interference – at the same time this context raises peculiar challenges for it. The disparity of economic conditions across the Eurozone makes the principle of limiting intervention to merely formal, rule-based approaches more difficult than ever to sustain. The insistence for political reasons on territorialising ordo-liberal ideas of responsibility and liability, so that states become their carriers,⁴² creates pressure for conditionality

⁴⁰ See Feld *et al.*, note 2 above, p.10.

⁴¹ See Scharpf, note 1 above.

⁴² See Schäfer, note 35 above.

requirements and national vetoes that have more to do with discretion than rules.⁴³ The problem of contagion is more pronounced given the interdependence of Eurozone economies. The weakness of the EU as a constitutional order in the conventional sense means there are fewer legal constraints on what agents can do in the service of an “economic constitution”. The lack of a dominant political agent able to exercise uncontested authority, in the manner of the government of a nation-state, means that the exercise of political discretion can be especially chaotic, involving as it must the collaboration of multiple agents, and the appeal to the politics of emergency especially tempting as a means to galvanise action. All these are ways in which the combination of rules and extraordinary discretion becomes especially clear in the EU context; the combination itself though seems a characteristic implication of the ordo-liberal standpoint.

The discretionary handling of legal and political norms – of sovereignty, democracy and others – in the name of strict policy rules: if this is what one witnesses today, then arguably it is the inverse of how many would want things to be. Instead of constitutional discretion to entrench a certain set of policies, a strong constitutional order that enables the orderly *contestation* of policies is arguably a preferable arrangement, certainly more in keeping with ideals of collective self-determination. Rather than aiming to reduce political discretion to the bare minimum, with all the potential for extraordinary action that this entails, there would seem to be no substitute for establishing the institutional structures that enable it to take legitimate form, as the considered

⁴³ On the asymmetric bargaining and threat of force involved, see Scharpf, note 1 above; Damian Chalmers, “Crisis Reconfiguration of the European Constitutional State”, in: Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity*, (Cambridge: Cambridge University Press, 2016); Magnus Ryner, “Europe’s Ordoliberal Iron Cage: Critical Political Economy, the Euro Area Crisis and its Management”, (2015) 22 *Journal of European Public Policy*, pp. 275-94; and Woodruff, note 22 above.

interventions of agents responsive to contending opinion rather than as the last-minute improvisations of technocratic élites.

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