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## Bound by the Economic Constitution: Notes for “Law and Political Economy” in Europe

*Abstract:* The aspiration of this article is to start a conversation about the possible contribution of a Law and Political Economy research agenda in Europe. I first unpack the role of law in structuring the economy at the supranational level by examining the legacy of ordoliberalism and the Economic Constitution of the EU as the normative project of insulating the internal market from political contestation. I then attempt to map the critical approaches that challenge the depoliticization of the economy and constitute the backdrop for an emerging LPE agenda. In particular, I discuss *negative universalism*, which focuses on the legal form as a limit to power and as enabling particular causes to make claims in universal terms; *instrumentalism*, which favors politicizing the law to advance egalitarian agendas; and *counter-hegemony*, which looks to civil society and to social transformation beyond the state. Concluding with a call for pragmatic and contextual critical practice, I attempt to carve out a space for an LPE in Europe agenda rooted in the normative commitment to democracy and equality as a form of immanent critique, in the aspiration to use institutions for social transformation, and in an orientation towards democratic power-building.

*Keywords:* Economic constitution, ordoliberalism, EU, depoliticization, critical approaches to law, Law and Political Economy in Europe

### I. Introduction

The emergence of a new Law and Political Economy (LPE) approach in the legal academy of the US invites a reckoning of the legal orthodoxies and legal imaginaries also in Europe. In the US, LPE constitutes a challenge to the “twentieth century synthesis” of a private law framework oriented towards economic efficiency and wealth maximization, and a public law framework that excludes questions of economic power from its ambit (Britton-Purdy et al. 2020). Building on the Legal Realist project to uncover the role of the law in the production and distribution of wealth and private power, LPE is premised on an understanding of the economy as a product of legal ordering. Law is not merely an external regulatory force superimposed on otherwise “natural” and “neutral” markets. Rather, it is an intrinsic part of the creation of markets in the first place, as its

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permissions, prohibitions, and entitlements backed up by public power determine the bargaining power of different actors (Hale 1923; Kennedy 1991).

Taking power as a central unit of analysis then develops into a methodological aspect of LPE. In this context, “methodological” is not meant to refer to a fully fleshed-out set of rules or principles employed to carry out research, but rather to the prioritization of certain analytical questions in the study of legal arrangements. The study of the distributive and power-structuring effects of the law means that the principal question that has to be prioritized is whom law endows with bargaining power and with what justification (Britton-Purdy et al. 2020, 1821). Instead of asking whether legal arrangements maximize efficiency—the principal question that structures the methodology of Law and Economics—LPE scholarship attempts to locate the way in which legal structures, in different fields, might generate private power, and how they possibly insulate such power from democratic control and contestation (for an example, see Kapczynski 2020).

Crucially, the analytical and methodological priorities put forward by LPE are underpinned by a set of normative commitments and aspirations. The emphasis on law’s constitutive role in the economy entails an implicit assumption that the law can also be instrumental for social transformation. If it is legal rules that establish regimes of socio-economic inequality, hierarchy, and structural exclusion, then legal rules, as the expression of citizen self-rule, could also undo them. In that direction, LPE prompts a shift from the supposed normative “neutrality” of market ordering to a moral vision of a democratic political economy (Britton-Purdy et al. 2020, 1832). It points to a reinvention of substantive ideas of freedom and equality, while it seeks to trace paths of reconstituting public power and asserting social priorities through the political medium.

In this article, I aspire to start a conversation about the role and possible contribution of an LPE research agenda in Europe (Kjaer 2020a; Haskell and Rasulov 2018). With that goal in mind, I attempt to map the critical approaches that challenge the role of the law in the prioritization of liberal economic commitments—including market freedoms, undistorted competition, and monetary stability—at the expense of democratic participation and social welfare considerations, in the context of the EU. The attempt to open a transatlantic channel of dialogue and cross-fertilization is supported by two considerations. First, most of the empirical findings that originally fuelled the emergence of LPE are not instances of American exceptionalism, but rather concrete manifestations of the political and ideological neoliberal hegemony that has similarly—even if perhaps to a different degree—seeped into European political and economic structures (Schröder et al. 2020; Lindberg 2019; Kjaer 2020b). Similarly, social inequalities based on established hierarchies of gender, race, and residence status persist, not only in the US, but also in Europe, and are internal in the shaping of political economy (Zbyszewska 2016; Kantola and Lombardo 2017; Möschel 2009; Mantouvalou 2020). As a result, the normative vision of LPE seems to be relevant for Europe as well. Second, while LPE is presented in its “foundational” texts (Britton-Purdy et al. 2020; Purdy, Kapczynski, and Grewal 2017) as primarily building on the work of American Legal Realists, the early American progressives themselves had a kinship with European social thought, including for example Marxian materialism and Weberian perspectives on coercion and freedom (Fried 2009; Joerges, Trubek, and Zumbansen 2011). In a way, LPE has “multiple beginnings” (Said 1983) that are worthy of being resurfaced, some of which originated and continue to be influential in Europe. At the same time, the foundational premise of LPE, that law is constitutive of the economy, has profound roots in European legal and social theory (Kjaer 2020b; Wiethölter 1968; Neumann 1996; Polanyi 2001). Importantly, the attempt to transnationalize the discourse of LPE has the potential to affect the discourse within US legal scholarship as well, both by prompting comparative exercises and by pronouncing more clearly the paradigm shift entailed by globalization, forcing a universal nuancing of legal theory that is overly attuned to the nation-state model.

Advancing an agenda of LPE in Europe might initially appear ambitious as it encounters the obstacle of institutional fragmentation (multiple national legal systems, different legal traditions, diversity of political economies) and the challenge of becoming meaningful in a diverse scholarly and theoretical landscape. However, both of these challenges can be overcome without thinning its prospective agenda. With regard to the legal and constitutional fragmentation, as well as the diverse trajectories of institutions and different economic formations, European unification provides a strong point of reference for a transnational research agenda. Even if one cannot speak of one “Europe” or one single “European capitalism” (Esping-Andersen 1990; Offe 2003; Hall and Soskice 2001), the process of European integration has created a shared institutional substratum for the member states, while the financial crisis of 2008 highlighted the interconnections of European economies and the inescapability of supranational ordering. In the core of the European legal order is the Economic Constitution, the ensemble of rules that undergird the supranational economy and which, in their fundamental goal to create and protect the internal market, have consistently performed the function of insulating the economy from democratic contestation. The Economic Constitution, as both a driving force in shaping the political economy of the continent and a recipient of numerous and diverse challenges, provides an opportunity to highlight how unifying normative projects of legal critique can be meaningful.

With regards to the diverse theoretical landscape, I will argue that, building on existing work and drawing eclectically and pragmatically from the currently predominant ways of thinking critically about the role of law for social transformation in Europe, LPE in Europe can constitute a powerful emerging research agenda. In parallel to the engagement with theoretical diversity, LPE in Europe could enable the development of methodological commonality by focusing on the role of legal structures, at both the supranational and the national level, in generating private power and consolidating hierarchies along lines of class, race, and gender. Drawing from existing critical work at the intersection of law and political economy in Europe, as well as from the developing LPE scholarship in the US, I also attempt to tentatively outline the substantive underpinnings of such an emerging agenda. These could be (1) the grounding of legal critique on normative commitments to democracy and equality as an instantiation of immanent critique, going beyond market-based equalization of economic opportunity to convey aspirations of substantive equality; (2) the drive to translate legal critique into concrete legal and institutional change without, nevertheless, fetishizing the latter or perceiving it as the end of politics; and, finally, (3) an orientation towards democratic and public power-building, which is not necessarily confined within traditional structures of government, but may also extend in different social spheres, such as structures of transnational governance, the workplace, etc.

In Part II, I outline the form, content, and function of the Economic Constitution of the EU, with the goal to highlight the role of the law in the structuring of the economy at the supranational level. I make the argument that the Economic Constitution consists fundamentally of the normative project to inoculate the economy and particularly the functioning of the internal market from democratic contestation. As such, the depoliticization of the economy becomes a transcontinental constant and an orthodoxy that allows us to draw parallels between the function of the ordoliberal guiding philosophy of the European Economic Constitution on the one hand, and the function of Law and Economics scholarship in the US on the other hand (Britton-Purdy et al. 2020, 1789-1790). In its original ordoliberal form, the Economic Constitution employed hard rules, often developed by means of judicial legislation, to encase market freedoms, undistorted competition, and monetary stability against political interference. However, the financial crisis gave rise to new forms of governance characterized by profound elasticity in their understanding of the rule of law, circumventing fundamental commitments of democratic constitutionalism in order to safeguard these core economic liberal commitments (Joerges 2014a,

2014b; Wilkinson 2019). The pragmatic and jurisprudentially flexible vision of a depoliticized economy sets explicit and implicit boundaries on how different member states structure or even imagine social ordering, while it also underpins and fuels diverse voices of contestation.

In the following parts, I attempt to map certain prominent ways of criticizing the function of law in economic reproduction, with a focus on European scholarship. These critical perspectives also provide a window into alternative forms and functions of law. This mapping is meant to serve as a theoretical backdrop for synthesis and the elaboration of a new agenda, providing the outlines of the approaches from which an emerging LPE in Europe research agenda could selectively draw.<sup>1</sup>

In Part III, I discuss the critical approach of *negative universalism*. Positive universalism signifies the attempt to challenge the increasing de-juridification of the Economic Constitution and its “democratic deficit” by promoting the deepening of constitutionalization and institutional fixes. By contrast, negative universalism suggests that it is impossible to articulate a positive universalism without reinforcing currently hegemonic positions. Yet, within the *form* of law there is a residue of universalism that is worth safeguarding. This is not only because the legal form may set limits on the exercise of power. It is also because law, as a result of its indeterminacy, enables particular identities and causes to make their claims in universal terms, transmitting them beyond their separate value-systems. The modest vision of negative universalism is that law is the space that guarantees that politics do not degenerate to a clash of incommensurate value-systems. Nevertheless, the jurisprudential defense of the legal form as a restraint of power and as vessel for possibly radical claims does not appear as a sufficient challenge to a pragmatic and flexible project of depoliticizing the economy, not least because clinging to legal indeterminacy may obscure the need to change the content of the law.

In Part IV, I examine *instrumentalism*. Undergirded by the notion that capitalism is a product of legal ordering, instrumentalist perspectives highlight the power of the agent of legal ordering for shaping the economy and steering society. Law is understood as non-autonomous and inherently political, able to advance or hinder different agendas. The normative goal becomes to orient legal coding towards goals of substantive equality and democratic participation. Popular sovereignty contestations for the determination of the content of law are then perceived as the means for social transformation. Yet, instrumentalism and its inspiration from the welfare state and social citizenship are challenged, first, by the limits of the ordering capacities of law in the globalized economy and, second, by the limits of the liberal legal form itself.

In Part V, I turn to *counter-hegemonic* approaches, which resist the subsumption of emancipatory politics under the umbrella of state power while identifying civil society and social movements as crucial factors in triggering social and legal transformation. Within the category of counter-hegemony, I distinguish between, on one hand, theoretical endeavors invested in the project of democratizing the economy from within, drawing from a system-theoretical conceptual background (Luhmann 2008; Teubner 1993), and, on the other hand, critical approaches that view legal reforms as inherently limited, reserving a special role for the critical practice itself and the utopian energies it might catalyze. However, the project of democratizing the economy from within may reify unequal social and market power by relying on a social sphere that has been shaped and determined by patterns of social hierarchy and distributional inequality. At the same

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<sup>1</sup> A word of caution is merited with regards to the proposed categorization of the different directions of critique, which is that it engages in the “anthropomorphic fallacy” (Harris 1994, 744) of creating arbitrary and unifying thinking and speaking subjects where none exists. In that sense, the grouping of different perspectives does not necessarily reflect the self-description of the authors, nor is it meant to characterize the entirety of their work but rather particular positions. The categorization is undertaken for analytical purposes.

time, the more radical agenda of relying on bottom-up mobilization and the normative pluralism of social movements risks underestimating the importance of legal centralism for social transformation.

In the Conclusion, I draw selectively from the above directions, and particularly from a reimagined instrumentalism and counter-hegemony, as well as from the US LPE scholarship, to delineate certain possible core features of an emerging LPE-in-Europe research agenda. As mentioned above, these could be the methodological commonality around the exposure of the constitutive function of law in the economy and a substantive component regarding the motivations, the purpose, and the goals of legal analysis. This component consists of a set of commitments to egalitarian politics, the aspiration to use institutions to advance social transformation, and an ethics of participatory parity revolving around democratic, public power. Yet, LPE is not only a scholarly but also a political project and movement. In that direction, the paper concludes with a call for a flexible, pragmatic, and contextual critical practice in line with social movements that share and materialize the goals and aspirations of LPE.

## II. Ordoliberalism and the Substance of the Economic Constitution

A core element of European integration—and what I argue could be a centripetal force for a research agenda of LPE in Europe—is the Economic Constitution, which, I suggest, signifies the project of insulating the economy from political contestation. This functional understanding of the European Constitution marks a constant of continuity for an otherwise changing legal form and political practice in the EU and across Europe. While the original ordoliberal impetus was to employ hard rules to insulate market freedoms, undistorted competition, and monetary stability from political interference, current modes of EU governance have pursued the same end by showing profound elasticity in their understanding of the rule of law. It can be inferred that European ordoliberalism is not fundamentally about *form*; the connection between hard rules and the Economic Constitution is contingent.<sup>2</sup> Rather, European ordoliberalism is fundamentally about a broader political vision of a depoliticized economy, the achievement of which eventually relies on acts of political will that can either entrench legal formalism or circumvent it, focusing on the imagined telos of the Union (Böhm 1937, 54-56; Mestmäcker 1969, 170-173; Slobodian 2018, 210-214).

Ordoliberalism, one of the influential building blocks of the European institutional edifice, (Joerges 2004; Gerber 1994; Feld, Köhler, and Nientiedt 2015) sprang from the Freiburg School following the fall of the Weimar Republic. Its key differentiation from its liberal predecessors was stressing that a liberal economic regime cannot result from a spontaneous natural order of *laissez-faire*. With the experience of inter-war corporatism fresh in their minds, the ordoliberals suggested that social progress was preconditioned on the existence of a legal framework that protects markets against political interference. Market freedoms, undistorted competition, and monetary stability were seen as key to economic prosperity and, eventually, social welfare (Möschel 1989). Such conditions had to be guaranteed through an “Economic Constitution.” According to the Freiburg School’s most prominent legal theoretician, Franz Böhm, an Economic Constitution is “a comprehensive decision (*Gesamtentscheidung*) concerning the nature (*Art*) and form of the process of socio-economic cooperation” (Böhm 1933, 107). As Gerber insightfully points out, this concept “turned the core idea of classical liberalism—that the economy should be divorced from law and politics—on its head by arguing that the characteristics and the effectiveness of the economy depended on its relationship to the political and legal systems” (Gerber 1994, 45). Crucially, the

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<sup>2</sup> For a contrary argument, see Hien and Joerges (2018).

Economic Constitution was not conceived as a testament to the normative primacy of politics over the economy, but rather as an attempt to impose a stable legal framework on the economy, which the political system itself would have to respect.

Following Hayek's influence in the development of the ordoliberal agenda, ordoliberalism has been understood as the application of a formalist understanding of the "rule of law" in the economic realm (Foucault 2008, 171). In that sense, the rule of law means that government action is bound by fixed rules, which not only make it possible to foresee the exercise of state coercion, but also do not distinguish between the needs and wants of different people, regardless of their place in society (Hayek 2001 [1944], 77). In other words, governments need to abstain from the necessarily partial, substantive legal rationalities that underpinned economic intervention and planning. This type of formalism is, according to Foucault, "the opposite of a plan," the categorical rejection of the idea that the law could pursue particular economic ends (Foucault 2008, 172; Hayek 2001 [1944]). Instead, law is defined by its "neutrality" and "objectivity" which enable and safeguard private economic initiative. However, the identification of ordoliberalism with formalism and hard rules (Hayek 2001 [1944]) elevates a historically specific, jurisprudential component of a broader project of social ordering into its essential characteristic. Indeed, as I will show below, recent developments in European economic governance reveal how the Economic Constitution maintains its normative thrust despite the adoption of discretionary measures that sit uneasily with strict adherence to the rule of law.

European integration, starting with the formation of the European Economic Community (EEC) by the Treaty of Rome in 1957, reflected the premises of ordoliberal thought in its structural orientation towards guaranteeing economic freedoms, safeguarding a system of undistorted competition, and sidelining dimensions of social policy, which remained under the auspices of the political autonomy of member states. Yet, even in its final form, itself a product of political compromise between the competing trends of ordoliberalism and *dirigisme* (Warlouzet 2019), the Treaty did not gain unanimous acceptance in the neoliberal camp, facing the skepticism of those that saw simply a more advanced and geographically extended form of protectionism (Slobodian 2018, 182-184). It would, then, be hasty to characterize the EEC as neoliberally "biased" from the outset, as if embedded with the inherent goal to reverse European welfare states, especially considering that the governance of the social was to remain intact from market-building processes and under the democratic governance of member states.<sup>3</sup> Yet, the political decoupling of economic integration and social protection laid the groundwork for the emergence of a fundamental constitutional asymmetry.

This asymmetry was the result of economic policies benefiting from the supreme status of European law, whereas welfare-state policies were confined to the eventually hierarchically inferior status of national law (Scharpf 2002, 647). Indeed, the pronouncements by the European Court of Justice (ECJ) of the doctrines of "direct effect" of EU law (*Van Gend En Loos*, 26/62, 1963), granting subjective rights to individuals against states, and of "supremacy," asserting the supremacy of the European legal order over the law of member states (*Costa v. ENEL*, 6/64, 1964), embedded this constitutional asymmetry (Weiler 1991). Using the law "as a mask for politics" (Burley and Mattli 1993, 44) helped immunize judicial law-making against political objections and the possibility of reversal (Scharpf 2010, 216-217). Grimm (2015, 469-471) has described this process as the "overconstitutionalization" of the EU, shifting power from the member states to the non-political institutions of the EU and immunizing the latter against public pressure. European law, as interpreted by the ECJ, is woven into the institutional fabric of member states through its application by national courts in ordinary litigation. As such, it cannot be challenged by

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<sup>3</sup> According to Rödl (2009), the "social compromise for integration;" see also Majone (2014).

governments without threatening to destabilize the rule of law upon which their legitimacy also depends (Scharpf 2010, 217; Mestmäcker 1973, 108-109). Furthermore, political reversal of ECJ decisions and interpretations through, for example, treaty amendments, is extremely challenging in a Union characterized by a diversity of national interests. Integration through law, rather than politics, has come at a cost. Insulating the project of the creation of the internal market from democratic contestation was structural in generating a systemic “democratic deficit” in the EU, especially with regards to the input legitimacy of European citizens (Nanopoulos and Vergis 2019; Isiksel 2016). Indeed, according to Isiksel, the *finalité économique* that is at the core of European constitutionalism structurally precludes the kind of mass participation in politics that could destabilize the economic telos of the Union (Isiksel 2016).

Integration through law was fundamental in shaping the content of the Economic Constitution. One of its crucial substantive features has been the elimination of barriers that restrict the movement of goods, services, and factors of production through a process of “negative integration” (Scharpf 1999; Case C-8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*; Case C-120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*). On the one hand, this process has expanded individual rights beyond a narrowly understood process of “market liberalization,” for example by guaranteeing the social rights of migrant workers against discrimination or solidifying a workplace-oriented regime of gender equality (Cichowski 2004).<sup>4</sup> However, on the other hand, as Scharpf highlights, the notion of European citizenship advanced by the Court remains disconnected from any vision of collective self-determination and democratic participation (Scharpf 2010, 223). It denotes individual rights of entry and exit into democratically shaped systems of national solidarity (Somek 2008), but it does not reflect the aspiration that citizens understand themselves as the authors of their own laws. Therefore, while integration through law has propelled the deregulation of national regimes of solidarity—which, of course, cannot be simply attributed to developments in EU law<sup>5</sup>—its rights-based structure cannot, unaccompanied by political initiatives, commence a process of re-regulation and establish norms of solidarity that would turn the Union into a “social market economy” (Müller-Armack 1978).

The ordoliberal vision of an economic policy beyond political contestation also began to expand in the realm of monetary policy, with a focus on monetary stability (Eucken 2004), with the introduction of the single currency, as set out by the Maastricht Treaty of 1992. In deciding on the status of the treaty, the German Constitutional Court described economic integration as an autonomous and apolitical process taking place beyond the political influence of member states, requiring only the functional legitimacy derived from its institutional commitment to price stability and against excessive fiscal deficits. *Brunner v. European Union Treaty*, 1 CMLR 57 (1994). The subsequent establishment of the European Central Bank, legally shielded from political interference with a high degree of independence and with the maintenance of price stability as its foundational purpose, was a further entrenchment of the Economic Constitution in the form of hard legal rules. Consolidated Version of the Treaty on the Functioning of the European Union, Articles 130, 282–284, May 9, 2008, 2008 OJ (C115) 47. However, according to Joerges, the Maastricht Treaty, as the first step towards the creation of the Economic and Monetary Union

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<sup>4</sup> On the “Polanyi in Brussels” debate about whether ECJ jurisprudence embeds markets in social arrangements, see Caropaso and Tarrow (2009) and Höpner and Schäfer (2010).

<sup>5</sup> Already by the 1970s, national administrations shifted from Keynesianism and the functional logic of bureaucracy to new institutional economics and public choice theory, which involved applying market values to theorize the functioning of the state and public sector institutions (Buchanan 1972; Ridley 1996). Especially from the 1980s onwards, an international trend of neoliberal reforms, including liberalization and privatization of social and public services, took place in several European countries, aspiring to “modernize” the state machinery on the basis of economic efficiency (Glyn 2006; Harvey 2005).

(EMU), was also a step towards “dejuridifying” the Economic Constitution. Indeed, the Stability and Growth Pact, designed to ensure budgetary stability after the introduction of the euro, also introduced political bargaining and unaccountable decision-making, based on non-justiciable criteria (Joerges 2004, 25). When a number of core EMU countries, including France and Germany, exceeded the 3% deficit limit set by the Pact, the prescribed penalties were circumvented by the Council, the discretion of which, “in particular on the basis of a different assessment of the relevant economic data,” was confirmed by the ECJ. Case T-27/04, *Commission of the European Communities v. Council of the European Union*.

The early tendencies of “de-juridification” identified by Joerges are indeed exacerbated in the post-crisis, “managerial” economic governance of the EU, indicating a transformation of the Economic Constitution. This is primarily a result of the shift from a rigid understanding of the rule of law, safeguarding market freedoms and undistorted competition, to the singular, overarching objective of budgetary balance. In that direction, individualized consolidation measures, as introduced by the Macroeconomic Imbalance Procedure (MIP) of 2011, are legitimated only via indeterminate clauses, raising serious questions about the rule of law and democratic accountability. Council Regulation 1174/2011, L 306 (EU). As openly stated in the Commission’s institutional paper on the MIP, “judgment plays a larger role in the MIP because there are no obvious rules-based criteria for the identification and assessment of macroeconomic imbalances” (European Commission 2016). The broad executive discretion for identifying macroeconomic imbalances, as well as for suggesting and enforcing on member states measures for preventing or correcting them, concentrates significant authority in the Council and the Commission. Far from the depoliticizing effect of integration through law, this hyper-politicization of economic governance and the subsumption of the rule of law under the economic purposes it is meant to serve entails a risk of arbitrary rule and of discrediting the law.

In the new architecture of economic governance, formalism and instrumentalism overlap and co-exist, indicating that formalism is not a principle of government per se, but only instrumental. The new and stricter version of the Stability and Growth Pact—the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2012 (TSCG or “Fiscal Compact”)—reinforces the fixation on budgetary discipline, first, by refining the requirements for maximum debts and deficits into a detailed balanced-budget rule and, second, by imposing a “golden rule” of balanced budgets. This means that budgetary balance should be incorporated in national provisions of “permanent” character, hierarchically superior to ordinary legislation—that is, in provisions that are “preferably constitutional” (TSCG, Article 3(1); see also Fabbrini 2013). The Fiscal Compact also empowers the CJEU to scrutinize and enforce budgetary rules within member states under the threat of significant penalties, allowing for no variation among national economies with different needs and, eventually, leaving weak economies with no other option than austerity measures (Blyth 2013; Streeck 2014; Joerges 2014a). Decisions for structural reforms are dependent upon the calculation of structural deficits and the monitoring by independent Fiscal Advisory Councils composed of experts. While such calculations are highly contested, the supposed objectivity of the prescription is an avenue to depoliticize the debate around economic issues (Bilancetti 2019, 256). Rather than a consistent turn to formalism, the “golden rule,” like the MIP, is underpinned by highly political calculations and decisions (Everson 2013, 107).<sup>6</sup>

The tendencies towards informality, politicization, and increasing reliance on non-justiciable criteria that have characterized the post-crisis EU economic governance dovetailed with a similarly pragmatic attitude of the Court. Tied to the Fiscal Compact was the establishment of the European Stability Mechanism (ESM), designed to offer financial assistance to member states under strict

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<sup>6</sup> On the formal legality of the TSCG, see Fischer-Lescano (2012b).

conditionality, including for example measures such as VAT increases, pension cuts, and the liberalization of public services (Scharpf 2011, 28). In the context of the *Pringle* case (*Pringle; Gauweiler*, C-62/14, 2015), contesting the compatibility of ESM with EU law, the ECJ defined sound budgetary policy and the survival of the euro as a *telos* of the constitutional structure of the treaties, aligning its interpretation of the contested provisions with these overarching objectives. Case C-370/12, *Pringle v. Government of Ireland*; Case C-62/14, *Gauweiler and Others v Deutscher Bundestag*. Critical commentators have seen in this decision a departure from the law as it stands and a judicial legitimation of an essentially political decision (Joerges 2014b, 1011-1013), while others have been more positive in their evaluation (Craig 2013).

Subsuming the rule of law under the objective of budgetary balance highlights that fundamental commitments of democratic constitutionalism, including representative democracy and the principle of legality, may be circumvented in order to maintain economic liberal commitments to price stability, competition, property rights, and the avoidance of moral hazard (Wilkinson 2019, 102; Streeck 2016, 118-125). Yet, it would be a mistake to consider this an aberration or a fundamental deviation from the “ordoliberal doctrine” (Feld, Köhler, and Nientiedt 2015). Instead, it serves as a reminder that the ordoliberal Economic Constitution may be flexible in its form, but rigid in its ultimate purpose to safeguard these core economic liberal commitments, in their varied historical instantiations, from democratic contestation.<sup>7</sup> In that sense, ordoliberalism is fundamentally a *normative* economic and political—and only secondarily a jurisprudential—project. As such, it is alternative *normative* projects that can challenge its foundations. It is to such normative agendas and their vision for the role of law in the economy to which the article will now turn.

### III. First Direction: Negative Universalism

The perceived debasement or, at least, the tenuous hold, of the Union on the rule of law provides fruitful ground for one of the responses to current modes of EU economic governance: a return and reinforcement of the rule of law, combined with institutional reforms, culminating in the vision of constitutionalization of transnational political authority and a reconfiguration of the demos. Acknowledging the systemic constraints imposed upon an interdependent world society, Jürgen Habermas endorses the position of extending democratic procedures beyond national borders as the only solution to questions of both governability (for example, control of financial markets) and legitimacy (Habermas 2012a, 2012b). According to Habermas, the current model of “executive federalism” reflects the reluctance of political elites to replace a regime that makes it possible to transfer market imperatives to national budgets without proper legitimation with a truly transnational democracy of argumentative conflict of opinions in the public arena—an essential prerequisite for deliberative processes of opinion- and will-formation (Habermas 2012b, 337-348). It is precisely these deliberative processes that make genuine consensus at least possible that can, therefore, provide a response to current democratic deficits (Habermas 1996). Following a different argumentative course but arriving at a conclusion comparable to those of Habermas, non-proceduralist accounts of post-national constitutionalism endorse the extension of constitutionalism beyond the state by reference to human rights, democracy, and the rule of law. In particular, such accounts stress that a set of universal constitutional commitments, such as to the principles of legality, subsidiarity, participation, and rights-protection, can be derived from a

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<sup>7</sup> In the case of the euro crisis, this meant, among other things, the prioritization of the interests of institutional investors, who had taken advantage of profit opportunities resulting from differences in interest rates within the eurozone, at the expense of European taxpayers (Varoufakis 2018, 8-29). The fiscal governance of the EU did not mitigate, but rather exacerbated the economic differences between North and South, by eventually supporting a growth model in which certain member states can maintain their positions as creditors, while the others will remain debtors (Bilancetti 2019, 262).

post-national constituent power that enables the search for a distinct sense of the public good or, slightly differently, from the underlying normative substratum of existing societies composed of free and equal individuals collectively acting to develop their conception of public good (Walker 2012; Kumm 2011; Peters 2009).

In both proceduralist and substantive accounts, constitutionalism is meant to set limits on state power—while, indirectly, it could entail limits for private power as well. Regardless of whether these limits flow from deliberative processes or from underlying normative principles, the vision of an at least possible universal consensus on certain fundamental human interests characterizes this approach to constitutionalism. Yet, if there is no universal position, there can be no universal—but only hegemonic—values. In that direction, feminist legal and political theory has highlighted that consensus cannot embody the desires of all participants equally—power differentials always remain (Fraser 1992; Cohen 1995). Could, nevertheless, a different constitutionalism—a “negative constitutionalism”—form the core of a critical response to the depoliticization of the economy and the expansion of market ordering?

A constitutionalism of negativity is predicated upon a certain conceptualization of formalism. Far from a substantive understanding of formalism, as advocated by Hayek, this neo-formalism builds on the positivist view that the concept of the rule of law is primarily procedural and has no reference to the relation between the government and the governed, but is only concerned with the conformity of the application of the law to valid law as it has been created according to established procedures (Kelsen 1955). Crucially, such formal conceptions of the rule of law mean that no judgment is passed on the content of the rules themselves (Craig 2017).

This is the direction in which the “culture of formalism,” suggested by Koskenniemi (2001), develops. Indeed, Koskenniemi agrees that formalism needs not be permanently associated with certain substantive outcomes—formalism can coexist with both just and unjust policies (Koskenniemi 2001, 503). It is, in fact, the critique of formalism that has shown the actual disjunction between the letter of the law and the predictability of outcomes. Endorsing a claim of legal indeterminacy that results not only from semantic indeterminacy but, more fundamentally, from the contradictory premises and sources of law (Koskenniemi 2006a; Dagan 2007, 614), Koskenniemi underscores that it is a matter of political contestation to give the meaning of the rules one or the other direction. Yet, in this process of political contestation, there is a residue of *universalism*, a common space to which contesting sides can resort when claiming a right. According to Koskenniemi, “the emancipatory core, and the universalism of the culture of formalism, lies precisely in its resistance to subsumption under particularist causes” (Koskenniemi 2001, 503-504). This universalism is distinct from the one undergirding the abovementioned versions of constitutionalism. As Beckett correctly highlights, for Koskenniemi, critique presupposes the universal as a condition of possibility (Beckett 2006, 1062). While it may be impossible to articulate a “positive” universalism without resorting to some form of imperialism, the form of the law—precisely because of law’s indeterminacy—functions as a vessel for any particular claim. As such, it enables particular identities and causes to make their claims in universal terms, transmitting them beyond their separate value-systems. Crucially, for these universal terms to steer clear of the dangers of imperialism and imposition of certain values on others, they must take a negative form: “lack of voice,” “lack of education,” “lack of economic justice.” This is a universalism that remains “empty, a *negative* instead of a positive datum;” it is a universalism of a *horizon of possibility* (Koskenniemi 2001, 506).

For this line of thinking, the value of the law is the law itself or, more precisely, its *form*. (Koskenniemi 2006b). Koskenniemi clarifies that it is not the role of legal theories to provide resolutions to social problems (Koskenniemi 1999). In a similar vein, Everson suggests that “the

law can refuse to judge,” avoiding, in the case of European economic governance, its own “transformation into a complacent instrument of a totalizing economic outlook” (Everson 2019, 402). The modest ambition of a “culture of formalism” would then be to set limits to the exercise of power and to undergird a social practice of accountability, openness, and equality, one not reducible to the political positions of the parties involved (Koskenniemi 2001, 500). In that sense, law is meant to be the space that guarantees that politics do not degenerate into a clash of incommensurate value-systems. By securing this gap between law and politics, while ensuring the existence of limits for both public and private power, formalism protects and enables democracy. Taking this point further, Brunkhorst suggests that law has a hidden negativity, which consists in the fact that it enables calling power to account (Brunkhorst 2014). Yet, “calling to account” does not simply imply the exercise of granted rights through established institutions. Rather, it implies a “constitutional mindset” that is attuned to the utopian moment in law: the idea that law, due to its radical openness to interpretation, could mean something different than its current hegemonic instantiations. The predominance of one understanding of the law over another is eventually a matter of social struggle. Koskenniemi summarizes this point by pointing out that “the roots of transcendence lie in immanence” (Koskenniemi 2015, 1041). In other words, the legal form contains a trace of freedom; it is “at once emancipatory and repressive, normative and functional, and both sides of the law are in dialectical tension from the beginning” (Brunkhorst 2014, 132).

Is negative universalism a normative project and, if so, how does it challenge the prioritization of liberal economic rationalities at the expense of democratic participation and of social, welfare, and environmental concerns—in short, how does it upend the Economic Constitution? “Positive” constitutionalism essentially focuses on institutional reforms and upholding the rule of law. Negative universalism resists the impulse to fix the universal in positive institutions and to outline straightforward institutional solutions; yet, it also relishes the power of positive law to draw limits on public and private power. For Koskenniemi, the force of positive law is the force to draw sharp lines in a fluid world of opportunity, which necessarily entails that “neither the revolutionary avant-garde nor the manager of a transnational company likes them” (Koskenniemi 2015, 1042). In that sense, critically inclined neo-formalism would require respect for the *form* of the law, on the supranational, the international, and the national level. Formalism’s value, as outlined here, is predicated on the leeway the legal form secures for reinterpretations of the law and critiques that the legal system has distorted the principles that supposedly inform its own foundations.<sup>8</sup>

Reducing the expectations from law to its role as a restraint of power brings to the foreground an established critique of the rule of law: Restraining power also prevents power’s benevolent exercise; the rule of law establishes formal equality but does not advance substantive equality (Horwitz 1977, 566). Furthermore, excessive faith in the indeterminacy of the legal form might engender the conclusion that the actual content of rules, whether advantageous for social causes or not, is eventually unimportant, thus undermining the importance of legal change (West 2011, 157- 161). If the roots of transcendence lie indeed in immanence, then the content of norms sets boundaries on institutional imagination and shapes political possibility. In other words, if alternative legal orderings cannot be imagined except through some reference to existing ones, then it is also imperative to change existing ones. By assigning the question of legal change to the sphere of politics, with which it does not engage, negative universalism does not provide an avenue to think about legal change. In addition, it is hard to see how to escape from the currently hegemonic politicization of the law without achieving some other form of political hegemony, which in itself would politicize the law. The currently functionalist orientation of the Economic Constitution overlays the spectrum of possible meanings of the law with an overarching *telos* (for example, the safeguard of the euro, price stability, etc.) that has been hegemonically established.

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<sup>8</sup> On “redemptive constitutionalism,” see Cover (1983, 33).

In that sense, the over-politicization of the legal framework places limits on the quest for negativity entailed by radical indeterminacy. Eventually, then, the weakness of negative universalism is that it responds to a pragmatic normative project of depoliticizing the economy that is flexible in the means it employs to achieve the desired ends with a principled, jurisprudential belief in the legal form as a vessel for possibly radical claims. Contrary to this vision of separating law from politics, *instrumentalism* attempts to respond to the ordoliberal challenge with a similar politicization of the law, only resting on different values.

#### IV. Second Direction: Instrumentalism

The second direction of critical engagement with the entrenchment of the Economic Constitution that I identify is that of *instrumentalism*—that is, using state law to advance goals of redistribution and democratic participation.

Instrumentalism rests on the assumption that state law is constitutive of economic structures. This assumption has multiple conceptual roots: Polanyi's analysis of how *laissez-faire* was planned and a product of legal ordering, rather than a natural development (Polanyi 2001 [1944]); a sociological jurisprudence that understands the legal system as intrinsic to the formation and reproduction of social systems (Kjaer 2020b); Legal Realist insights on how legal entitlements shape the bargaining power of different parties and generate economic value, having direct consequences for socio-economic inequality (Hale 1923; Cohen 1935; see also Samuels 2007); and the focus of contemporary legal institutionalism on capitalism's dependence upon general national systems of legal enforceability (Deakin et al. 2017). Overall, the instrumentalist position is undergirded by the notion that capitalism is a product of legal ordering, the fundamentals of which are juridical equality and the delegation of productive activity to private agents (Dagan et al. 2020; Lang 2017; Boyer 2001; Grewal 2014). Constitutional, counter-majoritarian mechanisms may then place further limits on the ability of people to radically revise the legal rules underlying commercial society, such as property rights and liberty of contract (Grewal 2014).

Law is understood as the central mechanism of social power and not an epiphenomenon or a mere reflection of economic relations, contrary to what is usually presented as the Marxist view (Marx 1990 [1867], 57, 178-179). In that direction, Pistor stresses that capital rules by law (Pistor 2019). Wealth creation is only possible thanks to a legal code backed by state power as, in the absence of legal enforcement, the legal privileges capital enjoys would not be respected. From Pistor's perspective, the centrality of law for coding capital shifts the focus from class struggle to the question of "who has access to and control over the legal code and its masters" (Pistor 2019, 8). The importance of institutions (and hence, law) was also not overlooked in Piketty's major work, *Capital in the Twenty-First Century*. Revisiting the main arguments of the book, Piketty warns against a simplified reading of his argument that because the rate of return on capital  $r$  exceeds the growth rate of the economy  $g$ , wealth inequality is destined to increase indefinitely over time (Piketty 2015). In fact, Piketty underscores that  $r > g$  is not the primary tool for examining changes in wealth and income in the twentieth century, pointing instead to institutional changes and political shocks (Piketty 2015, 67; Piketty, 2014). The focus on institutions echoes powerfully in Moyn's suggestion that "there is no such thing as capitalism"—only institutional arrangements that improve or worsen inequality (Moyn 2014, 55).

It follows from the constitutive function of law that the agent of legal ordering holds considerable power for the steering of society. As a source of inspiration, instrumentalism looks back at the *trente glorieuses* and the monumental reduction of inequality through bold institutional reforms. Indeed, the law of the welfare state expanded regulation and the use of the legal form (Kennedy 2006), emphasized uniformity, and reinforced the role of the central authority and control (Ewald

1986), while it concretized a form of functionalism that conceived of the law purposively, as part of a process of social engineering (Loughlin 2005). The welfare state was intrinsically connected with the notion of democratic citizenship. In fact, as T. H. Marshall noted, the welfare state brought about an evolution in the notion of citizenship, transforming it from the fundamental architect of legitimate social *inequality*, to the main drive toward social *equality* (Marshall 1992, 7). In other words, the abstract, formal, juridical equality of modern citizenship that disregarded one's actual position in society began to acquire a substantive content expressed through social rights, including these of fair wage, health care, and housing, but also through duties to the community, such as the duty to work (Marshall 1992, 45-46). The introduction of groups into the heart of private ordering and the "rematerialization of law" (for example, labor law, social law, tenancy law, consumer protection) were instrumental in concretizing a vision of the market as a political project (Bartl 2020, 236-238). According to Duguit's early observation, such transformations indicated that "a legal system of realistic and socialist order replaced the previous metaphysical and individualistic legal system" (Duguit 1913, xi).

It is on the basis of a profound connection between state regulation, intervention, and democratic citizenship that the instrumentalist position turns its attention to state power and governing by means of substantive legal rationalities. This aspiration to govern and to engage in ambitious, centralized, encompassing institutional designs could deliver on aspirations of equality (Moyn 2018, 219; Pistor 2019, 233; Rosanvallon 2013, 273, 293). Similarly, as markets do not exist beyond state power, they can be redesigned to fulfill their ultimate purpose of promoting human flourishing, as opposed to sustaining wealth maximization (Harris and Varellas 2020, 5, 10). Unlike the hesitation of negative universalism (and of counter-hegemony, as I will show below) to derive institutional solutions from critique, the pragmatism of instrumentalism is reflected precisely in the elaboration of alternative institutional designs capable of achieving egalitarian and participatory outcomes. Extending beyond superficial remedies to neoliberalism's most pernicious effects, such designs may range from redistributive policies, such as a progressive wealth tax (Piketty 2014), to structural reforms of monetary institutions inspired by legal analysis (Feichtner 2016), to normatively driven changes of substantive and procedural law in fields like corporate law (Ireland 2010) or European private law (Collins 2008). Yet, taking into consideration the constitutive role of law in current regimes of hierarchy and inequality, legal strategies and interventions require re-imagination and re-assessment if they can be instrumental in fulfilling the vision of a democratic political economy (Chadwick 2019, 18).

Overall, an instrumentalist perspective implies an understanding of the law as non-autonomous, an empty vessel to be filled with substantive content that can either advance or hinder different normative agendas. To give shape and content to the law, which eventually shapes the economy and drives our normative universe, instrumentalism relies on democracy as a core principle. According to Mouffe, the main ideas of the democratic tradition are those of equality, identity between the governing and the governed, and popular sovereignty (Mouffe 2009). These ideas, Mouffe argues, tend to be forgotten in the contemporary identification of democracy solely with the liberal values of the rule of law, human rights, and individual liberty. The connection of these values to democracy is based on tangential historical articulation, rather than on the same philosophical roots (Mouffe 2009, 2-3; see also Gauchet 2017). The ensuing democratic deficit cannot be remedied through appeals to consensus and technocratic politics "without adversary" (Mouffe 1993). Instead, it can only be addressed through an agonistic understanding of democracy, which endorses political adversity, competing political visions, and the non-universal nature of political outcomes. Unlike the warnings of negative universalism against the conflation of law and politics and the preservation of a universal space to which particular claims can resort to, the instrumentalist position aspires to translate necessarily partial—but majoritarian—rationalities into regulatory action. The exercise of popular sovereignty encapsulates the moment of *political possibility*

as a rejection of the limits supposedly set by “the economy,” eventually also enabling the renegotiation or even the rejection of the broader limits placed by liberal institutions, such as property rights.

The Economic Constitution of the EU appears designed to prevent the kind of agonistic contestation envisioned by instrumentalism. Its function is precisely to seal the capitalist principle of resource allocation, which operates on the basis of free market forces, from the democratic principle of resource allocation, which operates on the basis of social need and entitlement. This brings to the surface and intensifies the inherent tension that characterizes the institutions and functioning principles of democratic capitalism (Streeck 2011; Wilkinson 2019; Grewal and Purdy 2014). The Economic Constitution limits the scope of political possibility, setting implicit bounds on what type of policies might be deemed feasible and which are not, such as, for example, the nationalization of banks (Grewal and Purdy 2014, 6). The perceived structural impossibility of popular sovereignty to penetrate the governance of the EU and shape the content of norms in the normative direction of equality and participatory parity prompts a skepticism about the EU. Indeed, proponents of views that fall within the spectrum of what I identify as the instrumentalist position share different degrees of doubt with regard to the potential of the current institutional framework of the EU—or even of supranational ordering in general—to deepen democracy and assert social over liberal economic priorities in new legal ascriptions (Grewal 2018; Streeck 2012; Scharpf 2014; Mitchell and Fazi 2017; but see Hennette et al. 2017). For some, this would only be possible following a set of structural changes capable of both embedding diversity and democratic participation in the government of the Union and of reversing its current structural orientation towards liberalization and the preservation of transnational flows—in short, following a reinvention of the Union (Scharpf 2014).

While the optimism of the instrumentalist position about legal reform, its insistence on “political possibility,” and its focus on democratic participation and societal majorities as the primary lever for concretizing these aspirations are powerful, it is worth pondering whether it places too much faith in the ordering capacities of law and too little attention to the paradigm shift entailed by the processes of globalization (Michaels 2013). Perceiving law as eventually reducible to politics might obfuscate a reality in which the center of legal production shifts from the state to civil society (Merry 1988; Teubner 1996). Legal pluralism, for example in instances of transnational governance and private regulation, challenges instrumentalism by highlighting the plurality of actors that might be creating law and by drawing attention to forms of law that are not made deliberately (Taekema 2017, 119; Santos 2002). In this fragmented globalization, politics does not necessarily drive legal change, and the politicization of new transnational normative orders needs to find new ways of articulation (Zumbansen forthcoming). In addition, transnational economic integration and the structural power of private financial interests might insulate existing power relations beyond attempts of legal transformation through “automatic punishment mechanisms,” such as capital flight, increased interest rates, skyrocketing sovereign debt, rating downgrades, and disinvestment (Lindblom 1982; Roos 2019). This is particularly true for countries that lack the ordering capacities or the monetary sovereignty of strong global economies, like the US (Henwood 2019). Without developed mechanisms of global justice, redistribution, and transnational welfare, and absent a—highly improbable—coordinated inter-state effort to curb the structural power of private financial interests by means of international legal instruments, the instrumental approach appears to be missing the instruments that would allow it to become fully purposive and effective in the globalized economy of the twenty-first century. Importantly, this is not only—even if it is also—a question of technicalities, such as developing legal fixes against capital flight. If the instrumentalist approach is to be loyal to its grounding in popular sovereignty, equality, and democratic allocation of resources, the question of the transnational constitution of the demos

and the guaranteeing of “voice” and input legitimacy become fundamental, and not yet answered, questions.

Furthermore, the emphasis on the constitutive function of the law, if taken to an extreme, may lead to the rather one-dimensional prescription of “capturing the state,” including its powers of “legal coding” and monopoly of force, as *the* method for social transformation. Such an approach seems to take the determinant role of the economy too lightly. The pursuit of transforming the economy through incremental legal reforms does not take fully into account the unmalleability of the social power that lies in social relations of production and its resistance to grand realignment projects. Could, for example, the law ever abolish wage labor as the form of exploitation in capitalist societies (Selwyn and Miyamura 2014)? Marxist critiques, even if sensitive to the social constitution of the economy and wary of the flexibility, or even artificiality, of the base–superstructure divide, stress the limits of the liberal legal form in achieving social transformation (Wood 2016; Baars 2019). While nothing a priori precludes radical possibilities through, for example, “non-reformist reforms” (Gorz 1987), the expectation of unilateral, top-down social transformation by means of legal instruments, only with the backing of popular sovereignty, appears to underestimate the social forces and relations of production that participate in the creation and the shaping of law and ideology in the first place (Althusser 2014 [1971]). This skepticism does not point only to the correlation of wealth and political influence, lobbying, and possible regulatory capture, but more deeply to the notion that certain fundamentals of capitalist societies, such as property rights or the driving force of profit-making, could not be thoroughly reconfigured without also altering the fabric of society. The resultant risk that the instrumentalist position might be reduced to a project of limited reformism opens the way for *counter-hegemony* and its focus on civil society, pluralism, and, in some cases, the cultivation of structures of direct democracy beyond institutionalization.

## V. Third Direction: Counter-Hegemony

As *counter-hegemonic*, I categorize the approaches that tend to resist the subsumption of emancipatory politics under the umbrella of state power. The concept of “hegemony” is meant to draw attention to the importance of the political and ideological superstructure, including culture, in maintaining the relations of the economic base (Gramsci 2011). In that direction, a key element of the diverse array of approaches I identify as counter-hegemonic responses to the liberalization of the economy and the sidelining of social welfare concerns is the importance of civil society and its differentiation from the market. An attachment to normative pluralism, decentralization, and human rights, or, in some cases, to social struggles and a broader notion of utopianism, concretizes the shared discomfort with a unitary determination of the normative foundations of law. Instead, counter-hegemonic approaches look to the meaning created by societal processes of contestation, or even to the disruption of established institutions as an end in itself. Within the category of counter-hegemony, I distinguish between, on one hand, theoretical endeavors invested in the project of democratizing the economy from *within*, drawing from a system-theoretical conceptual background (Luhmann 2008; Teubner 1993), and, on the other hand, broader and more holistic oppositions to the congealment of social hierarchy that focus on the value of critique itself (Douzinas and Warrington 1995; Lacey 1996; Brown and Halley 2002; Tushnet 2011).

The first set of approaches recognizes that the constitutional question has moved beyond the containment of state interference in individual freedoms, to the simultaneous protection and limitation of the autonomy of functionally differentiated social systems, including the economy (Teubner 2012; Fischer-Lescano 2016). Contesting modernity’s fixation on a singularity of Reason and embracing the functional differentiation of contemporary society, Gunther Teubner’s societal constitutionalism rejects the complete reliance on the state for projects of social transformation,

stressing the impossibility of comprehensive *ex ante* regulation (Teubner 2011a, 5; Streeck 2009, 236). Such regulation is not only technically impossible, due to the lack of centralized knowledge and enforcement capacity, but it also corresponds to the aspiration that one system—politics—represent the whole of society. This aspiration contains a latent and looming threat of totalitarianism (Teubner 2011a, 36-37). Instead, social change could be envisioned as taking place within the internal functioning of social systems.

In such an institutional imaginary, the role of the law should not be the top-down imposition of substantive rationalities, but rather the enhancement of self-reflective capacities and the promotion of the self-limitation of social systems (Teubner 1983; Zumbansen 2008). The public/private dichotomy needs to cede its place to a multiplicity of social perspectives and a pluralism of partial rationalities *within* each system (Teubner 2012). This project of “polycontextuality” implies that social systems should not be allowed to express exclusively “public” or exclusively “private” rationalities. In other words, the economy, one social system among others, cannot be constituted solely by the drive of profit-maximization, but must incorporate public rationalities, such as respect for human rights, within its ambit: The economy needs to be democratized *from within*. While the role of state law is crucial in enabling and facilitating such a transition, concrete limitations on the destructive expansion of social systems, such as effective elimination of poor working conditions, will be the result of system-specific logic. This is because the necessary knowledge for inhibiting such expansion cannot be built from an external observation point, such as that of the state (Teubner 2011a, 14). Therefore, state law must leave space for, and even facilitate, the development of a multiplicity of “irritations” and “learning pressures,” including reputational sanctions, that have the capacity to trigger the desired self-limitation (Fischer-Lescano 2016, 167; Thornhill 2013). Social movements, media pressure, boycott campaigns, NGO action, and judicial control are some of the mechanisms that could steer the narrow path between external interventions and self-regulation (Teubner 2011a, 2011b).

The agenda of democratizing the economy from within means that the social cannot be disconnected from, but rather needs to permeate markets, for example through the development of a societal private law, a crucial element of which is business responsibilities towards third parties (Micklitz 2018). Similarly, corporate codes can be understood as a force of self-limitation and as emerging “civil constitutions,” explicitly recognizing a direct effect of human rights on private actors (Teubner 2011b; Kampourakis 2019). Human rights function as “social and legal counter-institutions to the expansive tendencies of the economic system” (Teubner 2011c, 210) and, as such, they become essential in this decentralized perspective of social transformation (Christodoulidis 2017). Societal collisions, like those arising from the unfettered expansion of economic rationalities, need to be seen in their fundamental rights dimension. In turn, this allows conceptualizing the *horizontal effect* of human rights beyond their protective effect only on victims of human rights violations by private actors, especially corporations. Rather, the horizontal effect of human rights captures their potential to become a shield of protection of societal spheres of autonomy against the destructive effects of the expansion of social systems. In essence, human rights prevent one single rationality, for instance the economy, from dominating society (Teubner 2006, 2011c; Fischer-Lescano 2016; Viellechner 2020).

However, inherent in this sociologically oriented approach is the risk of reifying the unequal social and market power behind the different forces of “self-limitation.” Societal constitutionalism relies on a social sphere that has already been shaped and determined by patterns of social hierarchy and distributional inequality. The shift from the legal centralism of the instrumental approach to social expectations and self-limiting norms emerging from societal pressures, such as consumer pressures, might deprive those who do not have the means to shape normative outcomes through their social/market activity from the capacity to co-determine normative outcomes (Kampourakis

forthcoming; see also Christodoulidis 2013). It suffices to think of the importance of reputational sanctions as “learning pressures” for the process of self-limitation and the vastly different capacities of individuals to inflict such sanctions, for example depending on the location of the actors in question (Global North/Global South) or the capacity for investment and consumption. In addition, contrary to the paradigm of legal centralism and its reliance on the abstract equality of citizenship and democratic participation to decide upon common, inter-subjective interest, the epistemology of system-theoretical approaches rejects the possibility of knowledge of other systems’ workings, eventually relying on self-change within delineated spheres of autonomy.<sup>9</sup> This defeats the possibility of ambitious, centripetal projects of social engineering (Blankenburg 1984).

Nevertheless, this sociological, pluralistic agenda for the limitation of economic rationalities can also be understood as not having a linear normative impetus, thus resisting its reduction into specific institutional blueprints (Teubner 1989, 152). Such a “critical systems theory” (Kjaer 2006, 77; Fischer-Lescano 2012a) and an open reading of societal constitutionalism place no predetermined limits on the content and form of the various, decentralized, social constitutions. In a sense, the focus on the different ecologies of justice draws attention to the possibility of subverting law’s self-descriptions, and captures the idea that justice through law is unattainable—in its realization, it creates new injustice (Teubner 2009). This dovetails with a tendency that characterizes the second set of approaches captured here as counter-hegemonic.

In these approaches, legal reforms are understood as inherently limited and, as such, a special role is reserved for the critical practice itself and the utopian energies it might catalyze. Avoiding the temptation to outline alternative social arrangements, critique needs to be sensitive to the notion that law is only one among multiple interrelated social frameworks in which social hierarchies might be instantiated (Lacey 1996, 146; Norrie 1993; Smart 1989). Dreaming up of blueprints ends up reflecting a “totalizing impulse” to affix stable meanings to social practices. Instead, what is sought is a form of utopianism and the articulation of an ethical project—not through metaphysical prescriptions, but rather through deconstruction and the openness of meaning (Cornell 1992), the imagination of the impossible (Irigaray 1992), and the ethics of alterity. Approaching the question of justice through the infinite responsibility to the Other means that, eventually, justice lies *beyond the law* (Douzinas and Warrington 1995; Loumansky 2006; Diamantides 2007). The law can only approach it—but never achieve it—by reference to its *negative* (Derrida 1992, 22). The lived experiences of injustice constitute the passage through which justice can become manifest—not as a result of the injustice itself, but because of the utopian energies it activates (Fischer-Lescano 2012a, 11). This utopianism may be found in social movements that engage in a continuous project of imagination beyond the conceptual limits of the present (Evans 2008), an imagination that would be killed in the moment of its institutionalization in law. Legal reforms could possibly be an “end of politics” (Lacey 1996; Tushnet 2011).

Indeed, the dynamics of social struggles against austerity in Europe have often been found in “extra-institutional spaces” (Rajagopal 2003, 235) that attempt to envision participatory, bottom-up routes to economic equality (Kinna, Prichard, and Swann 2019; Simiti 2014), including, for example, the protection of the commons (Bailey and Mattei 2013). Yet, the relationship between utopian thinking and institutionalization is more complicated than the aphorism “end of politics” implies. Subaltern actors in the Global South have challenged dominant forms of economic governance by using the law and reconfiguring hegemonic practices—integrating state law and rights in broader social struggles (Rodríguez-Garavito and Arenas 2005; Santos 2002). The role of *rights*, and specifically of social rights, is critical in both crystallizing a form of solidarity that

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<sup>9</sup> On the overlap between the Hayekian theory of knowledge and systems theory, see Slobodian (2018, 224-235) and Goldmann (2018, 335).

challenges the “totality” of market activity (Christodoulidis 2017) and in informing and inspiring grassroots practices and instances of bottom-up normative pluralism that can democratize the economy, such as, for example, participatory budgeting (Santos 2005). The language of human rights can amplify the voices of individuals, communities, and trade unions in the deliberative process, because it functions as visible inscription of equality, scandalising existing exclusions and enabling its addressees to “make something out of that inscription” (Rancière 2004, 303; O’Connell 2014, 73; Möller 2011, 308).

However, the concrete European experience of the financial crisis highlighted some of the limits of this approach, as the various decentralized social movements did not manage to formulate the concrete processes by which their goals could be realized in the social order. The arguable failure of anti-austerity struggles was often preceded by a canalization of the struggle to the political sphere and the attempt for centripetally organized social transformation. The inscription of social rights, as for example in the EU Charter of Fundamental Rights or in European constitutions, could have enabled—and to a certain extent did enable—the search for a normative substratum against policies that prioritized market imperatives over social welfare. Yet, if the control of centralized law-production may not be enough to reverse structures of economic inequality, as hinted above, the lack of such control makes the undertaking of redistributive and participatory transformations appear almost impossible.

## VI. (Non-)Concluding Thoughts: LPE in Europe

Having briefly visited some of the critiques against the Economic Constitution and the depoliticization of the economy it entails, as well as some of the blind spots and shortcomings of these critiques in outlining the role of law for social transformation, I am brought to the issue of the added value and contribution of an emerging LPE-in-Europe research agenda. How would such an agenda differentiate itself from previous critiques, and what could it contribute to envisioning a democratic political economy across the continent? My thoughts here are tentative, and this is a field in its early stages of development in Europe.<sup>10</sup> Indeed, the following reflections are only meant to contribute to and hopefully to enrich ongoing processes of discourse formulation.

One aspect of LPE that resonates in relevant scholarship in Europe (Kjaer 2020, Chadwick 2019, Lang 2017) is the constitutive role of law in economic life. Functioning as a binding factor for scholarship across legal fields and national differences, the acknowledgement of law’s constitutive role paves the way for methodological commonality and an exercise in deciphering how legal arrangements may be responsible for perpetuating inequalities and hierarchies along lines of gender, race, and class. Yet, the recognition that law generates private power is not in itself sufficient to flesh out a research agenda if not coupled with either an elaborate theoretical framework, or a normative framework that provides an answer as to what motivates such research and what its goals are.

In sketching such a normative framework, a potential component is the articulation of legal critique from the standpoint of a commitment to egalitarian and democratic ideals that are integral in the

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<sup>10</sup> Most notably, so far, through the organisation of the workshop “Law and Political Economy in Europe” at the Oxford Centre for Socio-Legal Studies in October 2019 (for the relevant blog series, see <https://lpeproject.org/blog/law-and-political-economy-in-europe-transnationalizing-the-discourse>), the *Ius Commune* Workshop in November 2020, and the publication of the edited volume by Poul F. Kjaer, *The Law of Political Economy: Transformation in the Function of Law*, in 2020 (for a relevant blog series, see <https://verfassungsblog.de/what-comes-after-neoliberalism-2>).

emancipatory urge to “create a world which satisfies the needs and powers of human beings” (Purdy, Kapczynski, and Grewal 2017; Harris and Varellas 2020, 10; Horkheimer 1972, 246). More than a simple moral condemnation of capitalist society, the assumption of such a standpoint could be an instance of immanent critique, in the sense that it involves the claim that the currently predominant liberal capitalism does not fulfill its own promises (Stahl 2013; Antonio 1981): Freedom is understood only negatively as the absence of state coercion, failing to reflect the “freedom from want;” equality is reduced to equality of opportunity, which functions as a legitimation of substantive inequality; formal justice is structured to reflect market and social power; and democratic institutions do not truly reflect the ideals of public autonomy and participatory parity. Of course, the meaning of both the criticized normative standards and the ideals they might engender is historically contingent and open to interpretation and contextualization, inevitably giving rise to internal debates about their meaning. Yet, the contestation about this meaning grounds legal and political claims and provides a vector for critical legal projects. This means that critique cannot be merely jurisprudential, reducible to the exposure of law as one more instance of politics, power, and ideology. Such critique can be co-opted or be structurally ambiguous, as it makes no claim about what kind of law could ground and be grounded on a different form of power. For instance, the critique against the over-politicization of the post-crisis economic governance of the EU and against the disregard for the rule of law has proven to be normatively ambiguous, in certain cases motivated by values antithetical to the ideals of a more democratic, social, and participatory Europe (Beck 2019).

Furthermore, the normative framework of the LPE agenda would endorse the drive to translate critique into legal and institutional change, without nevertheless fetishizing institutional reform and without reducing the critical dimension of the project to merely policy advocacy. Indeed, not all endeavors to shape collective life take a legalistic form (Brown and Halley 2002, 19). However, recognizing the constitutive role of law for the economy harbors the idea that the economy is a human creation and, as such, it could be radically different. This could bring LPE closer to the instrumentalist camp. Highlighting the contingency and the political underpinnings—as opposed to the supposed necessity, neutrality, and objectivity—of the European Constitution is then coupled with the idea that the legal structures that make it up *can* and *should* be changed. In that sense, and further advancing the point that critique cannot be solely jurisprudential, holding on to indeterminacy as the gate for radical transformation, as suggested to an extent by negative universalism and by certain currents of Critical Legal Studies, runs the risk of obscuring the need for concrete change in the content of the law (West 2011, 157-161). If the normative anchor of LPE in Europe is a commitment to the idea that all people living in Europe should be the authors of the laws governing their lives, as well as a striving for egalitarianism in the allocation of resources and for a sustainable future, then LPE in Europe would confront the national and supranational legal structures that oppose such aspirations. If the supranational legality of the EU appears impenetrable to struggles for democratic participation and egalitarian distribution, then a research agenda on LPE in Europe involves exploring the institutional reforms that would make this type of politicization possible.

Finally, recognizing the need for legal and institutional change involves a quest for the democratic and public power-building that can achieve this change. This signifies a commitment to democratic participation as a value in itself, reflecting a rejection of paternalism and a demand for private and public autonomy. While the positive outlook on public power differentiates LPE from a line of critique that targets the ubiquity of power and the subjectification it entails, it also should not lead to a fetishization of the state as the sole locus of power. As mentioned in the discussion of instrumentalism, loyally following the blueprint of the welfare state is not an adequate model for the globalized economy of the twenty-first century. Democratic and public power could be constituted in multiple ways and in different arenas where power is exercised by non-governmental

actors, including, for example, instances of transnational private regulation or the governance of supply chains (Teubner 2011d, 122; Dias-Abey 2019). In that regard, LPE in Europe could draw from the decentralizing and pluralistic impetus of counter-hegemony. This is also an invitation for institutional imagination and for the kind of internationalism and cooperation that can inform both trans-national and sub-national constitutions of the demos.

Establishing a research agenda on the basis of, on one hand, shared conceptual and methodological starting points and, on the other hand, fragments of a normative vision as to what might be the substance, the driving force, and the telos of such an agenda points to the political and pragmatic dimensions of the LPE agenda. While this political dimension and pragmatism—whereby ideas and concepts arise from behavior and action—can function as a centripetal force for the research agenda, it need not limit the boundaries of LPE as a scholarly project. Indeed, the need to further elaborate the genealogies, concepts, nuances, methodologies, and interdisciplinary connections employed by future scholarship is itself an open question and part of the project of the establishment of a research agenda. The theoretical development of key concepts, including that of power (Johns 2020), will also determine the kind of “transformativeness” promised by LPE. The political dimension of an LPE-in-Europe agenda is then tuned to the possibly transformative role of law for society and the economy. The discussion of the Economic Constitution highlighted the pragmatism that underlies the project of depoliticizing the economy. Upending a pragmatic and flexible normative project requires a similarly flexible and mobile critical practice.<sup>11</sup> In that sense, contextually driven performances of eclectic elements of all three of the approaches mentioned above could contribute to fleshing out an alternative vision of a democratic political economy through a process of “principled opportunism” (Knox 2009, 433). Drawing from Poulantzas, it could be argued that challenging the insulation of the economy from democratic contestation needs to take place on two different levels. First, on the level of system immanence: in other words, on the “strategic terrain constituted by the state,” which involves the attempt to employ state power to deliver legal change that reflects such normative commitments. Following on instrumentalism, the role of societal majorities, electoral mobilizations, centralized politics, and regulatory action is important in that regard. Second, on the level of system transcendence: not unlike counter-hegemonic approaches, this refers to a “parallel struggle” outside institutions, with the goal being to cultivate structures of direct democracy and participation at the base of society, directly challenging the social power embedded in relations of production (Poulantzas and Martin 2008, 338). A call for a flexible critical practice with fixed normative commitments to democratic participation and egalitarian allocation of resources eventually also means interweaving the emerging research agenda of LPE in Europe with empirical work, social movements, and political praxis.

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<sup>11</sup> For an account of how this emerges as an option following the internalization of existing critiques within structures of market regulation, see Desai and Lang (2020).

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