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ARTICLE

The Sovereign Lender of Last Resort Role of the ECB: Rules, Choice, and Time

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Abstract

This article argues that the European Central Bank (ECB), supported by the Court of Justice of the European Union (CJEU), can be perceived to have functionally softened the no sovereign lender of last resort (LOLR) rule originally implied by Articles 123 and 125 of the Treaty on the Functioning of the European Union (TFEU) towards a rule-with-exceptions and, increasingly, towards a presumption: The ECB will act as sovereign LOLR to a constituent Member unless and until that Member is insolvent or unwilling to cooperate with measures designed to restore market confidence. This functional moderation of a rule, from an ex ante specification of an outcome towards the exercise of greater choice at the point of application, carries with it contentious normative questions. To motivate discussion thereof beyond a largely ahistorical, non-indexical, rules versus discretion debate, the rules of the currency union are located within the genealogy of international exchange rate regimes. The "convertibility" rule of the gold standard and the "parity" rule of the Bretton Woods system are contrasted with their Eurozone equivalent. A consequentialist standpoint is sketched out from which the interventions of the ECB, in light of their available alternatives, appear broadly consistent with welfarist cost-benefit analysis and less normatively worrisome than by reference to evaluative criteria that emphasize a narrowly rule-bound conception of the rule of law.

Keywords: EU Law and Monetary Governance; Eurozone Crisis; Rule Making; Discretion

> ... but you must bind me hard and fast,
> so that I cannot stir from the spot where
> you will stand me ... and if I beg you to
> release me, you must tighten and add to my bonds
>
> Ulysses, *The Odyssey*
>
> "There are no atheists in foxholes and no ideologues in financial crises."
>
> Ben Bernanke, *New York Times*, September 30, 2008

A. Introduction

The core of the European integration project comprises Member States cooperating to construct shared markets. Although there are countless historical examples of successful international trade agreements, one country/one money remains perhaps the greatest regularity of law and economics. Yet, the euro project was based on a decision by Member States to replace currency-exchange markets with a fixed exchange rate.[1] In the Treaty of Maastricht, those Members committed themselves to a monetary rule (low and stable inflation) and established an institution to guard that rule (the European Central Bank).[2] Unlike traditional central banks, the ECB was not provided with a mandate to act as lender of last resort (LOLR) to the Members of the euro or the Eurozone banking system. In fact, its mandate explicitly prohibited the provision of bailouts or any type of credit facility to the Members.[3] Although not explicit, Article 123 of the Treaty on the Functioning of the European Union (TFEU) has been widely interpreted as prohibiting monetary financing.[4] The minimalist legal architecture of the single currency enshrined a political compromise that resulted from long and detailed negotiations.[5] The original political compromise embedded in Articles 123 and 125 TFEU can be thought of as embodying a deeper rule: The ECB will not act as a sovereign LOLR to the Members. During the global financial crisis, over a quarter of the Members were recipients of bailouts and, arguably, monetary financing of some kind.[6]

From a legal perspective, a normatively troubling aspect of the Eurozone crisis is the fact that the turning point came not from a legal enactment. Rather, it came in July 2012 when Mario Draghi, the President of the ECB, delivered his "whatever it takes" speech to the "Global Investment Conference" in London, followed by a press release in September 2012 setting out details of a program called Outright Monetary Transactions (OMT).[7] Subsequently, the Court of Justice of the European Union (CJEU) held, in Gauweiler, the ECB's proposed interventions into sovereign debt markets to purchase the sovereign debt of distressed Members, even in the absence of any ex ante quantitative limit, to be consistent with the prohibition on monetary financing.[8] As pointed out by Hinarejos, this decision was never in doubt given the likely welfare

[1]Eric Posner & Alan Sykes, *International Law and the Limits of Macroeconomic Cooperation*, 86 S. CAL. L. REV. 1025 (2012); Kevin H. O'Rourke & Alan M. Taylor, *Cross of Euros*, 27 J. ECON. PERSP. 167 (2013); Daniel Wilsher, *Law and the Financial Crisis: Searching for Europe's New Gold Standard*, 20 EUR. L.J. 241 (2014). Hereafter, "Members" refers to the Member States of the euro (as opposed to the EU Member States more generally).

[2]Barry Eichengreen, *European Monetary Integration with Benefit of Hindsight*, 50 J. COMMON MKT. STUD. 123, 134 (2012).

[3]Treaty on the Functioning of the European Union (TFEU) tit. VIII, ch. 2. *See* TFEU arts. 122(2), 123, 125. Consolidated Versions of the Treaty on European Union (TEU) and TFEU, 2016 O.J. (C 202) 1.

[4]*See*, for example, ECB Decision of Feb. 20, 2014, 2014 O.J. (L 159) 54, on the prohibition of monetary financing and the remuneration of government deposits by national central banks.

[5]KENNETH DYSON & KEVIN FEATHERSTONE, THE ROAD TO MAASTRICHT: NEGOTIATING ECONOMIC AND MONETARY UNION (1999); ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 379–471 (2005); HAROLD JAMES, MAKING THE EUROPEAN MONETARY UNION, chs. 7–9 (2012); Kathleen McNamara, *Where Do Rules Come From? The Creation of the European Central Bank*, *in* THE INSTITUTIONALIZATION OF EUROPE (A. Stone Sweet, N. Fligstein, & W. Sandholtz eds., 2001).

[6]Cyprus, Greece, Ireland, and Portugal were all recipients of official bailout programs. Spain received a partial bailout aimed at its financial sector. Kilpatrick notes that the loans to Greece and Cyprus were entirely based on three distinctive types of international agreement within the Eurozone. The Greek loan was initially by way of bilateral agreements and the IMF. As we shall see, two bailout provisions were then created. The loans to Ireland and Portugal were partly based on EU law. Kilpatrick reviews the legal responses to the crisis with a clear eye. Having meticulously detailed events, she demonstrates how those responses offended even the narrow conception of the rule of law offered by Lon Fuller (let alone the more substantive conception offered by Jeremy Waldron). *See* Claire Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35 OXFORD J. LEGAL STUD. 325 (2015).

[7]Mario Draghi, Speech at the Global Investment Conference in London (July 26, 2012), https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html (last visited Sept. 3, 2019). *See* ECB Press Release, Technical Features of Outright Monetary Transactions (Sept. 6, 2012), www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (last visited Sept. 3, 2019) (referring to decisions taken by the Governing Council of the ECB).

[8]Case C-62/14, *Gauweiler v. Deutscher Bundestag*, ECLI:EU:C:2015:400; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 21, 2016, 2 BvR 2728/13. The CJEU developed the logic of Pringle wherein it approved the European Stability Mechanism (ESM) Treaty. Case C-370/12, Thomas Pringle v Government of Ireland, EU:C:2012:756. On *Grauweiler* and its implications, *see* Alicia Hinarejos, *Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union*, 11 EUR. CONST. L. REV. 563 (2015); Kilpatrick, *supra* note 6; *On Courts of Last Resort and Lenders of Last Resort*, 11 EUR. CONST. L. REV.

consequences[9] flowing from any alternative decision.[10] These consequences would have been compounded by the fact that, unlike traditional central banks, the ECB is not a creature of domestic law capable of procedurally straightforward legislative amendment to address its shortcomings.[11]

Yet, so clear and strong was the signal sent by the CJEU to market actors, that one contemporary editorial remarked that the "room for manoeuvre which the Court of Justice grants the [European Central] Bank in Gauweiler will only strengthen the perception of the bondholders that the Bank indeed can and will act as a lender of last resort."[12] That 2015 editorial noted that the extension of sovereign debt purchases beyond distressed Members by way of the then new quantitative easing (QE) program, Public Sector Purchase Programme (PSPP), "points in the same direction" and would survive its inevitable challenge, which it did in the CJEU preliminary reference in Weiss in 2018, although the German Federal Constitutional Court (GFCC) took a less benign view.[13] Unlike the promise of the OMT, the conditions associated with PSPP do not require a Member to participate in a program of adjustment under the European Stability Mechanism (ESM), nor are the purchases limited to assets with a maturity of between one and three years.

The future course of COVID-19, and by extension the full extent of the economic shock, is a matter of Knightian uncertainty.[14] What is known is that the Eurozone Members will likely be poorer and more indebted as a result of the profound economic shock.[15] To that end, on March 18, 2020, the ECB announced its Pandemic Emergency Purchase Programme (PEPP), in effect, a blend of OMT and QE. Initially it consisted of a €750 billion corporate and sovereign bond purchasing program, increased to €1,850 billion as of December 10, 2020, together with a relaxation of the self-imposed restrictions on bond purchases for the duration of the crisis.[16] Most notably, the ECB has suspended its promise to purchase no more than one third of any Member's available bonds and to purchase the securities in proportion to the Member's economy.[17]

227 (2015). On the reference by the German Court, *see* Carsten Gerner-Beuerle, Esin Küçük, & Edmund Schuster, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, 15 GERMAN L.J. 281 (2014). *See also* 16(4) GERMAN L.J. 713–1072, including Monica Claes & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, 16 GERMAN L.J. 917 (2015); Federico Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16 GERMAN L.J. 1003 (2015); Heiko Sauer, *Doubtful it Stood: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment*, 16 GERMAN L.J. 971 (2015); Sven Simon, *Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling*, 16 GERMAN L.J. 1025 (2015); Michael Wilkinson, *The Euro Is Irreversible! . . . Or Is It?: On OMT, Austerity and the Threat of "Grexit,"* 16 GERMAN L.J. 1049 (2015).

[9]A Åslund, *Why a Breakup of the Euro Area Must Be Avoided: Lessons from Previous Breakups*, PETERSON INST. FOR INT'L ECON. (2012), https://www.piie.com/publications/pb/pb12-20.pdf.

[10]In the words of Hinarejos, "*Gauweiler* was not a surprising decision, in that very few expected the Court of Justice to declare the Outright Monetary Transactions Programme incompatible with EU law." She goes on to acknowledge the perceived arbitrariness of the Court's decision but locates the origin of that arbitrariness in the separation of competences at the heart of the legal framework. Hinarejos, *supra* note 8, at 574–75.

[11]DERMOTT HODSON & IMELDA MAHER, THE TRANSFORMATION OF EU TREATY MAKING (2019).

[12]*On Courts of Last Resort and Lenders of Last Resort, supra* note 8, at 236.

[13]Case C-493/17, Weiss, Judgment of the Court [Grand Chamber] of Dec. 11, 2018, EU:C:2018:1000. *See also* Mark Dawson & Ana Bobić, *Quantitative Easing at the Court of Justice—Doing Whatever It Takes to Save the Euro: Weiss and Others*, 56 COMMON MKT. L.R. 1005 (2019). Mark Dawson, Adina Maricut-Akbid & Ana Bobić, *Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism*, 23 EUR. L.J. 75 (2019). *See also The German Federal Constitutional Court's PSPP Judgement*, GERMAN L.J. SPEC. SEC. 21 (2020).

[14]FRANK KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921).

[15]INTERNATIONAL MONETARY FUND, *April 2020: The Great Lockdown*, World Economic Outlook (Apr. 2020).

[16]ECB Decision 2020/440 of Mar. 24, 2020, on a Temporary Pandemic Emergency Purchase Program, 2020/17, O.J. (L 91) 1.

[17]Under the program, the ECB has granted a waiver of the eligibility requirements for securities issued by the Greek government. For a political-economic context, see Erik Jones, *Old Divisions Threaten Europe's Economic Response to the Coronavirus*, FOREIGN AFFAIRS (Apr. 6, 2020), https://www.foreignaffairs.com/articles/europe/2020-04-06/old-divisions-threaten-europes-economic-response-coronavirus.

Goldman mounts a strong case that PEPP will likely survive any legal challenge before the CJEU on the basis of the Gauweiler and Weiss jurisprudence.[18] Indeed, Dawson and Bobić have observed that the CJEU's "answer to any question related to ECB activity (at least on monetary questions) seems to be known in advance."[19] However, on May 5, 2020, the GFCC delivered a controversial ruling wherein they took issue with the proportionality review conducted by the CJEU.[20] The Bundesbank were instructed to not continue participating in the PSPP unless within three months the ECB adopted a new decision that demonstrated "in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme."[21]

And so, notwithstanding the extent of the economic shock or the uncertainty surrounding the pandemic, in stark contrast with the Eurozone crisis, Members continue to enjoy the benefits of ultra-low bond yields.[22] Moreover, the legal position is that the ECB's unconventional interventions underpinning those ultra-low yields have so far been found consistent with the Treaty framework as adjudged by the relevant apex court, the CJEU. And PEPP is also likely to be so adjudged. The decision of the GFCC is not binding on the ECB, and, in fact, the GFCC court expressly stated the case did not concern PEPP.[23] Therefore, beyond parsing the constraints imposed upon the ECB by the CJEU, this might prompt the comforting conclusion that we have little use for further analytical or normative investigation into how the legal structure of the ECB has come to be both complimented and disciplined by the functions demanded of it through its lived experience. Put another way, we need not dwell on the extent to which (legal) form has, or has not, followed function.

Not so fast. The protest by the GFCC that their decision in Weiss does not concern PEPP rings hollow.[24] The GFCC explicitly list a set of conditions that they say mainly render PSPP a manifest circumvention of the prohibition on monetary financing.[25] In doing so, the GFCC imply that those conditions are necessary for the program to comply with EU law. PEPP does not contain those conditions. It strains credulity to believe that the court was not well aware of this fact. Therefore, the decision of the GFCC portends further significant conflict over the role of the ECB in minimizing and distributing the burden of economic adjustment arising from the pandemic as it functions as a sovereign LOLR to the Members. That conflict primarily manifests in the on-going struggle for interpretive control over the so-called prohibition on monetary financing as it embodies the principal legal constraint on the ability of the ECB to act as sovereign LOLR to the Members.

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[18]This is so even if the ECB makes asymmetric purchases of sovereign debt of Members not subject to a program of structural adjustment overseen by the ESM. Matthias Goldmann, *Borrowing Time: The ECB's Pandemic Emergency Purchase Programme*, VERFASSUNGSBLOG (Mar. 27, 2020), https://verfassungsblog.de/borrowing-time/.

[19]Dawson & Bobić, *supra* note 13, at 1040.

[20]Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], May 5, 2020, 2 BvR 859/15 [hereinafter Weiss].

[21]*Id.* at para. 235.

[22]Tommy Stubbington, *Eurozone Governments Rein in Borrowing Despite Ultra-Low Rates*, FINANCIAL TIMES (Jan. 8, 2020) https://www.ft.com/content/5bf34690-3239-11ea-9703-eea0cae3f0de.

[23]The ECB did not appear before the GFCC, perhaps, because it might prompt the misimpression that the ECB falls under the jurisdiction of Member courts. For a description of the atmosphere at the hearing, see Franz C. Mayer, *To Boldly Go Where No Court Has Gone Before: The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020*, 21 GERMAN L.J. 1116, 1120 (2020).

[24]Isabel Schnabel, Member of the Executive Board of the ECB, observed that despite Germany experiencing one of the longest economic upswings since the Second World War and the lowest level of unemployment since German reunification, public debate about ECB monetary policy is becoming more heated within Germany, with conversations referring to expropriation of German savers through punishment rates and claims of massive looming inflation and zombie firms. Isabel Schnabel, *Narratives About the ECB's Monetary Policy – Reality or Fiction?*, Speech at Karlsruhe (Feb. 11, 2020), https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200211_1%7Eb439a2f4a0.en.html.

[25]*Weiss* at para. 216.

Furthermore, Bobić and Dawson, who are also strongly supportive of the PEPP, get it exactly right when they argue that "the PEPP programme signals both the increasing redundancy of the legal framework governing EMU and an opportunity to develop a new one in its place."[26] Without in any way directly or implicitly undermining the pragmatic approach of the CJEU, in light of the growing gap between the formal and functional constitutional framework of the ECB, there are reasons prompting a more substantive, or thicker, analytical account of the evolution of the ECB's sovereign LOLR function: one that better works the ground between the judicial and sovereign bondholder interpretations of the rules.

The first reason for thickening our account is to develop theoretical frameworks that might usefully contribute to our understanding of, and predictions for, the ECB's functional constitutional framework at a time when unconventional measures have become the new normal. It is worth recalling that the intellectual response to the Great Depression birthed the field of macroeconomics as we know it.[27] In the wake of the global financial crisis, macroeconomists are "rethinking macroeconomic policy" in general and Dynamic Stochastic General Equilibrium Modelling (DSGE) in particular.[28] On the legal front, Yair Listokin is breaking a path towards a theoretical framework for law and macroeconomics.[29] He does so by combining New Keynesian models with legal theory.[30] As we will see in section 5, the analysis that follows finds itself in deep sympathy with Listokin's framework and consequentialist analysis.[31]

A further impetus for thickening our account is bound up with the fact that, from a governance perspective, the LOLR function of the ECB places the regime on the horns of a dilemma.[32] There is a long-established consensus within and between the Members that low and stable inflation is a mutually beneficial outcome for all. This consensus is the cornerstone of central bank

[26]Feichtner also offers a constructive reading of the judgment to the effect that it offers impetus for the democratization of money. *See* Isabel Feichtner, *The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratisation of Europe*, 21 GERMAN L.J. 1090 (2020). *See also* Ana Bobic & Mark Dawson, *COVID-19 and the European Central Bank*, VERFASSUNGSBLOG (Mar. 27, 2020), https://verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim/.

[27]Robert Lucas, *Macroeconomic Priorities*, 93 AM. ECON. REV. 14, 1 (2003).

[28]This is the title of three conferences held by the IMF. *See also* Olivier Blanchard, *Ten Take Aways from the "Rethinking Macro Policy: Progress or Confusion?"*, INTERNAIONAL MONETARY FUND BLOG (May 1, 2015), https://blog-imfdirect.imf.org/2015/05/01/ten-take-aways-from-the-rethinking-macro-policy-progress-or-confusion/; Olivier Blanchard, *Do DSGE Models Have a Future?* (Peterson Inst. Int'l Econ., Pol'y Brief 16–11, 2016), https://www.piie.com/publications/policy-briefs/do-dsge-models-have-future.

[29]Yair Listokin, *A Theoretical Framework for Law and Macroeconomics*, 21 AM. L. ECON. REV. 46 (2019); Yair Listokin & Daniel Murphy, *Macroeconomics and the Law*, 15 ANN. REV. L. SOC. SCI. 1 (2019); Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. REGUL. 791 (2017).

[30]Specifically, he uses the investment-savings and liquidity-money (IS/LM) model, which is less wieldy than dynamic stochastic general equilibrium modeling. *Id.*

[31]To borrow the definition offered by Walter Sinnott-Armstrong, consequentialism "embodies the basic intuition that what is best or right is whatever makes the world best in the future, because we cannot change the past, so worrying about the past is no more useful than crying over spilled milk." In terms of a legal formulation of this moral stance, Pildes and Sunstein put matters succinctly when they say that "[i]t is hard to challenge the view that law and policy should be assessed on the basis of inquiries into the advantages and disadvantages of different courses of action." W. Sinnott-Armstrong, *Consequentialism*, STAN. ENCYC. PHIL. (Edward N. Zalta ed., 2019), https://plato.stanford.edu/archives/sum2019/entries/consequentialism/ (last visited Sept. 21, 2020). *See also* JOHN STUART MILL, ON LIBERTY (1859); Richard Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995). For an account of the relationship between cost-benefit analysis and legal scholarship, see, for example, CASS SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018). For a detailed account of the distinction between Consequentialist and Kantian approaches to judicial adjudication, see Cass Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?* 60 STAN. L. REV. 155 (2007); Cass Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

[32]Timo Tohidipur, *The Emperor's New Clothes: The ECB and the New Institutional Concept*, 6 GERMAN L.J. 1575 (2015); Augustin Menendez, *The Existential Crisis of the European Union*, 14 GERMAN L.J. 453 (2013).

independence.[33] Conversely, no consensus exists regarding the distributional choices implied by the financial support provided to Members and their banking systems or the economic reforms that are a condition thereof. Leaving aside disagreement over the extent to which its newfound role is legitimated by the CJEU (and impugned by the GFCC), and whether it has the capacity to select the "right" policy response (assuming one to exist), the governance structure of the ECB was not designed to house contested disputes over distributional choices.[34] Nevertheless, during and since the Eurozone crisis, such choices were made, at least in part, by unelected EU officials (i.e., those of the ECB) and reviewed by other unelected EU officials (i.e., the members of the CJEU). As a result, even assuming the utmost probity and technical competence,[35] the balance of influence within the Eurozone between the Members, the institutions, and the Members and the institutions is being profoundly reshaped, and this balance of influence has been explicitly challenged by the GFCC.[36]

The GFCC, in Gauweiler and Weiss, can be seen to have raised concerns about the transparency of the cost-benefit analysis informing the ECB's choices. This concern is bound up with the democratic accountability and legitimacy of that institution. The governance issues implied by the ECB's sovereign LOLR function also give rise to deep uncertainty about the choices that it will have to make if the economic crisis implied by the pandemic deepens significantly. Although limited progress has been made towards a banking union with risk sharing,[37] the "doom-loop" link between the Members and their banking systems has not been severed.[38] It remains unclear how, and the extent to which, the ECB will support a Member in the throes of a financial crisis if that Member has not agreed to a structural reform package pursuant to the ESM Treaty.[39] Indeed, the high levels of unemployment in the periphery Members, the rise in support for populist parties, the high levels of reported distrust of EU institutions, and stubbornly low growth all undermine the assumption that a Member can agree to a structural reform package.[40] Worse still, even if an agreement can be reached, the ESM may prove undercapitalized in the event that a series of economies require large scale support.[41]

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[33]Alberto Alesina & Lawrence Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. Money, Credit & Banking 151 (1993).

[34]Kilpatrick, *supra* note 6; Deirdre Curtin, *"Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency*, 23 Eur. L.J. 28 (2017); Michelle Everson, *An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht*, 21 Eur. L.J. 474 (2015); Paul Tucker, Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State (2018).

[35]For diametrically opposed evaluations of the choices made by the ECB during the crisis, see the former president of the ECB, Jean-Claude Trichet, *The Euro After 20 Years Is a Historic Success: A Powerful Encouragement for Further European Reforms*, 155 Rev. World Econ. 5 (2019). *See also* the works of two former senior IMF officials (one of whom was awarded the Nobel Memorial Prize in Economics), Ashoka Mody, EuroTragedy: A Drama in Nine Acts (2018); Joseph Stiglitz, The Euro: How a Common Currency Threatens the Future of Europe (2016).

[36]Mark Dawson and Floris de Witte argue that this rebalancing has undermined the longer term stability and legitimacy of the European integration project.

[37]Pepper Culpepper & Tobias Tesche, *Death in Veneto? European Banking Union and the Structural Power of Large Banks* (EUI, Working Paper No. RSCAS 2019/04, 2019); Adalbert Winkler, *The ECB as Lender of Last Resort: Banks Versus Governments*, 235 Jahrbücher für Nationalökonomie und Statistik (2015), https://www.degruyter.com/view/j/jbnst.2015.235.issue-3/jbnst-2015-0307/jbnst-2015-0307.xml (last visited Sept. 21, 2020); Thorsten Beck, *The European Banking Union at Three: A Toddler with Tantrums*, VoxEU (July 4, 2017), http://voxeu.org/article/european-banking-union-three (last visited Sept. 6, 2019).

[38]Paul Krugman, *Revenge of the Optimum Currency Area*, 27 NBER Macroecon. Ann. 445 (2012), http://www.nber.org/chapters/c12759.pdf.

[39]Treaty Establishing the European Stability Mechanism, Feb. 2, 2012. The Eurozone Members had to ratify the Treaty, and so it came into effect on Sept. 27, 2012. For a Report on the Economic Policy Response to COVID-19 agreed by the Members on Apr. 9, 2020, *see* https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/.

[40]Yann Algan, Sergei Guriev, Elias Papaioannou & Evgenia Passari, *The European Trust Crisis and the Rise of Populism*, Brookings Papers Econ. Activity (2017) (finding a correlation between an increase in unemployment and a decline in trust in national and EU institutions).

[41]Jeromin Zettelmeyer, Nicolas Véron, Beatrice Weder di Mauro, Helene Rey, Isabel Schnabel, Philippe Martin, Jean Pisani-Ferry, Clemens Fuest, Pierre-Olivier Gourinchas, Marcel Fratzscher, Emmanuel Farhi, Henrik Enderlein, Markus

To date, much of the legal scholarship on the euro crisis has focused on the constitutional changes within a continuum of EU law and institutions.[42] Comparatively little attention has been paid to the creation of the euro in the context of international monetary governance regimes. This is understandable as there are no convincing historical analogies for the legal architecture of the Eurozone; a sui generis experiment, as noted at the outset.[43] Anachronistic reasoning is dangerous, yet the under-studying of the lived experience of rules underpinning historical international monetary cooperation regimes may have led to unrealistic expectations regarding the operation of monetary rules, albeit of different sources, in the face of adjustment. This article fills that gap and provides a novel historical analysis of the ECB's interventions from a consequentialist rule of law perspective by placing two distinct literatures in conversation. First, it provides a framework for the purposes of elucidating the role of law as a commitment technology used to bind future choice. Second, that analysis is enriched by way of a detailed historical account of the role of law in the gold standard and Bretton Woods systems.

In light of the foregoing analysis, this article goes on to provide an alternative perspective on Draghi's sagacious "whatever it takes" speech to that of the CJEU. To recall, the CJEU implied that the actions of the ECB never breached the sum and substance of the prohibition on monetary financing. This article argues that the interventions of the ECB represent a functional softening of the no sovereign LOLR rule originally implied by the treaty towards a rule-with-exceptions. The ECB did so in adherence to a rule of greater import: to secure the survival of the euro or at least avoid the welfare effects flowing from its abrupt collapse. Further, or in the alternative, the ECB did so to secure the survival of the legal order within which the rule was embedded.

Considered in this light, the no sovereign LOLR rule was softened towards a rule-with-exceptions, so the argument goes, as rule departure was necessitated by the economic circumstances of economically distressed Members and the commitment of those Members to enter into a credible program of macroeconomic adjustment to restore market confidence. However, a rule-with-exceptions implies a potentially paralyzing choice at the point of application. As politically challenging as it is to articulate the conditions for rule departure ex ante, it is better to do so rather than engage that choice at the point of application. This can be done by the creation of presumptions that retain a measure of choice at the point of application but limit the paralyzing effect of choice. As we will see, the conditions associated with OMT have softened for PSPP and softened again for PEPP. Therefore, notwithstanding the objections of the GFCC, these conditions can be viewed as sufficient, but not necessary.[44] In this context, the interventions of the GFCC can be interpreted as a call for greater clarity regarding the conditions for rule departure and for greater transparency regarding the decision to depart from the rule. This is a helpful step towards building a presumption. The presumption being: the ECB will act as sovereign LOLR to a Member of the Eurozone unless that Member is insolvent or unwilling to cooperate with measures designed to restore market confidence.

Brunnermeier, & Agnès Bénassy-Quéré, *Next Steps After the Euro Summit*, VoxEU (July 10, 2018), https://cepr.org/voxeu/columns/next-steps-after-euro-summit (last visited Feb. 24, 2019).

[42]Christian Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 15 German L.J. 985 (2014); Kaarlo Tuori & Klaus Tuori, The Eurozone Crisis: A Constitutional Analysis (2014); Agustin Menéndez, *Editorial: A European Union in Constitutional Mutation?*, 20 Eur. L.J. 127 (2014); Mark Dawson, *The Euro Crisis and its Transformation of EU Law and Politics*, The Governance Report (Dawson, Enderlein, & Joerges eds., 2015); Dawson & de Witte, *supra* 36. For a literature review, see Michael Ioannidis, *Europe's New Transformation*, 52 Common Mkt. L. Rev. 1237 (2016).

[43]Barry Eichengreen, *Sui Generis EMU*, (Nat'l Bureau Econ. Rsch., Working Paper No. 13740, 2008).

[44]Maduro argues that the GFCC assumed that the conditions in *Gauweiler* were necessary to safeguard the objective of sound fiscal and budgetary policies. He points out that a close reading of the CJEU decision fails to support that assumption. Miguel Poiares Maduro, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court* pt. 3, Verfassunblog (May 6, 2020), https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/.

In effect, the moderation of the rule operated like a safety valve releasing some of the pressure associated with internal devaluation or abrupt sovereign default as implied by strict adherence to the text of the treaty instruments. When placed into context alongside previous exchange rate regimes, this development represents less by way of historical anomaly than when viewed against the backdrop of EU law. Moreover, when this development is considered not as a choice between rules and discretion—where both appear unacceptable for economic or rule of law reasons, respectively—but is instead understood in light of a more refined understanding of the relationship between rules, choice, and time, the battle to create a sustainable single currency that promotes prosperity and satisfies the requirements of democratic legitimacy looks a little more winnable.

The balance of this article proceeds as follows. Section B analyzes a stream of, primarily though not exclusively, individual and collective work by Edna Ullmann-Margalit and Cass Sunstein on the relationship between rules, choice, and time. In particular, it examines second-order decisions and the use of law as a commitment technology. It considers the role of choice in the ex ante specification of outcomes. The insights from this section underpin the analysis of Section E. Section C reviews the role of the legal instruments in the gold standard and the Bretton Woods systems. It considers not only the rules, but also their consequences. Section D centers on the rules of the EMU. In particular, it examines the no sovereign LOLR rule that was—in theory—supported by the Stability and Growth Pact (SGP). Section E is the core of the paper. In light of the context in which the ECB's interventions took place, it argues that its effect can be understood as a softening of the no sovereign LOLR rule towards a rule-with-exceptions with the potential to become a presumption. Section F concludes by sketching out some insights for the reform projects that tackle the governance issues facing the ECB.

B. Law as a Commitment Technology

Central banks make decisions that can have good and bad consequences. Their ability to make decisions is deliberately circumscribed by rules. Rules constrain future choice in an effort to bring about consequences that are, in aggregate, better than exercising choice at the point of application. In this section we consider the relationship between choice, rules, and time at a general level so that we can consider the possibilities and limits of the specific rules underpinning international monetary regimes.

Rules matter for the transmission of monetary policy.[45] The debate over whether fixed rules can, in general, deliver superior monetary policy dates back as far as the "Currency School" versus "Banking School" debate on the Bank Charter Act of 1844.[46] In the contemporary transmission of monetary policy, rules are an important tool used by a monetary authority, usually a central bank, in an effort to achieve a target inflation rate.[47] Central banks endeavor to credibly signal a commitment to their rules so as to assist the public in adjusting its inflationary expectations.[48] Although the debate surrounding rules versus discretion in inflation targeting is in certain ways unavoidably related to exchange rate policy, it does not form the primary focus of this article.[49] The primary

[45]John Taylor, *Discretion Versus Policy Rules in Practice,* 39 Carnegie-Rochester Conf. Series Pub. Pol'y 195 (1993); Richard Clarida, Jordi Gali, & Mark Gertler, *Monetary Policy Rules and Macroeconomic Stability: Evidence and Some Theory* (Nat'l Bureau of Econ. Rsch., Working Paper, 1998), http://www.nber.org/papers/w6442.

[46]Charles Goodhart & Meinhard Jensen, *Currency School Versus Banking School: An Ongoing Confrontation*, 4 Econ. Thought 20 (2015); Alberto Giovannini, *Bretton Woods and Its Precursors: Rules Versus Discretion in the History of International Monetary Regimes*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 4001, 1992).

[47]Taylor, *supra* note 45; Clarida, Gali, & Gertler, *supra* note 45.

[48]Taylor, *supra* note 45; Clarida, Gali, & Gertler, *supra* note 45.

[49]For an overview of the Taylor principle and the debate more generally, *see generally* John Taylor, *Rules Versus Discretion: Assessing the Debate Over the Conduct of Monetary Policy* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24149, 2017).

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focus of this article is the role of legal instruments underpinning international exchange rate regimes within the context of EMU.

The euro, like the gold standard, can be thought of as a novel experiment in fixed-exchange rates with open capital markets implying that monetary policy is consistent throughout the constituent states. The euro, the gold standard, and the Bretton Woods system were exchange rate regimes guaranteed by differing legal instruments. As we shall see, a significant measure of the discussions surrounding the ECB's interventions, and in fact law more generally, are framed, imperfectly, in dichotomous terms as a choice between "rules versus discretion."[50] This dichotomy carries with it much normative baggage and empirical questions tend to loom large. Therefore, it is worth taking some time to consider the relationship between rules, choice, and time more closely in an effort to dissolve conceptual confusion about the restraint of future choice. In particular, we consider the exercise of interpretative choice over legal instruments that function as commitment technologies. The analysis that follows draws in significant part from Sunstein's response to a "pervasive social phenomenon: extravagant enthusiasm for rules and an extravagantly rule-bound conception of the rule of law."[51] For the avoidance of doubt, the purpose of this article is not to convince the reader of the merits of consequentialist approaches to the rule-of-law. Rather it is to contribute to the ongoing discussion by offering a vantage point that evaluates legal developments on the basis of welfare consequences, as opposed to deontological constraints such as the ethical necessity for rule adherence or an assumption that equates rule adherence with democratic accountability.[52]

Although there is an intrinsic value to exercising choice,[53] there are situations when actors do not want to exercise choice.[54] This can be a strategic reaction to the bounded nature of our rationality, our bounded willpower, or simply reflect the limitations of our computational capacity.[55] Rather than a limitation of liberty, choosing not to choose, in certain circumstances, is a welfare promoting behavior.[56] In fact, forcing an actor to make a choice, whether or not she wants to choose, can diminish her welfare.[57] Further, when an actor has chosen not to choose, failure to respect that choice might be paternalistic.[58] This extends beyond individual actors to institutions, political or otherwise.[59] Moreover, the preference not to choose applies to decisions of major and minor consequence; from dinner plans to the distribution of constitutional influence. Actors, therefore, develop strategies to limit choice.

The literature on second-order decision-making concerns itself with the study of the strategies actors develop to avoid decision-making in the first place or, in the alternative, to reduce the costs associated therewith.[60] In the words of Ullman-Margalit and Sunstein, second-order decisions are "strategies chosen before situations of first-order decision in order to eliminate the need for ordinary choice or to reduce the calculative demands of choice."[61]

[50]Eric Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PENN. L. REV. 991 (2008).

[51]Sunstein *infra* note 64, at 957. For Sunstein, F.A. Hayek is one such enthusiast. *See* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY, 148–61 (1960); FRIEDRICH HAYEK, THE ROAD TO SERFDOM, 72–87 (1944).

[52]MATHEW ADLER, MEASURING SOCIAL WELFARE 20–30 (2019).

[53]Cass Sunstein, *"Don't Tell Me What I Can't Do!": On the Intrinsic Value of Control*, BEHAV. ECON. GUIDE, (Introduction, A. Samson ed., May 30, 2017), http://eprints.lse.ac.uk/84059/1/The%20behavioral%20economics%20guide%202017.pdf.

[54]Cass Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5 (1999).

[55]Christine Jolls, Cass Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

[56]Cass Sunstein & Richard Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 UNIV. CHI. L. REV. 1159 (2003).

[57]CASS SUNSTEIN, CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE (2015).

[58]Sunstein & Thaler, *supra* note 56.

[59]EDNA ULLMANN-MARGALIT, SECOND ORDER DECISIONS, NORMAL RATIONALITY: DECISIONS AND SOCIAL ORDER 39 (A. Margalit & C. R. Sunstein eds., 2017). Note, Normal Rationality is a posthumous collection of some of Ullman-Margalit's work. An essay of the same title was published with Cass Sunstein in Ethics in 1999. These works are sufficiently distinct as to warrant separate consideration and citation. Sunstein & Ullmann-Margalit, *supra* 54.

[60]ULLMANN-MARGALIT, *supra* note 59, at 40.

[61]ULLMANN- MARGALIT, *supra* note 59, at 39.

These strategies impose different burdens on both the actor and on others. They are generally developed in advance of the process of ultimate decision-making but can be developed during that process also.[62] Although the burden of decision-making at the point of application might be reduced through the adoption of a second-order strategy, the construction of a premeditated strategy might itself prove overly burdensome. Furthermore, if an actor selects an inappropriate strategy, that strategy might result in, in aggregate, outcomes that do not justify the savings associated with not having to make the decision at the point of application. Similarly, the strategy might result in decisions that are, in aggregate, insufficiently better than decision-making at the point of application as to not justify the savings involved.[63]

One second-order strategy is to craft rules to bind future choice. Sunstein suggests that law has a toolbox.[64] We can plot some of these tools along a continuum.[65] At one pole, there are decisions made, or nearly made, ex ante the point of application. That is to say, at this pole we find the full ex ante specification of an outcome of a decision prior to the event taking place. Jon Elster uses the metaphor of self-binding, in the sense that, "To bind oneself is to carry out a certain decision at time t_1 in order to increase the probability of another decision being carried out at time t_2."[66]

At the other pole, we are concerned with what Sunstein calls "rulelessness."[67] Rulelessness is a form of decision-making whereby the choice is made at the point of application by the actor. Sunstein, Kaplow, Ullman-Margalit, and others contrast rules with "standards."[68] Kaplow's distinction between rules and standards is only "the extent to which efforts to give content to the law are undertaken before or after individuals act."[69] Writing with UllmanMargalit, Sunstein observes that the consequence of a standard is that it settles far less in advance relative to a rule and does not allow for mechanical on-the-spot judgments.[70] Instead, standards structure first-order decisions.

Second-order strategies are often stylized in terms of "rules versus discretion." However, as we shall see, this dichotomy can cause conceptual confusion. Although a pure account of both extremes might be describable in theory, the realm of praxis is a mix of both. That is to say, just as a rule cannot interpret itself, neither are decisions made without reference to some normative framework.[71] In between these extremes we have, inter alia, ruleswithexceptions and presumptions.[72]

When states use a second-order strategy whereby they enshrine rules in law to signal their future commitment to an outcome, the type of legal instrument into which the rules are embedded affects the level of credibility with which the commitment is greeted by its audience. Put

[62] *Id.*

[63] For example, deciding that a decision will be made by adherence to a coin flip. ULLMANN-MARGALIT, *supra* note 59, at 39.

[64] Cass Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 959 (1995).

[65] *Id.*

[66] Ester imposed a number of conditions. Jon Elster, *Ulysses and the Sirens: A Theory of Imperfect Rationality* 16 SOC. SCI. INFO. 469, 470 (1977).

[67] *See also* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Posner & Vermeule, *supra* note 50, at 1017.

[68] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 66 (1983).

[69] Kaplow, *supra* note 67, at 560; ULLMAN-MARGALIT, *supra* note 59, at 44.

[70] ULLMAN-MARGALIT, *supra* note 59, at 44.

[71] For a defense of the thesis that meaning is made, in the sense that it is settled by an account of interpretation that it does not itself contain, and not found, *see* Sunstein, *There Is Nothing that Interpretation Just Is*, *supra* note 31. It is worth emphasizing, however, that this does mean that meaning is entirely up-for-grabs. For a critical response from the perspective of scholars who have elsewhere advanced versions of originalism, *see* William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 70 (2017).

[72] Different literatures plot differing intermediaries along the continuum. I do not propose to establish a complete account here. The important point is that something exists between the two poles; the relationship is not binary. *See, e.g.*, Ullmann-Margalit & Sunstein, *supra* note 54; Sunstein, *supra* note 64.

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differently, legal instruments can function as a "commitment technology" or, to develop Elster's metaphor, as a binding agent.[73]

The second-order strategy of committing to rules functions as an "enabling constraint."[74] This is particularly so when an actor is tasked with making contentious decisions. For example, rules insulate central banks from popular or political influence so that, at least in theory, they can take unpopular but necessary decisions about the money supply.[75]

As one moves along the continuum, decision-making at the point of application raises normative concerns regarding democratic legitimacy and accountability. Unfettered discretion at the point of application can lead to abuse of power, a lack of consistency and predictability, a diminishment of shared future expectations, high costs associated with making decisions,[76] a failure of political accountability, arbitrariness, and an associated sense of unfairness among its audience, including, but not only, the subject of the discretion.[77] Any assumption that these concerns are remedied through movement towards the other extreme of no discretion is misplaced. Adherence to ex ante rules, when a measure of flexibility is required, can produce decisions that are not only unfair but so ill-suited to the circumstances that they degrade the function of the decision-maker and the legal order more generally.[78] This can also raise normative democratic concerns. Ex ante rules can fail to anticipate changes in technology or social norms. Similarly, at the point of design, the drafters may enjoy inadequate information about the context in which the rule will govern. Finally, actors can use legal instruments to give expression to political compromises without addressing pragmatic concerns about the future operation of the rule. From a regulatory perspective, if the enforcement of a rule is not deemed credible by audience actors, the rule might exist in statute but enjoy sparse compliance. This implies that the rules that exist in the text of a legal instrument and the rules that guide the behavior of actors should be distinguished and not conflated.[79]

Particular difficulties arise with irrebuttable, inflexible ex ante rules, embedded within a legal instrument, that meet a real world need for flexibility. To take an example: Assume that there is an explicit, numerically defined speed limit (say, 50 kilometers per hour) leaving no discretion to an actor or rule enforcer (versus, for example, a standard that says, "Do not drive dangerously").[80] A driver is observed breaching that speed limit by a police officer (say, 80 kilometers per hour). The breach is observed in circumstances that require flexibility (say, an unambiguous emergency). The driver is stopped, ticketed, and summonsed to attend Court. Before turning to the abstract, it is worth pausing to note that, in the real world, if that matter found itself before a Court, the perplexed Judge would likely not be asking herself, "What should I do?" Rather, the Judge would ask herself, "Why would a police officer stop the driver, let alone prosecute her, in such a

[73]Elster, *supra* note 66.

[74]Sunstein & Ullmann-Margalit, *supra* note 54, at 13.

[75]The ECB is not under the jurisdiction of the GFCC, nor is it bound by its judgment in *Weiss*. Hence why the threat by the GFCC to prohibit German authorities, including the Bundesbank, from complying with PSPP is so confrontational.

[76]For example, the costs associated with identifying, gathering, and assimilating the information necessary to make a decision at the point of application.

[77]Sunstein, *supra* note 64, at 958.

[78]*See* Kaplow, *supra* note 67.

[79]For a review of the literature on the economic sociology of law, see Roger Cotterrell, *Rethinking, "Embeddedness": Law, Economy, Community,* 40 J. OF L. SOC'Y 49 (2013). For a law and economics approach, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 UNIV. CHI. L. REV. 943 (1995); Lawrence Lessig, *The New Chicago School*, 27 J. OF LEGAL STUD. 661 (1998); Cass Sunstein, *On the Expressive Function of Law*, 144 UNIV. PENN. L. REV. 2021 (1996). For a review of the economics literature, see Roland Benabou & Jean Tirole, *Laws and Norms*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 17579, 2011), https://www.princeton.edu/~rbenabou/papers/NBER%20WP%2017579.pdf (last visited Sept. 21, 2020); Daron Acemoglu & Mathew Jackson, *Social Norms and the Enforcement of Laws*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 20369, 2014), http://www.nber.org/papers/w20369 (last visited Sept. 21, 2020).

[80]The example of speed limits is common for Sunstein, Ullman-Margalit, & Kaplow. *See, e.g.*, Sunstein, *supra* note 64, at 959; ULLMAN-MARGALIT, *supra* 59, at 45; Kaplow, *supra* note 67, at 560.

circumstance?" This implies that, in practice, actors and rule enforcers enjoy discretion: adhere to/ enforce the rule or not. In fact, the decision of an actor to adhere to, or rule enforcer to enforce, a clear ex ante rule might itself be normatively troublesome.[81] In an effort to formalize this understanding of the real-word implications of administrative discretion, Sunstein and Ullman-Margalit suggest that the police officer would "soften" or "moderate" the rule towards a presumption.[82] The promise of such a moderation is that actors continue to enjoy the benefits that flow from having an *ex ante* rule: Rule clarity is increased relative to a standard, and behavior can be organized around the rule, yet potential for manifestly bad outcomes arising from excessive rule adherence is diminished. In this way, the presumption functions as a default rule for the decision-maker. A presumption is particularly useful when the circumstances necessitating departure from the rule, i.e., rebutting the rule, are unknown at the time of rule-making. When the circumstances requiring exception are known and specified ex ante, we have a "rule-with-exceptions."[83] The distinction between a "presumption" and a "rulewithexceptions" is subtle but worth making; it relates to decisions made under conditions of uncertainty.[84]

When an actor knows that a particular circumstance exists or does not exist, the distinction between a presumption and rule-with-exceptions is immaterial. The actor will end up with the same result through the application of either. In their words, Ullman-Margalit and Sunstein formalize a "rule-with-exceptions" as:

> Do *X*—except in circumstances *A*, in which case do non-*X*
> (or, in which case you may be exempt from doing *X*).

By contrast, when an actor does not know whether a given circumstance exists, the distinction between a presumption and rule-with-exceptions becomes important. With a presumption, the actor is not justified in departing from the rule until the rule has been rebutted. Therefore, rule adherence should continue until the rule has been rebutted. Again, in their words, a "presumption" tends to be formulated as:

> Act on the assumption *P*—unless and until circumstances *A* (are shown to) obtain, in which case, stop (or reconsider or do something else).

And, so, with a rule-with-exceptions, the actor is not justified in departing from the rule unless the exception (particular circumstances) exists. If the actor is unsure whether the circumstances allowing departure from the rule exist, she still has to make a decision about whether she is justified in following the rule or justified in following the exception, and until she does so, that decision-making process paralyzes her. That is to say, under conditions of uncertainty, in the case of a presumption, the actor continues with rule adherence until the conditions for departure are satisfied. In the case of a rule-with-exceptions, the actor must make a choice and decide whether to adhere to or depart from the rule, and she is immobilized from doing either until the decision has been taken, yet may or may not be not be (at least fully) justified by the rule in doing either.

The obvious objection to the softening of a rule to a presumption is that it is not normatively or democratically justified. The integrity of the legal order, so the argument goes, requires rule adherence. Yet, returning to the example of the police officer softening the *ex ante* numerically defined speed limit rule, Sunstein defends the exercise of such a discretion as democratically legitimate and

[81]For an extreme articulation of the "banality of evil" associated with mindless rule-adherence, see Hannah Arendt, *Eichmann in Jerusalem,* THE NEW YORKER (Feb. 16, 1963), https://www.newyorker.com/magazine/1963/02/16/eichmann-in-jerusalem-i (last visited Sept. 3, 2019). Arendt's articles were subsequently collected into a book. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

[82]Sunstein, *supra* note 64, at 1009; Ullmann-Margalit & Sunstein, *supra* note 49, at 42.

[83]Ullmann-Margalit, Margalit, & Sunstein, *supra* note 49, at 43; Sunstein, *supra* note 54, at 962.

[84]Ullmann-Margalit, Margalit, & Sunstein, *supra* note 49, at 45.

normatively justified on the grounds that the discretion at the point of application promotes the cause of liberty.[85] That is to say, there are sound democratic grounds for the actor and enforcer "interpreting" the rule as, in fact, a presumption that has been rebutted on consequentialist grounds.[86] Doing so brings about a better outcome than any alternative courses of action. Therefore, the cost-benefit welfarist analysis underpinning this framework animates Sunstein's defense of a form of casuistry with a spirit of consequentialism.[87]

States aim to design second-order decision-making strategies that appropriately commit that State to the *ex ante* narrowing of future choice. Yet, they resist the temptation to try to, in uncomplicated ways, lay down decisions in advance of the unfolding of circumstances.[88] A second-order strategy, determining whether to adopt an ex ante rule or to defer decision-making to the point of application, trades decision and error costs across contexts.[89] The likelihood of an error at the point of application will depend, in significant part, upon an assessment of the competence of a decision-maker entrusted to make the future choice. A decision-maker with the capacity to conduct an efficient, pragmatic, contextualized inquiry into the relative costs and benefits of the prospective choice will likely minimize error. Such a capacity promotes the delegation of choice. Moreover, the capacity to do so affects the normative justification for decision-making at the point of application.[90] By contrast, limited competence might, in aggregate, result in greater errors than the straightforward application of an ex ante rule.

Finally, where a decision is made ex ante and a rule is embedded in a legal instrument, the compliance mechanism associated with that commitment, or absence thereof, will affect the credibility of the commitment of the state to that rule.[91] Often, a state will bind itself with a legal instrument in the knowledge that a court will hold it accountable for any breach of that commitment. Audiences can place trust in that commitment assuming that a court can appropriately monitor and sanction non-compliance. In reality, in an inter-state context, compliance with international law instruments, in the absence of credible mechanisms of enforcement, is typically met with less credibility.[92] As we shall see, states have experimented with international legal regimes and

[85]Sunstein, *supra* note 64, at 1024.

[86]For the avoidance of doubt, it is not being suggested that decision-makers enjoy unfettered discretion to elect what rules to enforce and in what circumstances they can do so. For a discussion of the constraints, see *id.*

[87]For state-of-the-art evaluation of consequentialism, welfarism, and costs-benefit analysis and their relationships to both ethical and legal analysis, *see* ADLER, *supra* note 52, at 20–38.

[88]Normative and empirical approaches to choice architecture are considered in the rapidly expanding field of behavioral public economics. *See generally* Sunstein & Thaler, *supra* note 56; Douglas, Bernheim, & Taubinsky, *Behavioral Public Economics* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24828, 2018), https://www.nber.org/system/files/working_papers/w24828/w24828.pdf (last visited Sept. 21, 2020).

[89]Posner & Vermeule, *supra* note 50.

[90]SUNSTEIN, *supra* note 31.

[91]For a normative analysis of the process by which compliance with regulatory rules is secured, see the hierarchy of enforcement, i.e., the regulatory pyramid, introduced in IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE ch. 2 (1992). The hierarchy combines basic game theory with sociological analysis. For a more recent literature review focusing on the role of non-state actors in promoting compliance, see Colin Scott, *The Regulatory State and Beyond*, *in* REGULATORY THEORY (P. Drahos ed., 2017).

[92]There is a strong and ever-growing literature analyzing how the effectiveness of international human rights regimes is being undermined. According to the UN Secretariat, not even the reporting obligations are complied with by the states, "As at 31 December 2017, 34 of the 197 States parties had no overdue reports under the relevant international human rights treaties and protocols. That was equivalent to 17 per cent of States parties." In 2015, the figure was 13 percent. UN Secretary-General, 30th Meeting of Chairs of the Human Rights Treaty Bodies, Secretariat, HRI/MC/2018/2 (Mar. 23, 2018), https://www.ohchr.org/Documents/HRBodies/TB/AnnualMeeting/30Meeting/HRI.MC.2018.2.docx. For a skeptical review of the welfare gains properly attributable to international human rights treaties, *see* ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014). A key deficiency in the international human rights regime is the lack of any—or any meaningful—monitoring and enforcement mechanism identifying and sanctioning non-compliance. Instead, Posner contrasts the absence of effective monitoring and compliance mechanisms in human rights treaties with the sanctioning capacity of the WTO. Posner suggests focusing on trade and investment in an effort to improve the welfare of the marginalized. Richard Rorty offers a defense of human rights discourse more generally to the effect that through conversations, and literature, about human rights we

institution building in an effort to promote the credibility of their commitments. They also do so to incentivize the compliance of other states with their commitments, thereby diminishing the likelihood of "cheating" or "free-riding," and in an effort to promote democratic accountability.

The Members of the Eurozone took a second-order decision to pool their sovereignty and bind themselves to rules functionally monitored and enforced, in significant part, by an institution, the ECB. Before turning to consider the operation of that regime, both in theory and effect, we turn first to consider two predecessors thereto. In this way, we consider the euro project against the backdrop of international exchange rate agreements.

We do so because the normative and institutional issues bound up with the European integration project have causes and effects that are interwoven. The debate about EMU serves as a metaphor for the future of the EU as a polity, the social model, and the nature of European identity.[93] Yet, the Eurozone crisis has cast doubt on the viability of a mechanism of integration such as one envisioned by the EMU.[94] This has made analysis of the legal rules governing monetary policy extremely contentious because, as Hinarejos puts it, these disagreements about monetary integration are really "disagreements about our understanding of political legitimacy, democracy, and the bond between Union, states and, citizens."[95] As we shall see, the single currency was a project built on words that are failing to sustain the heavy burden that they were required to carry. But we should not desire, let alone expect, what is not possible. And so, rather than wade directly into these deep and treacherous waters, we consider, and then bear in mind, the extent to which it was ever realistic to expect the rules at issue to sustain the burden that they were asked to carry. In this way, we might move beyond the blame game towards pareto improving interventions.

Accordingly, in the next section, we turn to examine the second-order decision by states to adhere to a "convertibility rule," thereby committing themselves to the gold standard regime. We turn then to focus on the strengths and weaknesses of its successor, the "parity rule," along with the institutional infrastructure erected to support it.

C. The Pre-Euro International Monetary Regimes: The Gold Standard and the Bretton Woods System

I. The Gold Standard

The gold standard was a product of technological innovation.[96] Prior to the industrial revolution, gold was impractical as a day-to-day currency, as the smallest gold coin was still too valuable to be useful in ordinary commercial exchange. Most states used silver or some form of bimetallic standard to create money. It was the harnessing of steam power by mints that allowed states to sufficiently standardize notes and coins to such a degree that counterfeiting became difficult. This technological development facilitated the rise of standardized tokens redeemable for gold and, by extension, the gold standard.

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sensitize ourselves to be more considerate of others. Richard Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. OF PHIL. 583 (1983). For further research, see generally, Hilary Charlesworth, *A Regulatory Perspective on the International Human Rights System*, *in* REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS (Drahos ed., 2017); Rachael Johnstone, *Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body* 111 HUM. RTS. L. REV. 173 (2007); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Emilie Hafner-Burton, *Trading Human Rights: How Preferential Trade Arrangements Influence Government Repression*, 59 INT'L ORG. 593 (2005); Emilie Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most,* 44 J. OF PEACE RSCH. 407 (2007).

[93]Francis Snyder, *EMU – Integration and Differentiation: Metaphor for European Union*, *in* THE EVOLUTION OF EU LAW (P. Craig & G. de Burca eds., 2d ed. 2011).

[94]ALICIA HINAREJOS, THE EURO AREA CRISIS IN CONSTITUTIONAL PERSPECTIVE (2015).

[95]*Id.* at 202.

[96]Barry Eichengreen, *The Euro as a Reserve Currency,* 12 J. JAPANESE & INT'L ECON. 483 (1998).

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In the late 1800s and early 1900s most states adhered to a gold standard such that they guaranteed to redeem their currency for gold, a "convertibility rule." In its purest expression, the gold standard implied that each country would provide a definition of the price of a specified weight of gold, a coin, in its own currency and then keep that definition fixed over time.[97] For example, if a United States dollar could be redeemed for one twentieth of an ounce of gold from the U.S. Treasury and a British pound could be redeemable for an ounce of gold, at least in theory, the exchange rate between the British pound and U.S. dollar was fixed, albeit in the absence of any international law instrument.[98] The purpose of the gold standard was to ensure aggregate price stability through governments self-binding their ability to engage in monetary expansion and, by extension, inflation.[99]

From a legal perspective, perhaps the most interesting aspect of the gold standard is what it was not: There was no formal agreement between its constituent states. Although policymakers recognized the advantages of a gold convertibility rule from as early as 1867, its gradual adoption emerged in a decentralized fashion as its benefits became apparent.[100] The convertibility rule within the state functioned as a commitment technology.[101] The implicit self-enforcing mechanism was dependent upon domestic legislative commitments and the credibility of those commitments in the eyes of market actors. In the event that a state expanded its money supply, currency holders could immediately redeem that currency for gold. This arbitrage opportunity incentivized actors to act as an equilibrating force within the system.[102]

The level of perceived commitment of a state to its convertibility rule was key to the smooth operation of the system. However, Bordo and Kydland are keen to point out that, contrary to popular opinion, a measure of discretion was always embedded within the public understanding of the convertibility rule.[103] That is to say, the commitment of a state to its convertibility rule was not absolute. According to Bordo and Schenk, the rule was contingent.[104] The rule could be rebutted and replaced by fiat currency in times of war or where a lender of last resort function was required.[105]

Although the system was straightforward and transparent in theory, in practice the operation of the gold standard was uneven. The period prior to the First World War was a prosperous era of global trade.[106] In fact, the gold standard boosted trade more than the euro ever did.[107] This led to the deification of the gold standard in sections of popular culture.[108] However, the fact that the

[97]Michael Bordo & Finn Kydland, *The Gold Standard as a Rule* (Nat'l Bureau of Econ. Rsch., Working Paper No. 3367, 6, 1990), http://www.nber.org/papers/w3367.pdf (last visited Sept. 21, 2020). In reality, in the nineteenth century there was a mixed standard containing both fiduciary money and gold coins.

[98]Posner & Sykes, *supra* note 1, at 1050.

[99]O'Rourke & Taylor, *supra* note 1, at 171.

[100]Barry Eichengreen, *International Policy Coordination: The Long View* (Nat'l Bureau of Econ. Rsch., Working Paper No. 17665, 6, 2011), http://www.nber.org/papers/w17665.pdf (last visited Sept. 21, 2020).

[101]In economic parlance, this mechanism functioned to limit the pursuit of time-inconsistent discretionary policies by states. This term describes the fact that policies deemed optimal at one point in time may not be deemed optimal at a future point in time and therefore not implemented. *See* Michael Bordo & Catherine Schenk, *Monetary Policy Cooperation and Coordination: An Historical Perspective on the Importance of Rules* (Hoover Inst. Econ., Working Paper Series 1, 4, 2016).

[102]Although, in practice, gold prices were not fully equalized. This is because there was a cost associated with arbitrage. *See* O'Rourke & Taylor, *supra* note 1, at 170.

[103]Bordo & Kydland, *supra* note 97.

[104]*Id.* at 4.

[105]*Id.*

[106]According to Bordo, true price stability was not achieved during the classical gold standard era due to shifts in the relative supply and demand for gold. *See* Michael Bordo, *The Gold Standard: The Traditional Approach 1821–1931*, 23–120, *in* A Retrospective on the Classical Gold Standard (M. Bordo & A. Schwartz eds., 1984).

[107]*See* O'Rourke & Taylor, *supra* note 1, at 171.

[108]In particular, cryptocurrencies are intertwined with the idea of an inflation free money that government cannot appropriate without the consent of the owner. In investigating the link between cryptocurrencies and the gold standard, see Michael Bordo & Andrew Levin, *Central Bank Digital Currency and the Future of Monetary Policy*, (Nat'l Bureau of Econ. Rsch.,

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system worked fairly smoothly in the core states, namely Germany, the UK, and France, during the pre-war period is intertwined with the specific economic and political circumstances of that period.[109] Importantly, only limited adjustment was required by the core states during that time, and, when adjustment was required, it could be achieved in ways that allowed countries to avoid policies of internal devaluation.[110]

Eichengreen argues that the success of the system during this period was not primarily attributable to the management of the anchor currency (sterling) by the Bank of England.[111] He argues instead that the system was, in fact, multipolar and supported by ad hoc cooperation between various states. It was the perceived commitment by the monetary authorities in the core countries to the gold convertibility rule, regardless of the consequences, that lay the groundwork for its success.

The operation of the gold standard following the First World War was significantly less smooth. Accordingly, it can be useful to divide the gold era into a functioning pre- World War One period (the "classical gold standard") and a dysfunctional inter-war period (the "gold exchange standard").[112] This conceptual division raises the prospect that the failure of the gold exchange standard might be attributable to factors other than the principle underlying the rule.

Without doubt, the political climate and economic circumstances were profoundly changed by the Great War.[113] Leaving aside the dispute within countries such as Germany and France over how the burden of adjustment would be distributed, the extension of suffrage and labor protection laws recalibrated influence within the core countries. The spirit of cooperation that existed between the states prior to the War was replaced by divide over reparations and war debts.[114] At a more technical level, the parities were set at unsustainable levels. This, in turn, was reinforced by a reluctance to re-align those rates lest it diminish the credibility of the commitment to the rule in the eyes of the market. At the same time, the perceived political and economic costs associated with a state pursuing policies associated with internal devaluation were better understood. This diminished the perceived likelihood of a state actually pursuing them.[115] In sum, the credibility of commitment of the core states to the gold standard was significantly weaker than during the classical gold standard era. This insight is key in the context of the euro crisis and the commitment the Members to internal devaluation: The gold exchange standard lacked the credible commitment of the pre-war system because it was obvious to market actors following the lived experience of the system that states could no longer be counted upon to subsume internal stability to external goals.[116] Similarly, the pre-war levels of cooperation were shot.

Seven observations are noteworthy: four to do with the rule, two with cooperation, and one with the framing effect of gold. First, the fundamental difficulty with the convertibility rule was the ex ante nature of the decisions it made about the money supply. It circumscribed the ability of a state to adjust its money supply as its economy grew. States became unable to smoothly adapt their money supply to changing internal or external economic developments. Instead, the

Working Paper No. 23711, 2017), http://www.nber.org/papers/w23711.pdf (last visited Mar. 11, 2019). For a description of the libertarian thinking vis-à-vis gold, see generally Henry Sanderson, *Digital Currencies: A Gold Standard*, FINANCIAL TIMES (May 15, 2015), https://www.ft.com/content/38d02382-f809-11e4-962b-00144feab7de.

[109] *See* O'Rourke & Taylor, *supra* note 1, at 173.

[110] *See id.* at 173.

[111] BARRY EICHENGREEN, GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919–39 (1995).

[112] Bordo & Schenk, *supra* note 101, at 8.

[113] EICHENGREEN, *supra* note 111.

[114] Note, however, that there were coordinated efforts in 1924 and 1927 by the United States, the United Kingdom, and France to prop up sterling. *See id.*

[115] *See* O'Rourke & Taylor, *supra* note 1, at 174.

[116] *See* EICHENGREEN, *supra* note 111.

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inelasticity of the supply of gold tied the supply of currency to the happenstance of gold discovery.[117]

Second, but relatedly, also as a by-product of the inelasticity of gold, states were constrained in their ability to pursue counter-cyclical monetary policies in times of crisis. This promoted internal adjustment rather than external devaluation.[118] A monetary authority would have to depart from the convertibility rule in the execution of its LOLR duties.[119] Indeed, Eichengreen attributes a significant portion of the failure of the Federal Reserve to act as an effective LOLR during the American banking crisis of 1931 to a misplaced sense of constraint imposed by the gold standard.[120] Again, the calamitous consequences of the gold standard for the Great Depression are well known.[121]

Third, given that the convertibility rule was domestic in origin, the system also lacked a formal, credible threat to "punish" a state that nevertheless unilaterally devalued its currency.[122] As one state devalued its currency in an effort to stimulate exports and reduce imports, others followed suit, creating a destabilizing domino effect.[123]

Fourth, Bordo and Kydland argue against viewing the coverability rule as a consistent, irrebuttable rule.[124] Instead, even in its strongest version, it was at all times contingent and could be temporarily abandoned during a wartime emergency on the understanding that coverability at the original price of gold would be restored following the emergency.[125] In its weaker forms, the rule functioned more like an aspiration than an operational constraint on decision-making.[126]

Fifth, central bank cooperation was required to prop-up the system at key junctures. Commitment to the convertibility rule forced central bankers to find ad hoc compromises to overcome challenges. Most notably, in July 1927, the Chairman of the Federal Bank of New York organized a meeting in his home with the Governor of the Bank of England, the President of the Reichsbank, and the President of the Bank of France.[127] It is noteworthy that only one member of the Federal Reserve Board was present at this meeting, the purpose of which was to coordinate action in order to prop-up sterling.[128] Although, for a time, the endeavor was successful, any system that is so dependent upon personal relationships and ad hoc decision-making is vulnerable to the personalities involved.

Sixth, the incentive structure established by the gold standard incentivized the hoarding of gold.[129] The key aim of a state was to increase its gold reserves or, at the very least, not diminish

[117]This, itself, is tied to improved extraction technologies and, in significant measure, chance.

[118]Barry Eichengreen & Peter Temin, *The Gold Standard and the Great Depression* (NBER, Working Paper No. 6060, 1997), https://www.nber.org/papers/w6060.

[119]Lender of last resort duties pre-date the modern focus on monetary policy transmission. *See* Karl Whelan, *Banking Union and the ECB as Lender of Last Resort*, *in* FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE (Allen, F., Carletti, E., Gray, J., & Gulati, M. eds., 2016).

[120]*See* EICHENGREEN, *supra* note 111.

[121]Although the views of Bordo and Eichengreen on the Great Depression differ in important respects, they agree that:

> It is unnecessary to choose between unstable policies and an unstable international system as the cause of the Great Depression. The two sources of instability interacted and compounded one another. More than any other episode, the Depression revealed the fragility of the gold-exchange standard and the tendency for its operation to aggravate policy mistakes.

Michael Bordo & Barry Eichengreen, *The Rise and Fall of a Barbarous Relic: The Role of Gold in the International Monetary System* (Nat'l Bureau of Econ. Rsch., Working Paper No. 6436, 18, 1998), http://www.nber.org/papers/w6436 (last visited Sept. 21, 2020).

[122]*See* Posner & Sykes, *supra* note 1, at 1053.

[123]*See*, *e.g.*, Posner & Sykes, *supra* note 1, at 1051; Richard Cooper, *The Gold Standard: Historical Facts and Future Prospects*, 1 BROOKINGS PAPERS ON ECON. ACTIVITY 36–37 (1982).

[124]*See* Bordo & Kydland, *supra* note 97, at 2.

[125]*See id.*

[126]*See id.* at 3.

[127]*See id.* at 9.

[128]*See id.*

[129]Douglas Irwin, *Did France Cause the Great Depression?* (NBER, Working Paper No. 16350, 2010), https://www.nber.org/papers/w16350.

them.[130] Should a state run out of reserves, it would experience a penalty in the form of being unable to maintain the fixed value of its currency. Conversely, there was no comparable penalty associated with accumulating gold aside from forgone interest. This incentive structure complicated central bank cooperation.

Seventh, Eichengreen and Temin elucidate the powerful framing effect of gold on policy discourse.[131] Over time, the appeal of the gold standard came to rely less on logic or experience but on the rhetoric that shrouded the regime. The regime became intertwined with Victorian and Edwardian virtues such as "thrift, reliability, stability and cosmopolitanism," and gold became synonymous with a "moral, principled and civilized monetary order."[132] This rhetoric went arm-in-arm with policies of internal deflation and wage cuts. This ideological lens contributed to the aggravation of the events culminating in the Great Depression. The most notorious example of puritanical dogma infecting a question of rule adherence is found in the, perhaps apocryphal, advice of Treasury Secretary Andrew Mellon to President Hoover. The Mellon Doctrine, as it would become known, was to the effect that the only way to restore a sustainable economy was to "liquidate labor, liquidate stocks, liquidate the farmers, liquidate real estate … purge the rottenness out of the system" so that "people will work harder, and live a more moral life."[133]

II. The Bretton Woods System

In light of these shortcomings, and toward the conclusion of World War II, a modified version of the gold standard was established by the Allied forces. The ultimate outcome of the compromise between predominantly the U.S. and UK was to create a pegged-but-adjustable exchange rate system through the establishment of the International Monetary Fund (IMF). One goal was to create credible rules that would foster cooperation and coordination, thereby promoting peace and prosperity. Traditional notions of monetary sovereignty were succeeded by an understanding that the exercise of monetary policy would become subject to rules, and that those rules would be monitored and enforced by the international community. The rules created a compliance mechanism, and two international institutions were established to help administer the new monetary system: the IMF and what would become the World Bank. The agreement listed the primary purpose of the IMF as the promotion of international monetary cooperation through that institution.[134]

In this way, the IMF became an instrument for the promotion of tighter fiscal and monetary policy. However, a fundamental flaw of the old gold standard system remained: the inelasticity of the supply of gold. The metal continued to govern an expanding global economy, thereby creating a destabilizing demand for liquidity.[135] Thus, this modified version of the gold standard also proved unsustainable. The core of the system hinged on the perceived willingness and capacity of the United States to convert its liabilities into gold—a commitment of diminishing credibility.[136]

[130]*See* O'Rourke & Taylor, *supra* note 1, at 172.

[131]*See* Eichengreen, *supra* note 111; Eichengreen & Temin, *supra* note 118, at 3.

[132]Eichengreen & Temin, *supra* note 118, at 3.

[133]Eichengreen & Temin, *supra* note 118, at 21. Although the "Mellon Doctrine" has become well-known, to be fair to Andrew Mellon, we rely on Hoover's own writings many years later as the source of the anecdote. *See* David Koskoff, The Mellons 265 (1978).

[134]*See* Article I(i) of the Articles of Agreement of the IMF. The agreement also provided for purposes including the facilitation of growth in international trade, the attainment of high employment levels, the encouragement of exchange rate stability, the establishment of a multilateral system of payments for current account transactions, the creation of confidence in member states by making funds available through the IMF, and the minimization of disequilibrium in balance of payments. For an examination of the negotiation of the wording of Article IV, see Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 The Am. J. of Int'l L. 443, 453 (1983).

[135]*See* Bordo & Eichengreen, *supra* note 121, at 21.

[136]*See* Bordo & Eichengreen, *supra* note 121, at 21.

Between 1961 and 1968, the main central banks of the Western World embarked on one of the most ambitious attempts at ad hoc central bank cooperation in history: the Gold Pool.[137] There was no written agreement or constitution underpinning the cooperative arrangement. The intergovernmental initiative came from the U.S. Treasury Secretary in 1961.[138] The goal was to keep the market price for gold at its official price. The states coordinated their acquisition and disposal of gold in London for the purpose of stabilizing the gold-dollar parity—the foundation of the Bretton Woods system. The profits and losses arising were shared. In effect, the European states committed to reimbursing the United States for a portion of its gold losses.[139] During this period, the market applied acute pressure to the pegged-exchange rate rule and, by extension, the commitment thereto. Nevertheless, the system worked reasonably well until its eventual collapse. Its collapse inflicted significant losses on the constituent states. In the wake of the March 1968 crisis, an effort was made to maintain a two-tier gold market in which the price of gold for private use would be significantly higher than $35 per ounce, but in which central banks would be limited to that price. That system was short-lived. In 1971, President Nixon effectively ended the ability of foreign central banks to redeem dollars for gold.

And so, one unsustainable international monetary regime anchored by the gold standard gave rise to the unsustainable Bretton Woods system, anchored by a modified gold standard. The Gold Pool was an ad hoc initiative aimed at buttressing the modified gold standard system. Ad hoc cooperation did prolong the existence of the pegged exchange-rate rule but ultimately could not compensate for its inflexibility.

It is worth reflecting on the successes and limits of this ad hoc cooperation. Eichengreen argues that the collapse of the Gold Pool is attributable to the inability of its constituents to prevent free-riding.[140] Toniolo and Clement emphasize the mounting heavy financial losses inflicted on those states.[141] The timing of the breakdown of the system is also important. France engaged in particularly uncooperative behavior in 1965 in an effort to capitalize upon UK and U.S. economic weakness, yet the system survived its free-riding. Bordo, Monnet, and Naef argue that the reason for the collapse of the Gold Pool in March 1968 is attributable to an external shock that the system was unable to cope with.[142] The devaluation of sterling by 14.3% in November 1967 caused a loss of confidence, and contagion quickly spread throughout the system. In particular, the shock spread to the United States. Sterling was, at that time, a second reserve currency. As a consequence, it was the first line of defense to the gold-dollar link. The devaluation of sterling triggered a speculative run on gold, causing unbearable losses for the Gold Pool states. Therefore, the rigidity of the parity rule amplified a shock throughout the system, eventually resulting in its collapse.

In the wake of World War II, the Bretton Woods system facilitated thirty years of low inflation and rapid growth in the western states. However, this was not the consequence of strict rule adherence. Rather, the rules were breached by the more influential countries from the very outset of the system.[143]

The primary shortcoming of the parity rule was that it operated to reduce monetary policy flexibility. By circumscribing the practicability of that adjustment mechanism, states were often de facto forced to pursue policies of internal devaluation. The domestic political, social, and

[137]*See* Michael Bordo, Eric Monnet, & Alain Naef, *The Gold Pool (1961–1968) and the Fall of the Bretton Woods System: Lessons for Central Bank Cooperation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24016, 2017).

[138]*See* Bordo & Schenk, *supra* note 101, at 20.

[139]*See* Eichengreen, *supra* note 100, at 61.

[140]*See* Barry Eichengreen, Global Imbalances and the Lessons of Bretton Woods (2010).

[141]*See* Gianni Toniolo, Central Bank Cooperation at the Bank for International Settlements, 1930–1973 (2005).

[142]*See* Bordo, Monnet, & Naef, *supra* note 137.

[143]For example, in 1949, the UK did not give adequate notice to the IMF in order for it to review its decision to devalue sterling. Eichengreen, *supra* note 100, at 48.

economic consequences thereof inevitably proved unsustainable. Furthermore, the parity rule lacked the flexibility to cope with asymmetric economic growth levels between constituent states. In this way, economic divergence translated into a source of pressure on the fixed exchange rates that sought to diverge accordingly. The rigidity of the rule prevented the market from reflecting the "natural" equilibrium value. Over the long run, this disassociation became unsustainable.[144]

Again, in theory, the legal framework was designed to embed a measure of flexibility. It established an institution, the IMF, to play the role of supervising devaluations. In practice, however, states were disincentivized from being seen drawing upon IMF support due to the stigma attached thereto and the potential reaction of the markets. As a result, economically desirable devaluations became a source of political sensitivity. Conversely, once one state sought assistance, other states became more likely to follow in its wake, thereby creating a destabilizing cascade dynamic. Furthermore, the indeterminacy of the language of the agreement circumscribed its operation. There was no definition of "fundamental disequilibrium" within the agreement. Similarly, the agreement was silent as to the test to determine whether an event constituted a legitimate "adjustment" or an impermissible "manipulation."[145] More generally, the regime raised normative and empirical concerns about the institutional capacity of the IMF. Insofar as it is tasked with interpreting its own constitutional framework, whether the IMF, or anyone, enjoys the capacity to distinguish between "legitimate" and "illegitimate" devaluation—assuming that one exists—is open to contest.[146] Equally, the normative legitimacy and functional capacity of the IMF to identify and impose domestic structural reforms on states in vulnerable economic circumstances as a quid pro quo for assistance is, at its kindest, controversial.[147] This applies, *mutatis mutandis*, to its role monitoring their implementation. Finally, like the gold standard before it, the system was not self-enforcing in practice. When the domestic political costs associated with internal devaluation outweighed the benefits of complying with the rules, the incentive structure favored unilateral devaluation, or "cheating."[148] Put another way, the system lacked an effective "punishment" mechanism that could inflict costs sufficient to dwarf to the benefits associated with "cheating."

III. Comparison of the Legal Regimes

A number of scholars have contrasted the gold standard with the euro.[149] Anachronistic reasoning can be misleading, nevertheless there are a number of useful observations to be noted about the lived experience of the convertibility, parity, and no sovereign lender of last resort (LOLR) rule.

During the gold standard era, domestic commitment to the convertibility rule represented a second-order decision that limited future choice. That is, the rule was used to specify ex ante

[144]*See* Bordo & Eichengreen, *supra* note 121.

[145]Posner & Sykes, *supra* note 1, at 1056.

[146]Indeed, in his critique of the IMF's LOLR function, Goodhart thinks it a myth that it is generally possible to distinguish between "liquidity" and "solvency" in real-time during an economic crisis. *See* Charles Goodhart, *Myths About the Lender of Last Resort*, 2 INT'L. FIN. 339 (1999).

[147]Jeffrey Sachs has strongly criticized the IMF for its handling of the East Asia Crisis.

> The world accepts as normal the idea that critical details of IMF programs should remain confidential, even though these "details" affect the well-being of millions. Meanwhile, staff at the Fund are unaccountable for their decisions. The people most affected by these policies have little knowledge or input. In Korea, the IMF insisted that all presidential candidates immediately "endorse" an agreement they had no part in drafting or negotiating—and no time to understand. The situation is out of hand. However useful the IMF may be to the world community; it defies logic to believe that the small group of 1,000 economists on 19th Street in Washington should dictate the economic conditions of life to 75 developing countries with around 1.4 [billion] people.

Jeffrey Sachs, *IMF is a Power Unto Itself*, FINANCIAL TIMES (Dec. 11, 1997).

[148]Posner & Sykes, *supra* note 1, at 1056.

[149]*See* Wilsher, *supra* note 1; *see also* Eichengreen, *supra* note 43; Posner & Sykes, *supra* note 1; Marc Flandreau, Jacques Le Cacheux, & Frédéric Zumer, *Stability Without a Pact? Lessons from the European Gold Standard, 1880—1914*, 13 ECON. POL'Y 116 (1998).

future outcomes. Collective adherence to domestic convertibility rules had the effect of securing significant international cooperation. The primary distinction between the convertibility rule and the Economic and Monetary Union (EMU) financing prohibition is the source of the respective rules. States were not required by international law to adhere to the convertibility rule, nor did they divest themselves of the ability to depart from the rule. This difference is key because, even in the heyday of the gold standard, policies of internal devaluation were nowhere near as common as sometimes assumed.[150] So too the convertibility rule implied a measure of discretion to be exercised in light of the circumstances at the point of application. Rule adherence was never absolute.

Similarly, the ability of the gold standard to endure was achieved in significant measure through the ability of the core states to cooperate, albeit in an ad hoc fashion. There are unfortunate parallels with the less successful attempts at ad hoc cooperation to sustain the euro during its crisis. The Member States produced a flotsam and jetsam of intergovernmental summits and meetings, the counter-productive decision to pursue fiscal contraction through revised budgetary rules, and the short-term, undercapitalized, ineffectual European Financial Stability Facility (EFSF) and European Financial Stabilization Mechanism (EFSM) that failed to address the core of the crisis.[151] Similarly, although better than before its introduction, the ESM currently fails to offer a credible set of rules capable of addressing a significant economic challenge, like the Covid-19 pandemic. It is under-capitalized, it requires the recipient to agree to a program of structural reforms that can take months to negotiate, and—as so forcefully argued by the Italian government —such reforms during a severe crisis may not be appropriate.[152]

This is not to imply that the ability of states to cooperate during the gold era was not also circumscribed; they were unable to formalize, let alone institutionalize, a set of rules such that deviation from the gold standard, when justified, and re-application, when appropriate, could be achieved in an orderly fashion. Therefore, although states could, and did, suspend the operation of the convertibility rule and devalue their currency, the rule nevertheless reduced monetary flexibility during economic crisis.

Both the convertibility rule and the no sovereign LOLR rule amplified shocks throughout the system and hampered the ability of monetary authorities to act as LOLRs. States were also incentivized to hoard gold to the detriment of others, just as states were incentivized to run excessive balance-of-payments surpluses in the EMU.[153] Blanchard, Erceg, and Linde make the case that fiscal expansion in the core Members could have a large and positive impact on the GDP of the periphery, particularly during a liquidity trap.[154] An important point of disassociation between the classical gold standard and the EMU is that the latter is located in a time when the consequences of internal devaluation are understood by all; to wit, market actors and states, which was not the case during the classic gold standard era. That is to say, the credibility attached to

[150]*See* O'Rourke & Taylor, *supra* note 1, at 174.

[151]In May 2010, Greece was the recipient of an €80 billion loan on the basis of a bilateral agreement with other Members. It also received €30 billion from the IMF. To establish a sounder legal footing for the administration of financial assistance, TFEU art. 122(2) provided the legal basis for EFSF and EFSM. *See also* Council Decision 9614/10, 2010 O.J. (L 223) 1 (EU) (regarding the Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union); Council Regulation 407/2010, 2010 O.J. (L118) 1, 1 (EU) (establishing a European Financial Stabilization Mechanism). For an analysis of the legal decisions, see Kilpatrick, *supra* note 6. For a review of their macroeconomic effect, see Eichengreen *supra* note 2, and JOSEPH E. STIGLITZ, THE EURO: AND ITS THREAT TO THE FUTURE OF EUROPE (2016).

[152]*See* Sam Fleming, Miles Johnson, & Martin Arnold, *Giuseppe Conte Prepares for Toxic Choice on Eurozone Rescue Fund,* FINANCIAL TIMES (Apr. 21, 2020), https://www.ft.com/content/e5bc46a8-8317-4876-acb9-0bcc5b67dedd.

[153]Despite pressure from the Commission and the IMF, the German current account surplus reached 8.5% of GDP in 2015 —second only to China. *See* INTERNATION MONETARY FUND, 2016 Article IV Consultation—Press Release; Staff Report; And Statement by the Executive Director for Germany, Country Report No. 16/202 (June 2016). https://www.imf.org/external/pubs/ft/scr/2016/cr16202.pdf.

[154]*See* Olivier Blanchard, Christopher J. Erceg, & Jesper Lindé, *Jump Starting the Euro Area Recovery: Would a Rise in Core Fiscal Spending Help the Periphery?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21426, 2015).

the no sovereign LOLR rule reflects the lived experience of the rule in the eyes of market actors, not just its wording. Finally, the framing effect of the gold standard invites parallels with the SGP. Just as the role of gold within the convertibility rule became confused with virtues such as thrift, reliability, and stability, the self-defeating rules in the SGP invite confusion with fiscal prudence. As a consequence, the attractiveness of rule adherence constrained counter-cyclical economic policies during the Eurozone crisis and thereby amplified the crisis.

Just as the gold standard era gave rise to the IMF, so too the original role of the ECB has evolved in the wake of the crisis to include the supervision of internal devaluation. This new role has been institutionalized in the form of the ESM Treaty. In fact, the ECB performs this role arm-in-arm with the IMF. Another obvious parallel is that, from the outset, the rules were not respected by the core members of either regime. Although more flexible than the gold standard, the parity rule was insufficiently flexible to prevent disassociation from economic performance. As a consequence, the IMF, like the ECB, continues to house a struggle over its operational norms and the legitimacy and capacity of that institution to formulate and monitor the economic reforms that form a quid pro quo for financial assistance.

In wake of this analysis, we now turn to consider the euro project, first in theory and then in practice. In particular, we focus on the no sovereign LOLR rule in light of the lived experience of the convertibility and parity rules.

D. The Economic and Monetary Union

Since the Treaty of Rome, European monetary cooperation was the subject of intermittent rhetoric and spasmodic policy coordination.[155] Indeed, McNamara is undoubtedly correct when she says that the ECB represents "the institutional expression of a process of monetary integration that began early on in the history of the European Union [,] but underwent a multitude of setbacks before becoming a reality."[156] Historical examples of monetary unions provide little cause for optimism, and their structural shortcomings are obvious; monetary unions are characterized by decentralized fiscal policy, yet centralized monetary policy.[157] As Snyder points out, the "EMU was created mainly for political reasons."[158] Likewise, Feldstein, who in 2012 considered the project a failure, identified the initial impetus for the euro as political and not economic.[159] According to Feldstein, the project aimed to promote a European identity, to shift monetary responsibility from the Members to Germany, and to increase Europe's influence in world affairs.

155*See* McNamara, *supra* note 5, at 171. The experiments in monetary cooperation, such as the European Monetary Cooperation Fund—which supported the Snake and subsequently, the Snake in the tunnel, or the European Monetary Institute (EMI)—preceded the euro project.

156McNamara, *supra* note 5, at 171. For an analysis of the precursor to the euro, the European Exchange Rate Mechanism (ERM), which operated from March 13, 1979, as a part of the European Monetary System—although technically, ERM II is still in operation with one currency, the Danish Krone—see Benjamin J. Cohen, *The European Monetary System: An Outsider's View*, 142 INT'L. FIN. 1 (1981). *See also* PETER LUDLOW, THE MAKING OF THE EUROPEAN MONETARY SYSTEM: A CASE STUDY OF THE POLITICS OF THE EUROPEAN COMMUNITY (1982); TOMMASO PADOA-SCHIOPPA, THE ROAD TO MONETARY UNION IN EUROPE: THE EMPEROR, THE KINGS, AND THE GENIES (expanded ed. 2001). The most detailed and authoritative account of the precursors to the EMU is provided by DYSON & FEATHERSTONE, *supra* note 5. For a view to the effect that the euro was, in fact, driven by sound economic logic, see JAMES, *supra* note 5. For an account that emphasizes political intergovernmental motivations, see MORAVCSIK, *supra* note 5. *See also* MODY, *supra* note 35, and McNamara, *supra* note 5.

157*See* Mark Aguiar, Manuel Amador, Emmanuel Farhi, & Gita Gopinath, *Coordination and Crisis in Monetary Unions*, 130 THE QUARTERLY J. OF ECON. 1727 (2015).

158Francis Snyder, *EMU-Integration and Differentiation: Metaphor for European Union, in* THE EVOLUTION OF EU LAW 687 (Craig & de Burca eds., 2d ed. 2011).

159*See* Martin Feldstein, *The Failure of the Euro*, FOREIGN AFFS. (Jan. 1, 2012), https://www.foreignaffairs.com/articles/europe/2012-01-01/failure-euro; Martin Feldstein, *The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability*, 11 J. OF ECON. PERSPS. 23 (1997).

Nevertheless, the analysis that follows emphasizes the principle of neutrality and evaluates the regime, not in political terms, but in terms of law.[160]

At the beginning of 1999, the founding eleven members[161] of the Eurozone agreed to fix their exchange rates as against one another and lock that parity into a legal regime.[162] In this way, the Members utilized the Treaty of Maastricht, along with an institution, to administer their collective monetary policy—the ECB—as their commitment technology.[163] By divesting themselves of legal control over the currency that circulated within their borders, and by issuing debt in a currency that they did not fully control, the Member States established a level of commitment to a fixed exchange rate regime that went beyond the commitments implied by either the gold standard, the Bretton Woods system, or the ESM. Moreover, they circumscribed the ability of the ECB to operate otherwise than the guardian of what, in 1992, Folkerts-Landau and Garber described as a "monetary rule."[164] That monetary rule was that the money supply should be regulated to ensure low and stable inflation, and that the ECB would not act as LOLR to the Members. The ECB was not established to act as a historic central bank, leading Folkerts-Landau and Garber to predict that the single-minded pursuit of price stability could be achieved only if the Members agreed to repress their financial systems and securitization markets in particular. Otherwise, the ECB would inevitably be required to play the LOLR role historically played by central banks, notwithstanding its formal mandate. Similarly, Kenen and Meade—approvingly adopting the language of Schinasi— considered the ECB to be originally formulated as "the ultimate 'narrow' central bank" because it was focused on price stability and lacked LOLR powers.[165] They attributed this choice to the concerns over "moral hazard" that led to Germany preventing the Bundesbank from serving as LOLR.

The ECB's mandate and powers are now enshrined in the Treaty on the Functioning of the European Union (TFEU).[166] It is required to act within the limits of the powers conferred upon it by the Treaties.[167] In an effort to define its own governing norms, the ECB has declared that it considers its legal framework to "have gained 'constitutional' status."[168] The functions and objectives of the ECB are enshrined in Article 127 of the TFEU, and paragraph 1 thereof limits the primary objective of the ECB to maintaining "price stability"—in other words, the control of inflation.[169] Without prejudice to low and stable inflation, the ECB shall support the general EU economic policies with a view to contributing to the achievement of the objectives set forth in Article 3 of the TFEU. Although the primary objective of the ECB is to maintain price stability,

[160] For accounts of the Maastricht negotiations, and in particular, the "monetarist" versus "economist" advocacy coalitions, see Dyson & Featherstone, *supra* note 5, at 142.

[161] Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxemburg, Netherlands, Portugal, and Spain.

[162] Now nineteen. Cyprus joined in 2008, Estonia in 2011, Greece in 2001, Latvia in 2014, Lithuania in 2015, Malta 2008, Slovakia in 2009, and Slovenia in 2007.

[163] There is no consensus explaining how this *sui generis* experiment came to be. *See generally supra* note 5.

[164] David Folkerts-Landau & Peter Garber, *The ECB: A Bank or a Monetary Policy Rule*, *in* Establishing a Central Bank: Issues in Europe and Lessons from the US (Matthew B. Canzoneri, Vittorio Grilli, & Paul R. Masson eds., 1992); Eichengreen, *supra* note 2, at 130.

[165] Peter Kenen & Ellen Meade, Regional Monetary Integration 58 (2007); Gary J. Schinasi, *Responsibility of Central Banks for Stability in Financial Markets* (Int'l Monetary Fund, Working Paper No. 121, 2003), https://www.imf.org/en/Publications/WP/Issues/2016/12/30/Responsibility-of-Central-Banks-for-Stability-in-Financial-Markets-16526.

[166] *See* the Consolidated Version of the Treaty on the Functioning of the European Union arts. 119–44, June 7, 2016, 2016 O.J. (C 202) 230, together with TFEU Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, June 7, 2016, 2016 O.J. (C 202) 230 [hereinafter ECB/ESCB].

[167] *See* ECB/ESCB art. 7.

[168] European Central Bank, *The ECB's Relations with European Union Institutions and Bodies—Trends and Prospects,* Monthly Bulletin (Jan. 2010). The ECB was elevated to the legal status of a Union institution in the Treaty of Lisbon.

[169] This stands in contrast with, for example, the dual mandate of the U.S. Federal Reserve, providing that it conducts its monetary policy in pursuit of full employment and stable prices. *See* 12 U.S.C. § 225(a).

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contributing to the stability of the financial system is an enumerated objective per Article 127(5).[170] Nevertheless, this contribution to financial stability is circumscribed by the restrictions placed upon the exercise of its powers by the treaties and the absence of historic LOLR features described below. Article 123 of the TFEU prohibits the provision of any credit facility, including overdrafts, by the ECB to a Member State.[171] Importantly, the ECB is prohibited from purchasing a debt instrument directly from a Member State.[172] The purpose was to prohibit the ECB from providing monetary financing to the Member States.[173] Council Regulation 3603/93 extends the spirit of the prohibition on direct purchases into transactions in secondary markets.[174] Article 125 of the TFEU prohibits the Union or its Member States from assuming a liability on behalf of another Member State, save for in a narrow exception relating to joint venture public projects: The "no bailout" provision.[175] Additionally, Article 122(2) provides a mechanism for the provision of financial assistance to a Member State that "is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control."[176] Furthermore, the second indent of Article 18.1 of the Statute of the ESCB and the ECB shields

[170]"The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system." TFEU art. 127(5).

[171]TFEU art. 123 provides as follows:

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States—hereinafter referred to as "national central banks"—in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.
2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.

Rosa Maria Lastra, *The Evolution of the European Central Bank*, 35 FORDHAM INT'L L.J. 1260 (2012).

[172]Drawing a technical distinction between direct and indirect purchased debt instruments became a feature of the justification of OMT by the CJEU in *Gauweiler*. The extent to which the consequence of purchasing debt on a secondary market, as opposed to directly from the Member, is in fact different is, at its kindest, the subject of debate. *See* Claes & Reestman, *supra* note 8; Hinarejos, *supra* note 8.

[173]For an analysis of the prohibition on monetary financing, see Christian Hofmann, *Greek Debt Relief*, 37 OXFORD J. LEGAL STUDS. 11 (2016).

[174]"Whereas Member States must take appropriate measures to ensure that the prohibitions referred to in Article 104 of the Treaty are applied effectively and fully; whereas, in particular, purchases made on the secondary market must not be used to circumvent the objective of that Article." *See* Council Regulation 3603/93, 1993 O.J. (L 332) 1–3 (EC) (specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty).

[175]The text provides as follows:

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.
2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

TFEU art. 122(2).

[176]"Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken." TFEU art. 122(2).

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the Eurosystem from counter-party risk when dealing with private financial institutions. It ensures that credit institutions, and other market participants, provide adequate collateral when engaging in credit operations with the ECB and national central banks (NCBs).[177]

The instruments did not provide for a fiscal union, a banking union with risk sharing, or an explicit LOLR to either the Eurozone banking system or to sovereigns.[178] This stands in contrast to the United States, for example, where the federal government takes carriage of a large proportion of banking regulation, is responsible for banking failures, and provides a deposit insurance scheme.[179] At a national level, NCBs retain an exceptional ability to provide Emergency Liquidity Assistance (ELA) to domestic credit institutions, albeit under certain circumstances. However, pursuant to Article 14.4 of the ESCB Statute, the Governing Council—by a majority of two thirds of the votes cast—can declare that the ELA interferes with the objectives and tasks of the ESCB.[180]

Each Member of the Eurozone divested itself of control over its currency, and with that, its ability to depreciate or devalue its own currency. In effect, the process of adjustment within the single currency is comparable to that of a fixed exchange rate system.[181] As with the gold standard, exchange rates are fixed—albeit in the case of the euro through their elimination—while capital markets are open, implying consistent monetary policy across the constituent states. Prior to the euro, the Member States issued sovereign bonds in a currency that their central bank controlled. De Grauwe suggests that the most useful way of thinking about the effect of the EMU is that Member States signed up to issue debt in a "foreign currency."[182] In this way, the Members provide no guarantee to the holders of their sovereign bonds that they will have the liquidity necessary to discharge their future obligations, as they can no longer simply create the requisite money via their central bank.[183] To combat a self-fulfilling debt roll-over crisis—in which sovereign debt holders fail to coordinate on rolling over maturing debt—a monetary union requires a clear, transparent, sovereign LOLR.[184] It is not sufficient to have a central bank tasked with an inflation mandate because, during a rollover crisis, the central bank must eliminate coordination failures among lenders.[185] This is particularly so when the union is made up of high and low debt countries who do not enjoy aligned monetary policy preferences. Notwithstanding this fact, the aforedescribed provisions effectively established a prohibition on the ECB acting as sovereign LOLR to the Members. This is because, through the provision of financial assistance to a Member, the ECB might create a redistributional risk in the event that the Member simply defaults

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[177]"In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may . . . conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral." ECB/ESCB art. 18.1.

[178]In the context of the banking union, the Eurozone crisis brought developments such as the single supervisory mechanism, the single resolution mechanism, and the European deposit insurance scheme. *See* Council Regulation 1024/2013, 2013 O.J. (L 287) 63 (EU) Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions; Council Regulation 1022/2013, 2013 O.J. (L 287) 5 (EU). *See also* Council Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on Deposit Guarantee Schemes (Recast), 2014 O.J. (L 173) 149 (EU). For analysis, see MARIO PILADE CHITI & VITTORIO SANTORO, THE PALGRAVE HANDBOOK OF EUROPEAN BANKING UNION LAW (2019); Agnese Pizzolla, *The Role of the European Central Bank in the Single Supervisory Mechanism: A New Paradigm for EU Governance*, 43 EUR. L. REV. 3 (2018).

[179]Torben Iversen, David Soskice, & David Hope, *The Eurozone and Political Economic Institutions*, 19 ANN. REV. POL. SCI. 163, 179 (2016).

[180]For a discussion of the role of ELA in the provision of financial assistance to Members during the Eurozone crisis, see Armin Steinbach, *The Lender of Last Resort in the Eurozone*, 53 COMMON MKT. L. REV. 361 (2016).

[181]*See* O'Rourke & Taylor, *supra* note 1, at 171.

[182]David Quinn, *The Law and Norms of the European Central Bank as Sovereign Lender of Last Resort*, EUR. CONST. L. REV. (2021); Paul De Grauwe, *The European Central Bank as Lender of Last Resort in the Government Bond Markets*, 59 CESIFO ECON. STUDS. 520 (2013); PAUL DE GRAUWE, ECONOMICS OF MONETARY UNION (13th ed. 2020).

[183]*See* De Grauwe, *supra* note 182, at 520.

[184]*See* Aguiar et al., *supra* note 157, at 1729.

[185]*See id.*

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on its debts and exits the currency zone, for example.[186] Not without good reason: Although the treaties have no provision for the withdrawal of a Member from the Eurozone—other than exiting the EU—with all that would follow from such a decision, as we shall see, euro exit, or redenomination risk, was widely considered during the Eurozone crisis.[187]

Although hindsight is 20/20, U.S. macroeconomic,[188] political-economic,[189] law and economic[190] scholars all expressed profound misgivings about the EMU prior to the minting of the first euro. Within legal studies in the EU there was also skepticism regarding the viability of the legal framework.[191] In contrast, European scholarship was, by and large, supportive of the idea based upon an assumption that economic "convergence" would overcome the asymmetry of the monetary union with only economic cooperation in the context of an incomplete internal market.[192] From its inception to the global financial crisis, the EMU precipitated asymmetric flows of capital from high to low per capita income and productivity countries.[193] The first nine years of the euro should have been spent in a state of concern regarding the lack of convergence other than between economies with relatively strong institutions.[194] In light of the ECB's price stability

[186]*See* Charles Calomiris, Marc Flandreau, & Luc Laeven, *Political Foundations of the Lender of Last Resort: A Global Historical Narrative*, 28 J. OF FIN. INTERMEDIATION 48, 61 (2016).

[187]*See* Treaty of the European Union art. 50(1).

[188]*See* Eichengreen & Ghironi, *infra* note 194; Martin Feldstein, *Reflections on Americans' Views of the Euro Ex Ante*, VOXEU (Jan. 26, 2009), https://voxeu.org/article/reflections-americans-views-euro-ex ante; Martin Feldstein, *The European Central Bank and the Euro: The First Year* (Nat'l. Bureau of Econ. Rsch., Working Paper No. 7517, 2000), http://www.nber.org/papers/w7517; Feldstein, *supra* note 159.

[189]*See* Peter A. Hall & Robert J. Franzese, *Mixed Signals: Central Bank Independence, Coordinated Wage Bargaining, and European Monetary Union*, 52 INT'L. ORG. 505 (1998); Robert J. Franzese, *Institutional and Sectoral Interactions in Monetary Policy and Wage/Price-Bargaining*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARTIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001). For a recent review of this literature challenging the varieties of capitalism account of the motivations for establishing the euro, see Waltraud Schelkle, *The Political Economy of Monetary Solidarity*, 44 WIRTSCHAFT UND GESELLSCHAFT 335 (2017).

[190]*See* Hal Scott, *When the Euro Falls Apart*, 1 INT'L. FIN. 207 (1998).

[191]The concerns of these scholars ranged considerably. For example, in a provocative 1999 paper that still rewards close reading, Francis Snyder noted that the project was meant to symbolize a milestone in integration, anchor the internal market, crystallize political integration, and establish the EU's presence in international markets. However, he feared that it may prove "a millstone around the neck of a fledgling, causing the young European Union to sink in the turbulent waters of deflation, enlargement, postmodern politics, and globalisation." Francis Snyder, *EMU Revisited: Are We Making a Constitution? What Constitution Are We Making?* (Eur. Univ. Inst., Working Paper No. 6, 1998). Furthermore, Hodson and Maher expressed deep concerns regarding the legitimacy of the ECB, and hence the EMU, and predicted that this could, in turn, affect the credibility of monetary policy. Presciently, they were concerned that the shortcomings in "conscious legitimacy" would result in a delegitimization of the ECB at times of crisis. Dermot Hodson & Imelda Maher, *Economic and Monetary Union: Balancing Credibility and Legitimacy in an Asymmetric Policy Mix*, 9 J. EUR. PUB. POL'Y 391 (2002). Amtenbrink and de Haan mounted, in forceful terms, a challenge to the assumption that the ECB was subject to meaningful transparency and accountability. Fabian Amtenbrink & Jakob de Haan, *The European Central Bank: An Independent Specialized Organization of Community Law—A Comment*, 39 COMMON MKT. L. REV. 65 (2002). Hadjemmanuil criticized the vagueness of the price stability mandate as set out in the treaty instruments. Christos Hadjiemmanuil, *Democracy, Supranationality, and Central Bank Independence*, *in* CENTRAL BANK INDEPENDENCE: THE ECONOMIC FOUNDATIONS, THE CONSTITUTIONAL IMPLICATIONS, AND DEMOCRATIC ACCOUNTABILITY 161 (Jan Kleineman ed., 2000).

[192]In January 2010, Lars Jonung and Eoin Drea published an article highlighting—in what has been interpreted as a mocking tone—the distinction between the European and American economic communities on the euro, the latter based on Optimum Currency Theory. *See* Lars Jonung & Eoin Drea, *It Can't Happen, It's a Bad Idea, It Won't Last: US Economists on the EMU and the Euro, 1989–2002*, 7 ECON. J. WATCH 4 (2010). In the words of Paul Krugman, "the article's intended hall of shame—the long list of economists it cites for wrongheaded pessimism—has instead become a sort of honor roll, a who's who of those who got it more or less right." PAUL KRUGMAN, ARGUING WITH ZOMBIES: ECONOMISTS, POLITICS, AND THE FIGHT FOR A BETTER FUTURE 184 (2020). On convergence, see Peter A. Hall, *The Mythology of European Monetary Union*, 18 SWISS POL. SCI. REV. 508 (2012).

[193]*See* Eichengreen, *supra* note 2, at 126.

[194]*See* Barry Eichengreen & Fabio Ghironi, *EMU in 2010*, *in* EMU AND ECONOMIC POLICY IN EUROPE: THE CHALLENGE OF THE FIRST TWO YEARS (Marco Buti & André Sapir eds., 2003).

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mandate, the asymmetry of external balances appear to have been noted but insufficiently tackled.[195] Prevailing economic and political-economic theory suggested that national institutions were deeply rooted in the history of a state, and that short-term change was optimistic.[196] Therefore, the economies that started out with strong institutional advantages would, in fact, widen their lead.[197] Convergence proved a mirage.

By removing currency depreciation and devaluation, traditional adjustment mechanisms used by the Members without building a banking union, a fiscal union, centralized financial regulation, or even effective fiscal policy, the experiment was nothing if not bold. Moreover, currency unions in general create a "free-rider" problem: States are incentivized to borrow in the common currency and, when their obligations became unsustainable, secure bailouts by the other members.[198] The attempt to solve this free-rider problem came in two parts.[199] First, the Stability and Growth Pact (SGP) set an arbitrary annual budget deficit of 3% of GDP and the stock of public debt of 60% of GDP. According to Eichengreen, writing in 2003, that "has no basis in economic logic."[200] In theory, these rules were profoundly misconceived because imposing the fines provided for by the pact would only serve to aggravate the problems of a distressed government and encourage the very debt crisis that the mechanism was intended to avert.[201] The rules were also misplaced in practice and actually diverted attention from the true source of the Eurozone crisis. Although the Eurozone became a full-blown sovereign debt crisis, that fact can obscure its origins. Between 2002 and 2007, France and Germany had debt to GDP ratios far above those of Ireland and Spain, which appeared to be in relatively good public health until the eve of the crisis.[202] Belgium and Italy had debt to GDP ratios of 100% at the start of the crisis yet did not require programs of adjustment. By contrast, Ireland and Spain had ratios of 40% and were running budget surpluses.[203] Leaving aside Greece, which was not an original Member and is a special case,[204] the sovereign debt crisis was deeply intertwined with a private debt banking crisis and

[195]See, for example, the comments of the Commissioner for Economic and Monetary Affairs, Joaquin Almunia, writing in 2008 in the foreword to "EMU@10":

> A full decade after Europe's leaders took the decision to launch the euro, we have good reason to be proud of our single currency. The Economic and Monetary Union and the euro are a major success. For its member countries, EMU has anchored macroeconomic stability, and increased cross border trade, financial integration, and investment. For the EU as a whole, the euro is a keystone of further economic integration and a potent symbol of our growing political unity. And for the world, the euro is a major new pillar in the international monetary system and a pole of stability for the global economy.

Iversen et al., *supra* note 179; European Commission, *EMU@10—Successes and Challenges After Ten Years of Economic and Monetary Union*, 2 EUR. ECON., May 7, 2008, https://ec.europa.eu/economy_finance/publications/pages/publication12682_en.pdf.

[196]*See, e.g.*, Franzese, *supra* note 189; Hall & Franzese, *supra* note 189; Eichengreen, *supra* note 2, at 126. *See also* KATHLEEN THELEN, HOW INSTITUTIONS EVOLVE (2004); Robert Barro & Xavier Sala-i-Martin, *Convergence*, 100 J. OF POL. ECON. 223 (2002).

[197]*See* Paul Krugman, *Lessons of Massachusetts for EMU*, *in* ADJUSTMENT AND GROWTH IN THE EUROPEAN MONETARY UNION (Francisco Torres & Francesco Giavazzi eds., 1993); Hall, *supra* note 192.

[198]*See* Willem Buiter, Giancarlo Corsetti, & Nouriel Roubini, *Excessive Deficits: Sense and Nonsense in the Treaty of Maastricht*, 8 ECON. POL. 57 (1993).

[199]*See* Philip Lane, *The European Sovereign Debt Crisis*, 26 J. OF ECON. PERSPS. 49, 49 (2012).

[200]Barry Eichengreen, *What to Do with the Stability Pact*, 38 INTERECONOMICS 7, 8 (2003). TFEU art. 121 is the primary legal basis of the preventative arm of the SGP. TFEU art. 126 is the primary legal basis for the corrective arm of the SGP. *See also* European Commission, Directorate-General for Economic and Financial Affairs, *Vade Mecum on the Stability and Growth Pact*, 2019, https://data.europa.eu/doi/10.2765/724849.

[201]Similarly, Jean Tirole also considers the SGP rules to be misconceived on the basis that "sanctions aggravate deficits at a time distressed countries have difficulties controlling them . . . ." Eichengreen, *supra* note 2, at 128. *See* Jean Tirole, *The Euro Crisis: Some Reflexions on Institutional Reform*, 16 FIN. STABILITY REV. 225 (2012).

[202]*See* Lane, *supra* note 199, at 51.

[203]*See* Karl Whelan, *Sovereign Default and the Euro*, 29 OXFORD REV. ECON. POL'Y 478, 492 (2013).

[204]Greece used creative accounting to obscure its fiscal position; it is less understood why other Member States failed to identify and address this practice.

macroeconomic imbalances within the Eurozone. Insofar as the SGP was not taken seriously by Members, this was entirely predictable. Again, Eichengreen noted that, given that the SGP rules were arbitrary and lacking in any "sound economic rationale" bearing "only the loosest relationship to the ultimate objective of debt sustainability," they were not viewed as legitimate or "taken seriously."[205] In 2004, the Commission sued the Council for its effective suspension of the excessive deficit procedure against France and Germany, to little or no avail.[206]

The second attempt to address the free-rider problem was the inclusion of the "no bailout," "no monetary financing," and "no overdraft" clauses in the TFEU. Together, these were supposed to signal that a sovereign default would occur if a Member reneged on its debt obligations. I have argued elsewhere that one plausible explanation for the failure of sovereign bond spreads to adequately reflect the prospect of default might lie in the fact that there was a clear mismatch between the framing of Articles 123 and 125 of the TFEU and the political-economic exigencies required to sustain a single currency.[207] Instead, these provisions might be better understood as serving a political-expressive function, as opposed to a concrete, sanctionable legal function. This function failed in that sovereign yields converged on German levels until the eve of the crisis.[208]

The handling of the liquidity shock from the U.S. sub-prime mortgage crisis by Eurozone policymakers converted a sudden-stop in credit into a full blown sovereign debt crisis.[209] Prior to the global financial crisis, European banks readily consumed U.S. securities—many of which were backed by sub-prime mortgages.[210] This led to a sudden stop in credit in Europe.[211] Every Member that was negatively affected in a significant manner was, however, running a current account deficit.[212] By contrast, none that were running a surplus were significantly hit. The absence of a sovereign LOLR amplified liquidity shocks so that rising risk premiums and deteriorating budget deficits stemming from those higher debt servicing costs negatively reinforced one another. Some Members were forced to assume the debts of their banking systems, rendering them unable to access credit through traditional markets and—for all intents and purposes—bankrupt.[213] The Members could not devalue their currency. Matters came to a head with Greece, which, by early 2010, clearly required a quick sovereign default or significant financial assistance. Although some members of the ECB resisted the provision of a bailout,[214] even the German

[205]Eichengreen, *supra* note 200, at 8.

[206]*See* Case C-27/04, *Comm'n v. Council*, 2004 E.C.R. I-6649.

[207]*See* Quinn, *supra* note 182.

[208]*See* Whelan, *supra* note 203, at 283.

[209]There has been an attempt to establish a consensus narrative regarding how the Eurozone crisis emerged. *See* Richard Baldwin, Thorsten Beck, Agnès Bénassy-Quéré, Olivier Blanchard, Giancarlo Corsetti, Paul de Grauwe, Wouter den Haan, Francesco Giavazzi, Daniel Gros, Sebnem Kalemli-Ozcan, Stefano Micossi, Elias Papaioannou, Paolo Pesenti, Christopher Pissarides, Guido Tabellini, & Beatrice Weder di Mauro, *Rebooting the Eurozone: Step 1—Agreeing a Crisis Narrative*, VoxEU (Nov. 20, 2015), https://voxeu.org/article/ez-crisis-consensus-narrative. Additionally, Philip Lane provides an accessible macroeconomic account. *Supra* note 199. Iversen, Soskice, and Hope provide an equally accessible account from the perspective of comparative political economy. *Supra* note 179.

[210]*See* Whelan, *supra* note 203, at 14.

[211]Philip Lane organizes the relationship between the EMU and European sovereign debt crisis into three phases. First, the legal architecture of the euro plausibly increased fiscal risks in the pre-crisis period. Second, once the banking crisis began to take root, these design flaws in the EMU amplified the fiscal impact of the crisis dynamics through multiple channels. Third, the restrictions imposed by the EMU shaped the post-crisis recovery period along with the chaotic response of the Member States and the failure to have crisis institutions in place. *See* Lane, *supra* note 199.

[212]*See* Lane, *supra* note 199.

[213]For an example of a detailed discussion of Ireland's banking turned sovereign crisis, see Karl Whelan, *Policy Lessons from Ireland's Latest Depression*, 41 ECON. SOC. REV. 225 (2010), and Karl Whelan, *Ireland's Sovereign Debt Crisis*, *in* LIFE IN THE EUROZONE: WITH OR WITHOUT SOVEREIGN DEFAULT? (Franklin Allen, Elena Carletti, & Giancarlo Corsetti eds., 2011), http://finance.wharton.upenn.edu/FIC/FICPress/eurozone.pdf.

[214]ECB Executive Board member, Juergen Stark in January 2010: "The markets are deluding themselves when they think at a certain point the other member states will put their hands on their wallets to save Greece." Lefteris Papdimas & Stephen Jewkes, *EU Visit Starts in Greece, Stark Says No Bailout*, REUTERS (Jan. 6, 2010, 4:17 AM), https://www.reuters.com/article/us-

finance minister acknowledged a disjunction between the rules and the requirements of the circumstances as early as February 2009,[215] followed by the Economic Commissioner in January 2010.[216]

In December 2011, the Head of the ECB, Mario Draghi, announced a modified version of the ECB's Long-Term Refinancing Operations (LTRO), which provided banks with three-year loans at 1% with substantially reduced collateral requirements.[217] This "Sarkozy carry trade" meant that banks borrowed from the ECB at 1% and purchased sovereign debt at a significantly higher yield.[218] Other attempts to cope with the crisis included: The provision of financial support in exchange for structural reforms overseen by the Troika;[219] the establishment of the temporary European Financial Stability Mechanism (EFSM)[220] and European Financial Stability Facility,[221] which were replaced by the European Stability Mechanism (ESM) for new bailouts;[222] and the ECB's Securities Markets Program.[223] In at least three cases—Ireland, Italy, and Spain—the ECB sent letters to Members of the Eurozone. In the case of Ireland, receipt of the letter was immediately followed by a request for a bailout.[224] In the case of Italy and Spain, they contained detailed instructions from the ECB of the structural reforms and fiscal consolidation expected of them.[225] Likewise, the ECB took a strong line on the question of burden sharing with bondholders.[226] In any event, the ECB announced that it would purchase the bonds of distressed Members

ecb-stark/eu-visit-starts-in-greece-stark-says-no-bailout-idUSTRE60519Q20100106. *See also* Whelan, *supra* note 203, at fn.199, 15.

[215]German finance minister Peer Steinbrueck in February 2009: "The euro-region treaties don't foresee any help for insolvent countries, but in reality, the other states would have to rescue those running into difficulty." Bertrand Benoit & Tony Barber, *Germany Ready to Help Eurozone Members*, FINANCIAL TIMES (Feb. 18, 2009), https://www.ft.com/content/825af89a-fe02-11dd-932e-000077b07658.

[216]Economics Commissioner Joaquin Almunia in January 2010: "No, Greece will not default. Please. In the euro area, the default does not exist." Lin Noeuihed & Jon Boyle, *DAVOS-EU's Alumnia: No Chance Greece Default, Euro Zone Exit*, REUTERS (Jan. 29, 2010, 3:06 AM), https://www.reuters.com/article/davos-almunia/davos-eus-almuniano-chance-greece-default-euro-zone-exit-idUSLAE00004520100129.

[217]For details, see European Central Bank, *ECB Announces Measures to Support Bank Lending and Money Market Activity*, EUROSYSTEM (Dec. 8, 2011), https://www.ecb.europa.eu/press/pr/date/2011/html/pr111208_1.en.html.

[218]Paul Yowell, *Why the ECB Cannot Save the Euro*, *in* LEGAL CHALLENGES IN THE GLOBAL FINANCIAL CRISIS 107 (Wolf-Georg Ringe & Peter M. Huber eds., 2015).

[219]The ECB, IMF, and Commission.

[220]TFEU art. 122(2) provided the basis for one of the bailout measures. Council Regulation 407/2010 of 11 May 2010, Establishing a European Financial Stabilisation Mechanism, 2010 O.J. (L118) 1, 1. *See also* European Commission for Economic and Financial Affairs, *European Financial Stabilisation Mechanism (EFSM)*, EUR. COMM'N, https://economy-finance.ec.europa.eu/eu-financial-assistance/euro-area-countries/european-financial-stabilisation-mechanism-efsm_en (last visited Jan. 26, 2023).

[221]Council of the European Union, Directive 9614/10 of 10 May 2010 Regarding the Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union, https://data.consilium.europa.eu/doc/document/ST%209614%202010%20INIT/EN/pdf. The EFSF was incorporated on June 7, 2010.

[222]ESM Treaty was agreed to on February 2, 2012, and came into effect on September 27, 2012.

[223]For an illuminating series of case studies in crisis management by the ECB, see Thomas Beukers, *The New ECB and Its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention*, 50 COMMON MKT. L. REV. 1579 (2013).

[224]The ECB published the correspondence following the European Ombudsman's call for the Governing Council to reconsider its refusal to do so. Although beyond the scope of this study, the correspondence is revealing. *See* European Central Bank, *Irish Letters*, EUROSYSTEM, https://www.ecb.europa.eu/press/html/irish-letters.en.html (last visited Jan. 26, 2023).

[225]Kilpatrick, *supra* note 6, at 344.

[226]In fact, it was reported that an "irate" Jean-Claude Trichet, then President of the ECB, "warned" the then Irish Finance Minister, Michael Noonan, that "an economic bomb would go off in Dublin if he pursued the option of imposing losses on senior bondholders." *See* Sarah Bardon, *Noonan Told 'Bomb Would Go Off' If Bondholders Burned*, THE IRISH TIMES (Sep. 10, 2015, 7:54 PM), https://www.irishtimes.com/business/financial-services/noonan-told-bomb-would-go-off-if-bondholders-burned-1.2347438.

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on the secondary market, as opposed to directly, thereby supporting them notwithstanding the purpose of Article 123 of the TFEU.[227]

Nevertheless, by 2012, the break-up of the Eurozone was a very real possibility. Cyprus, Greece, Ireland, and Portugal had required full bailouts, while Spain had enjoyed a partial bailout focused on its financial system. Italy did not receive a bailout but came close to it. The turning point did not come from a new law; rather, it came in July 2012, when Mario Draghi gave his "whatever it takes" speech to the "Global Investment Conference" in London.[228] In September 2012, the ECB issued a press release setting out the details of Outright Monetary Transactions (OMT).[229] The ECB intervened in the crisis in a quasi-unilateral way. In effect, OMT permit the ECB to buy sovereign bonds without any ex ante limit of a distressed Member State, albeit on the second-hand market, to keep its yields close to that of Germany, as long as that Member State has a credible fiscal plan to ensure the medium-term viability of its debts.[230] Whelan considers the ECB's OMT program as a necessary part of the Eurozone's policy architecture because it is "effectively a sovereign lender of last resort programme in which it [the ECB] is willing to lend to governments that it views as solvent [,] provided they co-operate with a programme of measures designed to restore market confidence."[231]

Therefore, we can summarize the position as follows. Prior to the "whatever it takes" intervention of the ECB, the ECB broadly operated pursuant to a rule: It would not act as sovereign LOLR to the Members. This was justified on the basis of the prohibition on monetary financing found in Article 123 of the TFEU, and perhaps also because doing so might constitute a bailout of sorts as mentioned in Article 125 of the TFEU. In reality, the operation of the rule was never clean-cut; the ECB did provide indirect support to Members through emergency liquidity assistance (ELA), for instance the Sarkozy carry trade. Following the "whatever it takes" intervention and the promise of OMT, the rule was functionally softened to the following rule-with-exceptions:

> The ECB will not act as sovereign LOLR to a Member—except in circumstances *A*, in which case it will act as sovereign LOLR to that Member. *A* was defined as including a Member agreeing to and implementing a program of macroeconomic reforms with the EFSF/ESM supervised by the Troika.

In Gauweiler, the CJEU declared that the ECB's OMT, even in the absence of any ex ante quantitative limit, was consistent with the treaty instruments.[232] The decision of the CJEU follows the spirit of Pringle, which decided that the ESM Treaty was also consistent with EU law.[233] Hinarejos persuasively argues that, together, Pringle and Gauweiler represent the judicial ratification of a shift from rules-based EMU toward a policy-based one in the wake of the crisis.[234] As a consequence, the ECB seemed to enjoy significantly greater choice at the point of application of the no

[227]For an analysis of German and French political decision-making during the crisis, see Helen Thompson, *Germany and the Eurozone Crisis: The European Reformation of the German Banking Crisis and the Future of the Euro*, 20 New Pol. Econ. 851 (2015).

[228]Mario Draghi, President, Eur. Cent. Bank, Speech at the Global Investment Conference in London (July 26, 2012). www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

[229]European Central Bank, *Technical Features of Outright Monetary Transactions*, EuroSystem (Sep. 6, 2012), www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

[230]*See* Iversen et al., *supra* note 179, at 179.

[231]The ECB's Collateral Policy and Its Future as Lender of Last Resort, Eur. Parl. Doc. PE 507.482 (2014), https://www.karlwhelan.com/EU-Dialogue/Whelan-November-2014.pdf.

[232]*See* Gauweiler, Case C-62/14. OMT had been unsuccessfully challenged—the proceedings deemed inadmissible—before the General Court. ECJ, Case T-492/12, *von Storch v. ECB* (Dec. 10, 2013). That decision was unsuccessfully appealed. ECJ, Case T-492/12, *von Storch v. ECB*, ECLI:EU:C:2015:300 (Apr. 29, 2015), https://curia.europa.eu/juris/documents.jsf?num=T-492%252F12&cid=11095.

[233]*See*, *e.g.*, Pringle, *supra* note 8; Alicia Hinarejos, The Euro Area Crisis in Constitutional Perspective, ch.8 (2015).

[234]*See* Hinarejos, *supra* note 8.

sovereign LOLR rule, but this greater freedom has now been called into question, notably by the German Federal Constitutional Court (GFCC).[235]

The "whatever it takes" intervention of the ECB saved the euro, but it did not solve the problem of anemic growth and the specter of secular stagnation.[236] As the central banks around the globe pursued programs of quantitative easing, the ECB followed suit via the public sector purchase program (PSPP).[237] The program provides for the open-ended purchase of the sovereign bonds of Members and the securities of European institutions, until the ECB sees "a sustained adjustment in the path of inflation which is consistent with the aim of achieving inflation rates below, but close to, 2% over the medium term."[238] Again, the program was challenged before the GFCC in Weiss, which, in turn—and only for the second time ever—sought clarification from the CJEU as to its compatibility with the limits implied by the Gauweiler decision; particularly, the treaty prohibition on monetary financing. Again, to the surprise of no one, the CJEU proved reluctant to engage in what Dawson and Bobic called an "intensive and meaningful proportionality review," but instead applied a narrow proportionality test. Thus, the CJEU accepted the procedural safeguards proposed by the ECB without question, so that, as with Gauweiler, "[t]he common thread . . . is that ultimately the ECJ will do, and appears to have done, whatever it takes to save the euro."[239]

Despite the pandemic, and in contrast to the aftermath of the sub-prime crisis, sovereign yields remain ultra-low. Therefore, in light of the effect of the "whatever it takes" announcement, the promise of OMT on sovereign debt yields, and the announcement of PSPP and PEPP, the functional rule can be perceived as shifting closer to the following presumption, developing from a rule-with-exception:

> Act on the assumption that the ECB will act as sovereign LOLR to a Member—unless and until circumstances *A* [are shown to obtain], in which case, the ECB will stop [or reconsider or do something else]. *A* being that the Member is insolvent or is unwilling to co-operate with a program of measures designed to restore market confidence.

In sum, the ECB and the CJEU have condoned an interpretation of the treaty rules which effectively accommodate the creation and development of a sovereign LOLR for the ECB. On the face of it, this sits uncomfortably with the prohibition on monetary financing and raises legitimate concerns of free-riding, moral hazard, and an absence of democratic oversight. This was done by the ECB announcing that it would purchase the debt of distressed Members on secondary markets subject to conditions. The ECB did in fact purchase significant quantities of sovereign debt through its quantitative easing (QE) policies, albeit again subject to conditions. These initiatives were primarily justified on the basis of monetary policy, as opposed to financial stability or supporting the economic policies of the union. They stabilized markets and promoted growth while, as we shall see, legal scholars expressed concern about the way the original treaty rules had been stretched, if not exceeded. Moreover, PEPP is a blend of OMT and QE that has contributed to ultra-low borrowing costs for Members, despite the economic shock of the pandemic. Hence, in the next section, we return to a discussion of rules, choice, and the re-imagining of the monetary financing prohibition to accommodate the establishment of a sovereign LOLR.

[235]Again, for analysis of the application of this discretion from a variety of perspectives, see Beukers, *supra* note 223; Kilpatrick, *supra* note 6; Everson, *supra* note 34.

[236]Lawrence Summers, *Reflections on the New Secular Stagnation Hypothesis*, VOXEU (Oct. 30, 2014), https://voxeu.org/article/larry-summers-secular-stagnation.

[237]*See supra* note 13.

[238]Mario Draghi, President, Eur. Cent. Bank, Introductory Statement to the Press Conference at Frankfurt am Main, (Jan. 22, 2015) (with question and answer), http://www.ecb.europa.eu/press/pressconf/2015/html/is150122.en.html.

[239]Dawson & Bobić, *supra* note 13, at 1006, 1040.

E. "You Shall Not Crucify Mankind Upon a Cross of Gold"[240]

The ECB, supported by the CJEU, has signaled itself sovereign LOLR to the Members, apparently saved the euro, and—to date—played a highly positive role in diminishing the extent of the economic impact of Covid-19 on the Members. The formal account of the trifecta of interventions captured by OMT, PSPP, and PEPP considers them consistent with the treaty provisions, albeit the latter prospectively so.

In Gauweiler, the GFCC, for the first time, asked for a preliminary ruling from the CJEU regarding the compatibility of the ECB's OMT program with EU law. Although Advocate General Cruz Villalón was troubled by the ECB involving itself in both the economic reforms and debt purchasing,[241] one argument before the GFCC was that the program constituted economic and not monetary policy and violated the prohibition on monetary financing. In the reference, the GFCC indicated certain limits that might render it consistent with the constitutional identity of the German Basic Law. The GFCC did not want the program to interfere with the conditionality implied by the ESM/EFSF, yet it wanted limitations on the quantity of the purchases, the length for which they would be held, and the possibility of debt reduction. The GFCC wanted to ensure consistency with their program of integration. The CJEU found that the object and instruments of the OMT program fell within the scope of monetary policy, and that the fact that the program has indirect effects on economic policy did not classify it as economic policy. The CJEU also found the program appropriate and proportional to its objectives on the basis of a thin review. All of this is to say, the CJEU found that the ECB could, without any ex ante limit, purchase the debt of a distressed Member without troubling the prohibition on monetary financing.[242]

In particular, the approach of the ECB and CJEU rests largely on the claim that the ECB is not acting in a manner that is functionally equivalent to breaching the prohibition on monetary financing when purchasing sovereign debt.[243] Empirical questions loom large. Suffice it to say, Listokin suggests that it is hard to dispute the GFCC's underlying concern regarding OMT as "buying the long-term sovereign debt of some Eurozone nations [,] but not others [,] with money created by the central bank is just about the definition of monetary financing."[244] In ordinary times, a prohibited act that is "laundered through third parties" ought not be deemed legal by a court.[245] Similarly, Amarello argues that "the massive purchases of government bonds clearly have the equivalent effects of purchases" from Members, where investors in the primary market are "confident that the ECB will purchase their bonds within a certain period due to OMT."[246] The consequence of OMT, he goes on, would be to utilize market participants as "simple intermediaries," allowing Members to be "indirectly financed by the central bank." The overriding concern is that the original prohibition on monetary financing has been rewritten, such that it is now

[240]William Jennings Bryan, Address to the Democratic National Convention in Chicago (July 9, 1896).

[241]Opinion of Advocate General Villalón at para. 123., Case C-62/14, *Gauweiler v. Deutscher Bundestag* (June 16, 2015).

[242]The decision implied the following conditions: (1) purchases should not be announced; (2) their volume should be limited from the outset; and (3) there should be a minimum period between the issue of the government bonds and their purchase by—technically speaking—the European System of Central Banks (ECSB), which should be defined from the outset in order to minimize the issuing conditions from being distorted.

[243]Specifically, TFEU arts. 119, 123(1), 127(1–2), and ECB/ESCB Protocol No. (4), arts. 17–24. But Beukers has shown that, at its kindest, strong cases can be mounted in either direction. Thomas Beukers, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program: 'In the ECB We Do Not Trust. What About You?'* 15 German L.J. 343, 343 n.1 (2014) (providing an extensive list of the arguments advanced by economists and lawyers for and against the legality of OMT).

[244]Yair Listokin, Law and Macroeconomics 89 (2019). Former Governor of the Bank of England Mervyn King, expressing support for Jens Weidmann's concerns, said, "It is not easy to see how the purchases of the debt of some countries but not others can be construed as solely an act of monetary policy." Mervyn King, The End of Alchemy: Money Banking, and the Future of the Global Economy 386 (2016).

[245]Listokin, *supra* note 244, at 90.

[246]Luca Amarello, *A Legal Approach to Monetary Policy*, *in* Macroprudential Banking Supervision & Monetary Policy 161 (2018).

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effectively allowable as an indirect consequence of monetary policy.[247] Even if this distinction were plausible, so the argument goes, the rules do not provide for indirect monetary financing; it is not what was agreed in the Treaty of Maastricht, nor was it subsequently incorporated into EU law by the Members. De Grauwe, by contrast, argues that through its secondary market purchases, "the ECB does not provide credit to governments," but rather the holders of the bonds who are typically financial institutions. This implies that, legally, "[i]n no way can this be interpreted as monetary financing of government budget deficits."[248] Although, De Grauwe does go on to acknowledge that, "in practice [,] the distinction [is] blurred." If a bank is pressured by its national treasury to purchase its newly issued sovereign debt, then the consequence may come close to the financing of a budget deficit by the ECB.

More importantly, the GFCC's and CJEU's judicial dialogue regarding whether, and to what extent, safeguards exist such that OMT will not function to alleviate the pressure on a Member to undertake the economic reforms required by a program of adjustment agreed with the ESM, largely misses the point. The effect of the ECB announcing itself as a sovereign LOLR is that OMT was never operationalized, but as we have seen, from the "whatever it takes" intervention onwards, the sovereign debt yields of the periphery collapsed to near convergence with that of Germany. Therefore, Italy and Spain did not enter formal ESM programs because they enjoyed the benefits associated with lower sovereign debt yields. It was the credible promise of a sovereign LOLR that alleviated the need for the economic reforms that would have been a sine qua non of ESM financial support.[249] In this context, in Weiss, the CJEU revisited Gauweiler to note that the ECB must build safeguards into PSPP to ensure that the purchases on secondary markets are not equivalent to direct purchases, such that they reduce the impetus for a Member to pursue sound budgetary policy.[250] The CJEU went on to find that the procedural safeguards in PSPP, although weaker than in OMT, satisfy the requirements implied by the prohibition on monetary financing.

But again, much rests on the asserted distinction between direct and indirect sovereign debt purchases, and the assertion that OMT is primarily an element of monetary policy; though it is a vehicle through which distressed Members may be provided with financial support which is closely linked to economic policy, a competence of the Member States and the purpose of the ESM. Similarly, like OMT, PEPP does not require the symmetric purchase of sovereign debt.

In any event, assuming the CJEU's reasoning to be persuasive, the ECB has a narrow formal mandate reflected in a governance structure that has not broadened in conjunction with increased distributional consequences flowing from its choices. That is, from a governance perspective, form has not followed function. The GFCC have expressed concerns regarding the parliamentary accountability of the ECB in the performance of its sovereign LOLR role. Those concerns were foreshadowed by Yowell when he argued that the new role "should be a cause of concern rather than comfort, for it means that bond and stock markets are being distorted by the expectation of monetary financing of public debt [,] and a belief that the ECB has now become a lender of last resort in sovereign bond markets."[251]

Yowell is far from alone in worrying that rule of law is being replaced by rule of experts. Joerges—commenting on the first of the CJEU's crisis decisions, like the ESM—notes with frustration the "irritating" oscillation of the Court between strictly formalist arguments and "sudden

[247]*See* Yowell, *supra* note 218, at 104.

[248]De Grauwe, *supra* note 182, at 183.

[249]Blyth argues that it was ECB policy and not public sector cuts that lowered and stabilized the sovereign debt in the Eurozone. In his view, so long as the markets believe that the ECB will engage in bond buying if yields spike again, then those yields will stay down. *See* Mark Blyth, Austerity: The History of a Dangerous Idea 251 (2013).

[250]*See* Weiss, Case C-493/17 at paras. 106–107.

[251]Yowell, *supra* note 218, at 199. Putting aside the jurisdictional issues associated with doing so, the GFCC echoed Yowell's views in Weiss. *See* Weiss, Case C-493/17 at paras. 180–82, 205–06 (revealing the "considerable concerns" of the GFCC).

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turns" toward "an imagined telos."[252] He decries as "deplorable" the contractionary reasoning of the CJEU in Pringle and joins Everson's plea for "legal honesty."[253] Given that, through the selection of different methods of interpretation, one can beat a path toward different conclusions, Joerges requires a "meta-norm" to guide analysis.[254] In the absence of such a norm, what one makes of the decisions of the CJEU and GFCC in Gauweiler and Weiss is, in significant measure, a function of the perspective from which one views European integration more generally.

The credit crunch that became the Eurozone sovereign debt crisis manifested an existential threat to the European integration project. And so, there was little doubt that the CJEU would undertake the "[H]erculean struggle with the law" necessary to approve OMT.[255] Listokin suggests that:

> . . . these were not ordinary times. Arguably, the ECJ's expansive reading of the Maastricht Treaty can be justified as a necessary response to exigent circumstances. The constitutional structure of the Maastricht Treaty, which likely prevented OMT, was failing when the program was announced. The ECB and the ECJ faced a stark decision: either functionally "amend" the monetary financing prohibition of the Maastricht Treaty by enabling OMT, or allow the Euro currency union possibly to fail. The ECB and the ECJ chose to "amend" the treaty.[256]

Yowell also views the "whatever it takes" intervention and promise of OMT as a likely breach of Article 123—and possibly also Article 125—of the TFEU as they were originally conceived, and dares to pose the awkward question: Should the ECB have saved the euro? Yowell acknowledges the political-economic realities required to sustain the single currency and their potential incompatibility with the prohibition on monetary financing. Moreover, he even allows for the possibility that some legal actors are justified in certain emergencies in violating the law. Nevertheless, he cautions against overlooking the ECB transgressing its mandate to save the euro. Insofar as the ECB was the only institution capable of saving the euro, this is testament to the fact that there is an absence of democratic will to move toward fiscal integration. For Yowell, "if the ECB is the only institution that can save the Euro, then that is a strong reason for it not to attempt to save the Euro." For Yowell, the consequence of the ECB's potential monetization of the debt of the periphery may well leave it as a kind of fiscal authority redistributing wealth absent any, or any adequate, mandate or oversight—a concern that might underlie the GFCC's strongly worded judgments.

Yowell's argument is well made, and the absence of any, or any sufficient, democratic will cannot be brushed aside. Likewise, the concern voiced by the GFCC, perhaps imperfectly, regarding the dearth of parliamentary accountability cannot be ignored. Moreover, as we have seen, this dilemma was a foreseeable consequence of the Maastricht Treaty. Nevertheless, notwithstanding the legitimate normative concerns it raises, this study finds itself in deeper sympathy with the ECB's choice to avoid the potential abrupt collapse of the currency in light of the foreseeable welfare effects that would flow therefrom. Recalling Sunstein's analysis of rules, the prohibition on

[252]*See* Christian Joerges, *Brother, Can You Paradigm?*, 12 INT'L. J. CONST. L. 769, 789 (2014); *see also* Case C-370/12, Thomas Pringle v Government of Ireland, EU:C:2012:756.

[253]More particularly, Joerges objects to the CJEU taking a strict reading of Article 122 such that it engages financial assistance provided by the Union only and not granted by the Members. *See* Joerges, *supra* note 252. Yet, then when interpreting Article 125, it "takes a turn to an imagined telos" and infers from "preparatory work relating to the Treaty of Maastricht" to imply a "logic of the market" to prompt budgetary discipline, which itself purportedly contributes to "a higher objective, namely, maintaining the financial stability of the monetary union." Everson, *supra* note 34.

[254]*See* Joerges, *supra* note 252.

[255]Vestert Borger, *Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler*, 53 COMMON MKT. L. REV. 139, 139 (2016).

[256]Listokin makes plain how seriously he takes the welfare effects of inadequate demand: "A legal decision that is right when the economy is healthy may well be wrong at the zero lower bound on interest rates." LISTOKIN, *supra* note 244, at 6, 90.

financing, as a rule, was never likely to function in absolutist terms—especially when regard is had to the historical-legal context of exchange rate systems and monetary cooperation projects. When placed into historical context, Articles 123 and 125 of the TFEU appear closer to politically convenient compromises that express aspirational ideals than to sober rulemaking. The circumstances necessitating rule departure were not articulated ex ante for political reasons, but this did not mean that no exceptions would ever exist. "Central banks were put on this earth to be lenders of last resort,"[257] and so, for ill or for good, the inability of the Members to agree upon the exceptions required the ECB to determine those exceptions at the point of application. Central banks are in the business of making choices in complex, uncertain situations where both the nature and scope of appropriate support, and the distinction between liquidity and solvency, are contestable. The ECB has been forced to either make such choices, or risk collapsing the entire currency. In light of the approval by the CJEU of the expansion of sovereign debt purchases in Weiss, and the further softening of the constraints on the ECB announced as part of PEPP, the conditions for rule departure have become better elucidated and more transparent. Nevertheless, forcing the ECB to do so has come at a significant cost, raising legitimate concerns vis-à-vis the extent of its parliamentary accountability and democratic oversight more generally.

As we have seen, under the gold standard and the Bretton Woods system, the convertibility rule, implicitly, and the parity rule, explicitly, retained a measure of discretion at the point of application; rule non-adherence was an option in certain circumstances. In the case of the euro, the sum and substance of the treaty provisions is to prohibit bailouts, overdrafts, and monetary financing. Yet, in the wake of the Eurozone crisis, arguably all of these have been provided absent any amendment to Articles 123 or 125 of the TFEU. Placed within the genealogy of monetary rules, the intervention of the ECB into the euro crisis—through its "whatever it takes" message and promise of OMT—represents little by way of historical anomaly. The ex ante specification of an outcome embedded in a rule ran up against the realworld requirement for discretion at the point of application. The effect of the intervention of the ECB, supported by the Members as signatories of the ESM—albeit an instrument of international and not initially EU law—and the CJEU, was to soften the ex ante rule embedded within the treaty instruments to a rule-with-exceptions, and increasingly, to construct a rule that appears to function more like a presumption, despite the concerns now raised by the GFCC. So long as there is a disruption to monetary policy transmission or a threat to the singleness of the single currency, if a Member agrees to the ECB's conditions and has a credible fiscal plan to ensure the medium-term viability of its sovereign debt, then that Member may, in practice, receive indirect financial support notwithstanding Article 123 of the TFEU.[258] As we have seen, often there is no operational distinction between a rule-with-exceptions and a presumption. The difficulty with rules-with-exceptions manifests under conditions of uncertainty where it is unclear whether rule adherence or rule departure is required by the circumstances. Difficult choices are made at the point of application, during which time paralysis can ensue, as neither choice is justified. This is what happened from 2008 up until the "whatever it takes" intervention. The ECB then declared itself sovereign LOLR subject to conditions. In doing so, it raised concerns over the extent of its democratic accountability. Over time, and in the wake of judicial review, the conditions for rule departure are becoming increasingly honed and refined. By crafting clear, transparent, and credible sovereign LOLR rules, the ECB is increasingly operating in practice pursuant to something more akin to a presumption. That is to say: Under conditions of uncertainty, the ECB will simply continue to adhere to the presumption that it will act as LOLR unless the conditions for rule departure manifest. This, in significant part, explains the relatively low and stable borrowing costs enjoyed by Members in the teeth of the significant economic shock created by the global pandemic. The position stands in stark contrast to the aftermath of the credit crunch until Draghi's "whatever it takes" intervention in July 2012.

[257]Eur. Parl. Doc. PE 507.482, *supra* note 231, at 19.

[258]*See* Gauweiler, Case C-62/14 at para. 62.

In light of the experience of the convertibility and parity rules, this moderation is not only less remarkable, but necessary. Those rules serve as a reminder of the importance of monetary policy and the value of macroeconomic flexibility.[259] As noted by O'Rourke and Taylor, calls for adherence to the sum and substance of Articles 123 and 125 of the TFEU naturally collided with the exigencies of the Keynesian short-term time frame during which politics unfold.[260] In an attempt to solve a free-rider problem through legal instruments, the Member States set limits on the commitments made that proved insufficiently flexible during crisis and risked collapsing the entire EMU infrastructure until the scope of commitment was softened.

Finally, as the ECB is an institution with significant technical expertise, the likelihood that it is capable of exercising its limited discretion fruitfully at the point of application is increased. The ECB proved itself increasingly capable of undertaking a pragmatic, efficient analysis of the foreseeable costs and benefits that would flow from the application of the rule—or, in this case, departing from the rule. Through the crafting of clear, transparent, and effective sovereign LOLR rules, the functional constitutional order might be such that the ECB will apply a presumption. From a perspective of narrow rule-adherence, this undermines the rule of law insofar as the exceptions were not introduced in a manner consistent with formal parliamentary assent. Nevertheless, no useful purpose is served by criticizing the ECB for avoiding the collapse of an unsustainable legal regime. Moreover, even if the Eurozone could have survived the strict application of the no sovereign LOLR rule, Kilpatrick has argued—with considerable force—that the manner in which macroeconomic reforms in the periphery Members were agreed to and implemented also troubled the rule of law and was incompatible with the legal values underpinning the EU.[261]

Finally, it bears repeating that pursuant to Article 127 of the TFEU, without prejudice to the objective of low and stable inflation, the ECB shall support the general economic policies of the EU, and that contributing to the stability of the financial system is an enumerated objective. Therefore, the ECB may well have little cause to fear the GFCC's call for greater public transparency surrounding the requirement for policies such as OMT, PSPP, and PEPP over and above monetary policy transmission, as each has proven proportionate to, and justified by, the broader objectives set forth in Article 127 of the TFEU.[262] Indeed, if greater transparency in ECB decision-making is the cost of establishing the presumption that the ECB will act as sovereign LOLR at times of crisis, then it is a small price to pay for the welfare benefits associated with lower sovereign borrowing costs, increased economic growth, and significantly greater financial stability.

F. Conclusion

At the outset of this article, it was observed that the European integration project has represented a second-order decision by Member States to cooperate to construct markets. Exchange rate markets played the role of distributing, in significant measure, the balance of adjustment between states arising from trade and during periods of economic instability. The Treaty of Maastricht was intended to replace those markets with a monetary rule supported by the SGP, a ban on bailouts, and a prohibition on monetary financing. For ill or for good, it has succeeded in replacing that market with an institution that acts as LOLR to the Members in circumstances that have been introduced ex post.

Without doubt, it would have been preferable for the Members to have made better provision for financial stability in the original treaty framework or proved themselves capable of responding

[259]*See* O'Rourke & Taylor *supra* note 1, at 177.

[260]*See id.*

[261]*See* Kilpatrick, *supra* note 6.

[262]Case in point: Philip Lane, Exec. Board Member, Eur. Cent. Bank, Speech at the Financial Center Breakfast Webinar in Frankfurt, The ECB Monetary Policy Response to the Pandemic: Liquidity, Stabilisation, and Supporting the Recovery (June 24, 2020) (setting out the ECB's monetary policy response to the pandemic), ~https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200624~d102335222.en.html.

to the inadequacies of the constitutional architecture of the ECB by way of pragmatic political compromise enshrined by way of formal treaty revision. But neither of those failures, nor the decision to soften the no sovereign LOLR rule, represent much by way of a historical anomaly. On the contrary, international monetary rules have a long pedigree as politically expedient compromises that fail to bear their burden. Ad hoc compromises and contentious economic reforms as a sine qua non for liquidity enjoy a long, vexed history. In fact, rules that solve the free-rider problem, yet remain responsive to the exigencies of circumstances, are the historical anomaly.

All of this points to the likelihood that the ECB will continue to house conflict over the distribution of the costs of financial stability. This is so despite the fact that, as an independent central bank at the EU level, the ECB is not subject to the jurisdiction of any national court. The spilling over of that conflict to a dispute between the GFCC and the CJEU provides impetus for reform projects to address the disassociation between the formal and functional constitutional architecture of the EMU. That is to say, if the Bundesbank is torn between its domestic constitutional obligations and those implied by the EU legal order, it risks undermining the Eurozone monetary architecture. The effective transmission of monetary policy and financial stability are dependent, in significant part, upon the credibility of this legal architecture. All Members benefit from a commitment to low and stable inflation—itself contingent on the credibility of the ECB.

Through the clear, credible, and effective articulation of the requirements necessary for rule departure, a more stable and sustainable euro would be constructed. This would require making politically contentious choices ex ante. Yet, such rules would diminish the perceived excessive politicization of the ECB, as it would simply adhere to the rule at the point of application unless and until the clear conditions necessary for rule departure be met.

The alternative is not—and never was—absolute adherence to the literal wording of Articles 123 and 125 of the TFEU come what may; it was always a rule-with-exceptions. Under conditions of uncertainty, the ECB was forced to make choices regarding whether the circumstances required rule adherence or rule departure—meaning whether to create an exception. Those choices were made at the point of application, thereby amplifying their political and legal contentiousness. Therefore, it is not the softening of the rule toward a rule-with-exceptions or the construction of a presumption that threatens the legal order. Rather, it is the paralysis implied by forcing the ECB to make politically and legally contentious choices at the point of application—only to be inevitably reviewed by CJEU and the GFCC—that threatens the sustainability of the euro.

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