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The welfare state between juridification and commodification: how the Frankfurt School gave up on economic democracy

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Abstract

The aim of this contribution is to critically introduce and assess the Frankfurt School's theory of late capitalism as it emerged in the 1970s, when a combined crisis of inflation and stagnation began to unravel the Keynesian orthodoxies of state-organised capitalism. In the process, Frankfurt theorists such as Jürgen Habermas and Claus Offe developed powerful critiques of commodification and juridification. The origins of their theory of late capitalism are first traced to the interwar debates on the Weimar Constitution – Germany's first experiment in both constitutional and economic democracy. The rest of the Article takes a closer look at the Frankfurt School's changing posture towards economic democracy in the 1970s. Accordingly, I first reiterate how the theory of late capitalism converged with that of the other major crisis theory of the time – the neo-conservative theory of 'ungovernability'. In diagnosing the 'governability crisis' as a crisis of democracy, the Frankfurt School's increasing pessimism about democracy's economic reach becomes apparent. Secondly, by looking at the way the Frankfurt School perceived the emergence of the 'neoliberal' alternative in the early 1980s, I also argue that the theory of late capitalism had, and did, little to resist the de-democratisation of the economy through the rise of economic constitutionalism in the 1980s. As the welfare state was caught between the two logics of commodification and juridification, economic democracy was its unwitting victim.

Keywords: juridification; commodification; Frankfurt School; Jürgen Habermas; rule of law

1. Introduction

The aim of this contribution is to introduce and critically assess the Frankfurt School's theory of 'late capitalism', which produced the two powerful critiques of commodification on the one hand, and juridification on the other. The theory of late capitalism is above all a crisis theory, developed over the course of the 1970s by Jürgen Habermas and his former student Claus Offe to grasp the so-called 'governability crisis' of the postwar welfare state. It was their attempt to come to terms with the fate of state-organised capitalism, which after three 'glorious' postwar decades was suddenly crumbling under the weight of inflation and stagnation.¹ In the midst of the 'shock of the global', the future of the modern welfare state began to be questioned on the right as well as on the left.²

¹In France, the first 30 years after the Second World War are remembered as the *trente glorieuses*. Similar assessments were made elsewhere along the lines of economic 'miracles' and 'booms'.

²N Ferguson et al. *The Shock of the Global: The 1970s in Perspective* (Harvard University Press 2010).

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But the theory of late capitalism is also a distinctly German crisis theory, in the sense that it cannot be separated from the famous constitutional debates of the Weimar Republic, Germany's first experiment not only with constitutional democracy, but also with economic democracy. When the first generation of Frankfurt scholars entered the fray of these interwar debates, their work focused not only on the interplay between these two forms of democracy, but also on the striking centrality of law.³ 'Man schritt auf allen Gebieten zur Verrechtlichung', a young Otto Kirchheimer wrote in his doctoral dissertation, observing how all the major conflicts and class struggles were being juridified.⁴ As I show in Section 2 in more detail, these interwar debates form the crucial backdrop to the vocabulary used in the Frankfurt School's crisis theory of the 1970s, when a familiar set of questions on economic democracy and constitutionalism returned.

Following a brief summary of the events which led up to the return of crisis theory during 'the long 1970s' (Section 3), I critically reconstruct the Frankfurt School's crisis theory of late capitalism (Section 4). This is also where the notion of commodification makes one of its first appearances in academic discourse.⁵ Offe used it to account for the fact that the modern welfare state fulfils contradictory functions *vis-à-vis* the capitalist economy. In short, whilst the state commits to upholding and protecting the sphere of commodification (ie, the market, where the means of production are privately owned), it seeks *at the same time* to counter and compensate for the dysfunctional side effects of that sphere through the provision of social insurance and welfare. This fundamental contradiction lay at the root of what Habermas went on to theorise as the 'legitimation crisis' of the welfare state.⁶

The remainder of the Article makes two more critical arguments with respect to the theory of late capitalism and its changing posture towards the desirability and feasibility of economic democracy. Firstly, I argue that the Frankfurt School's crisis theory converged with that of the other major stream of crisis theorising in the 1970s, the neo-conservative theory of 'ungovernability'. Here, in diagnosing the 'governability crisis' as a *crisis of democracy*, the Frankfurt School's increasing pessimism about democracy's economic reach becomes apparent (Section 5). Secondly, by looking at the way the Frankfurt School anticipated (if at all), perceived, and responded to the emergence of the 'neoliberal' alternative in the early 1980s, I also argue that the theory of late capitalism had, and did, little to resist the de-democratisation of the economy through the rise of economic constitutionalism in the 1980s (Section 6). As the welfare state was caught between the two logics of juridification and commodification, economic democracy was its unwitting victim.

2. Juridification in the Weimar Republic

When Kirchheimer first coined the term juridification in his doctoral dissertation in 1928, he was accounting for the rise of the welfare state itself.⁷ After all, the Weimar Republic was not just born out of the defeat of the German Empire in the First World War, but also out of the November Revolution of 1918. Germany's first experiment with constitutional democracy was also its first experiment with the democratisation and socialisation of the economy. Kirchheimer's notion of juridification was meant to stress the central role law came to play in this ill-fated dual experiment –

³For two selections of these writings, see WE Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (University of California Press 1996); O Kirchheimer and FL Neumann, *Social Democracy and the Rule of Law* K Tribe (ed), (Routledge 1987).

⁴O Kirchheimer, 'Zur Staatslehre Des Sozialismus Und Bolschewismus' 17 (1928) *Zeitschrift für Politik* 593, 597.

⁵Though he came close, Karl Polanyi used the terms 'proletarianisation' and 'commercialisation' to describe the commodification of labour and land respectively, see K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001). See also C Hermann, 'The Critique of Commodification' in C Hermann (ed), *The Critique of Commodification: Contours of a Post-Capitalist Society* (Oxford University Press 2021) 1–19.

⁶J Habermas, *Legitimation Crisis* T McCarthy (ed), (Heinemann Educational 1976).

⁷J Habermas, *The Theory of Communicative Action. Volume 2, Lifeworld and System: A Critique of Functionalist Reason* (Polity Press 1987) 357.

the fact that it was pursued within the ambit of the constitutional state, or *Rechtsstaat*. The aim of this section is to recount the debates on the Weimar Constitution in the interwar period through the lens of juridification (*Verrechtlichung*). Doing so sheds light not only on the notion of juridification itself, but also on the related concepts of economic democracy (*Wirtschaftsdemokratie*) and the economic constitution (*Wirtschaftsverfassung*).

Kirchheimer argued that the juridification accompanying the rise of the democratic welfare state marked a profound change in the function (*Funktionwechsel*) of the *Rechtsstaat*. The latter had ‘stepped out of the circle of thought’ (*Gedankenkreis*) and ceased to be merely a weapon in the hands of bourgeoisie to protect its financial rule (*Herrschaft*), private property, and economic activity against an unreliable judiciary. Instead, it had entered the level of struggle (*Kampfebene*) ‘between the people and the propertied classes’.⁸ With the ascent of the reform-oriented trade unions and the German Social Democratic Party (SPD), the organised working class was a factor that could no longer be discounted. The SPD itself wielded considerable political power in the young republic, first in the Weimar National Assembly and then in the *Reichstag*.⁹ Its commitment to parliamentary democracy and legislative reform meant that both sides of the class struggle now sought ‘to consolidate their conquests into law’.¹⁰ From the Weimar Constitution to the rise of labour and collective bargaining law, the *Rechtsstaat* had become the dividing line (*Grenzscheide*) along which class struggle was organised and institutionalised.¹¹

One of the clearest manifestations of what Kirchheimer had in mind was the compromise at the heart of the Weimar Constitution, between liberal economic rights and principles on the one hand, and social (seemingly even socialist) objectives on the other, such as land collectivisation (Article 155), socialisation of private enterprises (Article 156), and the institutionalisation of workers’ councils (Article 165, also known as the *Räteartikel*).¹² The latter provisions were found in Section 5 of the second part of the Weimar Constitution, which contained a fully fledged programme for the democratisation of the economy. The section’s author was the father of German labour law, Hugo Sinzheimer, who in the early days of the Weimar Republic eyed an ‘economic constitution’ to counterweigh ‘the “anarchy” of economic freedom in bourgeois society and to ensure the economy was run to achieve social ends.’¹³ The spearhead of this vision was worker co-determination through workers’ councils, who in a corporatist setting would be recognised as co-regulators not only of wages and working conditions, but also of ‘the entire economic development of productive forces’.¹⁴ In Sinzheimer’s early vision, any form of ‘true democracy’ had to be complemented with a genuine form of economic democracy.¹⁵

But Sinzheimer (and the SPD more generally) soon turned away from this conception of economic democracy in favour of the more moderate reformism of the unions and a shallower concern with enhancing workers’ interests, collective bargaining, and corporatism.¹⁶ By the end of the 1920s, economic democracy was no longer about socialising the means of production and

⁸Kirchheimer (n 4) 596–7.

⁹Though the SPD never managed to gain a majority in the *Reichstag*, which made implementing the ambitious programmes of socialisation and democratisation of the economy difficult if the political will could have been mustered in the first place.

¹⁰B Tavolari, ‘Juridification’ (2018) *Krisis* 94, 95–6. See also R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014).

¹¹Kirchheimer (n 4) 597.

¹²For a translation, see German National Assembly, ‘Constitution of the German Reich (Die Verfassung Des Deutschen Reichs)’ (11 August 1919), https://en.wikisource.org/wiki/Weimar_constitution, accessed 7 August 2023. See also G Grégoire, ‘The Economic Constitution under Weimar: Doctrinal Controversies and Ideological Struggles’ in G Grégoire and M Xavier (eds), *The Idea of Economic Constitution in Europe: Genealogy and Overview* (Brill Nijhoff 2022) 58–9.

¹³MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 33; citing Dukes (n 10) 18.

¹⁴The quote is Ernst Fraenkel’s, cited in R Dukes, ‘Authoritarian Liberalism: A Labour Law Perspective’ 1 (2022) *European Law Open* 150, 155.

¹⁵Dukes (n 10) 18, citing Sinzheimer.

¹⁶Wilkinson (n 13) 33–4.

overcoming capitalism, but rather about balancing and regulating the relationship between labour and capital. If Sinzheimer's earlier position had been that economic democracy was a necessary precondition for any kind of 'true democracy', his later position was much closer to the liberal theory of 'formal democracy' defended by theorists like Hans Kelsen.¹⁷ Despite sustained critique, this was also the direction taken by the SPD more generally. At its famous Kiel Congress in 1927, the SPD's main in-house theorist, Rudolf Hilferding, put forward a conception of economic democracy as a form of 'organised capitalism',¹⁸ an early iteration of the state-organised capitalism theorised by the Frankfurt School in the 1970s. As long as an autonomous and neutral state could stand above class conflict, capitalism could be organised and tamed.

This reformist course was the target of sustained critique from both the left and the right. On the left, the Austro-Marxist Max Adler attacked Hilferding's 'formal-legalistic' attitude, which was underpinned by the same 'formal positivism of law and state' as that espoused by liberal theorists like Kelsen.¹⁹ Younger labour lawyers such as Ernst Fraenkel and Kahn-Freund similarly criticised how the promise of economic democracy and co-determination enshrined in the Weimar Constitution had 'not even been seriously contemplated'.²⁰ They illustrated how the provisions on equal co-determination, the labour laws that ostensibly implemented them, and the courts' interpretations thereof had been turned into 'an instrument of the state to suppress class contradictions'.²¹ Their observations were particularly acute in light of the authoritarian turn in late Weimar. Despite the promise of economic democracy, and despite the commitment to parliamentary democracy amongst many liberal scholars and the reform-oriented SPD, Weimar was in fact increasingly ruled through presidential emergency decrees which bypassed the parliament.²² This trend also led some social-democratic scholars initially supportive or tolerant of the 'syndicalist-corporatist economic constitution', such as Hermann Heller and Franz Neumann, to formulate powerful critiques of 'authoritarian liberalism' and 'monopoly capitalism' respectively.²³

On the right, the later *Kronjurist* of the NSDAP (the Nazi party), Carl Schmitt, ended up explicitly posing the authoritarian turn of the Weimar state (and the president in particular) as an alternative to the SPD's conception of the economic constitution.²⁴ To Schmitt, unless the commitment to the liberal and bourgeois *Rechtsstaat* enshrined in the Weimar Constitution (likewise found in its second section) would be completely negated, which had happened only in soviet Russia and fascist Italy, an economic constitution was a contradiction in terms. Instead, the Weimar Constitution reflected the rise of the quantitatively 'total state', a state too intimately involved in economic life to be the neutral state of early liberalism, whilst at the same time lacking the will to become 'a genuine "corporatist, syndicalist or council state"' based on an actual

¹⁷H Dedek, 'Private Law Rights as Democratic Participation: Kelsen on Private Law and (Economic) Democracy' 71 (2021) University of Toronto Law Journal 376, 409.

¹⁸*Ibid.* 402 and 409–10.

¹⁹*Ibid.*, 410; citing M Adler, 'Demokratie Als Ziel Und Als Mittel Über Marxistische Staatsauffassung' 2 (1928) *Der Klassenkampf* 292, 292 and 293ff Max Adler also debated Kelsen, and opposed his conception of 'social democracy' to that of Kelsen's 'formal democracy'.

²⁰Dukes (n 14) 155; citing E Fraenkel, 'Kollektive Demokratie' in H Buchstein and M Langfeldt (eds), *Gesammelte Schriften*, vol 1 (Nomos 2011) (originally published in 1929).

²¹Dukes (n 14) 155; citing O Kahn-Freund, 'The Social Ideal of the Reich Labour Court: A Critical Examination of the Practice of the Reich Labour Court' in R Lewis (ed), J Clark (tr), *Labour Law and Politics in the Weimar Republic* (Wiley Blackwell 1981) 152 (originally published in 1931).

²²Before, that is, the NSDAP seized power in 1933. See also Wilkinson (n 13) 26–30.

²³See H Heller, 'Authoritarian Liberalism?' 21 (2015) *European Law Journal* 295–301; FL Neumann, 'The Decay of German Democracy' in WE Scheuerman (ed), *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (University of California Press 1996). Both of these were originally published in 1933.

²⁴He did so most explicitly in a speech delivered to the employers' association of Rhineland and Westphalia in 1932, titled 'Strong State and Sound Economy'. For an English translation, see the appendix in R Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy* (University of Wales Press 1998).

economic constitution.²⁵ The result, Schmitt argued, was a confusion between the state on the one hand, and society and economy on the other; a total but weak state, entirely at the mercy of vested interests and the demands of mass democracy.

The solution he worked out just a few months before the NSDAP seized power was to replace the quantitatively total but weak state based on an economic constitution with a ‘qualitatively strong state’ based on a political constitution. Such a political negation of the economic constitution would restore ‘the sphere of genuine state privilege’ and the autonomy of the state. And insofar the economy would recover a sphere of its own by being depoliticised in the process, Schmitt’s proposals appealed to economic liberals (to whom I will turn shortly). Heller’s polemic against ‘authoritarian liberalism’, which was published in 1932, is a direct response to this convergence.²⁶ Schmitt and his followers indeed upheld a sphere of state privilege over and against a sphere of individual freedom or ‘pure privacy’. But unlike the early ordoliberalists at the Freiburg School, Schmitt also defended an intermediate public but non-state sphere ‘structured around “industrial and commercial chambers, non-voluntary unions of every sort [*Zwangssyndikate*, ie compulsory cartels], associations, monopolies, etc.”’.²⁷ Schmitt rejected the economic constitution *tout court*, whilst the sphere of ‘corporatist and cartelized self-administration’ could be tolerated as an adjunct to the strong state.²⁸

Kirchheimer’s earlier critique of juridification can, to some degree, be read as a left-wing version of Schmitt’s critique of the economic constitution (Schmitt was Kirchheimer’s doctoral supervisor).²⁹ Both were sceptical about the juridification of state power (the aspiration of the constitutional state or *Rechtsstaat*), and of societal conflicts (the Weimar Republic’s *sozialer Rechtsstaat*). And to both of them, the ‘tendency toward an increase in formal (or positive, written) law’, which accompanied the attempt to manage Weimar’s conflict-ridden social and economic life, could only hide such conflicts, not resolve them.³⁰ Though the young Kirchheimer’s critique was undoubtedly Schmittian insofar he held that the Weimar Constitution was ‘without a decision’ and thus marked by (legal) compromise and contradiction, he was also one of the first and most fervent critics of Schmitt’s apology of the authoritarian turn.³¹ This led Kirchheimer to nuance his own critique of the *Rechtsstaat*.³² Schmitt ended up not only *describing* the need for political decisions to draw the line between friend and enemy (or between capital and labour),³³ but also *endorsing* the specific authoritarian manifestation thereof in late Weimar, when the

²⁵Grégoire (n 12) 71; citing C Schmitt, *Der Hüter der Verfassung* (Tübingen 1931).

²⁶Heller (n 23) 300. Heller wrote:

Through these references, a rough estimate of the substance of authoritarian liberalism appears to have been more or less adequately characterised: retreat of the ‘authoritarian’ state from social policy, liberalisation (*Entstaatlichung*) of the economy and dictatorial control by the state of politico-intellectual functions. According to Schmitt’s quite credible reassurances, such a state has to be strong and ‘authoritarian’, for only a state of this type is able to sever the ‘excessive’ connections between the state and the economy.

²⁷Grégoire (n 12); citing Schmitt from Cristi (n 24) 224–6. See also n 24 above.

²⁸Grégoire (n 12) 75.

²⁹See, for example, CJ Thornhill, *Political Theory in Modern Germany: An Introduction* (Blackwell 2000) 120. See also K Tribe, ‘Introduction’ in K Tribe (ed), *Social Democracy and the Rule of Law* (Routledge 1987) 15–7.

³⁰This is how Habermas defined Kirchheimer’s notion of juridification in Habermas, *The Theory of Communicative Action Volume 2* (n 7) 357.

³¹See especially O Kirchheimer and N Leites, ‘Remarks on Carl Schmitt’s Legality and Legitimacy’ in WE Scheuerman (ed), *The Rule of Law under Siege: Selected Essays by Franz L. Neumann and Otto Kirchheimer* (University of California Press 1996) 64–98. See also WE Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (MIT Press 1994) 82–3.

³²See especially Kirchheimer and Leites (n 31).

³³See also Tribe (n 29) 18–9. Tribe cites a letter from Neumann to Schmitt, dated 7 September 1932: ‘If one accepts that the fundamental political opposition in Germany is the economic conflict, that the decisive friend/foe grouping in Germany is that of labour and capital, it is thus apparent that under the conditions of such political contradictoriness it is no longer possible to govern through parliament . . .’

‘Guardian of the Constitution’, the Reich’s President, bypassed the parliament to pursue austerity and deflation through emergency decrees.³⁴

Rather than following Schmitt’s rejection of the economic constitution, the first generation of the German ordoliberals (the so-called Freiburg School) reworked the notion in the opposite direction as the reform-oriented socialists had done.³⁵ Whilst Alexander Rüstow had made a very similar defence of Schmitt’s ‘strong state’, he placed the latter squarely in the service of ‘the laws of the market’.³⁶ Walter Eucken, providing an economic perspective, argued that the main problem with the ‘economic state’ was not the undermining of its political autonomy, but the cartelisation, state subsidies, and other economic interventions which undermined competition and the price mechanism. A strong state was needed, but only as a means to restore and maintain the depoliticised, ‘free market’.³⁷ Franz Böhm, finally, developed a fully fledged counter theory of the economic constitution which incorporated these concerns, and it is his conception which today is known as the economic constitution (*Wirtschaftsverfassung*). The ‘legal constitution of the free market economy’ would be based on private law but constitutionally protect free trade, industry, and competition. And whilst it was not seriously pursued until after the Second World War, it returned afterwards under the misnomer of the ‘social market economy’.³⁸

If the SPD’s reform-oriented conception of the economic constitution reflected the juridification of the economy as programmatically provided for in the Weimar Constitution, which Schmitt and Kirchheimer criticised from the right and the left respectively, then the ordoliberal conception of the economic constitution reflects a different form of juridification at a different, constitutional level. The ordoliberals sought the application of the rule of law to the economy, as Foucault would later put it.³⁹ Not, that is, the legislative juridification (*Verrechtlichung*) of the economy to institutionalise class conflict, but the constitutionalisation (*Verrechtsstaatlichung*) of the free-market economy to carefully delineate ‘the rules of the game’ and keep economic interventionism in check. As we will see, these ideas did not only return in the 1980s, but were also further developed to be scaled up to a transnational level by second generation ordoliberals, such as Ernst-Joachim Mestmäcker.⁴⁰

3. The return of crisis theory

Just as the crisis of the Weimar Republic exposed the contradictions of its interwar welfare state, so the crisis of the 1970s exposed those of the postwar welfare state. In fact, the interwar debates form the crucial backdrop to the various crisis theories of the 1970s. This is particularly true of the German neo-Marxist tradition, led by the successors of Kirchheimer and Neumann at the Frankfurt School. But continuities also exist between the conservative and ordoliberal thought of late Weimar and the neo-conservative and neo-liberal crisis theories of the 1970s. Like the

³⁴Wilkinson (n 13) 26; citing H Heller, ‘Autoritärer Liberalismus’ (1933) 44 *Die Neue Rundschau* 289. For the English translation, see Heller (n 23).

³⁵See especially F Böhm, W Eucken and H Grossmann-Doerth, ‘The Ordo Manifesto of 1936’ in AT Peacock and H Willgerodt (eds), *Germany’s Social Market Economy: Origins and Evolution* (MacMillan 1989) 15–26.

³⁶See W Bonefeld, ‘Freedom and the Strong State: On German Ordoliberalism’ 17 (2012) *New Political Economy* 633. Because ordoliberals consistently emphasised this political dimension, the later Hayek of *Law, Legislation, and Liberty* can be seen to diverge from them. More on this below.

³⁷See also R Cristi, ‘Carl Schmitt: Decisionism’ in T Biebricher, P Nedergaard and W Bonefeld (eds), *The Oxford Handbook of Ordoliberalism* (Oxford University Press 2022) 243–57.

³⁸AT Peacock and H Willgerodt (eds), *Germany’s Social Market Economy: Origins and Evolution* (Palgrave MacMillan 1989). See also F Böhm, ‘Rule of Law in a Market Economy’ in AT Peacock and H Willgerodt (eds), *Germany’s Social Market Economy: Origins and Evolution* (Palgrave Macmillan 1989) 46–67.

³⁹M Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978–1979* (G Burchell tr, Palgrave MacMillan 2008) 171–2.

⁴⁰C Joerges, ‘Ernst-Joachim Mestmäcker: A Vision of European Economic Constitutionalism’ in T Biebricher, P Nedergaard and W Bonefeld (eds), *The Oxford Handbook of Ordoliberalism* (Oxford University Press 2022) 179–89.

Frankfurt School, the ‘German’ neoliberalism of the Freiburg School also found its successors gathering in the same place (Friedrich Hayek moved to Freiburg in 1962). The neo-conservative crisis literature comes from a significantly broader school, and the fascist roadblock meant that German conservatism in particular underwent perhaps the most far-reaching inflection. Most notably, the affinities between economic liberalism and conservatism were more pronounced in the postwar period, when ‘hard’ forms of authoritarianism were disowned.⁴¹ But before I elaborate on these preliminaries, I will first provide a brief introduction to the crisis of the 1970s.

There is a strong tendency to look at the 1970s through the lens of the ‘neoliberal’ 1980s. Accordingly, the 1970s are often reduced to a period of economic crisis and inflation, prefacing the inevitable shift towards the deflationary politics of the 1980s.⁴² What such accounts tend to overlook, however, is the fact that the 1970s themselves were full of political struggles and experimentation. It was the era, in Adam Tooze’s words, ‘of large and unapologetic deficits and elaborate corporatist wage bargaining schemes’, the ‘high point of European social democracy and daring national Keynesianism’.⁴³ It is in this sense that the ‘long 1970s’, stretching from the student protests of 1968 to the turn to fiscal and economic discipline in the 1980s, reflect a window of *demystification* similar to that of the interwar period. The state’s highly administrative mode of economic interventionism became visible again after having enjoyed the relative obscurity of the first three postwar decades of growth and affluence.

In most of Europe, this period came to an end only in the 1980s. In France, for example, reforms turned austere with Mitterrand’s U-turn in 1983, following two years of extensive nationalisations and welfare state expansion. Even in Germany, where the *Bundesbank* initiated the monetarist turn in its annual report of 1974 (coining the ‘there is no alternative’ mantra for the first time),⁴⁴ supply side-reforms came only under Kohl in the mid-1980s, after expansionary fiscal policies had been the norm for most of the 1970s and early 1980s. Similar shifts towards economic discipline occurred in most other west-European economies around the same time.⁴⁵ Only in the United Kingdom (UK) did the postwar consensus (between welfare and capitalist rationalisation) end before the turn of the decade, with the election of Thatcher in 1979.

From the vantage point of the 1970s, the monetary and fiscal discipline that emerged in the 1980s was as far from inevitable as it was from being anticipated. In fact, before the triumph of the ‘neoliberal’ politics of economic depoliticisation, the prevailing perception was that economic relations were rapidly being *repoliticised*. Whilst the rise of the welfare state implied the ‘recoupling’ of the economic and political spheres (as the state was now actively engaging with and intervening in the economy),⁴⁶ the crisis of the 1970s subjected the interventionist state itself to contestation by revealing its failures. Such ‘legitimation problems’ occupied a central place in the crisis theorising of the Frankfurt School in the 1970s. The postwar compromise between capitalist

⁴¹CS Maier, *In Search of Stability* (Cambridge University Press 1988) 187–224.

⁴²AJ Tooze, ‘Who Is Afraid of Inflation? The Long-Shadow of the 1970s’ 12 (2014) *Journal of Modern European History* 53, 56; reviewing W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014).

⁴³Tooze (n 42) 56. Postwar Keynesianism roughly followed Keynes’ own suggestions insofar it reflects a belief in state-based fiscal policies and discretionary interventions to manage the macroeconomy. Internationally, however, the Bretton Woods system was far removed from what Keynes envisaged, as the ‘global reserve currency’ he advocated for never became a reality. Instead, the US dollar operated as the world’s *de facto* gold standard, placing the burden of adjustment entirely on debtor states. See S Eich, *The Currency of Politics: The Political Theory of Money from Aristotle to Keynes* (Princeton University Press 2022) ch 5.

⁴⁴Report of the Deutsche Bundesbank for the Year 1974’ (1974), <https://www.bundesbank.de/en/publications/reports/annual-and-environmental-reports/annual-report-1974-702884>, accessed 26 October 2022.

⁴⁵As to the Netherlands, see B Mellink and M Oudenampsen, *Neoliberalisme: Een Nederlandse Geschiedenis* (Boom Uitgevers 2022) chs 6–8. Even the Swedish model of social democracy, which had not ‘restrained’ democracy in the same way as continental constitutional orders had done, was ‘caught up’ by the shift of the 70s and 80s. See, more generally, B Eichengreen, *The European Economy Since 1945: Co-Ordinated Capitalism and Beyond* (Princeton University Press 2007) chs 9 and 10; T Judt, *Postwar: A History of Europe Since 1945* (Pimlico Penguin 2005) part 3.

⁴⁶Habermas, *Legitimation Crisis* (n 6) 36.

rationalisation on the one hand, and state-administered welfare regimes on the other, which had always consisted in a highly technocratic and administrative *modus operandi*, became visible again.⁴⁷

The postwar welfare state was a peace formula which took on a form similar to that of the reform-oriented social democrats of the Weimar Republic. As Streeck explains, ‘that formula entailed the organised working classes accepting capitalist markets and property rights in exchange for political democracy, which enabled them to achieve social security and a steadily rising standard of living’.⁴⁸ And just as Fraenkel and Kahn-Freund observed in late Weimar, this also meant that most of the crucial economic and societal decisions had been centralised ‘in the political cockpit’ of the welfare state.⁴⁹ The highly bureaucratic and technocratic machinery required to make such a ‘central-rational-rule’ approach possible was obscured by its apparent success.⁵⁰ Until, that is, the economic growth of the postwar period slowed down and inflation soared again for the first time since the interwar period.

The inflation and recession of the 1970s put the spotlight back on the state. The ‘effervescence’ of the late 1960s, reflected above all by the student protests of 1968, was followed by the collapse of the Bretton Woods system in 1971 and the oil crisis of 1973.⁵¹ The already slowing economic growth (stagnation) was joined by soaring levels of inflation, giving rise to the unsettling phenomenon of ‘stagflation’ and the spectre of wage-price spirals, which still haunts policy makers today.⁵² Societal unrest increased and class conflicts erupted all over the industrialised world. Whilst major industries faltered and had to be bailed out with tax-based subsidies to save jobs, waves of strikes, wage disputes, and collective bargaining spread throughout Europe. And the unrest was not confined to the working class either. The additional distributive impact of inflation on the middle classes, at once the greatest supporters and beneficiaries of the welfare state, translated into public discontent everywhere.⁵³

For most of the 1970s, governments responded with familiar but also increasingly daring ‘Keynesian’ means: deficit financing, extensive economic planning, and a politics that prioritised full employment over fighting inflation.⁵⁴ When it became clear that these interventions did little to abate the crisis, they were increasingly seen as part of the problem rather than the solution. In a context of profound societal unrest and discontent, the result was a widely held conviction that the modern welfare state was, in the language of neo-conservative scholars, ‘overburdened’, ‘overloaded’, and ultimately ‘ungovernable’.⁵⁵ By 1979, Offe observed how the ‘major peace formula of advanced capitalist democracies’ had itself become ‘the object of doubts, fundamental

⁴⁷This *modus operandi* came in different national variations, of which the French tradition of *dirigisme* is a telling example.

⁴⁸W Streeck, ‘The Crises of Democratic Capitalism’ 71 (2011) *New Left Review* 5, 10.

⁴⁹D Bell, *The Cultural Contradictions of Capitalism* (Basic Books 1996) 24 (originally published in 1976). See also Judt (n 45) ch 14. The nature of this kind of interventionism is well known: extensive ‘state planning’ of economic and business cycles; fiscal and monetary policies to ensure full employment and the stability of the economy; large-scale ‘public works’, and New Deal-style investments to redirect excess accumulated capital to neglected areas and strata of society; and so forth.

⁵⁰HR van Gunsteren, *The Quest for Control: A Critique of the Rational-Central-Rule Approach in Public Affairs* (Wiley 1976).

⁵¹Judt (n 45) ch 14.

⁵²CS Maier, ‘“Malaise”: The Crisis of Capitalism in the 1970s’ in N Ferguson and others (eds), *The Shock of the Global: the 1970s in Perspective* (Harvard University Press 2011) 25–48. But see JA Alvarez et al, ‘Wage-Price Spirals: What Is the Historical Evidence?’ (IMF), <https://www.imf.org/en/Publications/WP/Issues/2022/11/11/Wage-Price-Spirals-What-is-the-Historical-Evidence-525073>, accessed 4 August 2023.

⁵³Judt (n 45) ch 14.

⁵⁴Moreover, as Tooze points out, these ‘national Keynesianisms’ were also articulated internationally through the G7 summits; see Tooze (n 42) 55.

⁵⁵See *inter alia* A King, ‘Overload: Problems of Governing in the 1970s’ 23 (1975) *Political Studies* 284; MJ Crozier, SP Huntington and J Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York University Press 1975); S Brittan, ‘Inflation and Democracy’ in F Hirsch and JH Goldthorpe (eds), *The Political Economy of Inflation* (Harvard University Press 1978) 161–85; S Brittan, ‘The Economic Contradictions of Democracy’ 5 (1975) *British Journal of Political Science* 129.

critique, and political conflict'.⁵⁶ From left to right, the crisis mood increasingly resolved around the authority of the state. The economic interventionism that had dominated much of the postwar period was called into question, the depoliticised, technocratic façade of the advanced capitalist economy was coming off, and scholars of all stripes hurried to make sense of the shifting sands.

The result was a proliferation of crisis theorising across the entire political spectrum. The next sections focus above all on the crisis theory of Habermas and Offe, but I also interrogate the way their neo-Marxist theory of 'late capitalism' related to the two other main crisis theories: neo-conservatism (Section 5) and neo-liberalism (Section 6). At least two of these 'neos' show considerably continuity with the protagonists of the interwar debates on the Weimar Constitution introduced above. The Frankfurt School theorists were preceded by Neumann and Kirchheimer, whose own trajectories already span a considerable part of the spectrum that ran from the SPD's reformism on the one hand, to direct economic democracy on the other.⁵⁷ And the continuity of German neoliberalism was also secured – and further developed – by the likes of Franz Böhm, Ernst-Joachim Mestmäcker, and of course Friedrich Hayek.⁵⁸

4. The Frankfurt School theory of late capitalism

In this section, I first look at Offe's work on the contradictions of the welfare state, in which the notions of commodification and decommodification make some of their first appearances in academic discourse.⁵⁹ Inspired by Karl Polanyi, Offe's notion of 'administrative recommodification' captures these contradictions particularly well. I then turn to Habermas's *Legitimation Crisis* to show how the legitimation problems he identified as arising from these contradictions led him to a pessimistic position on the possibility of economic democracy. In Section A, I argue that the neo-conservative crisis literature offered a very similar diagnosis but located the root of the problem not in the contradictions of capitalism, but in the excessive demands of organised interests and mass democracy.

A. The welfare state between commodification and decommodification

Already in the 1950s and 1960s, Marx's theory of capitalist crisis, with at its core the 'tendency of the rate of profit to fall', was revamped for the conditions of state-organised capitalism. The result was the so-called 'state debate' on the left, which was an attempt to move beyond the discredited orthodox Marxist theory of 'state monopoly capitalism' on the one hand (which denied the autonomy of the state, and reduced the state to an instrument of the national capitalist class), and the social democratic theory of the state on the other hand (which insisted not only on the autonomy of the state vis-à-vis the economy, but also on its neutrality).⁶⁰ If the former had already been undermined by the growth of the welfare state, the successes of social democratic politics,

⁵⁶C Offe, 'Some Contradictions of the Modern Welfare State' in J Keane (ed), *Contradictions of the Welfare State* (Hutchinson 1984) 147–8.

⁵⁷On the changing trajectories of Neumann and Kirchheimer, see Tribe (n 29).

⁵⁸Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 182–4. Slobodian introduces us to a significantly wider network of 'Geneva School' neoliberals which split up into two camps in the late 1950s, after the signing of the Rome Treaty: the constitutionalists and universalists.

⁵⁹See n 5 above.

⁶⁰S Clarke, 'The State Debate' in Simon Clarke (ed), *The State Debate* (Palgrave Macmillan 1991) 3. For a different take and overview of this debate, see also B Jessop, 'State Theory, Regulation, and Autopoiesis: Debates and Controversies' 25 (2001) *Capital & Class* 83. The central exchange here was that between Miliband and Poulantzas in the *New Left Review*, see N Poulantzas, 'The Problem of the Capitalist State' 58 (1969) *New Left Review* 67; R Miliband, 'The Capitalist State – Reply to N. Poulantzas' 59 (1970) *New Left Review* 53; R Miliband, 'Poulantzas and the Capitalist State' 82 (1973) *New Left Review* 83; N Poulantzas, 'The Capitalist State: A Reply to Miliband and Laclau' 95 (1976) *New Left Review* 63.

and the internationalisation of capital,⁶¹ the governability crisis of the 1970s also rapidly dismantled the illusion that the welfare state was a neutral site of struggle.⁶²

The way out of this theoretical impasse was marked by the rise of systems theory and the structural-functionalist theories of the state, which stressed the intrinsic contradictions of state-organised capitalism.⁶³ Foremost of these is the Frankfurt School theory of 'late capitalism', as developed over the course of the 1970s by Jürgen Habermas and his former student Claus Offe, both of whom are part of the second generation of the Frankfurt School. Building on the works of Poulantzas, these theories stressed the state's relative autonomy, attributing to it the capacity to appease class conflict even in the interest of the working class.⁶⁴ Tellingly, the 'late' in late capitalism pertained to the exhaustion not of capitalism itself, but of the 'political containment mechanisms' which the late capitalist state operationalised to curb economic and political crises. If the interwar period saw the rise of these forms of 'organised capitalism' in the discourse of the SPD, 'late capitalism' was meant to capture the crisis of this discourse.

Offe understood the 'primary contradiction' of the welfare state to consist in the two incompatible functions it fulfilled with respect to the capitalist economy: commodification and decommodification.⁶⁵ The function of *commodification* refers to the fact that regardless of the extent to which the welfare state 'plans' the sphere of economic production and exchange, so long as it does not touch the private ownership of the means of production (labour power, capital), its actions are in principle limited to address only the 'secondary effects of the strategies of private enterprise'.⁶⁶ Limited, that is, by its own commitment to the sphere of commodification. The economic theorist of the welfare state, John Maynard Keynes, similarly emphasised that state intervention was *not* in the first place about the direct organisation of markets, but about the *stabilisation* of the capitalist economy, which was secured through the pursuit of full employment and the stability of the currency (or price stability) by means of fiscal and monetary policy.⁶⁷

Whilst the postwar welfare state had by the 1970s indeed curtailed the sphere of commodification to an unprecedented degree,⁶⁸ state planning was still primarily aimed at maintaining the 'health' of that sphere, as measured by levels of capitalist investment and employment. After all, the sphere of the production and exchange of commodities was the main source of state revenue.⁶⁹ In a similar vein, Habermas speaks of the policies associated with 'global planning' as *supplementing* the market mechanism, aimed at correcting what he called its 'dysfunctional side effects' but in an essentially reactive manner. 'Global planning is limited by the

⁶¹The governability crisis of the 70s undermined even the state's *ability* to function as an instrument of (national) capital.

⁶²Clarke (n 60) 5. See also C Offe and V Ronge, 'Theses on the Theory of the State' in J Keane (ed), *Contradictions of the Welfare State* (Hutchinson 1984) 119–20.

⁶³See also PC Caldwell, 'From Solution to Problem: The Welfare State as a System' in PC Caldwell (ed), *Democracy, Capitalism, and the Welfare State: Debating Social Order in Postwar West Germany, 1949–1989* (Oxford University Press 2019) 163–93.

⁶⁴C Offe, 'Structural Problems of the Capitalist State' in K von Beyme (ed), *German Political Studies*, vol 1 (Psychology Press 1974) 31.

⁶⁵Offe and Ronge (n 62) 123; J Keane, 'Introduction' in J Keane and C Offe (eds), *Contradictions of the Welfare State* (Hutchinson 1984) 14–8. Offe's crisis theory thus offered a powerful critique of commodification, which was also echoed by political theorists in the US, like Michael Walzer, see M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983); as cited in Eich (n 43) 200.

⁶⁶Habermas, *Legitimation Crisis* (n 6) 34.

⁶⁷See S Clarke, *Keynesianism, Monetarism and the Crisis of the State* (Elgar Aldershot 1988).

⁶⁸See also the third essay in J Keane, *Public Life and Late Capitalism: Toward a Socialist Theory of Democracy* (Cambridge University Press 1984).

⁶⁹A Glyn, *Capitalism Unleashed: Finance, Globalisation, and Welfare* (Oxford University Press 2012) 161. More specifically, the revenue is raised from taxation on income and consumption, as Andrew Glyn out:

countries with more welfare expenditures do not tax incomes from capital more highly than the liberal market economies; if anything the reverse is the case. Additional tax revenue in the generous welfare states comes from extra taxation of labour incomes and of consumption.

private autonomous disposition of the means of production . . . and positively by the avoidance of instabilities.⁷⁰ From the perspective of commodification, then, the welfare state is above all a ‘self-limiting state’, constrained by the need for stability in its currency, economic growth, full employment, and balance of trade.⁷¹

However, Offe also argued that capitalism’s ‘self-crippling, cyclical dynamics’ consistently threaten the autonomous functioning of the market and its steering mechanisms, which ultimately force the late capitalist state to intervene by means of *decommodification*.⁷² In using this term, Offe had in mind Polanyi’s notion of the fictitious commodity form. Polanyi argued that labour, in particular, cannot genuinely be commodified (or proletarianised, in his terminology), because it cannot be disposed of ‘the physical, psychological, and moral entity “man” attached to that tag’.⁷³ But as this fiction nonetheless makes up the organising principle of the ‘labour market’, non-commodified support systems like social security, welfare, and benefits, or more traditional forms of charity, community, and family care, must necessarily sustain labour whenever it is not traded in the labour market.⁷⁴ In other words, these ‘decommodified’ support systems were always a precondition of the commodification of labour power, and therefore also of a genuine ‘market society’ ruled by the commodity form.⁷⁵ As the commodity form expands, moreover, society would inevitably resist and protect itself by ‘re-embedding’ the market in society. Hence the famous Polanyian double movement: ‘the extension of the market organisation in respect to genuine commodities was accompanied by its restriction in respect to fictitious ones.’⁷⁶

Now whilst Polanyi had located the origin of the countermovement against the dysfunctional side effects of commodification in society, Offe points out that it is the defining feature of ‘state-organised or advanced capitalism’ that non-market support systems are centralised in the institutions of the welfare state.⁷⁷ As we have seen, Kirchheimer already argued that this development would lead to bureaucratisation and juridification. As Habermas puts it in his *Theory of Communicative Action* (TCA), ‘The net of [legal] welfare-state guarantees is meant to cushion the external effects of a production process based on wage labor. Yet the more closely this net is woven, the more clearly ambivalences of *another sort* appear.’⁷⁸ To Habermas, decommodification through law is simultaneously freedom-guaranteeing and freedom-undermining. The instrumental use of law (as medium) risks a legal intrusion into social spheres (or lifeworld) which were previously only informally organised – ‘like colonial powers coming into a tribal society’.⁷⁹ Social welfare law, in particular, was not only a tool to emancipate workers, women, and children, but also tended to impose on welfare recipients, families, and schools an alien strategic and instrumental logic.⁸⁰

⁷⁰Habermas, *Legitimation Crisis* (n 6) 34–5.

⁷¹Keane (n 65) 15; Habermas, *Legitimation Crisis* (n 6) 35.

⁷²Keane (n 65) 15.

⁷³Polanyi (n 5) 76. See also C Offe, D Held and J Keane, ‘Reflections on the Welfare State and the Future of Socialism: An Interview’ in J Keane (ed), *Contradictions of the Welfare State* (Hutchinson 1984) 263. Polanyi held that the same self-destructive tendencies inhere in a ‘genuine’ commodification of money and land. Land cannot be separated from nature, and even under capitalism money is not produced, but always ‘oscillates between capital and currency . . . between law and commodity’ (from Eich (n 43) 138.).

⁷⁴Offe, Held and Keane (n 73) 263.

⁷⁵Keane (n 65) 15. Polanyi used the term ‘market society’ to describe a society in which ‘social relations are embedded in the economic system’, rather than the other way around. See Polanyi (n 5) 60.

⁷⁶Polanyi (n 5) 79.

⁷⁷Habermas, *Legitimation Crisis* (n 6).

⁷⁸Habermas, *The Theory of Communicative Action Volume 2* (n 7) 362.

⁷⁹*Ibid.*, 355. See also D Loick, ‘Juridification’ in A Allen and E Mendieta (eds), *The Cambridge Habermas Lexicon* (Cambridge University Press 2019) 208–11.

⁸⁰But see N Fraser, ‘What’s Critical about Critical Theory? The Case of Habermas and Gender’ 35 (1989) *New German Critique* 97.

Economically, too, state-administered attempts at decommodification are difficult. Offe and Habermas both note that the high costs of directly subsidising owners of labour power (unemployment benefits) and capital (industry bailouts) are not necessarily self-financing, especially when economic growth stagnates and middle-classes (the main tax-base) start feeling the additional distributive burden of inflation.⁸¹ This, of course, happened in the 1970s. Because the commodity form tends to self-paralyse (economic crisis), and because the welfare state took on increasing responsibilities for the non-commodified support systems, economic crisis would quickly translate into a fiscal crisis.⁸² And again, this happened in the 1970s.

This finally brings us to Offe's notion of *administrative recommodification*. Because of the self-paralysing commodity form, pressure on the state to actively and positively create and improve conditions for investment increases, leading to the need for the welfare state not just to negatively subordinate itself to the market, but to do so positively as well.⁸³ Therefore, paradoxically, the welfare state would replace (ie, decommodify) the market mechanism *in order to* create and improve opportunities for investment and the saleability of labour power – that is, to *expand* the sphere of commodification.⁸⁴ Offe argued that this form of administrative recommodification had by the mid-1960s become the main strategy of the late capitalist state.⁸⁵ With each of these interventions the welfare state essentially seeks, directly or indirectly, to increase the productivity of labour *in order to* increase capital's 'use value'.⁸⁶ Why, in the final analysis, is this contradictory? Keane sums it up as follows: 'welfare state policies are required to do the impossible: they are forced to reorganise and restrict the mechanisms of capitalist accumulation in order to allow those mechanisms to spontaneously take care of themselves.'⁸⁷

B. Legitimation crisis

Contrary to the period of 'liberal capitalism', where the state's role *vis-à-vis* the economy was to merely secure the general conditions of production, we have seen that in late capitalism, the welfare state takes on functions to actively supplement and replace the market mechanism.⁸⁸ Under these conditions, Habermas was primarily concerned with the tendency of economic crises to turn into crises of legitimacy. I believe that it is on the basis of this argument, found in *Legitimation Crisis*, that Habermas ultimately arrived at a sceptical position on the economic reach of democracy, a position he shared with the neo-conservative crisis literature on the other side of the political spectrum, as well as with the rising star of neoliberalism, Friedrich Hayek.⁸⁹

⁸¹Judt (n 45) ch 14.

⁸²A Schäfer, 'Krisentheorien der Demokratie: Unregierbarkeit, Spätkapitalismus und Postdemokratie' 2 (2009) *Der Moderne Staat* 164–5.

⁸³Keane (n 65) 15.

⁸⁴Offe adopts here a dialectical notion of contradiction, which is meant not just to describe a conceptual dichotomy, but a hierarchical relation or power dynamic. It is in this respect that commodification stands in a privileged position to decommodification, see also C Offe, 'Legitimacy versus Efficiency' in J Keane (ed), *Contradictions of the Welfare State* (Hutchinson 1984) 130–4. In *Legitimation Crisis*, Habermas provides a number of examples of the use of non-market means to expand the sphere of commodification. Most notable is perhaps the 'organising of supranational economic blocks' to improve the competitive position of states in the global market. But he also mentioned armament (US spending on the Vietnam War was topical), the improvement of material and immaterial infrastructure (transport, urban planning, health, education), and structural policy to redirect capital flows to neglected areas and sectors. See Habermas, *Legitimation Crisis* (n 6) 35. This short, programmatic book was to provide the outline for Habermas's research agenda until at least TCA. Habermas acknowledged the influence of Offe's work, and in particular the latter's essay of 1972: Claus Offe and Michel Vale, 'Political Authority and Class Structures – An Analysis of Late Capitalist Societies' 2 (1972) *International Journal of Sociology* 73.

⁸⁵Offe and Ronge (n 62).

⁸⁶Habermas, *Legitimation Crisis* (n 6) 35.

⁸⁷Keane (n 65) 15.

⁸⁸Habermas, *Legitimation Crisis* (n 6) 36 and 68.

⁸⁹See also Eich (n 43) ch 6. Hayek won the newly instated Nobel Prize for Economics in 1974, and Friedman followed in 1976.

In *Legitimation Crisis*, Habermas first argued how the political system had been recoupled to the economic system as it took on the tasks of addressing the ‘functional weaknesses of the market’ and compensating for its ‘dysfunctional side effects’. Such a recoupling, which ‘in a way repoliticizes the relations of production’, creates also an increased need for legitimation.⁹⁰ If the state politically commits to intercepting an economic crisis, it not only commits itself to turning such a crisis ‘into a systematic overloading of the public budget’ (risking a fiscal crisis), it also risks losing the mass loyalty (and revenues) needed if the desired outcomes do not materialise. As the Keynesian crisis management failed in the 70s, Habermas and Offe feared that the state would face such legitimation deficits precisely at those moment when it needed to interfere more.⁹¹ Convinced that the real threat of the governability crisis was the legitimation of the state’s economic interventionism – not, that is, the technical and administrative capacity of the state – Habermas turned his attention to how states seek to secure mass loyalty by means other than substantive democracy.

His focus thus shifted from the contradictions of late capitalism to the socio-cultural sphere of the ‘lifeworld’. Habermas argued that by tapping the lifeworld’s ‘production of meaning’ (‘national symbols, religious and civic traditions, cultural references, and so on’),⁹² the state sought to forestall a full-blown legitimation crisis. It would do so by separating its administrative decision-making system from the legitimation process. By separating the administrative and technocratic functions of the state from ‘expressive symbols that release an unspecific readiness to follow’, the state engaged in what Luhmann later called ideological regulation.⁹³ Examples of this include, according to Habermas, ‘the personalisation of substantive issues, the symbolic use of hearings, expert judgements, juridical incantations, and also the advertising techniques (copied from oligopolistic competition)’.⁹⁴

The thrust of these strategies is the securing of mass loyalty that is *as diffuse and general as possible*, allowing administrative decisions to be made largely in isolation from the concrete, specific motives of citizens. A more genuine kind of participation by citizens in a more *substantive* form of democracy would bring to their consciousness the fundamental contradictions of late capitalism identified above, ‘between administratively socialised production and the continued private appropriation and use of surplus value’.⁹⁵ To keep these tensions latent whilst securing sufficient legitimation, the democratic welfare state sticks to a merely formal type of democracy:

This structural alteration of the bourgeois public realm [*Öffentlichkeit*] provides for application of institutions and procedures that are democratic in form, while the citizenry, in the midst of an objectively [*an sich*] political society, enjoy the status of passive citizens with

⁹⁰Habermas, *Legitimation Crisis* (n 6) 36. Habermas points out that the welfare state is in this sense analogous to the pre-capitalist state, which relied heavily on the integrative forces of tradition now lacking under conditions of rationalisation and modernisation.

⁹¹*Ibid.*, 69. In 2016, Offe would repeat this argument almost verbatim in his *Europe Entrapped*, this time applying the argument to the crisis of the Eurozone. See C Offe, *Europe Entrapped* (Polity Press 2015); On page 3 of his introduction, he cites his own earlier essay on crisis management: C Offe, ‘“Crises of Crisis Management”: Elements of a Political Crisis Theory’ in J Keane (ed), *Contradictions of the Welfare State* (Hutchinson 1984) 35–64.

⁹²J Heath, ‘Legitimation’ in A Allen and E Mendieta (eds), *The Cambridge Habermas Lexicon* (Cambridge University Press 2019) 245–9.

⁹³Habermas, *Legitimation Crisis* (n 6) 70.

⁹⁴The last of these is captured well in the acclaimed BBC documentary series ‘The Century of the Self’ by Adam Curtis, which appeared on British television in 2002. Habermas also refers here to M Edelman, *The Symbolic Uses of Politics* (University of Illinois Press 1967); M Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence* (Academic Press 1971).

⁹⁵Habermas, *Legitimation Crisis* (n 6) 36. See N Luhmann, ‘Differentiation of Society’ 2 (1977) *The Canadian Journal of Sociology* 29.

only the right to withhold acclamation. Private autonomous investment decisions thus have their necessary complement in the civic privatism of the civil public.⁹⁶

For Habermas, the core of the crisis of the welfare state consists in the structural limits to this formal mode of legitimation. On the one hand, the symbolic reproduction of the lifeworld can at most be *procured* by the administrative subsystem. As Habermas puts it: ‘There is no administrative production of meaning.’⁹⁷ Therefore, the legitimation of the welfare state finds its outer limit in the legitimations made available through the symbolic reproduction of the lifeworld. On the other hand, in the search for legitimation the administrative subsystem tends to encroach upon the lifeworld and ‘pollute’ it with its functional and strategic imperatives, which endanger the communicative and informally structured sphere of the lifeworld and risk social disintegration (ie, a widespread ‘loss of meaning’ or *Sinnverlust*).⁹⁸

5. The crisis of democracy

This outline of Habermas’s argument shows us that the Frankfurt School crisis theorists bought into the still largely undisputed paradigm of postwar Keynesianism. Even as the crisis of governability was unfolding, Habermas and Offe were hardly concerned about the *technical* capacity of the welfare state to successfully manage and fine-tune the economy. Instead, they diagnosed in the contradictions of late capitalism above all *a crisis of democracy*. As Streeck puts it: ‘What appeared critical to them was not the technical governability of modern capitalism but its social and cultural *legitimation*.’⁹⁹ The Frankfurt School theorists were alone neither in their confidence in the technical capacity of the postwar welfare state (the Keynesian paradigm), nor in their doubts about the limits of (economic) democracy.

Contrary to the interwar period, the general perception of the 1970s and early 1980s was that there was no alternative to the welfare state. Stefan Eich cites the words of the American political theorist Michael Walzer, who as late as 1980 confidently maintained that the most striking thing about the discontent and unrest of the previous decade was that there was ‘so little opposition to the welfare state as a whole . . . no serious revolutionary program for dismantling it or replacing it with some radically different institutional arrangement.’¹⁰⁰ Even if he did not anticipate the imminent neoliberal turn, Walzer was right insofar as neoliberalism never ‘dismantled’ the welfare state.¹⁰¹ What crisis theorists like Walzer and Habermas overlooked was the possibility that the state’s interventionist powers could be redeployed in the service of the market rather than welfare – and that there were concrete plans to that effect, especially in the works of Hayek, to whom I will turn in the next section.¹⁰²

When it comes to their doubts about democracy, Offe and Habermas were in the company of their neo-conservative counterparts. Similar to the conservative crisis theory in late Weimar, the neo-conservatives took issue with the excessive democratic demands made on the ‘economic state’, along with those of the well organized trade unions. Most of the neo-conservative crisis

⁹⁶Habermas, *Legitimation Crisis* (n 6) 36–7. This last sentence indicates to me that Streeck’s reading of the theorists of late capitalism as being blind to the powers of capital disinvestment (ie, accumulation crises) is somewhat exaggerated. Streeck does provide a helpful corrective to the neo-Marxist crisis literature insofar as the latter largely overlooked the fact that the loss of loyalty does not just occur amongst the masses, but also amongst capital. See Streeck (n 42) 2–6.

⁹⁷Habermas, *Legitimation Crisis* (n 6) 69–70 (emphasis omitted).

⁹⁸Loick (n 79).

⁹⁹Streeck (n 42) 2. They did so whilst underestimating the political power of capital, which according to Streeck ultimately forced the roll-back of the state in the economic realm.

¹⁰⁰M Walzer, *Radical Principles: Reflections of An Unreconstructed Democrat* (Basic Books 1980) 52–3; cited in Eich (n 43) 196.

¹⁰¹See also Slobodian (n 58) 92–3. For a similar argument in the Dutch context, see Mellink and Oudenampsen (n 45).

¹⁰²Eich (n 43) 196.

literature originates from the United States (US), from scholars like Samuel Huntington, Daniel Bell, and Irving Kristol, who were polemicising against the ‘liberal’, that is social democratic, vision of economic interventionism.¹⁰³ But also in the United Kingdom (UK), where the trade unions were particularly strong, the neo-conservative crisis theorist Anthony King introduced the powerful rhetorical trope of ‘overload’ to describe the condition of government.¹⁰⁴ The most prominent example of the neo-conservative crisis literature is *The Crisis of Democracy*, a report published in 1975 for the Trilateral Commission (made up of prominent members of the political and business elites of the US, Western Europe, and Japan).¹⁰⁵ Offering perspectives from Japan (Joji Watanuki), the US (Samuel Huntington), and Europe (Michael Crozier), the authors of the Trilateral Commission report argued, like King, that the welfare state apparatus was structurally exposed to an ‘overload’ of often contradictory demands, especially from increasingly organised unions and welfare recipients.

The theorists at the Frankfurt School were well aware of these works and ended up agreeing with much of the diagnosis of ungovernability. Towards the end of the 1970s, the narrative of democratically induced ‘overload’ quickly gathered support and was particularly successfully applied to inflation. As the source of the predicament of the 70s, the neo-conservatives identified ‘an excessive burden . . . on the “sharing out” function of government’ – that is, the functions of decommodification and administrative recommodification described by Offe, which took on the familiar forms of Keynesian economic and fiscal policy.¹⁰⁶ Placed alongside the theory of late capitalism, the striking thing is that the neo-conservative crisis literature affirms the neo-Marxist insight that democracy and the capitalist mode of production stand in a strained, incommensurable relationship.¹⁰⁷ Both literatures trace the governability problems of the welfare state to a ‘continuous explosiveness of class conflicts or their inadequate institutionalisation’.¹⁰⁸

But aside from this argument from excessive demand, the neo-conservative diagnosis had a second element focused on the other side of the coin: the government’s capacity to *supply*. Here, the neo-conservatives focused on the government’s *failures* – to bring inflation down, restore the balance of payments, decrease crime, build more houses, etc.¹⁰⁹ Moreover, neo-conservatives also argued that welfare state’s steering capacity was *in principle* too limited, and in doing so echoed Schmitt’s critique of the social democratic conception of the economic constitution. Offe summarised this argument by citing a German neo-conservative crisis theorist, Bernd Guggenberger: ‘an effective processing of the avalanche of claims would be conceivable only with the annulment of some of the constitutional guarantees whose continued existence ties the hands of state power. “Whoever says A must also say B; whoever desires indivisible state responsibility must also be prepared to sacrifice many enjoyed freedoms”’.¹¹⁰ In other words, to

¹⁰³Especially Bell (n 49) (originally published in 1976); I Kristol, *Two Cheers for Capitalism* (Basic Books 1978). See also AH Birch, ‘Overload, Ungovernability and Delegitimation: The Theories and the British Case’ 14 (1984) *British Journal of Political Science* 135, 136–9.

¹⁰⁴King (n 55).

¹⁰⁵Crozier, Huntington and Watanuki (n 55). See also MC Behrent, ‘The Origins of the Anti-Liberal Left: The 1979 Vincennes Conference on Neoliberalism’ 35 (2017) *French Politics, Culture & Society* 44, 50.

¹⁰⁶Brittan, ‘The Economic Contradictions of Democracy’ (n 55) 130; as cited in H Lokdam and MA Wilkinson, ‘The European Economic Constitution in Crisis: A Conservative Transformation’ (2021) *LSE Law, Society and Economy Working Papers* 03/2021 9. Elsewhere, Brittan also links excessive democratic demands to inflation: ‘Democracy comes in as an inhibition on methods which might otherwise be attempted for curbing the power of unions to force the authorities to finance inflation – on pain of pricing workers out of jobs. Just as democracy whips up expectations, it reduces the means available for fulfilling these expectations.’ (see Brittan, ‘Inflation and Democracy’ (n 55) 176.).

¹⁰⁷As Offe saw, see C Offe, ‘“Ungovernability”: The Renaissance of Conservative Theories of Crisis’ in J Keane (ed), *Contradictions of the Welfare State* (Hutchinson 1984) 66.

¹⁰⁸*Ibid.*, (emphasis omitted).

¹⁰⁹King (n 55) 166. King calls this ‘the problem of intractability’.

¹¹⁰Offe, ‘Ungovernability’ (n 107); citing B Guggenberger, ‘Herrschaftslegitimierung Und Staatskrise. Zu Einigen Problemen Der Regierbarkeit Des Modernen Staates’ in M Greven (ed), *Krise des Staates?* (Luchterhand 1975) 39. On the

satisfy the ever-increasing demands, the welfare state would increasingly be forced to overstep the limits of the liberal *Rechtsstaat*, according to which the state is merely supposed to guarantee the general conditions of private production, exchange, and accumulation through the protection of individual liberties and private rights, legal certainty, and formal equality before the law.¹¹¹

The neo-conservative crisis theorists thus echoed Schmitt's concerns about the quantitatively 'total state'. But they could not follow the 'hard' authoritarian solution he had offered in late Weimar. As Charles Maier explained in 1988, in postwar Europe, conservatives only had three choices in their confrontation with the left:

an outworn insistence on the value of traditional élites and privileges, which had little prospect for success under conditions of universal suffrage; or a fascism requiring that all class rivalry must be submerged in the search to aggrandize national authority and territory (which emerged discredited by the war); or the *non-zero-sum pursuit of economic growth in the hope that this might make the older doctrines of class conflict irrelevant*.¹¹²

The neo-conservative commitment to the latter explains the convergence of neo-conservative crisis theory and economic liberalism from the 1960s onwards. It also explains why much of the Trilateral Commission report and the other neo-conservative crisis literature reads like a manifesto for economic liberalism. I return to this in the final section, which takes a closer look at the neoliberal alternative offered in the 1980s.

In sum, for the neo-conservatives, the governability of the welfare state was jeopardised on both the input and the output side; the expectations and demands it faced were too many, and its capacity to meet them too limited. Reflecting the position of the Frankfurt School towards the end of the 1970s, Offe fully subscribed to this diagnosis: 'In my opinion the two components . . . fully and correctly circumscribe the functional problems that now confront the capitalist welfare and interventionist state.'¹¹³ Where the neo-Marxist crisis literature sees a crisis of legitimation as a consequence of the recoupling of state and market, the neo-conservative literature sees an 'overburdened' state as a consequence of democratic excess. Both literatures made much of this difference. Huntington, one of the authors of the Trilateral Commission report, concluded that the source of the governability crisis was not capitalism (a claim he ascribed to the neo-Marxists), but democracy: 'What the Marxists mistakenly attribute to capitalist economics . . . is, in fact, a product of democratic politics.'¹¹⁴ Offe agreed: 'The difference consists only in the fact that the neo-conservative theorists of crisis see the source of crisis and what they wish to eliminate not in conditions of capitalist *wage-labour* but, rather, in the institutionalised arrangements of welfare state mass democracy.'¹¹⁵

6. From economic to legal interventionism

The neo-Marxist affinity with the neo-conservative diagnosis of 'ungovernability' is not particularly controversial. In fact, as we have seen, it was openly acknowledged by many of the

successes and failures of German neo-conservative crisis theory, see M Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (Yale University Press 1982) chs 3 and 4.

¹¹¹Offe, 'Ungovernability' (n 107) 67–8. A similar argument, but more broadly focused on the changing nature of the *Rechtsstaat* in the twentieth century, can be found in M Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 321.

¹¹²Maier (n 41).

¹¹³Offe, 'Ungovernability' (n 107) 73.

¹¹⁴Crozier, Huntington and Watanuki (n 3) 73; cited in Offe (n 4) 66.

¹¹⁵Offe, 'Ungovernability' (n 107) 66.

crisis theorists on the left.¹¹⁶ Towards the end of the 1970s, the welfare state was in both of these literatures increasingly seen as exacerbating rather than neutralising the fundamental tensions between ‘bourgeois democracy and the capitalist mode of production’.¹¹⁷ In this final section, I look at the way these tensions were seemingly (and rather suddenly) resolved by the ‘neoliberal’ alternative of the 1980s, and how the Frankfurt School theorists anticipated and perceived this shift. If the previous section looked at the way the Frankfurt School theorists related to the neo-conservative crisis literature, this section is concerned with their relationship to the ‘neoliberal’ successors of the interwar ordoliberals.¹¹⁸

The German neoliberals or ordoliberals of the postwar period had come to agree with Polanyi on the utopian dimensions of a ‘self-regulating market’.¹¹⁹ As we saw in the discussion on the interwar period, first generation ordoliberals already argued that the ‘free’ competitive market needed a ‘strong state’ and a ‘robust institutional framework’, or else the concentration of private power would lead to monopolisation and cartelisation.¹²⁰ They thus addressed both sides of the diagnosis of the neo-conservatives. On the one hand, ordoliberals focused on the self-constraint of the state to limit the *supply* of interventionist policies, which they saw as bolstering monopoly power and undermining competition. On the other hand, they outlined a *Gesellschaftspolitik* geared at suppressing society’s demands for anti-competitive mechanisms.¹²¹ Crucially, they pursued these objectives *by means of a constitutional framework of rules*, that is, an ‘economic constitution’ restraining the state to engage only in what they called *Ordnungspolitik*. A competitive market system had to be ordered politically (along the lines of a Schmittian decision) but also constitutionally entrenched, so the state could be placed in the service of the market.

Like their interwar predecessors, the postwar ordoliberals sought a legal fix to the failures of state interventionism and the monopolistic tendencies of private accumulation. Or as Foucault put it in 1979, they wanted to transform the state’s ‘economic interventionism’ into ‘legal interventionism’.¹²² Instead of the legislative juridification of the economy to appease class conflict, as Kirchheimer described the *modus operandi* of the welfare state, ordoliberals seek to constitutionalise the free, competitive market and place the state apparatus in its service. Both are forms of juridification (they resort to law), and both are forms of depoliticisation (they place limits on democratic action). But where the one is oriented to welfare, the other is oriented to economic discipline.

This also explains the central role of the rule of law in the neoliberal thought of the postwar period. In this respect the postwar ordoliberals followed the work of Hayek, who had long maintained that the rule of law and economic planning were diametrically opposed.¹²³ But contrary to Hayek, who by the 1970s began to reject the political and institutional underpinnings of liberalism (including the state itself), the second generation of the ordoliberals followed their predecessors (and Böhm in particular) in their understanding of the economic constitution as a

¹¹⁶In addition to Offe’s own admissions (see n 113), see also A Wolfe, *The Limits of Legitimacy: Political Contradictions of Contemporary Capitalism* (Free Press 1977) 329.

¹¹⁷For an overview of this shift, see Offe, ‘Ungovernability’ (n 107).

¹¹⁸As noted above (n 58), I am mainly concerned here with what Slobodian calls the ‘constitutionalist’ strand of neoliberalism, which in the current context overlaps almost entirely with the second generation of ordoliberals. Unless specified otherwise, I use these terms interchangeably.

¹¹⁹See especially DM Woodruff, ‘Ordoliberalism, Polanyi, and the Theodicy of Markets’ in J Hien and C Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017).

¹²⁰F Böhm, ‘Left-Wing and Right-Wing Approaches to the Market Economy’ 135 (1979) *Journal of Institutional and Theoretical Economics* 442, 364. See also M Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 72–3.

¹²¹Woodruff (n 119) 223; citing Foucault (n 39) 160.

¹²²Foucault (n 39) 167.

¹²³FA Hayek, *The Road to Serfdom* (Routledge 1976) ch 6. See also FA Hayek, *The Constitution of Liberty* (Ronald Hamowy ed, University of Chicago Press 2011) ch 15.

‘fundamental decision’.¹²⁴ What sets the ‘constitutionalist’ neoliberals of the postwar period apart is their efforts to upscale the economic constitution at a level *beyond* the state. This is why second generation ordoliberalists like Ernst-Joachim Mestmäcker confidently declared the Treaty of Rome to be an economic constitution as early as 1973.¹²⁵ The crisis of the welfare state in the 1970s offered a unique opportunity to further develop these efforts, marking the transition from (welfare) nation-states to Member States.¹²⁶

Moreover, just as the authoritarian liberalism of late Weimar saw a convergence between interwar conservatives and economic liberals, so European neo-conservatives could pursue their aspirations to ‘roll-back’ democracy’s economic reach through the economic constitutionalism of the neoliberals.¹²⁷ But the turn to (economic) constitutionalism also tempted the neo-Marxist crisis theorists in the Frankfurt School. From the late 1970s, they (and Habermas in particular) began to pay closer attention to the legal modes in which states exercise their authority.

In TCA, a still critical Habermas argues that ‘from the start, the *ambivalence of guaranteeing freedom and taking it away* has attached to the policies of the welfare state’.¹²⁸ Echoing Kirchheimer, Habermas maintained that the juridification of the economy has an inherently dilemmatic structure. Social welfare law, for example, is not only used to emancipate workers, women, and children, but also tends to impose on welfare recipients, families, and schools an alien functional and strategic logic. Habermas even presents juridification as a prime example of his thesis of lifeworld colonisation, a process whereby ‘the imperatives of autonomous sub-systems [economic, political] make their way into the lifeworld *from outside* . . . and force a process of assimilation upon it’.¹²⁹ Until his abandonment of much of this critical terminology in the 1990s,¹³⁰ it was this fundamental ‘antagonism between the mechanisms of system integration and social integration’ that took centre stage in Habermas’s thought over the course of the 1970s and 1980s.¹³¹

Habermas was thus keenly aware of the corrupting effects of using money and law as ‘steering media’ (leading to critiques of commodification and juridification respectively). But we see here that he is also struggling with the emancipatory promises of the welfare state and the reform-oriented conception of economic democracy espoused by the SPD since the 1920s. As Eich points out, by the late-1970s, Habermas was openly doubting ‘the feasibility and desirability of economic democratization’ and was increasingly sceptical about a way out of the dilemma posed by the coupling of steering and democracy.¹³²

¹²⁴Slobodian (n 58) 211; Loughlin (n 120) 72. On Hayek’s changing relationship with the state, see C Kukathas, ‘Hayek and the State’ in D Dyzenhaus and T Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press 2015) 281–94.

¹²⁵EJ Mestmäcker, ‘Power, Law and Economic Constitution’ 11 (1973) *German Economic Review* 177. Other influential constitutionalist neoliberals include Erich Hoppmann and Hans von der Groeben. See also Slobodian (n 58) 210–4.

¹²⁶CJ Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press 2012).

¹²⁷This is a central leitmotiv in Wilkinson (n 13).

¹²⁸Habermas, *The Theory of Communicative Action Volume 2* (n 7) 361.

¹²⁹See generally F Gonçalves Silva, ‘Colonization of the Lifeworld’ in A Allen and E Mendieta (eds), *The Cambridge Habermas Lexicon* (Cambridge University Press 2019) 36–9. Citing Habermas, *The Theory of Communicative Action Volume 2* (n 7) 367. ‘The thesis of internal colonization states that the subsystems of the economy and state become more and more complex as a consequence of capitalist growth and penetrate ever deeper into the symbolic reproduction of the lifeworld’. On juridification, see also Loick (n 79). See also D Loick, ‘Juridification and Politics: From the Dilemma of Juridification to the Paradoxes of Rights’ 40 (2014) *Philosophy & Social Criticism* 757.

¹³⁰See J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996); and as to the transnational dimension, see J Habermas, *The Postnational Constellation: Political Essays* (MIT Press 2001).

¹³¹Offe, Held and Keane (n 73) 255–6.

¹³²Eich (n 43) 186; citing J Habermas, ‘Conservatism and Capitalist Crisis’ (1979) *New Left Review* 73, 81. Habermas writes: ‘In other words, I wonder – this is an empirical question which cannot be answered abstractly, but only through experimental practice – if we should not preserve part of today’s complexity within the economic system, limiting the discursive formation of the collective will precisely to the decisive and central structures of political power: that is, apart from the labour process as such, to the few but continuously made fundamental decisions which will determine the overall structure of social production and, naturally, of distribution.’

Can we explain Habermas's turn to law's mediating role in *Between Facts and Norms*,¹³³ his wholehearted embrace of constitutionalism within *and* beyond the state,¹³⁴ as well as his rejection of more radical forms of democracy in favour of deliberative democracy as a kind of resignation?¹³⁵ As a disillusionment with the ill-fated experiment of economic democracy, with which the Frankfurt School has been trying to come to terms ever since the Weimar Constitution was adopted? More work is needed to provide a more definite answer to these questions, but the fact is that the Habermas of the late 1970s ended up surprisingly open to the modes of 'indirect control' which characterised so much of the neoliberal turn.¹³⁶

To conclude, whilst offering powerful critiques of the corrupting effects of using money and law merely as 'steering media', the Frankfurt School theory of late capitalism has some serious blindspots. If unwittingly, their pessimism around the possibility of economic democracy led them to adopt an ambiguous posture when the push to depoliticise the economy arrived in the 1980s. Above all, the Frankfurt School failed to anticipate the possibility that the sizeable administrative apparatus of the national welfare state could be reoriented away from welfare towards discipline, and that economic constitutionalism would play a significant role in this, both within as well as beyond the state.¹³⁷

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¹³³Habermas, *Between Facts and Norms* (n 130).

¹³⁴Habermas, *The Postnational Constellation: Political Essays* (n 130).

¹³⁵For a critique, see A Somek, 'The Argument from Transnational Effects II: Establishing Transnational Democracy' 16 (2010) *European Law Journal* 375.

¹³⁶J Habermas, *Communication and the Evolution of Society* (T McCarthy tr, Beacon Press 1979) 193–9. Also cited in Eich (n 43) 186.

¹³⁷Bickerton (n 126).

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