Muscles in Brussels:

The European Union's Economic Authority in Comparative and Theoretical Perspective

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May 2019

**** Partial & Preliminary Draft to be Presented at EUSA biennial meetings in Denver ****

**** Not for distribution or citation – Comments Welcome ****

Introduction (Really just a note to readers for EUSA conference)

This is a partial work in progress. The paper first took shape as of January 2019. Once we had the key pieces formulated—and saw how long it was—we needed to step back to work on how to best frame it. That reframing is currently underway. This document just presents the existing empirics, and I will greatly appreciate your input on how to best frame them.

Hopefully these empirics are interesting even without a well-constructed frame around them. They come in two parts.

First we make a bold comparative claim: EU authority in the Single Market and the Eurozone is now more extensive than analogous federal authority in nation-states like the United States, Canada, or Australia. The EU has surpassed all these polities in central constraints on state subunits' economic policy choices. In some ways its central role is even more active than in the relatively centralized federation of Germany. In other words, practically all scholarship on the EU has substantially mischaracterized the outcome. It is not just the world's most powerful international organization (IO). In important areas it is more powerful than many states.

Our second section positions this outcome in political-economic theory. What school of thought could see this EU as desirable or predictable? We review debates on the EU's relationship to the intellectual traditions of Friedrich von Hayek[1] or Karl Polanyi,[2] and argue that it features a mix. The EU is a polity that pursues Hayekian normative goals (of cross-border openness and market discipline) in ways that fit Polanyian analytical expectations (which theorize that such openness requires strong central authority). We then note that the result resembles the thinking of German ordo-liberals, who share Hayekian goals but envision stronger central authority to enforce it. We show, however, that today's EU displays even more extensive and active central authority than ordo-liberals have advised. The Polanyian muscles in this Hayekian Brussels amount to a kind of ordo-liberalism on steroids.

I'll be very grateful to hear your reactions to these claims and your thoughts on how to present them to the field in the most persuasive and impactful way.

[1] Gill 1995; Harmes 2006; Höpner & Schäfer 2012.
[2] Caporaso & Tarrow 2009; Van Apeldoorn 2009; Everson and Joerges 2012; Streeck 2016.

1. EU economic authority in comparative perspective

The EU is an international organization, founded in diplomatic treaties between states, but has gained so much authority that scholars have increasingly compared it to national federations.[3] This literature presents the US, Canada and Australia as the most plausible comparative cases, with some comparisons to the more centralized German federation. We survey how EU authority compares to these countries' federal authority over their subunits with respect to market regulation and macro-economic policies.

1.1. Authority for "Single Markets"

Consider first the terrain of "single markets." The original European Economic Community (EEC) centered on replicating a core element of American, Canadian, and Australian federalism: empowering central institutions to encourage open exchange across subunits. How does the authority exerted by these federal governments to require subunit openness compare to that of the EU? After these Anglo-Saxon comparisons we sketch the different German case, which becomes important later when we discuss ordo-liberalism.

1.1.1. Legal foundations

The EU and the Anglo-Saxon federations have roughly comparable constitutional-level bases for federal authority to require openness. The language varies, but no one debates that the founders of all these polities sought to empower central institutions with this market responsibility.

The EEC treaty of 1957 features the most specific clauses to this effect. It committed member-states to eliminate quantitative restrictions on imports of goods "and all measures having equivalent effect," as well as to "abolition… of the obstacles to free movement of persons, services and capital" (Article 3). Exceptions were possible for reasons of public policy, public security, or public health. It aimed to abolish restrictions on the freedom of establishment

[3] Sbragia 1992; Burgess & Gagnon 1993; Knop et al 1994; Nicolaidis and Howse 2001; Kelemen 2004, 2011; Fabbrini 2005, 2015; Parsons & Jabko 2005; Bartolini 2005; Menon & Schain 2006; Genschel & Jachtenfuchs 2014; Schakel, Hooghe & Marks 2015; McNamara 2015, 2018.

and "free supply of services" by 1969 (Arts. 52 and 59); to allow temporary provision of services "under the same conditions as are imposed by that State on its own nationals" (Art. 60); and called for directives on the mutual recognition of professional qualifications (Art. 57).

The Commerce Clause of the US Constitution (Art. 1, section 8) is vaguer, simply authorizing Congress "to regulate commerce… among the several states." The Privileges and Immunities Clause (Art. 4, section 2) added that "Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." But there is little debate about the founders' intent on openness. Even conservative "originalists" like Kenneth Starr note, "The same concerns that prompted James Madison to insist on empowering the national government to regulate interstate commerce (the *only* substantive power not included in the Articles of Confederation) counsel in favor of displacing state common law, statutes, and regulatory standards that intrude on federal prerogatives or discriminate against out-of-state commerce."[4]

The drafters of the Canadian and Australian constitutions were similarly concerned with interstate openness. In the 1860s Canada's founders sought to upgrade central authority relative to the US, defining distinct federal/provincial competencies rather than making the latter the default.[5] The federation received exclusive responsibility for "the regulation of trade and commerce" (section 91) and required that provincial goods "be admitted free into each of the other provinces" (section 121). Provinces were responsible for "local works" and other "merely local" matters (section 92). Australia's drafters in the 1890s were less favorable to centralization, but even more so to openness.[6] Not only did they copy the US Commerce Clause (Art. 51) and Privileges and Immunities Clause (Art. 117), they added an article (92) asserting that "trade, commerce and intercourse among the States… shall be absolutely free," and authorized an Interstate Commission (Art. 101) for "execution and maintenance" of these provisions.

1.1.2. Judicial interpretations

In all these polities powerful judiciaries have strongly shaped these legal commitments. But where the European Court of Justice (ECJ) has consistently maximized central requirements for

[4] Starr 2007, xv, his emphasis.
[5] Cites.
[6] Cites.

openness, Anglo-Saxon courts have narrowed them. Relative to the EU, writes legal scholar Catherine Barnard, the US legal system (and by extension Canada and Australia) "allows a much greater degree of deference to state actors and to state regulation."[7]

Such deference is strongest in Canadian and Australian jurisprudence. Early on, the Canadian Supreme Court limited federal authority to distinct problems of federal concern. Even federal laws aimed at inter-provincial commerce are unconstitutional if they tread on intra-provincial affairs, like in a 2012 case barring federal legislation to regulate securities.[8] In the widely-followed "Free the Beer" case of 2018 – challenging New Brunswick's limits on buying out-of-state beer – the Court confirmed previous rulings that constitutional "be admitted free" language only bars provincial laws whose "primary purpose" is protectionism.[9] Australian law followed similar paths. In 1913, its High Court rendered the Interstate Commission stillborn by ruling that it lacked enforcement powers.[10] Like its Canadian counterpart it also found that federal legislation could not tread on intra-state regulatory issues, blocking federal internal-market action for most of the twentieth century. In 1988, the landmark case *Cole v. Whitfield* rediscovered some limits on state powers, but only to bar "discriminatory burdens of the protectionist kind."[11] Explicitly discriminatory exceptions remain allowable if "appropriate and adapted to their purpose" for other goals.[12] Other decisions uphold states' rights to discriminate in public procurement and subsidies.[13]

US commerce powers have been interpreted more broadly, but not for the purpose of eliminating interstate barriers. In the 1940s, the New Deal Supreme Court diverged sharply from Canadian and Australian courts on the scope of commerce powers. Seeking to legitimate progressive federal legislation (not to require interstate openness), it found that almost any regulation affects interstate commerce – authorizing Congress to "preempt" many state policies. Later conservative courts narrowed this scope in *Lopez* (1995), *Morrison* (2000), and *NFIB v.*

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[7] Barnard 2009, 578.
[8] Cite case; Hinajeros 2012. See also Dymond & Moreau 2012.
[9] Cite.
[10] Gaegeler, Stephen. 2017. "The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution," *Public Law Review* 28(3): 205-218.
[11] Cite to Zines, *The High Court and the Constitution* 5th edition, Sydney: Federation Press, 2008. p. 195; Gonzalo Villalta Puig, "The Boundaries of the Free Trade Jurisprudence of the High Court of Australia," in Puig and Christian Twigg-Flesner, eds. *Boundaries of Commercial and Trade Law*, Munich: Sellier, 2011, pp. 76-101.
[12] Walsh 2012, 14.
[13] Cite.

Sebelius (2012), but it remains broad today.[14] However, if Congress *could* invoke these powers against interstate barriers, it has hardly done so in living memory (see below). The main openness-related limits on states today reflect court decisions that invoke the so-called "dormant Commerce Clause" to invalidate the most protectionist state laws. It is now applied only against "purposeful discrimination," like bans on out-of-state wine orders in *Granholm* (2005).[15] Other rulings exempt procurement from commerce considerations – states can favor in-state firms as much as they wish – and exempt state actions like subsidies from antitrust scrutiny.

Meanwhile the ECJ interpreted its legal commitments to openness as far more restrictive for states. The 1974 *Dassonville* case found that the treaty forbade "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade." In 1979, the *Cassis de Dijon* ruling by the ECJ qualified *Dassonville* – allowing barriers that constitute proportional defense of "general interest" concerns – but clarified a principle of "mutual recognition:" states must accept all goods that meet any states' rules, unless the receiving state shows they are harmful. Other 1970s cases outlined similar principles in services, though the "big bang" in this sensitive area came with cases in the 1990s.[16] National rules may not "impede" or even "make less attractive" cross-border services provision unless they pass tests based on *Gebhard* (1995). They must serve imperatives of policy, security, health or the environment; apply equally to home providers (non-discriminatory); be suitable to obtain their objective; and proportional (doing only what is necessary for the objective).[17] Other rulings set similar principles for freedom of establishment across borders and somewhat broader limits on short-term "posting" of foreign workers.

1.1.3. Policy action and state authority today

Important though legal principles may be, "judge-made law" is typically slow and passive.[18] Requirements for openness matter most when enacted into legislation and administratively

[14] Quote from Halberstam 2004, 795, referring to the Roberts court, but it summarizes accounts of the Roberts court as well. See Tushnet 2005; Sullivan 2007; Banks & Blakeman 2012; Keck 2015; Bowling & Pickerill 2013; Tribe & Matz 2014.
[15] See Regan 1986; Gardbaum; others…
[16] Hatzopoulos 2012, 103; a key 1974 case was *Van Binsbergen*, and 1990s landmarks were *Dutch TV* and *Säger* (both 1991) and *Alpine Investments*, *Bosman* and *Gebhard* (all 1995).
[17] Cites.
[18] On this point in the EU context, see Nicolaïdis & Meunier (cite).

enforced. The most striking divergences in these cases arise at this level. The EU today continues to pass central legislation and tighten administrative enforcement to require interstate openness. The US Congress has hardly touched its commerce powers to promote openness in recent decades. Australia and more recently Canada have launched their own "single market" projects – both inspired explicitly by the EU. But unlike the EU, they have pursued voluntary, "intergovernmental" approaches that do not directly challenge state-level authority.

The EU's single market legislative activity is well known. By the early 1980s, directives harmonized many areas of goods and some in services (like qualifications for doctors, lawyers, or pharmacists). Then came the "Single Market 1992" plan, which sought to implement *Cassis de Dijon* principles across the board. A torrent of legislation into the 1990s largely "completed" the single market for goods, established non-discriminatory public procurement, banned preferential subsidies, and removed some barriers in capital markets and services. Over time services became the main focus, as the "big bang" of services jurisprudence encouraged directives on "posted workers" and then general directives on Professional Qualifications and Services in the mid-2000s. These rules aimed to make the temporary provision of services (where someone based in one state sells services elsewhere) and establishment (where someone based in one state incorporates elsewhere) as automatic as possible. Receiving states face a burden of proof to justify remaining national conditions on such access, subject to Commission and ultimately ECJ review against *Gebhard* tests.

Less widely known is that this activity has continued in the past decade even as the EU struggled with multiple crises. Proposals for more effective enforcement of openness dominate the legislative agenda in the so-called "Services Package," "Procurement Package," "Company Law Package" and "Mobility Package." Already states are required to publicize all remaining impediments to cross-border exchange and mobility, pre-notify the Commission of any changes, tender most contracts through an EU-wide e-Procurement system, and maintain online "Single Points of Contact" for authorization of incoming service providers. A core element of the new proposals would further integrate all remaining national impediments within "Single Digital Gateways" to make them transparently accessible to citizens and to EU reporting and oversight.

The US, meanwhile, has had no "single market project" at all, even though many barriers remain between US states. Federal regulations set regulatory floors in several sectors – transport, telecommunications, food and drug safety, part of finance – but these are targeted preemptions in

a fragmented landscape. In standards for goods, the US is "by far the most institutionally heterogeneous and fragmented of all advanced industrial countries."[19] No central standards exist for many goods. One example is elevators: manufacturers make different models for different jurisdictions.[20] In sectors with federal "floors," states often set additional requirements, like California's chemical regulations.[21] Professional qualifications are generally state-by-state: even experienced architects, lawyers, electricians, contractors, or hairdressers typically start from zero to qualify to practice in another state, just as they would if they had emigrated from abroad. The concept of temporary interstate provision of services does not exist: providers must be fully licensed in each state to practice for one day. In procurement, 47 states have in-state preferences, including outright bans: Pennsylvanian agencies may *only* buy coal in-state. States freely target subsidies to in-state firms.

Despite the dominance of pro-market rhetoric in the US since Ronald Reagan, Congress has not recently exerted its authority against interstate barriers except to liberalize interstate banking in the 1990s.[22] Reagan himself made "regulatory relief" a headline economic goal of his administration, but focused on weakening federal regulation, not using federal power against interstate barriers.[23] Subsequent pro-market Republicans maintained this focus on loosening federal rules, with no attention to requiring state-level openness. As Republican House Speaker Paul Ryan's "Better Way" manifesto said in 2016, federal regulation should be "used sparingly," because "States in many cases do a better job, and should be encouraged to take the lead."[24] None of the deregulation under President Trump has related to interstate barriers.[25]

Australia and Canada have undertaken more "single market" legislation, but without building up central legal authority. Until fairly recently, both countries had even more interstate barriers than the US.[26] In the 1980s, Australians became concerned about relative decline in wealth and productivity. In 1992, with constant references to Europe's "Single Market 1992,"

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[19] Jay Tate in *Varieties of Capitalism*, 463. See also Mattli and Büthe 2003, 2011.
[20] Hoffmann 2011.
[21] For an overview, see the American National Standards Institute site, https://www.standardsportal.org/usa_en/key_information/state_level.aspx.
[22] Cite on banking; Deroy Murdock, "Tear Down State Barriers to Health Insurance," *National Review* Online, April 14, 2017.
[23] Prasad 2006; Viscusi 1994.
[24] Cite.
[25] See the Brookings Institution's "tracker" of deregulation under Trump at https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/.
[26] Cites.

they created the "Council of Australian Governments" (COAG): an intergovernmental set of policy area councils of federal and state ministers. The federal budget incentivizes states to meet COAG goals, but their participation is voluntary.[27] Operating mainly by suggesting "model laws" that each state passes separately, the process has successfully ended discrimination in procurement, established some mutual recognition of qualifications, and adopted a stronger National Competition Policy. Preferential subsidies remain possible but must be justified in terms of "public benefits." In 2007 it added a focus on reducing regulatory fragmentation in the "National Partnership Agreement to Deliver a Seamless National Economy." Negotiations continue to move forward gradually today.[28]

Canada's more recent steps were even more directly spurred by the EU. In the 1990s, the North American Free Trade Agreement (NAFTA) and the EU's "1992" model nudged federal and provincial governments into conversations on internal trade. They initially produced a non-binding, intergovernmental "Agreement on Internal Trade" (AIT) that delivered little change.[29] More significant steps reacted to the Canada-EU Comprehensive Economic and Trade Agreement (CETA) in 2014. It sparked objections that European companies would enjoy freer market access than Canadian firms did across provinces. This was indeed the case. Goods face different standards and requirements for interprovincial "imports;"[30] professional qualifications are mostly exclusive; local preferences apply in subsidies and procurement. In 2016, the Senate published a report titled, "Tear Down these Walls: Dismantling Canada's Internal Trade Barriers,"[31] leading to the more robust Canadian Free Trade Agreement (CFTA) in 2017. The provinces agreed to pursue openness for goods and services (with a huge caveat for "protection… appropriate to achieve a legitimate objective"); non-discrimination in procurement and subsidies; and to reconcile provincial differences in regulation and licensing. Provincial participation remains voluntary, however, and results are modest to date. The 2018 "Free the Beer" case disappointed advocates who hoped for a new legal impetus. As one lawyer said after

[27] Walsh 2012, 37.
[28] See, for example, the Productivity Commission's 2015 report on ongoing efforts in mutual recognition of qualifications. (ADD link).
[29] Brown 2001: 163.
[30] See, ironically, European Commission, *The Food and Beverage Market Entry Handbook: Canada*. Brussels: European Commission, 2017.
[31] See Canadian Senate report, "Tear Down These Walls: Dismantling Canada's Internal Trade Barriers," June 2016, http://publications.gc.ca/site/eng/9.819431/publication.html.

the decision, “This is going to have to be negotiated by the provinces rather than decreed by the Supreme Court.”[32]

1.1.4. The absence of single-market issues in the centralized German federation

The EU’s Single Market authority is easiest to compare to that of Anglo-Saxon federations, which feature parallel debates about commerce powers and interstate barriers. To set up our discussion of ordo-liberalism below we quickly describe German federalism as well. The key point, though, is that it has few comparable debates. In this more centralized and homogeneous federation, “single market” fights have not come up.

Germany is often called a “unitary federal state.”[33] Its Basic Law assigns the federation responsibility for “legal and economic unity” and “the establishment of equivalent living conditins” (Art. 72), as well as sole authority for “unity of the customs and trading area” and “free movement of goods.” The *Länder* have little autonomy in taxation: strong revenue-sharing schemes equalize their budgets. They share “concurrent” authority with Berlin on most other “economic matters” – including major regulatory areas like labor, health and safety standards – but most regulation is passed at the federal level and implemented by the states. This logic of shared authority routinely involves the kind of federal “commandeering” that is fiercely resisted by Anglo states.[34] As one specialist summarizes, “…[T]o a far greater degree than… in Canada or the United States… the states carry out centrally-made decisions.”[35]

The result is that the *Länder* exert influence over economic regulation mainly as partners in federal policy-making, not by resisting encroachment on their own distinct regulations. The Bundesrat (Senate), where *Länder* governments are represented directly, must pass roughly 60 per cent of federal legislation. Around this veto point extends “cooperative federalism,” with committees linking *Land* and federal departments and a Forum of Prime Ministers (including the German Chancellor). In some areas *Länder* defend more autonomy – education, culture, and police matters, with recent trends toward policy divergence[36] – but federal responsibility for

[32] Litigator Andrew Bernstein, quoted by the BBC, 19 April 2018, https://www.bbc.com/news/world-us-canada-43813125.
[33] Kommers 1997, 68.
[34] Halberstam & Mills 2001.
[35] Taylor 2009, 153.
[36] Jeffrey et al 2016.

"economic unity," together with the longstanding dominance of national-level interest groups and standards associations, invites little conflict over interstate exchange. German jurisprudence has no parallels to commerce-clause fights, and the Federal Constitutional Court "has rarely had a role in judging conflicts about responsibilities between the federal government and the *Länder*."[37] Thus German regulation is so nationalized, and German states participate so constantly in federal regulatory processes, that the German federation has not needed to actively develop or enforce requirements over state-level regulations. No hint of a "single market project" arose in modern Germany because it is a "federal state with a unitary political culture."[38]

In sum, the heterogeneous EU has quite different market-regulatory politics from Germany, but a comparison to Anglo-Saxon internal markets will surprise many observers. Relative to EU member-states, states in these national federations have far more legal leeway to adopt distinctive regulations. Their central authorities pay far less legislative and administrative attention to restricting their regulatory autonomy. This is simply not because the EU is "catching up" to these polities. The list of concrete interstate barriers removed in the EU but remaining in the Anglo-Saxon federations is long, and getting longer.

1.2. Authority over Fiscal Policy & Debt Management

Now we turn from market regulation to macro-economic fiscality. Here it seems like international authority should be even harder to establish. The EU's authority over market access is an extreme case of a phenomenon that is nonetheless common: states routinely negotiate trade treaties that legally constrain their policies. In fiscal policy, by contrast, formal international constraints are rare. Normally they arise only around poor states in severe crises that cannot finance themselves. In democracies, moreover, budgetary control is frequently seen as a fundamental responsibility of domestic elected officials. For an international organization to gain authority in this realm is thus especially striking. This section shows that even though the EU lacks federations' resources as a fiscal *actor*, it greatly exceeds their authority in fiscal oversight.

[37] Schneider 2006, 143.
[38] Scharpf 2008, 510.

1.2.1 Central institutions as fiscal actors

One channel of fiscal authority by which central institutions influence subunits in multi-level polities is their own action to tax, spend, borrow, and redistribute. In this respect the EU has nothing like the powers of federal governments. This relates to the EU oversight powers noted below: with few fiscal resources, EU authority necessarily operates through oversight rather than action. It also makes that authority more remarkable. An IO with modest resources to offer has acquired some control over state budgets. The EU resembles a new form of central "regulatory state."[39]

The American, Canadian, Australian and German federations are all substantial organizations that spend a great deal of money. They have broad authority to levy taxes, borrow money, and spend in many areas, and may also influence their states through conditional grants. They also confront various limits on their fiscal action, however, which all have stronger parallels in the EU:

- One simple sort of limit is decentralization. States that spend more money generally have more autonomy. Canada is the most decentralized OECD member, with direct federal spending (after transfers to provinces) at roughly a third of overall expenditure (see Table 1). The American federation is a bigger spender, at over 50 per cent. Australia's federal spending share is close to America's, but stronger federal domination of tax collection makes its states more dependent on transfers and centralizes power overall. Germany falls in the middle of the pack. Its more unitary principles allow much freer federal "commandeering" of states to administer federal policies, so direct spending understates federal influence, but the Länder's strong role in federal policy-making through the Bundesrat means that such influence is meticulously negotiated.[40]

- Other limits come in requirements for equalization of revenues across sub-units. Such rules make most federal transfers quasi-automatic in Canada (such that federal conditionality is very modest), Germany (where the constitution specifies extensive tax-

[39] Majone 1994.
[40] Cite Halberstam.

sharing and equalization, plus other transfers are effectively negotiated between the Bund and the Länder rather than simply offered conditionally) and Australia (where equalization rules are especially redistributive, though a larger federal budget makes unconditional transfers only about half of all transfers).[41] By contrast the US federal government attaches conditions to almost all grants and faces no equalization rules.

- Some federations face limits on areas where they can spend. The German federation requires Bundesrat authorization to spend in areas of Länder responsibilities. Australian federal spending is mostly free, though recent jurisprudence raises questions about possible limits.[42] Again the US is unconstrained: its Supreme Court holds that the federal spending can freely incentivize state action even in areas beyond federal legislative authority. Canada's federation enjoys the same authorization, though decentralization and equalization leave much less room to use it.

Table 1. The EU and national federations as fiscal actors

	Initial central share of total revenue[a]	Central share of total spending[a]	Share of state revenue from central transfers[b]	Fiscal equalization across states?	Conditional transfers share of all transfers[c]	Central share of all public debt[d]
AUS	69%	55%	45%	Yes	≈50%	71%
US	58%	52%	26%	No	>80%	72%
DEU	64%	47%	15%	Yes	<10%	64%
CAN	46%	32%	19%	Yes	<5%	42%
EU[‡]	0%	1.9%	1.8%	No	Most	.004%

[a]2014 figures from Blöchliger and Kim 2016, 16; Australian figures from 2011, in *OECD Economic Surveys: Australia 2014*.
[b]Parker 2015, 192. Figures are from 2007.
[c]Watts 2005, 55; updated support for these rough estimates from Hueglin and Fenna 2015, 166-204.
[d]2016 figures from IMF Government Finance Statistics.
[‡]EU figures are authors' calculations based on EU data, http://ec.europa.eu/budget/figures/interactive/index_en.cfm.

[41]See Watts 2005; Hueghlin and Fenna 2015; Parker 2015; Béland and Lecours 2018.
[42]See Chordia and Lynch 20xx.

How does the EU compare as a fiscal actor? Among IOs it has no peers. Its budget is roughly fifteen times that of the United Nations (including peacekeeping operations), and larger than the national budgets of all but eight EU member-states.[43] But if EU spending is substantial enough to affect targeted policy areas and regions, it is not in the same category as national federations. Many limits make its fiscal role look much more like an overgrown IO than a government:

- No national federation has ever approached EU levels of fiscal decentralization. The EU collects none of its own revenue. It all comes as upward transfers from the states through negotiated formulae for sharing customs duties, VAT, and direct budgetary contributions. Then almost all effectively gets transferred back to be spent by the member-states. Of the 1.9 per cent of overall EU-28 revenue that was transferred into EU "own resources" in 2016, over 75 per cent was doled back out to member-states to spend in programs for farmers, fishermen, and regional development. The EU can only borrow to make loans to member-states under specific conditions, not to finance operations.

- "Equalization" of various sorts dominates the distribution of downward EU transfers. Transfers to support farmers, fishermen, or poorer regions are declining, but are still roughly 70 per cent of the 2018 budget. Only about 20 per cent of the budget targets items that are arguably distinctive EU-level priorities—research, educational programs like the Erasmus exchange framework, trans-European infrastructure, foreign and security policy, migrant integration—and these too bear a heavy mark of interstate distributive bargains. Significant EU oversight and conditionality shape precisely how all these monies are spent, but "precisely" is the key word: EU priorities exert influence within the main lines set by multi-annual redistributive deals.[44]

- Overall, the EU's budgetary limits are so severe that its fiscal role "bears little resemblance to that in central government of nation-states, whether federal or unitary…"[45] Its revenues are capped at 1.2 per cent of EU gross national income (GNI).

[43]EU Budget Factsheet, http://ec.europa.eu/budget/library/biblio/publications/2017/EUbudget-factsheet-2018_en.pdf; https://www.un.org/en/ga/fifth/72/ppb1819sg.shtml.

[44]CITE someone on EU budgetary politics here.
[45]Begg 2009,

> Budget frameworks are haggled out in seven-year "multi-year financial frameworks" (MFF) that require member-state unanimity, underscoring a disconnect from macro-economic management that could respond to evolving conditions. The current MFF (for 2014-20) also saw the first-ever real decline in EU spending, at the insistence of richer member-states.

A greater fiscal role may be in the EU's future. As a first step into counter-cyclical action, in 2014 Commission President Jean-Claude Juncker cleverly repurposed €20 billion to back €60 billion in borrowing by the European Investment Bank, which then had some success in leveraging private investment in projects too risky to undertake otherwise.[46] In June 2018 the Commission proposed to render permanent this mechanism as a new "InvestEU" fund. French President Emmanuel Macron has recently floated ideas for a more serious Eurozone budget.[47] For the moment, though, the EU's fiscal action pales in comparison to its oversight powers.

1.2.2 Central fiscal oversight

Besides using their own fiscal resources, central actors in multi-tier systems may exert authority over subunits' resources. In principle such arrangements could range from fully autonomous subunit spending and borrowing to hierarchical relations where the center can steer or veto subunit choices. The latter might or might not come with central responsibility to support or bail out subunits in fiscal difficulties.

At one end of this spectrum today is the US, which sets no demands or supports around state fiscal autonomy. Its states define their budgets and borrow "essentially as sovereigns."[48] State budgets face no federal monitoring or expectations for bailouts in crisis. At the republic's origin this separation was uncertain: the federal government initially assumed state debts. The key step toward today's arrangements came in 1843, when better-off states blocked bailout requests from nine insolvent states. International money markets reacted to the multi-state default by shutting the whole US out from finance into the late 1840s, extending an already-

[46]Sarah Gordon, "Juncker's Investment Plan: Rhetoric versus Reality," *Financial Times*, March 28, 2017.
[47]Beatriz Rios, "Goodbye Juncker Plan, Hello InvestEU," *Euroactiv.com*, June 6, 2018.
[48]Rodden 2006, 142.

severe depression. Yet this painful episode consolidated "no bailout" expectations that have endured ever since.[49] It also convinced states to limit themselves fiscally, launching a wave of balanced-budget rules. States did so voluntarily, without any federal role in this movement.[50]

Canadian provinces enjoy similar autonomy. In Jonathan Rodden's phrase, "each Canadian government often proceeds as if the other did not exist."[51] Canadian observers perceive more uncertainty, however, about the potential for bailouts.[52] Canada never explicitly rejected bailouts like the US did in the 1840s; to the contrary, federal funds rescued insolvent Alberta and Saskatchewan in the 1930s. Moreover, greater decentralization means that provinces hold a majority of public debt, hinting at pressure for bailouts because state-level defaults would be more likely to taint all national credit.[53] Still, the status quo is that the provinces tax, spend and borrow as they please without oversight. Like US states, their only strict limits are the balanced-budget rules that eight of the ten provinces adopted themselves (in this case, since 1990).[54]

Australia has long occupied the other end of the spectrum. Not only are its states especially dependent on federal fiscal resources, they must submit annual plans for borrowing to the national Australian Loan Council. This body dates from the 1920s, when the Commonwealth absorbed state debts and created the Council to approve all future state borrowing. But if Australian fiscal federalism overall has centralized even more since then—with the federation gathering more taxes and using its resources to influence state fiscal action[55]— direct fiscal oversight lessened considerably in the 1990s. Federal and state leaders agreed to replace the effective Commonwealth veto with market discipline, and states became free to borrow. They still report annual financing needs, and the Council may request an explanation, but cannot alter their choices. Its goal now is just to attract market scrutiny if borrowing seems excessive.[56]

Germany has moved in the other direction, putting new legal limits on state fiscality. Its postwar regime is closer to the Australian end of our spectrum, with "fiscal semisovereignty" for

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[49]Rodden 2006, PAGE (ch. 3). But the constitution assigns federal responsibility for the District of Columbia, which was bailed out the 1990s. Puerto Rico's budget has also been under federal oversight since 2016.
[50] Fabbrini, 2013: 30
[51]Rodden 2006, PAGES (ch. 10).
[52]Jacques Poitras, "What happens if New Brunswick defaults on its debt?" CBC News, March 1, 2018. https://www.cbc.ca/news/canada/new-brunswick/nb-what-happens-default-debt-1.4555976.
[53]Joffe, Marc. 2012. "Provincial Solvency and Federal Obligations." Ottawa: MacDonald-Laurier Institute.
[54]Mou, Haizen, Michael Atkinson and Stephen Tapp 2017. "Do Balanced Budget Laws Matter in Recessions?" Public Budgeting & Finance 38(1): 28-46.
[55]Fenna 2018.
[56]Koutsogeorgopoulou and Tuske 2015.

the Länder.[57] Almost all Länder revenue comes from "shared" taxes (which both levels must approve) distributed through elaborate fiscal equalization, and since 1969 budgeting has been partly coordinated in a federal Financial Planning Council. This cumbersome co-dependence long left borrowing as the one area where Länder were fairly free. Here they faced no oversight—besides an ineffective constitutional injunction against borrowing in excess of "investment purposes"—and their influence in the Bundesrat protected them from central sanction. They also enjoyed federal support: in 1992 two insolvent Länder argued successfully in court that the federation's responsibility for "equality of living conditions" made it liable for bailouts. Constitutional reforms in 2009 altered this permissive regime. As Abraham Newman has argued, "solidarity exhaustion" hit much of Germany after the expensive reconstruction of Eastern Germany.[58] The richer Länder led a push to impose a "debt brake" (*Schüldenbremse*) on both levels of government.[59] Länder budgets must now be kept close to balance. They must report on debt twice a year to a Stability Council (the upgraded Financial Planning Council), and they cannot incur new net debt after 2020. The Stability Council itself cannot impose sanctions, so doubts remain about enforcement, but the legal expectations are clear.[60]

How does EU fiscal oversight compare? Like with fiscal action, it is in another category from national federations—but in the other direction. In principle EU member-states accepted fiscal limits when they agreed to create the euro in the Maastricht Treaty of 1991: its "convergence criteria" limited deficits to 3 per cent of GDP and national debt to 60 per cent. Concerns about loose application of these criteria, especially from Germany, led to the Stability and Growth Pact (SGP) of 1997, which aimed for permanent scrutiny along these lines.[61] Initially it arrangements proved ineffective, and an ailing Germany itself supported loosening SGP rules in 2005. But with the onset of the sovereign debt crisis in 2009, a slew of new regulations and treaties upgraded EU oversight.[62] The result is the "European Semester," "an annual cycle of coordination and surveillance of EU economic policies" (as the Commission puts it[63]):

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[57]Rodden 2006, page (start ch. 7). He echoes Katzenstein CITE.
[58]Future of Euro, 128.
[59]Feld and Baskaran 2010.
[60]Kirchgässner 2017. The Council was, however, able to impose special conditions on five shaky Länder who received special support during the transition period to 2020.
[61]Cite Heipertz and Verdun (2004).
[62]Matthijs and Blyth 2018.
[63]Cite.

- First comes a process of goal-setting. Each November the Commission publishes an Annual Growth Survey, launching a discussion of economic priorities to be approved by the European Council (the heads of government) in March. In parallel, the Commission publishes reports in February on each state's economic situation and progress on previously-agreed reforms.

- As mid-year approaches more specific parameters are set. In April states must present three-year budget plans to the Commission, including plans to address previous EU recommendations. In May the Commission produces country-specific recommendations. These address not only fiscal rectitude but also countries' efforts to meet EU policy goals. They are discussed in the Council and adopted in July by "reverse qualified majority voting" (RQMV): accepted unless a supermajority opposes them.

- Autumn is final budgeting season. By October 15 states must submit full draft budgets to the Commission, prior to passage through national parliaments. In November the Commission assesses plans against the SGP and its recommendations and issues an Opinion. Countries that are not currently meeting the SGP's debt or debt rules are evaluated against the "adjustment path" to which they have previously committed. The Commission can reject a state's budget and require specific amendments, as it did to Italy in November 2018. States must adopt their budgets by the end of December.

The "Semester" also feeds into the Macroeconomic Imbalance Procedure (MIP). Each November, past reviews can trigger an early-warning "Alert Mechanism Procedure" for special scrutiny going forward. Thirteen states were flagged in 2018 (Bulgaria, Croatia, Cyprus, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Romania, Slovenia, Spain, Sweden). The Commission can eventually take punitive steps against states failing to address debt problems or serious imbalances. For Eurozone states it can issue a warning (with Council approval by RQMV) and require the state to set aside an interest-bearing deposit of up to 0.2 per cent of GDP. Past the warning stage it can seek Council approval to initiate either the "Excessive Debt Procedure" (EDP, by RQMV) or the "Excessive Imbalance Procedure" (EIP, by normal QMV).

It can require specific reforms, suspension of some EU funding, and large fines (up to 0.2 per cent of GDP for the EDP, or 0.5 per cent given statistical fraud, or 0.1 per cent for the EIP). The power of these tools has recently been tested: after the Commission threatened to launch the EDP for Italy, Rome's populist government backed down and revised its budget.

All this oversight comes with some potential for central support, though not much. Eurozone countries are eligible for bailouts from the European Stability Mechanism (ESM). Funded by national contributions—almost half from Germany and France—it can offer up to €700 billion for countries at risk of losing access to market financing. Over the past decade the ESM and its temporary predecessor (the European Financial Stability Facility) distributed €254.5 billion for broad bailouts of three small economies (Greece, Ireland, Portugal) and more targeted banking rescues for one large and one tiny one (Spain and Cyprus). Even the lion's share of these funds could not restore faith in Greek debt, however. Greek bond yields only retreated from crisis levels in 2012 after ECB President Mario Draghi announced the "Outright Monetary Transactions" (OMT) program to purchase debt of distressed states—after saying he would do "whatever it takes to preserve the euro." This pledge of ECB resources to salvage national debt was so effective that the OMT was never used. Yet it is unclear today that even the ESM and OMT together could bail out an economy like Italy's (ten times bigger than Greece's). Moreover, states may only receive OMT support after seeking an ESM bailout, which means accepting reform plans and far *more* intrusive oversight. Thus even the populist Italian government that recently picked a fight with the EU eventually opted to follow the Commission's fiscal guidance.

As EU specialist Ben Crum summarizes, "the experience of the Euro crisis has led national economic policies to become incorporated in a dense web of European surveillance."[64] Not even the centralized federations of Australia or Germany subject states to such oversight. Like in the Single Market, EU authority in the Eurozone has surpassed that of national federations in important ways.

2. EU economic authority in theoretical perspective

Having described the EU's economic authority in comparative perspective, we now consider what sort of political-economic thinking could inspire such a model. What theoretical

[64] Crum 2018, 281.

perspective on economic governance might endorse such authority normatively, or help us to understand analytically why it arose? Three notable political-economic labels that have been prominently applied to the EU in recent years are "Hayekian," "Polanyian," and "ordo-liberal."[65] Positioning the EU outcome relative to these theoretical schools allows us to describe it as a Polanyi-esque pursuit of Hayekian goals, or a bulked-up form of ordo-liberalism.

2.1. A Hayekian EU?

When political economists seek labels for binding frameworks of openness and market discipline, they are likely to think of "Hayekian." Friedrich von Hayek's famous 1939 essay on "The Economic Conditions of Interstate Federalism" argued that a certain form of multi-level government would best deliver economic liberty and its wealth-generating effects. Markets flourish where central authority ensures that "goods, men and money can move freely over [subunit] frontiers" – but does little else.[66] If the center is limited to this function (plus defense), and mobility and competition across subunits deters their interventionism, the desirable result will be "less government all round."[67]

These ideas later developed into "constitutional economics" in the hands of American economists like Milton Friedman (and the "Chicago School") and James Buchanan (and the "Virginia School").[68] In the US context Hayek's model became known as "competitive federalism:" tight constitutional limits restrain federal power, and interstate openness disciplines states through competition over mobile factors of production.[69] The same ideas are known to many political scientists through Barry Weingast's concept of "market-preserving federalism." Weingast argued that multi-jurisdictional markets thrive if "subnational authorities have primary authority over regulating the economy," but central authorities are tasked with "preventing the lower governments from using their regulatory authority to erect trade barriers against the goods and services from other units."[70]

[65] See Caporaso and Tarrow 2009, Höpner and Schäfer 2012, and Young 2014.
[66] Hayek 1939, 258.
[67] Ibid, 266.
[68] Boettke & Candela 2016.
[69] Buchanan 1975, 1989; Brennan & Buchanan 1980.
[70] Weingast 1995, 4.

This image sounds much like the EU, especially when we add Hayek's musing that central enforcement of openness might need to be extensive:

> … all the effects of protection can be achieved by means of such provisions as sanitary regulations, requirements of inspection, and the charging of fees for these and other administrative controls. In view of the inventiveness shown by state legislators in this respect, it seems clear that no specific prohibitions in the constitution of the federation would suffice to prevent such developments; the federal government would probably have to be given general restraining powers to this end. This means that the federation will have to possess the negative power of preventing individual states from interfering with economic activity in certain ways, although it may not have the positive power of acting in their stead.[71]

Also evocative of the EU was Hayek's inclusion in his 1939 essay on interstate federalism of a "common monetary unit" under which "the latitude given to the national central banks will be restricted as much as it was under a rigid gold standard…"[72]

It is tempting, then – though ultimately problematic – to join the scholars who argue that the EU has come "to resemble Hayek's blueprint of 'interstate federalism.'"[73] With its active central enforcement of openness and macro-economic discipline, the EU certainly features a neoliberal "new constitutionalism"[74] that imposes "constraints on government intervention by locking-in inter-jurisdictional competition."[75] But this characterization is problematic for a simple reason: Hayekians dislike the EU's economic authority. Not only do they voice unsurprising criticisms of the EU's market-mitigating features – the Common Agricultural Policy, regional development funds, social policy rules – but they object that the Single Market and Eurozone are *too* restrictive. Buchanan lamented Jacques Delors' vision of a Union in which "the whole economy is subject to uniform regulation," belying a "basic failure to understand the nature of competitive federalism."[76] Hayekian historian John Gillingham describes the EU's regulatory harmonization as derailing a promising "new market economy" into an ominous "superstate."[77] The related "Bocconi School" economists Alberto Alesina and Enrico Spolaore

[71] Hayek 1939, 267.
[72] Hayek 1939, 259.
[73] Höpner & Schäfer 2012, 431.
[74] Gill 1995.
[75] Harmes 2006, 727.
[76] Buchanan 1995, 25; Buchanan 1996, 255.
[77] Gillingham 2003.

object to the EU's "excessive centralization," since "fiscal policy and taxation, regulation of markets, education, and social protection and welfare... are best left in the hands of national governments."[78] Hayekian monetary theorists like Roland Vaubel or Milton Friedman have been vitriolic critics of the Euro from its origins.[79] Experts at the Hayek Institute in Vienna, the Mont Pèlerin Society that Hayek founded, or the Cato Institute in Washington, DC today display a "wholesale rejection of the European project," seeing the EU as a centralized monstrosity.[80]

These criticisms reflect a downgrading of the role for central authority in Hayek's later work and others' – especially Americans' – elaborations of his themes. The early Hayek displayed clearer support for central authority to establish market conditions, more like German ordo-liberals (of which more below).[81] During his later career in the UK and then the US, he placed increasing emphasis on "competition as a discovery procedure."[82] Wherever possible the best policies should be "discovered" in evolutionary proceses of decentralized competition, not bindingly imposed. This thrust was central to the work of Milton Friedman, James Buchanan, and related scholars. They identified central authority as the main threat to markets, not states' protectionist temptations. The bigger the government, the more regulatory capture and inefficient abstract rules would produce bad outcomes. "If government is to exercise power," Friedman argued, "better in the county than in the state, better in the state than in Washington."[83] Buchanan developed public choice theories to argue that given basic interstate "exit" possibilities for capital or labor, states will compete to attract them. Charles Tiebout theorized that "sorting" will then enhance welfare even if states are not disciplined into market-friendly policies, since remaining differences in state policies allows mobile citizens to choose among packages of public goods.[84] Even on single market issues concerning interstate barriers – e.g. occupational licensing – these theorists tend to see state "competition" over such rules as preferable to

[78] Alesina & Spolaore 2003, 206.
[79] CITE VAUBEL.
[80] Rohac 2016, 10.
[81] Kolev 2010; Jackson 2010.
[82] For one of many statements, Hayek 2002(1968).
[83] Friedman 1962, 3.
[84] There is, however, little empirical evidence either that American states change their policies or that citizens move for these reasons. Tiebout 1956; Musgrave 1959; Oates 1972; Oates & Schwab 1988; McKinnon 1997; Banzhaf & Walsh 2008.

"uniform regulation." These are the arguments that conservatives in the UK offer to insist that "Hayek would have been a Brexiteer."[85]

In monetary affairs, Hayekians tend to praise the EU's macro-economic disciplining of Eurozone members while remaining skeptical of its strong central authority to do so. At the end of Hayek's career, he called for privatizing money, criticizing government currencies as money "monopolies" and envisioning a competitive "discovery process" among specie. At this point he specifically rejected a European currency.[86] Some note that he took this stance because he thought it impossible politically to do what the Eurozone later did: establish an independent European Central Bank (ECB) with a sole mandate for price stability and (initial) guarantees against monetary financing.[87] If Hayek might have conceded some merit in the euro's framework, however, Hayekian economists have generally attacked it with themes that parallel their opposition to regulatory harmonization: such high-level authority is vulnerable to "capture," delivers crude one-size-fits-all policies, and will tend to expand its interventionism.[88] They feel vindicated by the ECB's shift to quantitative easing and the EU's expansion of fiscal oversight and banking regulation, showing that such centralized institutions could never resist political pressures to meddle further.[89]

If the EU's economic model shares Hayekian normative goals of openness and market discipline, then, it does not reflect Hayekian advice about how to pursue them. Hayekians expect that their goals are best delivered by institutional arrangements with much less central authority.

2.2. A Polanyian EU?

Perhaps, then, other political economists are right to perceive "Polanyian" dynamics at work in the EU? Polanyi saw a "double movement" in the spread of "market society" in nineteenth century Europe.[90] The first movement was a state-driven ideological project of market building. Polanyi judged the drive to marketization to be profoundly bad and unnatural, and observed a

[85] As one example among many, Ryan Bourne, "Hayek Would Have Been a Brexiteer," *Institute of Economic Affairs (IEA)*, London, blog entry March 16, 2016, at https://iea.org.uk/blog/hayek-would-have-been-a-brexiteer.
[86] Hayek 1978.
[87] Issing 1999, 56.
[88] Vaubel 1999; FIND OTHERS.
[89] Find some cites here. Hopefully this is what they argue.
[90] Polanyi 1944.

destructive process of “dis-embedding” economic exchange from other social relationships. Analytically he argued that it thus depended heavily on central state authority to advance and maintain itself. He also theorized that the first movement would naturally provoke a “second movement,” as people fought to “re-embed” markets in social norms.

Polanyi-inspired scholars usually criticize the EU even more sharply than Hayekians in normative terms, but their analytic understanding of market-building makes better sense of EU authority. Many Polanyians interpret EU history to this point as a “first movement” process in which an especially wide and deep market project is predictably accompanied by increasingly powerful central institutions. Indeed, some of the critics cited above who denounce the EU as Hayekian –but ignore that Hayekians dislike strong central institutions – are really offering Polanyian analyses. Adam Harmes draws on Polanyi to explain why Hayekian goals require “more deliberate and specific institutional mechanisms to separate economics from politics.”[91] Stephen Gill stresses that the EU’s “new constitutionalism” uses institutions to prevent a second-movement reaction.[92] Many other scholars invoke Polanyi in similar veins. Michelle Everson and Christian Joerges argue that in a Europe where ECJ decisions undercut national labor laws and the constraints of monetary union operate without democratic input, “… Polanyi’s insights have gained a depressing degree of topicality.”[93] Wolfgang Streeck writes of his conversion to Polanyian thinking to understand Europe’s challenges and answer the dramatic question, *How Will Capitalism End?*[94] Matthias Goldman sees the EU reproducing Polanyi’s 19th-century story, such that “… we might sleepwalk into another human, political, economic and social catastrophe.”[95]

Less clear, and contested among Polanyian thinkers, is whether the EU outcome today also displays the second prong of Polanyian expectations. The scholars cited above are rather pessimistic Polanyians, emphasizing that central institutions and business power still stifle any significant “second movement.” More optimistic Polanyians read aspects of the EU as maintaining or developing “embedded” limits on markets. Economist sociologist Fred Block’s “neo-Polanyian” analysis of American neoliberal deregulation – which he attributes to an

[91] Harmes 2006, 730.
[92] Gill 1998, 23.
[93] Everson and Joerges 2012, 646.
[94] Streeck 2016.
[95] Goldman 2017, 273.

alliance of American business with the religious right – refers to the EU as better balanced between Polanyi's two forces: "Without the prospect of a dramatically different set of political allies, business in Europe has generally kept its distance from the most aggressive versions of market fundamentalism. At both the European Community level and within member states, businesses generally lobby for their preferred policies within a framework that acknowledges the necessity and legitimacy of a governmental role in shaping the economy."[96] Bastiaan Van Apeldoorn, while more critical of the EU order, also describes it as "embedded neoliberalism" that mixes markets and social protections.[97] James Caporaso and Sidney Tarrow build on Block to emphasize an even more optimistically embedded image of "Polanyi in Brussels." They see in ECJ jurisprudence an "attempt to shape market-making through regulations that aim to embed the market within its understanding of legitimate social purposes." In ensuring the portability of social benefits, for example, they argue that "the ECJ has intervened between the European free-market regime and domestic structures to begin to create what we regard as a structure of *supranational embedded liberal compromises*."[98]

Our preceding description of the EU economic order in comparative perspective better supports the pessimistic Polanyians. More than any other current polity, the EU institutionalizes a central prioritization of unfettered economic flows and macro-economic discipline over other considerations. Its authority is uniquely active: no other polity has comparable ongoing processes in which well-resourced agencies systematically target internal obstacles to cross-jurisdictional flows, nor does any other multi-tiered polity have comparable central processes to surveil and pressure units toward fiscal balance and structural reform. We are somewhat skeptical of Caporaso and Tarrow's view that ECJ social policy jurisprudence runs against these priorities. As other scholars have argued, decisions like the portability of pensions have the intention and effect of preventing national social policies from disrupting interstate mobility, not of empowering governments to "embed" those flows.[99] The social rights clauses of the EU treaties might yet provide bases for other developments, but in Höpner and Schäfer's aptly phrased title, the substance of European rules is still "waiting for Polanyi in a Hayekian setting."[100] Together

[96] Block 2008, 26.
[97] Van Apeldoorn 2009.
[98] Caporaso and Tarrow 2009, at 598, 594; emphasis in original.
[99] Höpner & Schäfer 2012; Mabbett 2014.
[100] Höpner & Schäfer 2012. More plausible, perhaps, is to see a Polanyian "second movement" in the rise of Eurosceptical nationalism (Hopkin 2017, 476). But this second movement too has yet to alter the EU order.

with our previous point that Höpner and Schäfer miss how much that Hayekian setting relies on un-Hayekian central authority, we conclude that the EU today is best characterized by a mix of these labels. There are Polanyian muscles in Hayekian Brussels.[101]

2.3. An Ordo-Liberal EU?

The notion that the EU order combines muscular central authority with Hayekian goals will evoke another label for political economists: "ordo-liberal." This German tradition, defined by "Freiburg School" economists like Walter Eucken and legal scholars like Franz Böhm (with overlapping "Austrian School" economists like Wilhelm Röpke), differs from Hayekian-American neoliberalism in advocating a stronger state framework around markets. Especially since the Eurozone's debt crisis, a wave of scholarship describes the EU as ordo-liberal.[102]

Ordo-liberalism's principles certainly seem to fit EU authority. Ordo-liberal theory departed from concerns in Weimar Germany that markets are most threatened by cartels, monopolies, and "rent-seeking capitalists."[103] This focus made early ordo-liberals less worried about central state power than Hayek and his descendants. As one German economist summarizes: "Hayek… emphasized the threat to the free market system emanating above all from the state's attempt to steer a purpose-free, self-organizing, and complex order of actions, whereas ordo-liberals stressed that economic freedom is mainly endangered from within, by economic power groups facing a 'weak' state that is unable to protect and enforce the competitive order."[104] Eucken's "first principle" was, "The policy of the state should be directed at the dissolution of economic power groups or at limiting their functions."[105] Indeed, early ordo-liberals championed state action to foster markets so strongly that they sometimes equated their own interventionism to socialism, just with different goals.[106] They favored "market-conforming" intervention to set background conditions for private exchange, opposing "non-conform" actions to steer or cushion market mechanisms. In market regulation, ordo-liberals

[101] For related general discussions of Polanyi and Hayek that suggest that Hayekian orders could only come about through Polanyian dynamics, see Cahill 2018 and Mirowski 2018.
[102] Moss 2000; Dullien & Guérot 2012; Dale & El-Enany 2013; Somma 2013; Biebricher 2014; Jacoby 2014; Young 2014; Siems & Schnyder 2014; Matthijs & McNamara 2015; Matthijs 2016; Schäfer 2016.
[103] Dyson 2017, PAGE (location 2897 in Kindle).
[104] Wolgemuth 2013, 160.
[105] Eucken 1952, 334; see Streit & Wolgemuth 2000, 254.
[106] Siems & Schnyder 2014, 380, in particular citing Miksch 1949, 327. See also Bilger 1964.

focused above all on robust competition policy, while also recommending that all regulations and taxes be "systematically checked as to whether they tend to promote or to inhibit a well-functioning competitive order."[107] In macro-economic terms, Eucken called for an "economic constitution" with the first goal of upholding "the functioning of the price system," a second goal of assuring price stability, and an emphasis on clear (never joint) liability.[108] Monetary policy should aspire to "rational automatism," with minimal policy discretion within a framework of explicit rules.[109]

Many scholars perceive this doctrine at work in the EU today. Pierre Dardot and Christian Laval find ordo-liberalism in the EEC treaty, arguing that "Ordo-liberalism provided the basics of the doctrinal foundation of current European construction…"[110] Some specialists on EU competition policy stress ordo-liberal inspirations.[111] Christopher Allen traces the EMU deal to ordo-liberal principles, and Sebastien Dullien and Ulrike Guérot describe a "long shadow of ordo-liberalism" over European (and especially German) responses to the debt crisis.[112] Most famously, Mark Blyth sees an "ordoliberalization of Europe" in the past decade as a German-dominated EU imposed austerity and oversight on its southern members.[113]

We agree with a core thrust of this scholarship: the outcome of EU economic authority today better matches the principles of ordo-liberalism than any other school of political economy. Like with our previous discussion of Hayekians, however, this observation confronts a simple problem: ordo-liberals today are not happy with the EU. Though their emphasis on central authority places them closer to the EU outcome than Hayekians, many ordo-liberals have been uncomfortable with the EU since its origins, and their discomfort seems only to have grown. At the beginnings, Röppke and many figures in the German Economics Ministry opposed the EEC as likely to be overly interventionist.[114] For similar reasons German Economics Minister and ordo-liberal "fellow traveler" Ludwig Erhard was publicly opposed to the early EEC negotiations.[115] Later ordo-liberals approved of the "Single Market 1992" program, but the

[107] Vanberg 1988, 20.
[108] Eucken, Grundsätze, p. 14. The second goal was called "the primary of currency policy," but he meant price stability. See Feld et al, 2015, 58.
[109] For a discussion, see White 2017.
[110] Dardot and Laval 2013, 194.
[111] Gerber 1998; Buxbaum 2006; Ryner 2015.
[112] Allen 2000; Dullien and Guérot 2012.
[113] Blyth 2013, 142.
[114] Van der Groeben 1988, 48; Abelshauser 2016.
[115] Lee 1995.

Maastricht deal on a single currency was “highly controversial” among German economists.[116] During EU responses to the euro crisis, prominent figures associated with ordo-liberalism resigned from the Bundesbank and the ECB, while an economics professor founded the anti-euro political party *Alternative für Deutschland*.[117] Overall, writes one specialist, ordo-liberalism has become “increasingly unrecognizable” in the EU.[118]

Two points about ordo-liberalism square these observations and further specify our description of the EU outcome. First, ordo-liberalism itself evolved over time to be more critical of central authority. Eucken, its central figure, died unexpectedly in 1950. In 1962, Hayek moved from Chicago to Freiburg, and his developing ideas on “discovery procedures” mixed into ordo-liberal thinking through economists like Erich Hoppmann and Ernst-Joachim Mestmäcker.[119] In the 1980s and 1990s Viktor Vanberg led an importation of Buchanan’s constitutional economics into Germany, effectively arguing that American “competitive federalism” was what ordo-liberalism’s founders meant all along.[120] The turn of the millennium confirmed “the disintegration of ordo-liberalism in economic science,” as American-style formal theorists won an explicit battle with the vestiges of *Ordnungsökonomik* in German universities.[121] In parallel to this mixing of German economists’ views with Hayekian themes, German economic policies also became less distinctive. Kenneth Dyson and Brigitte Young argue that German monetary policy from the 1970s onwards was more Chicago-School than ordo-liberal (“Milton Friedman trumped Eucken”[122]), and that neither the logic of the EMU deal nor many German economists’ concerns about it were distinctively ordo-liberal. They “owed more to the New Institutional Economics taught at virtually all Anglo-Saxon economic departments as well as prominent economics and business school studies curricula in Europe.”[123] In sum, some of ordo-liberals’ recent discomfort with the EU traces back to their Hayekian turn.

The deeper reason behind ordo-liberals’ unease with the EU is that their founders never clearly intended their ideas to apply far beyond their German context. They formulated their model of background economic rules within a centralized federation with a “unitary political

[116] Hein & Joerges 2018, 15; see also Majone 2014, 151.
[117] Jacoby 2014; Grimm 2015;
[118] Biebricher 2017 (Kindle location 3187).
[119] Dyson 2017.
[120] Ibid; Vanberg 1988, 1994; see also Grosskettler 1994; Streit & Wolgemuth 2000, 258.
[121] Hien and Joerges 2018, 17.
[122] Dyson 2017, Kindle location 3009.
[123] Young 2017, Kindle location 3836.

culture" and routine federal "commandeering" of the states. The *Länder* had limited fiscal autonomy and decreasing inclination since the 19th century to develop distinct regulations. Low state-level variation made it relatively easy to imagine an automatic role for federal rules that required little active management or discretion. Thus ordo-liberals never developed clear views about what exactly the federation would need to do to discipline heterogeneous units. There are no real parallels in German jurisprudence to American fights over the Commerce Clause or ECJ decisions on the Single Market, and no perceived need in the 20th century for anything like a German "Single Market project."[124] Nor has Vanberg's introduction of "competitive federalism" in economic discussions had much impact on discussions of German federalism, because there simply isn't enough policy variation among the *Länder* for this model to resonate strongly. Even with the addition of the Eastern *Länder* in the 1990s, and constitutional reforms in 2006 that gave *Länder* a bit more autonomy, Germany still displays "a normative commitment to coordination and a broad similarity of policies across the territory…"[125]

The main source of ordo-liberal unhappiness with the EU is that extending their model across a heterogeneous continent predictably creates opportunities or pressures for the active governance that they aspire to eliminate. One ordo-liberal concern has been the political problem that European institutions could offer opportunities to non-Germans to pull Europe away from pro-market commitments. This was Röppke and Erhard's worry about the EEC: even if the treaty enshrined pro-market principles, the French in particular might steer it in market-mitigating directions. The French indeed attempted this across EU history, though the outcome makes clear that they had little success altering the EU's core commitments. But the deeper conundrum for ordo-liberals, in our view, has been more functional than political. Extending ordo-liberal goals across Europe constantly raised complex questions about what the EU should require of its increasingly heterogeneous membership. In the Single Market, strong legal commitments to openness produced a far more active and ongoing regulatory project to root out barriers and harmonize differences than ordo-liberal theories ever pictured. It also invited calls for market-mitigating side payments that ordo-liberals disliked, like in the EU's regional development funds. In the Eurozone, advocates of market discipline hoped to force member states to align on background rules with the Maastricht convergence criteria, ban on bailouts, and Stability Pact.

[124] For an English-language overview, consider Kommers 1997, 61-96.
[125] Jeffrey et al 2016, 171.

Instead EMU actually worsened certain national divergences and eventually produced a crisis that opened the door to more active European governance in the form of bailouts, monetary financing, and fiscal and regulatory oversight. As Hien and Joerges put it, "Not only von Hayek, but also Walter Eucken would be horrified."[126]

In sum, recent EU changes make sense as an "ordoliberalization of Europe," but not as an intentional plan orchestrated by ordo-liberals. These Polanyian muscles in Hayekian Brussels can also be described as "ordo-liberalism on steroids." Healthy, disciplined ordo-liberals would never advocate taking steroids, of course, and they never envisioned the bulking-up of central economic authority that the EU has developed in extending ordo-liberal-style goals across 28 countries. These descriptive points hint that we must look beyond German hegemony, and beyond the intentionality of any configuration of powerful actors, to explain this EU outcome.

[126] Hien & Joerges 2018, 99.