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Neoliberal taxation regimes and the articulation of sovereign state power

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Conflict of Interest: None.

Abstract: After decades of consistent refusal of attempts to curb international tax evasion, the US Biden administration has recently proposed an international scheme for taxing the world's largest transnational companies. The fate of Biden's proposal depends on support not only from the US Congress but also from the EU and other leading economies. Neither can be taken for granted. This article seeks to improve our understanding of why it has been and remains very difficult to develop an international scheme controlling tax evasion by examining the role played by neoliberal governmentalities and their link to sovereign power. This examination contributes to our understanding of the politics of international taxation but also of the wider relationship between neoliberalism and sovereignty. It is argued that neoliberal governmentalities display several systematic but also diverging reflections on the use of sovereign power within taxation. These governmentalities have been crucial in propagating a design of sovereign power that is conducive to tax competition and, ultimately, to tax evasion. Yet, these divergences also seem to provide a space for reforming current taxation regimes.

Keywords: Governmentality; Sovereign power; Elitism; Taxation; The European Union.

Introduction

With a view to finance extensive public investments, the new Biden administration announced in April 2021 a corporate tax reform that would raise taxation rates from 21 to 28 per cent and raise the minimum tax level for US transnational corporations to 21 per cent (US Department of Treasury, 2021). The tax reform proposal is a radical break with four decades of neoliberal tax reforms aimed at cutting both corporate and income taxes to a minimum. While the initiative has received support from the OECD and the EU, who for decades have tried to forge an international alliance to reduce international tax evasion, the destiny of the US reform proposal and those of the OECD and the EU remains uncertain. Given the extensive and growing public deficits in most advanced liberal democracies, dwindling tax incomes to state coffers and that tax evasion, correctly or not, has been posed as a cause of the rise of populism in the EU (Morgan, 2017), it does seem puzzling why resistance against such reforms trying to tax transnational companies more effectively is so strong (Dietsch and Rixen, 2016).

At the most general level, the answer to this puzzle may rest with the fact that neoliberal governmentalities have informed political ideas and reforms in liberal democracies since the 1980s. Under the banner of individual freedoms and competitive markets, these governmentalities have informed interventions that erode institutions of representative democracy in favour of constitutions securing free trade and markets; and the freedom of individuals and companies from taxation and other political regulations (Biebricher, 2015; Brown, 2015; Kiely, 2017; Mirowski and Plehwe, 2009). These studies of the influence of neoliberal governmentality provide a convincing starting point. Yet, in order to get a better grasp of the role of neoliberalism in the area of taxation, we need to examine in more detail how key neoliberal thinkers regard the proper role of taxes and, not least, the state's sovereign right to decide on these.

The overall aim of this article is to improve our understanding of why it has been and remains very difficult to develop an international scheme controlling tax evasion. It does so by examining the role played by neoliberal governmentalities and their link to sovereign power. This examination contributes to our understanding both of the politics of international taxation but also of the wider relationship between neoliberalism and sovereignty. Thus, the question pursued here is: How do neoliberal governmentalities articulate the need for or avoidance of sovereign state power in the area of taxation? The functioning of all liberal democracies depends on their ability to extract various forms of taxes from their citizens or corporations. At the same time, taxation is predicated on the state's threat and ultimate ability to exercise sovereign power in order to extract taxes from the assets, consumption or production of their citizens and corporations. The ways in which a political rationality seeks to account for and justify the use of sovereign power in this area may be indicative of neoliberalism's wider approach to the use of sovereign state power and, ultimately, to democracy and economic equality.

Several historians have examined how the interrelations between state building, sovereign power and taxation in Europe and North America (Lachmann, 2010; Tilly, 1990). More recently, political sociologists have studied the relationship between neoliberalism and taxation (Huerlimann et al., 2018; Prasad, 2006). These studies have provided much needed insights into the national variations in neoliberal tax reforms and their distributional effects on public welfare. Yet, they have not focused on the question of how neoliberalism justifies the use of sovereign power in this area. This article's approach is informed by Michel Foucault's analytics of power-knowledge regimes, notably his lectures on modern governmentalities (Foucault, 2008). Despite several calls for continuing Michel Foucault's promising research on the interrelationship between neoliberalism and sovereignty (Dean, 2002; Dean and Larsson, 2021; Villadsen and Wahlberg, 2015), remarkably few did so until around the advent of the 2008 global financial crisis (Gamble, 1994; Singer and Weir, 2006). The latter crisis and the economic reforms following it sparked several studies of the links between neoliberalism and sovereign power, notably in the European Union

(Bonefeld, 2012; Slobodian, 2018), but also in Russia (Collier, 2011) and elsewhere (Mirowski and Plehwe, 2009). These studies suggest that neoliberalism is indeed in various ways articulated with and dependent upon sovereign state power. (Bonefeld, 2017; Streeck, 2015). The present article seeks to contribute to this line of research by focusing on how neoliberal rationalities articulate the need for sovereign power in the area of taxation, a key site for the territorial state's exercise of sovereign power. This exploration concludes that neoliberal governmentalities display several systematic but also diverging reflections on the use of sovereign power in the area of taxation. On the one hand, these governmentalities have been crucial in propagating a design of sovereign power that is conducive to tax competition and, ultimately, to tax evasion. On the other hand, these divergences also seem to provide a space for reforming current taxation regimes.

In order to shed light on the relationship between neoliberalism and sovereign power, this article explores the work of Friedrich Hayek and James Buchanan, and, to a lesser extent, on Milton Friedman and the German Ordoliberals Franz Böhm and Ernst Joachim-Mestmäcker. Of course, these are not the only persons that have contributed importantly to neoliberal governmentalities and their reflections were often disputed by other neoliberals (Mirowski and Plehwe, 2009). Still, they are widely regarded as prominent contributors to neoliberal governmentalities. The latter are understood here as the rather diverse set of scholarly informed reflections on how best to govern a society by, firstly, seeing the state's key role to ensure the optimal functioning of markets and, secondly, pegging the utility of state interventions to some imaginary ideal of market efficiency (Foucault, 2008, pp. 119–121). The term sovereign power is used to denote the democratized state power that seeks to command citizens and organizations to behave or refrain from behaving in particular ways under the threat of legally sanctioned physical coercion (Singer and Weir, 2006; Weber, 1948). Thus, sovereignty here refers not to the spectacular, monarchic powers, but to the mostly rather dull and democratized forces exercised by a central government with the support of a state apparatus equipped with coercive forces. Finally, these two forms of power are assumed to be

strategically interlinked, rather than mutually exclusive powers where one succeeds the other (Foucault, 2007, pp. 107–108). Based on these conceptual and analytical premises, the article focuses on the writings of influential (or at least oft-quoted) publications by neoliberal academics dealing with the use of sovereign power in the area of taxation. The relationship between neoliberalism and sovereignty in the area of taxation is further illustrated by the OECD's and, in particular, the EU's attempts to curb international tax evasion.

The remainder of this article starts by examining the general relationship between neoliberal governmentalities and sovereign state power, notably the importance attributed to imposing constitutional constraints on democratized sovereignty. It then moves on to explore how neoliberal moves to constrain taxation goes hand in hand with the consolidation of federalized sovereignty. The conclusion sums up the findings and points out the contribution made by the current article to existing critical analyses of the role neoliberalism and political sovereignty in taxation (Dietsch and Rixen, 2016; Ganghof, 2006; Palan et al., 2010).

Constitutional Constraints on Political Sovereignty

This section examines how key neoliberal thinkers, such as Friedrich Hayek, the *Ordoliberalen* and James Buchanan, address how and under what circumstances sovereign state power could and should be invoked. It seeks to show how neoliberals go at great pains to create constitutional constraints on state power while at the same time advocating that a constitution be designed on the basis of criteria derived from neoliberal political economy, not on the will or interests of the people.

Neoliberal constitutional rule

Neoliberalism's relationship to sovereignty evolves around the ambition of ensuring the rule of law. In an excellent exposition of the relationship between neoliberalism and law, the legal and political philosopher Raymond Plant (2009, pp. 5–25) argues that Hayek and several other neoliberal thinkers subscribe to a nomocratic position on the role of law in society (see also Gill, 1998; Rose and Valverde, 1998).

Directly inspired by Michael Oakeshott's distinction between nomocratic and telocratic law, Hayek, Buchanan and several *Ordoliberalen* propagated the former and was generally sceptical of the latter. The essential principle of *nomocratic law* – or simply the rule of law – is to provide a general set of rules that allows or even develops the pursuit of private ends. This implies a clear separation between government (or polity) and politics (or policies) (Plant, 2009, pp. 7–8). The government must have the sovereign power to develop and enforce a set of laws that provide a set of framework conditions and institutions under which citizens and civil organizations may pursue their ends. It is crucial that these conditions and institutions are indifferent or neutral to the private ends they allow to be pursued. In contrast to nomocratic rule, Hayek regards *telocratic law* as designed to pursue substantive ends, such as social justice or religious purposes. Accordingly, nomocratic law does not operate with any clear distinction between government and politics, as both must engage in the pursuit of common ends. Here, sovereign power is used not to provide a set of framework conditions and institutions enabling the pursuit of private ends but rather to allocate resources and direct the behaviour and perhaps even the will of civil actors in ways that are seen to be in line with higher purposes, such as the general welfare of the population. This dual conception of rule is mirrored in James Buchanan's distinction between a 'protective state' and a 'productive state' (1975, pp. 88–89).

Hayek and Buchanan also agreed on celebrating nomocracy or a protective state, and being sceptical towards telocratic rule or a productive state, including social democratic-style welfare states. True, both authors did allow for situations in which citizens would come together and agree to provide certain public

goods either directly or by convincing the state to finance this. Buchanan allowed that the state provide public goods in situations where free-rider problems are immanent, though with the proviso that such services are supported by a qualified majority and subjected to some sort of constitutional review (Buchanan, 1975, chap. 3). Hayek found that education might very well be financed and even provided by the state to ensure the creation of civilized and productive citizens (Hayek, 1960, p. 499ff). Yet, he also argued, explicitly inspired by Carl Schmitt, that: 'a pluralist state will become "total" not from strength and force but out of weakness; it intervenes in all sectors of life, because it feels that it has to fulfil the demands of all interested parties' (Hayek 1979, p. 195 quoted in Slobodian, 2018a, pp. 205–206). Most likely informed by the events of the Weimar Republic some four decades earlier, Hayek (1979, pp. 194–195) found that unlimited democracy or telocratic rule would lead to totalitarianism, as all kinds of societal groups pursuing their interests would try to capture the state. Nomocratic law entails that the state uses its monopoly on coercive power in order to ensure that one person's (negative) liberty is not infringed by another person's actions:

Coercion, however, cannot be altogether avoided because the only way to prevent it is by the threat of coercion. Free society has met this problem by conferring the monopoly of coercion on the state and by attempting to limit this power of the state to instances where it is required to prevent coercion by private persons. (Hayek, 1960, p. 21)

Buchanan agreed with Hayek on the need for a coercive state apparatus in order to create and sustain free markets. In *Liberty, Market and State*, Buchanan (1985) distinguished between 'economics' and 'political economy'. Whereas economics examines and tries to predict the presumably self-seeking behaviour of persons within a given constraining, legal framework, the aim of political economy is 'to evaluate the structure of the constraints, "the law", with some ultimate objective of redesign or reform aimed at securing enhanced efficiency in the exploitation of potential mutuality of advantage' (Buchanan, 1985, p.

33). Even if economists are right about human nature (*homo economicus*) and often able to predict their behaviour, Buchanan argued, they fail to understand that such behaviour is not free. To have free markets, man must be chained by regulatory constraints, which in complex societies requires a sovereign form of power. Political economy is a normative science, Buchanan (1985, p. 35) explains, in that its task is not to predict behaviour but to enable: 'persons to analyse their own behaviour, along with that of others, in some imagined state and, from such analysis, to define the appropriate or desired set of constraints that will be embodied in the law assigned to the sovereign for enforcement'. In order to ensure the interactions between suppliers and consumers and the value these interactions provide, laws and institutions are necessary to protect property and contracts. These laws and institutions are predicated on the presence of a sovereign state, the absence of which would lead to Hobbesian anarchy (Buchanan, 1985, p. 167). Buchanan may be alluding to a Hobbesian understanding of human nature as a wild beast unless constrained by a sovereign power. Yet, he clearly has little if any trust in the benign character of the sovereign. The latter, whether in the form of a monarch or representative government, is driven by self-interest like all other actors; hence the need to control the sovereign (Brennan and Buchanan, 1980, p. 13).

The need for a political sovereign to found and defend liberal constitutionalism

In several instances, Hayek (e.g. 1960, pp. 56–61, 1976) argued that the design and construction of a constitutional framework of the nomocratic type is more likely to result from the evolution of spontaneous interactions and dialogue between private citizens than from centrally imposed designs. Referring to the growth of common law in Britain and 'grown law' experiences from other societies, he found reason to believe in the potential of everyday interactions and arbitrations to generate an abstract order of rules that will further facilitate individual freedoms and a free market (Hayek, 1976, p. 119). Still, he did acknowledge that 'it does not prove that it will always be good law or even that some of its rules may not be very bad' (Hayek, 1976, p. 88). It might therefore become necessary for the state to use its powers to modify existing legislation and develop new rules to ensure a free society and market economy (see also Whyte, 2019).

In contrast to Hayek's general, but not unconditional, faith in the constitution-building capacities of the cultural and social evolution of societies, James Buchanan (1975, p. 211 note 1; 1985, p. 58ff) insisted on the need for a decisive constructionism adhering to the constitutional design principles espoused by neoliberal political economy. This follows from Buchanan's assumption that politicians, like all others, are essentially self-serving actors seeking to gain popularity and (re-)election. Thus, it is well known that Buchanan's state theorizing, usually labelled public choice, assumes that politicians and civil servants alike are self-interested individuals. Politicians are driven not by the public good but by vote- and office seeking (Buchanan and Tullock, 1962), and civil servant conduct is informed not by virtues of impartiality and *sachlichkeit*, but by their maximization utility via budget maximization or bureau shaping (Niskanen, 1971). While Buchanan does not completely reject the idea that a protective constitution can be developed via democratic solutions, he is very sceptical about this option for at least two reasons. Firstly, with the erosion of social ties and ethical standards among private citizens in the post-1960s US, it is doubtful that a majority of the citizens will prefer a constitution restricting their freedom (Buchanan, 1975, p. 162). Secondly, even if most citizens do at times prefer a restrictive constitution, it is unlikely that they will be able to find political candidates working wholeheartedly for such a constitution.

This distrust in the electorate and in politicians leads Buchanan (1985, p. 90) to suggest that the push for a protective constitution, at least initially, seems to be up to a few enlightened people, such as the founding fathers of the US constitution or the founder of political economy, Adam Smith (Buchanan, 1975, p. 170). Unlike modern political scholars, the founding fathers realized, Buchanan argues, that teleological-style politics must be constrained. Political economists, including Buchanan (1985, p. 67) himself, must engage in a 'battle of ideas' to persuade the public and policymakers of the political (freedom) and economic (wealth) benefits of adopting a constitution whereby the sovereign powers of government are restricted to nomocratic-style interventions.

Thus, Buchanan claims that the only form of legitimate sovereign power is one constrained by value-free rule undertaken by insulated professional jurists. Based on his 'realistic' analysis, Buchanan argues that the push for such rule is likely to come neither from politicians nor the citizens electing them, but from the ideas enunciated by political economists of a neoliberal bend like himself. True, the struggle for a contemporary constitutional revolution in favour of protective rather than productive order, must be fought by citizens. But they are only likely to engage in this struggle if their attitudes are changed, and that change is to come from political and legal philosophy:

General acceptance by working scholars is perhaps a necessary prelude to acceptance of such ideas by a frustrated public. This emergence of a modified public philosophy in this respect should not be beyond the bounds of hope. Both the ideas and events of the preceding decades have created a potentially receptive attitude in the ordinary man. He has lost his faith in government as it operates, but he remains unwilling to jettison the governmental crutch. He searches silently for a philosophy that might offer him some reconciliation and that might partially restore his social faith (Buchanan, 1975, pp. 176–177).

If Buchanan suffers from state-phobia (Villadsen and Dean, 2012), he seems much less concerned with the dangers of sovereign power exercised by either judicial institutions or political economists academic elites like himself.

Buchanan was far from the first to express neoliberal arguments in favour of an authoritarian act of power to found a liberal constitution. Key German thinkers linked to the *Ordo* journal expressed the need for decisive political intervention to create a suitable constitutional framework to ensure economic freedom. As Slobodian pointed out, Franz Böhm (1895–1977), a professor in economics at the University of Freiburg

and member of the Bundestag for CDU after WWII, argued in 1937 for the need for an economic constitution that could only come into being through the exercise of a: 'conscious and aware political will, an authoritative decision of leadership' (Böhm 1937, p. 56, quoted in: Slobodian, 2018, p. 211). Similar reflections were expressed by Ernst Joachim-Mestmäcker, a German law professor and advisor to the West German Ministry of Economics and Technology and to the EEC Commission on competition policy in the 1960s. In the context of developing a constitution for the EEC, Mestmäcker (1969, p. 173) argued against Hayek's faith in the outcome of 'grown law' and instead stressed the need for a manifest political will and decision to install a constitutional framework ensuring free-market principles. Not surprisingly, Mestmäcker regarded the establishment of the EEC via the Rome Treaty in 1957 as the most prominent example of a political decision founding an economic constitution that, via the European Court of Justice, safeguarded the free interactions between enterprising citizens and corporations from the interests of and capture by democratically elected governments (Bonfeld, 2017).

In sum, it seems that Hayek, Buchanan, and the *Ordoliberalen* on the need for some kind of constitutional framework constraining state power because the latter is easily captured by majoritarian, democratic forces trying to impose their will on minorities, whose property rights and other rights may be curtailed. However, they also differ fundamentally on how such a constitution is most likely to come about. While Hayek seemed to have faith in common law and Buchanan believed parts of the populace can be educated in way of liberal constitutional principles, the *Ordoliberals* clearly had less faith in the populace and therefore proposed that a constitution be founded by political and technocratic elites, *in casu* the EEC.

Constraining Taxation by consolidating federalized Sovereignty

After securing the territorial borders from unchecked interference from other states and migration, the ability and undisputed right to collect taxes, if necessary by force, is usually taken as one of the defining

features of state sovereignty. Neoliberalism disputes this right. Moreover, a number of critical scholars have linked neoliberalism to the systematic erosion of the taxation of capital income and property since the late 1970s (Harvey, 2005, pp. 17, 23; Jones, 2012, pp. 172, 248). Quite simply, the general neoliberal argument against taxation is that it brings about an inefficient allocation of resources because it, by design, changes how citizens would otherwise have acted if they could freely pursue their preferences (Brennan and Buchanan, 1980, p. 158). Accordingly, it was concerns over the functioning of markets, not the lot of the poor, that led Milton Friedman (1968) to argue for a negative taxation system enabling poor citizens to react to economic incentives and participate in the market game.

Like Friedman, Hayek and Buchanan addressed taxation as a question of economic efficiency rather than in terms of human rights. This distinguishes them from Robert Nozick's (1974) rights-based critique of taxation, which argues that taxes imposed for anything other than securing citizens' corporeal safety and property amounts to forced labour, as the state coerces the individual to undertake a certain amount of work for no pay. In contrast, Hayek (1960, pp. 316–317, 320) rejected progressive taxation because it distorts the supply and demand for products and services; supplants efficient, long-term (private) investments; and protects established industrial monopolies. In particular, he insisted that a majority of people should not be allowed to impose a rule that applies to a minority only, such as a higher taxation rate. Such a majoritarian imposition would amount to 'an infringement of a principle much more fundamental than democracy itself, a principle on which the justification of democracy rests' (Hayek, 1960, p. 314). The fundamental principle to which Hayek refers here is that of formal equality; that each citizen is treated equally in the face of an abstract law (i.e. nomocratic rule).

For Buchanan too, economic efficiency was the key criteria for approaching the taxation question. To him and his colleague George Brennan (1980, pp. 9–10) it is, in principle, acceptable that a government taxes the entire income of its citizens, provided that the latter unanimously vote for doing so and that the

government spends the money on public goods in accordance with the citizens' preferences for such goods. In this ideal situation of unanimity, the government would not need to use its coercive power. Accordingly, there would be no need to constrain the government. Unsurprisingly, Buchanan rejected this ideal situation as unrealistic because governments are prone to collect taxes and spend the income for purposes, they think will maximize their prospects for re-election. Such expenditures are inevitably going to be economically inefficient, as they are above all driven by political attempts to please particular rent-seeking interest groups at the expense of others.

This abhorrence of government taxation for other than protective purposes informed the neoliberal thinkers' rejection of attempts by the OECD and, later, the EU, to fight 'harmful tax competition'. Under mandate from the G7, the OECD (1998) launched a project against harmful tax competition. The OECD justified the project in terms of reducing the distortion of markets and securing a 'level playing field' for international trade (OECD, 1998, pp. 8–9). While the OECD's carefully justified the need to avoid harmful tax competition in neoliberal terms of securing fair competition, free trade and international investments, they failed to convince thinkers like Friedman and Buchanan. Both supported the campaign launched by the liberal think tank Center for Freedom and Prosperity against the OECD project; a campaign that may have been instrumental to the Bush Jr. administration's decision to force the OECD to remove corporate taxation from its project (Sharman, 2011, p. 62). At a speech at the Hoover Institution in May 2001, Friedman explained that:

Competition among national governments in the public services they provide and in the taxes they impose is every bit as productive as competition among individuals or enterprises in the goods and services they offer for sale and the prices at which they offer them. (Biswas, 2002, p. 125)

A more recent initiative, the OECD/G20 Base Erosion and Profit Shifting project was launched in 2015 to curb corporate tax evasion by systematic monitoring and peer review of state taxation policies (Graaf and Visser, 2018). So far, this initiative has largely been ineffective in combating tax competition and tax evasion taking place by corporations and persons deftly exploiting different tax regimes of sovereign states. A key obstacle to effective taxation is that current national corporate laws and international trading regimes regard a corporation as a legal subject entitled to separate itself into discrete entities that allow the company to escape taxation in the states where the corporation's economic activities are actually taking place. In the case of tax havens, political economist Ronen Palan has argued that the liberal invention of companies as legal subjects and its subsidiaries as discrete entities has gone hand in hand with the increasing legal sovereignty of states (Palan, 2002). Thus, during the twentieth century international trading laws allowed that corporations to split up into discrete units and decide which of these units were liable to pay tax. At the same time these laws established the sovereign right of one state to reject tax claims by another state regarding corporate entities legally registered in the former but in practice conducting its activities in the latter. Consequently, eliminating tax havens and other forms of international tax evasion will require the dissolution of legal state sovereignty (Palan, 2002, p. 173).

Such radical solutions for dissolving state sovereignty would not go well with neoliberal thinkers who have gone at great lengths in outlining the constitutional designs to avoid such reforms and, instead, to further tax competition. The most important design is federalism. Numerous neoliberal thinkers have articulated the need for a federal political system designed to restrain taxation for public good or welfare purposes, including Hayek (1948 [1939]), Richard Wagner (1971, pp. 6–10), Buchanan (1995) and Barry Weingast (1995).

The neoliberal idea of tax federalism has perhaps been most thoroughly unfolded by Barry Weingast, a prominent political science professor at Stanford University. He argues, on the one hand, that sovereign

power exercised in order to ensure property rights, enforce contracts, balance national budgets and create markets should be centralized and displaced from the realm of democratic decision-making and subjected to constitutional arrangements restraining government action (1995, p. 4). Apart from ensuring the free movement of capital, goods and labour, the constitutional rules should stipulate that central government can collect taxes only for purposes of ensuring national security, internal law and order and the functioning of markets (see also Hayek, 1948, p. 268). On the other hand, the sovereign power to collect and allocate taxes for welfare purposes should be delegated to sub-state authorities, who must compete to attract mobile citizens and corporations (Weingast, 1995, p. 4). The appetites of these sub-state authorities to collect taxes will then be constrained by the possibility of citizens and corporations to exit sub-state units that they find provide undesirable conditions, such as high tax levels. A similar argument for the possibility of a group of citizens to leave or even secede high-tax Polity X in favour of lower-tax Polity Y has been articulated both by Hayek (1948, p. 260) and Buchanan (1985, p. 170). This tax competition by sub-state authorities should be reined in by national/federal constitutional rules on maximum allowable budget deficits.

The European Union: a neoliberal Utopia of federalized taxation?

The EU is probably the closest realization of the neoliberal ideal of a federalized tax regime. In contrast to true federal systems, such as the US and Germany, where tax collection is a right both of the individual states and the federal level, it is only the member states that have this right in the EU. It may therefore serve well as an illustration of the struggles over state sovereignty induced by neoliberal governmentalities. At the same time, the EU could be considered a most likely case of international tax cooperation due to the highly institutionalized setting of coordination and cooperation. By implication, if member states in the EU

are unable to agree on how to tax corporations or finance capital, it is unlikely to be possible any other international setting.

Buchanan explicitly targeted the newly formed EU when explaining in the *Cato Journal* that:

The Europe-wide economy has been substantially integrated, with historically unprecedented liberties of resources flows and trade across traditional national boundaries. Reform requires the establishment of a strong but limited central authority, empowered to enforce the openness of the economy, along with other minimal state functions ... At the same time, however, the extension of the central authority's powers beyond such minimal limits must be rigidly opposed. (Buchanan, 1996, p. 266)

Buchanan must have been happy with the EU and its predecessor the EEC. Despite extant economic and political reforms, the EEC/EU has maintained that taxation is a national prerogative and that any joint EU interventions in the area of tax be explicitly targeted to enhance the economic functioning of the internal market. Moreover, any EU intervention in the area of direct taxation (personal or corporate) requires unanimity among the member states (Kube et al., 2016, p. 248). Finally, it has turned out that rulings by the European Court of Justice since 1990s have reduced obstacles to the economic functioning of the internal market, and at the same time reduced the consistency of the member states tax systems (ibid. p. 255). Accordingly, the ways of calculating indirect taxation and regulating (avoiding) double taxation have been harmonized in order to eliminate hindrances for the efficient movement of capital in the common market (Vanistendael, 1994). In contrast, no attempt has ever been made to harmonize personal income tax, and the attempts to find common ground for corporate taxation during the early 1990s and again in the early 2000s fared rather miserably as such measures were met with resistance from several member states, not least France, Ireland and the Netherlands (Kube et al., 2016; Radaelli, 1995). Accordingly, the EU has seen a

gradual erosion of corporate tax rates from almost 30 per cent in the late 1990s to less than 20% in the late 2010s (European Commission, 2021a).

Still, developments over the last decade suggest that the EU may be moving away from the neoliberals' federal dream. The EU 2012 Action Plan against tax evasion gave the EU Commission the power to fine private companies. The rationale for the action plan was:

the overall protection of Member State's tax revenues tends to be only as effective as the weakest response of any one Member State. This does not only erode Member States' tax bases but also endangers fair competitive conditions for business and, ultimately, distorts the operation of the internal market. (European Commission, 2012a, p. 5)

After years of reform attempts, during which the Commission came to recognize the unwillingness of certain member states to give up their taxing autonomy, it nonetheless managed to make the ECOFIN agree on a directive aimed at combating tax evasion (Council Directive (EU) 2016/1164 of 12 July 2016, 2016). It is important to note that throughout the 2010s, the European Union has carefully distinguished between 'tax competition' as opposed to 'tax fraud' and 'tax evasion'. While the former is legal and the EU Commission regards it as a morally justifiable policy, the latter two are illegal activities. Tax fraud is defined as a deliberate criminal activity, tax evasion as 'illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities' (European Commission, 2012b, p. 2). Since 2012, the EU Commission has used the term tax evasion in a very broad manner to include government tax exemptions to specific private companies, because such exemptions are seen to undermine free market competition. In effect, the notion of tax evasion is criminalizing activities that neoliberals like Buchanan would see as efficient and, therefore, merely another form of tax competition that should not be criminalized.

By this definitional move, the European Union has tried to rework the legal boundaries and thereby the justification and requirements for the exercise of sovereign power to sustain a free market. At least, it is this concern for upholding equal and free competition in the European Union that is provided as the explicit justification of the sovereign interventions (in the shape of spectacularly large fines) by the EU Commission targeting both member states and large transnational corporations (European Commission, 2017; Vestager, 2016). A similar argument was given in support of the EU directive adopted in 2017 to enhance the EU's legal competencies to curb tax evasion by corporations exploiting differences between tax laws in countries inside and outside the European Union (Council of the European Union, 2017).

Most recently, the European Commission reacted positively to the Biden administration's proposal for taxation of transnational corporations by enhancing the scope for taxing corporations in jurisdictions where they actually have a large share of their turnover, and by determining a minimum corporate tax rate (European Commission, 2021b). Interestingly, like the Biden reform, the EU Commission is now justifying the need for an international corporate tax regime not in terms of securing the functioning of the internal market and ensuring equal competition for companies, but instead by reference to the states' need for public investments:

The EU needs a robust, efficient and fair tax framework that meets public financing needs, while also supporting the recovery and the green and digital transition by creating an environment conducive to fair, sustainable and job rich growth and investment (European Commission, 2021b, p. 2).

This recent position of the EU Commission seems to have the support of leading EU member states, France and Germany, though resistance from Ireland makes the prospects for a substantial EU reform gloomy

(Delfs and Horobin, 2021). Apart from narrow the narrow economic self-interests of Ireland, the resistance against a the European Commission's position on taxation may have to do with its testing of the limits of neoliberal articulations of state sovereignty. At the very least, the recent tax proposal is a clear break with North American neoliberalism and its dream of federalized taxation. It may even go to the very limits of *Ordoliberal* rationalities by which state interventions are justified in terms of providing a legal framework for spurring economic competitiveness.

Conclusion

This article has tried to shed light on the question: How do neoliberal governmentalities articulate the need for or avoidance of sovereign state power in the area of taxation? At the most general level, it is clear that neoliberalism is anything but shy in justifying the use of sovereign power. Thus, neoliberal governmentalities display several systematic but also tension-laden reflections on the use of sovereign power. A fundamental reason for this tension stems from neoliberalism's avowal to a constitutionalism ensuring equality before the law and its academic elitism invoked in the founding of such constitutionalism (Biebricher, 2015; Slobodian, 2018). This tension is found both in the North American and German modes of neoliberalism. Both argue that sovereign power must be tied down by constitutional rules because governments consist of persons like the rest of us; namely, self-interested agents who cannot be expected to behave altruistically. This constraint cannot be left to democratic procedures only or even primarily. There is a need, the neoliberals argue, for a constitutional framework constraining the coercive potential of the state government. At the same time, both the North American and German neoliberalism agree that a government with the capacity to exercise sovereign power is absolutely necessary and that the development of constitutional constraints on state power must be based on criteria derived from neoliberal political economy. This endorsement of a founding decision based on the ideas propagated by a

fraction of academic thinkers has been noted by several critical analysts arguing that neoliberals have repeatedly seized the opportunity created by economic crises to mobilize sovereign state interventions to secure market competition and curtail democratic influence (Klein, 2008; Mirowski, 2013).

The article has suggested that this tension on the proper use of sovereign state power pervades the neoliberal debates on taxation. Neoliberal governmentalities are generally sceptical about any form of taxation, favour tax competition, and engage in constitutional designs reining in the exercise of sovereign power to tax. This observation concurs with several other studies pointing to neoliberalism's anti-democratic implications (Biebricher, 2015; Brown, 2015) and its role in exacerbating economic inequality (Piketty, 2015). Yet as shown neoliberal (*Ordoliberal*) governmentalities have been mobilized to justify the exercise of sovereign power – either by multilateral international regimes or by the European Union – over states and transnational corporations seeking to profit from certain forms of tax competition; notably, tax havens and diverse illegal arrangements. Thus, neoliberal rationalities seem currently to undergo a change on the question about the state's legitimate use of sovereign power to monitor, criminalize and penalize certain forms of tax competition that are increasingly regarded as harmful. At the very least, the policy debates and political interventions in the European Union during the 2010s suggest that neoliberal rationalities can be invoked both against and in favour of certain forms of tax competition. Moreover, the EU Commission's 2021 reform ideas imply a clear abandonment of North American neoliberalism and even a testing of the limits of the Ordo-liberal justification of state sovereignty in terms of securing economic competitiveness.

These analytical insights provide an important correction to the many studies following the wake of the 2008 financial crisis, which tended to see the EU's stability and growth pact as the ultimate proof of a neoliberal regime finally eroding state sovereignty in the name of the market and its preservation (Biebricher, 2016; Hickel, 2016; Mitchell and Fazi, 2017). Rather than erosion of state sovereignty, we see a

rearticulation of its strategic interactions with liberal apparatuses of security, i.e. mechanisms seeking to secure the functioning of capitalist markets. We are witnessing a political struggle over how to justify the exercise of state sovereignty less to secure the free flow of capital and, thereby, allow for unfettered tax competition, and more to secure investments in human capital (education and health) and physical capital (energy, transport and communication) to reinvigorate market economies. This investment logic, which seems to amount to a renewed Ordo-liberalism, has played a crucial component in the social and employment policies in the EU since the early 2000s (Hansen and Triantafillou, 2011; Hemerijck, 2018), and may now be moving into the area of tax reforms.

Notwithstanding these neoliberal rearticulations of state sovereignty, it remains uncertain just how far the states can go to curb tax evasion within the neoliberal space of political action. As explained above, Ronen Palan has argued that tax havens cannot simply be legislated away as they are immanent features of flowing international capital in a world of sovereign states and that any serious attempt to break with these will require a multilateral intervention by a group of like-minded economically strong states (Palan, 2002, p. 173). It seems that it is exactly this recognition that is driving the Biden Administration's corporate tax reform proposal, which argues that US competitiveness is depending on public investments that in turn require increased corporate taxation; a clear break with neoliberal federalized taxation and with the American neoliberal conception of how to ensure national competitiveness. It is anything but certain that the EU will follow suit. But if it does, and this is a big, then neoliberalism's federal utopia, the EU, may become its nemesis.

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