The European Economic Constitution in Crisis: A Conservative Transformation

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Abstract: The original constitution of Economic and Monetary Union (EMU) rested on a neoliberal approach to interstate federalism à la Hayek. This approach appealed to political elites at the time of the Maastricht Treaty, promising to overcome the so-called 'crisis of governability' of the 1970s and early 1980s by constraining the capacity of Member States to respond to democratic demands, without at the same time constructing a comprehensive governmental apparatus at the European level. The original EMU thus sought to delink democratic legitimation from governmental capacity and to constrain what capacity was left. The Eurozone Crisis, however, introduced a 'crisis of ungovernability,' revealing that the original constitutional framework had failed in several respects. In efforts to salvage it, European and domestic political elites and institutions sought to correct the capacity deficit but only while imposing, in an authoritarian fashion, neoliberal policies and reforms. While early signs in response to the Covid-19 crisis suggest that the 'new EMU' permits a departure from neoliberal prescriptions, the other deficit of EMU is as glaring as ever: democracy remains a problem to be overcome rather than a potential to be realised.

Keywords: Economic and Monetary Union, Eurozone Crisis, neoliberalism, authoritarian liberalism, economic constitution

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1. INTRODUCTION

The decade-long Eurozone Crisis, and now the Covid-19 crisis, have challenged some of the key assumptions about the European economic constitution. In particular, they have challenged two of its core ideological premises: that inflation is the primary economic problem of democratic capitalism and that markets will discipline states' fiscal practices. Price stability, it turned out, was insufficient for financial stability, and market discipline was ineffective in ensuring fiscal prudence. In response to the Eurozone Crisis and, more spectacularly, the Covid-19 crisis, states took on an enormous responsibility for economic activity, both with and without the support of European institutions. As a consequence of bank bailouts, furlough schemes, direct state transfers, fiscal stimulus programmes, and monetary stimulus, the balance between private, market-based regulation and public intervention has shifted over the course of the long decade since the global financial crisis. In response to economic crises and a (secularly) stagnating economy, the state, and public authority more broadly, has returned to the centre stage.[1]

The European economic constitution, traditionally conceived as a neoliberal or ordoliberal construct, was designed to promote a competitive market economy and to insulate the market from democratic pressures. It was not imagined as a planned economy. Nor was it imagined as one in which supranational economic government would supplement the single currency. A key question, then, is how have the crises of the recent past and the present altered the European economic constitution and its regulation of the exercise of public authority?

A thorny issue in this regard is that although the constitution of the Economic and Monetary Union (EMU) has changed over the last decade, the policies pursued have only to a limited extent, and only very recently, shifted from those traditionally associated with neoliberalism and ordoliberalism. The policies pursued through the Eurozone Crisis overwhelmingly prioritised fiscal retrenchment, privatisation of public infrastructures, and labour market flexibilization. While the constitutional framework, as sanctioned by the European Court of Justice, became more permissive, suspending market forces permanently or temporarily, interventions left little if any room for democratic debate and accountability. This has been characterised as a form of 'authoritarian liberalism', where liberal economic ends have been pursued by authoritarian means, including the suspension, bypassing and repression of democracy.[2]

Does the response to the Covid-19 crisis challenge this characterisation? While it remains too early to predict the mid-term let alone long-term consequences of the

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[1] Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (New York: Verso, 2014); Lawrence H. Summers, "The Age of Secular Stagnation" 95:2 *Foreign Affairs* (2016), 2–9.

[2] See Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford: Oxford University Press, forthcoming); "Authoritarian Liberalism in Europe: A Common Critique of Ordoliberalism and Neoliberalism" 45:7-8 *Critical Sociology* (2019), 1023-1034; "Authoritarian Liberalism as Authoritarian Constitutionalism" in G. Frankenberg and H. Alviar (eds) *Authoritarian Constitutionalism* (Cheltenham: Edward Elgar, 2019); "Authoritarian Liberalism: The Conjuncture Behind the Crisis" in E. Nanopoulos and F. Vergis (eds) *The Crisis Behind the Crisis: The European Crisis as a Multi-dimensional Systemic Failure of the EU* (Cambridge: Cambridge University Press, 2019); "Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?" 21:3 *European Law Journal* (2015), 313-339; "The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union" 14:5 *German Law Journal* (2013), 527-560.

pandemic response, early indications suggest a break from the neoliberal and ordoliberal worldview, but without rectifying the Eurozone's problems of democratic legitimation. The break is most notable with regard to the recent suspension of state aid rules, the relaxation of budget deficit rules, and the European Central Bank's (ECB) embrace of its role as 'lender of last resort'. The EU's recovery and resilience fund also suggests an inflection of the rigid economic constitution entrenched at Maastricht, by opening the possibility of a greater degree of joint indebtedness and transnational solidarity.[3]

It is argued here that this inflection, although more oriented to the use of governmental powers in pursuit of social objectives, and more open-textured in its conditioning of public authority, is stuck in an authoritarian framework of governing. The task of democratising the new European economic constitution or reclaiming democratic authority over the economy at the domestic level remains unfulfilled. The transformation across the recent conjuncture is therefore of a limited and quite possibly temporary variety. It remains, in other words, a 'conservative transformation'.

The paper proceeds as follows. We first sketch the Maastricht constitutional structure which delinks the exercise of governmental powers from their democratic authorisation (part 2). We then explain the neoliberal logic of this construction by turning to Hayek's theory of interstate federalism, which, after laying largely dormant for several decades, was resurrected following the so-called *crisis of governability* of the 1970's, when democracy was (again) presented as over-demanding on the governing capacity of the state, and requiring 'external constraints' (part 3). The euro-crisis, however, exposed a problem of a different type, a *crisis of ungovernability*, with the Maastricht constitution revealing itself as overly constraining, allowing insufficient room for public intervention even when this was demanded. The euro regime could only resort to harsh disciplining of the Member States through the constitutionally dubious negotiation of strict conditionality measures; a strategy whose application was reinforced by the demand for strengthened European sovereignty or, as we shall call it, a 'meeting of Hayek and Schmitt' (part 4). In this combination, the meaning of sovereignty is transformed. Reduced to *potentia*, to the functional capacity of European institutions and figureheads to offer effective and protective government, sovereignty loses its grounding in *potestas*, the legitimacy of democratic rule (part 5). We conclude by noting that although the EU's response to the Covid-19 crisis suggests an inflection away from neoliberal and ordoliberal market logic, it largely confirms the trajectory of authoritarianism (part 6).

[3] For some doubts that this amounts to a Hamiltonian moment, see Marco Dani, Joana Mendes, Agustín José Menéndez, Michael A. Wilkinson, Harm Schepel, Edoardo Chiti, "'It's Political Economy…' Weiss as a Moment of Truth for the Eurozone and the EU" 19:1 *International Journal of Constitutional Law* (2021), forthcoming.

2. THE MAASTRICHT ECONOMIC CONSTITUTION: DELINKING THE EXERCISE OF GOVERNMENTAL POWERS FROM THEIR AUTHORISATION

The Maastricht Treaty established a comprehensive constitutional framework for the exercise of governmental powers in the Eurozone.[4] While the elaboration of this framework was elite-driven, EMU's creation, like the EU treaties more generally, was attributed to the will of the European peoples.[5] The Treaty did not, however, establish institutional mechanisms through which the multiple wills of the several peoples could be formed into a single will, continuously informing the means and ends of government. The Member States and peoples, in other words, did not create political institutions to govern EMU in its totality.[6] Maastricht thereby entrenched a distinction between the authorisation and exercise of governmental powers that was supposed to limit governmental flexibility at both the Member State and Union level, subjecting governmental discretion to constitutional rules rather than ordinary political contestation. Since the Maastricht Treaty was created by the Member State 'peoples' as distinct political subjects, any violation of this distinction – say, by allowing the European Parliament to control the ECB's exercise of powers – would threaten the continued existence and authority of the Member State peoples as separate political subjects.[7]

This distinction between the authorisation and exercise of governmental powers is reflected in the constitutional separation of the 'fiscal' and 'monetary' dimensions of economic policy, making it impossible for any single public authority to control all the main levers of macroeconomic power. It gives constitutional form to a dual conception which had become dominant among policy-elites at the time of the Maastricht Treaty:[8] limited political authority in economic matters and technocratic authority in monetary affairs.

Since the ECB's independence in conducting monetary policy was established by Treaty (article 130 TFEU), its institutional form and its actions escape the control of any constituted body of ordinary political representatives. As such, the ECB's authority does

[4] David H. McKay, *Federalism and European Union: A Political Economy Perspective* (Oxford: Oxford University Press, 1999); Signe Rehling Larsen, *The Theory of the Federation and the European Union* (Oxford: Oxford University Press, 2021).

[5] This has been characterised as a 'democratic naissance', see Chiara Zilioli and Martin Selmayr, *The Law of the European Central Bank* (Oxford: Hart, 2001), 49; see also Dieter Grimm, "Sovereignty in the European Union," in J. Van der Walt and J. Ellsworth (eds) *Constitutional Sovereignty and Social Solidarity in Europe* (London: Bloomsbury/Nomos, 2015), 48; Miguel Poiares Maduro, "Opinion of Advocate General Poiares Maduro in Kadi" (CJEU, 16 January 2008), 21.

[6] This can to an extent be generalised to the project of European integration as a whole, with its 'disconnect' between 'supranational regulatory power', and 'national democratic and constitutional legitimacy,' see Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010), 28.

[7] This is the essence of the German Constitutional Court's 'no demos' thesis, which also informs its jurisprudence on questions relating to the ECB in cases such as *Brunner*, *OMT* and *PSPP*. For a discussion of this principle in relation to the ECB's handling of the Eurozone Crisis, see Hjalte Lokdam, "'We Serve the People of Europe': Reimagining the ECB's Political Master in the Wake of Its Emergency Politics," 58:4 *Journal of Common Market Studies* 58 (2020), 978–98.

[8] David H. McKay, *Federalism and European Union: A Political Economy Perspective* (Oxford: Oxford University Press, 1999); Kenneth Dyson and Kevin Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (Oxford: Oxford University Press, 1999).

not depend on electoral majorities or other ways of expressing a changing political will. It is, of course, subject to judicial review by the European Court of Justice. But that this is the only potential avenue for challenging the ECB's acts (an avenue narrowed by the recent jurisprudence of the Court in *OMT* and *Weiss* which allows the ECB to escape serious judicial scrutiny with reference to its 'broad discretion'),[9] – only underlines the Treaty's attempt to depoliticise monetary policy. While the absence of meaningful political control of the ECB could conceivably be legitimated in the early phase of the project by the ratification of its founding Treaty, it meant, in practice, that the ECB exercised an unelected power largely beyond political (and, it turned out, legal) accountability; an arrangement that became particularly problematic when the Eurozone Crisis struck. This radical independence, however, was neither unforeseen nor considered unjustified by elites at the time. René Smits, then head of De Nederlandsche Bank's legal department, captured this view succinctly: 'The fact that it will be difficult to correct the ECB's behaviour, much more so than in respect of State central banks thus far, is unavoidable in the present constitutional make-up of the Community … it *may even be desirable* in view of the lack of a tradition of independence for central banks in Europe.'[10]

The absence of democratic controls over the ECB is legitimised within the EMU's constitutional structure by the single-minded pursuit of price stability, which is the monetary constitution's central *substantive* feature (3(3) TEU; article 119(2), 127(1) TFEU). The price stability anchor is, on the one hand, a justification for the ECB's independence, as EMU rests on the theory that central bank independence is the surest means of securing price stability. On the other hand, it constitutes a means of constraining the ECB's discretion because it is not allowed to exercise its governmental authority in a manner that jeopardizes this objective.[11] Thus, if the ECB's independence from all other governmental bodies (including European ones) is a means of depoliticising the conduct of monetary policy, the price stability mandate is intended to ensure that the ECB itself does not become 'political' in the sense of choosing between competing objectives. It is substantively constrained by its limited mandate. The ECB was supposed to be radically independent in a formal respect, but radically dependent in a substantive respect.

The upshot is that the capacity of governmental actors to control economic affairs is constrained at both the European and the Member State level. Fiscal responsibility remained with the Member States. This meant that the control of taxes, public spending and other aspects of economic policy was to remain subject to the political process in the individual Member States. EMU, in other words, had to respect the 'existence and preservation of [Member State] *plurality,*' as the Delors Report put it, with the Member

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[9] See, e.g., Vestert Borger, "Central Bank Independence, Discretion, and Judicial Review" in J. Mendes (ed) *EU Executive Discretion and the Limits of Law* (Oxford: Oxford University Press, 2019), 118–31; Lokdam, "'We Serve the People of Europe'"; Dani et al "'It's Political Economy…'"

[10] René Smits, *The European Central Bank – Institutional Aspects* (The Hague: Kluwer Law International, 1997), 500 (emphasis added); see also Zilioli and Selmayr, *The Law of the European Central Bank*, 48; Otmar Issing, *Should We Have Faith in Central Banks?* (London: The Institute of Economic Affairs, 2002), 43; European Central Bank, "The Accountability of the ECB," *ECB Monthly Bulletin* (November 2002), 47; Karl Otto Pöhl "Herr Pöhl discusses the basic features of a European monetary order," speech in Paris, 16 January 1990 (Historical Archives of the European Union, TPS-193), 5-6.

[11] See Issing, *Should We Have Faith in Central Banks?*; Borger, "Central Bank Independence."

States retaining 'a degree of autonomy in economic decision-making.'[12] The Maastricht Treaty outlined a set of general aims for economic policy – including a number of fiscal conditions and requirements ('convergence criteria') later elaborated in the Stability and Growth Pact (SGP) – that were intended to ensure the basic fiscal homogeneity necessary for price stability.[13] While both the convergence criteria and the SGP were notoriously under-enforced in the early years of the EMU, they reflect the idea that membership in the EU entails a commitment to an order of constraints on economic policymaking at the Member State level.

The order of constraints and the principle of Member State responsibility for fiscal policy was reinforced by a number of specific prohibitions contained in the Treaty, most notably the ban on monetary financing of Member States by the ECB (article 123 TFEU) and the no-bailout clause (article 125 TFEU). Their intended effect was to ensure that Member State governments remained subject to market discipline: any policy initiative had to be financed through taxes and/or borrowing on market terms.[14] The discretion left to Member State governments should not, in other words, allow them to collectivise the potential costs of 'irresponsible' or 'irrational' policies; in a different vernacular, the aim was to avoid moral hazard. This also meant that the feasibility of a particular economic programme was subject to market evaluation. The economic policy discretion of Member States was thereby subjected to certain self-imposed but externalised limits (creating a *vincolo esterno*, as the Italians put it).[15] These limits were linked strongly to the original commitment, but subsequently delinked from ordinary democratic accountability.

The combination of a politically independent monetary policy, the absence of a single fiscal authority, and the subjection of Member State fiscal policy to market discipline offered the macroeconomic constitutional superstructure to the already existing 'microeconomic constitution' of the single market freedoms.[16] A better understanding of the consequences of EMU in terms of general governmental capacity with respect to economic affairs can be gained by considering the link between the micro- and

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[12] Committee for the Study of Economic and Monetary Union, "Report on Economic and Monetary Union in the European Community," [aka 'Delors Report'] (EC Commission, 17 April 1989), 13 (emphasis in original).
[13] The economic case for the necessity of convergence criteria and fiscal rules is questionable. On this, see Paul De Grauwe, "Monetary Union and Convergence Economics," 40:3 *Papers and Proceedings of the Tenth Annual Congress of the European Economic Association* (1996), 1091-1101; *Economics of Monetary Union*, 13th ed. (Oxford: Oxford University Press, 2020), ch. 11. So is the case for the necessity of relative economic homogeneity once the monetary union is established, see Waltraud Schelkle, *The Political Economy of Monetary Solidarity: Understanding the Euro Experiment* (Oxford: Oxford University Press, 2017). However, as Schelkle (p. 1) notes, heterogeneity may spark a mistrust and lack of understanding between the diverse parties that makes collective action in terms of risk sharing more difficult. Whether this is enough to account for Europe's preoccupation with convergence is moot.
[14] Alexandre Lamfalussy, "Macro-Coordination of Fiscal Policies in Economic and Monetary Union in Europe," in *Collection of Papers Submitted to the Committee for the Study of Economic and Monetary Union* (Luxembourg: Office for Official Publications of the European Communities, 1989), 91–126.
[15] See Kenneth Dyson and Kevin Featherstone, 'Italy and EMU as a vincolo esterno: Empowering the Technocrats, Transforming the State" 1:2 *South European Society and Politics* (1996), 272-299; Christopher J. Bickerton, *European Integration: From Nation-States to Member States* (Oxford: Oxford University Press, 2012). Self-imposed because the Member States themselves signed up for them; externalised because the limits were enshrined in a legal framework beyond the control of the political authorities of any one Member State.
[16] Kaarlo Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015).

macroeconomic elements.[17] To help explain this we can turn to Friedrich Hayek's theory of interstate federalism.

3. INTERSTATE FEDERALISM: MILITANT DEMOCRACY OR NEOLIBERALISATION BY STEALTH?

In the constitutional imaginary of interstate federalism, elaborated by Hayek in 1939,[18] political authority in economic affairs is confined at all levels of government. Although its focus is on the structure of policymaking rather than the specific content of policies, it presents a theory of the expected outcomes of the structural conditions of federalism, and this includes traditional 'neoliberal' policies such as deregulation, privatisation and fiscal consolidation. These outcomes are not necessarily explicitly articulated goals but they flow from the general restriction of governmental power through the exercise of market discipline.

The link between the micro- and macroeconomic constitutions is crucial to the neoliberal theory of economic federalism. As Hayek put it:

> The absence of tariff walls and the free movements of men and capital between the states of the federation has certain important consequences … They limit to a great extent the scope of the economic policy of the individual states. If goods, men, and money can move freely over the interstate frontiers, it becomes clearly impossible to affect the prices of the different products through action by the individual state. The Union becomes one single market.[19]

According to Hayek, 'the federation will have to possess the *negative* power of preventing individual states from interfering with economic activity in certain ways.'[20] This, in essence, is a description of 'negative integration.' In the EU, negative integration was given impetus in the early decades following the Treaty of Rome through the judicial activism of the

[17] This is a key aspect of Fritz Scharpf's work on the neoliberalising consequences of 'negative integration' in a political structure that makes 'positive integration' slow, cumbersome and subject to multiple veto players (see e.g., Fritz W. Scharpf, "After the Crash: A Perspective on Multilevel European Democracy," 21:3 *European Law Journal* (2015), 384-405; *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999).
[18] Friedrich A. Hayek, "The Economic Conditions of Interstate Federalism," in *Individualism and Economic Order* (Chicago, IL: The University of Chicago Press, 1948), 255–72. For similar neoliberal accounts of federalism, see Wilhelm Röpke, *International Order and Economic Integration* (Dordrecht-Holland: D. Reidel Publishing Company, 1959) and Lionel Robbins, *Economic Planning and International Order* (London: Macmillan and Co., Limited, 1937). See Martin Höpner and Armin Schäfer, "Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting," 66:3 *International Organization* (2012), 429–55, and Streeck, *Buying Time,* for analyses that similarly highlight the structural similarity between Hayek's vision of interstate federalism and the EU/EMU.
[19] Hayek, "The Economic Conditions," 258. The logic informing this is that associated with jurisdictional or regulatory arbitrage, which predicts a taxational and regulatory 'race to the bottom' within a single market of several otherwise independent jurisdictions. Under such conditions, states are less able to effectively introduce tax policies or regulatory regimes that place onerous demands on individuals or firms because of the freedom of movement. As such, the tendency is towards a form of government that is less intrusive in the economic lives of its citizens, natural and artificial, not because of conviction but because intervention is simply counter-productive.
[20] Ibid., 267 (emphasis added).

European Court of Justice, as it turned Treaty law into an economic constitution with the help of domestic courts and acquiesce of governments.[21] But the dynamic itself is built into the very structure of economic integration based around the principle of open, competitive markets. This structure limits the individual state's capacity to effectively control economic activity within its borders, including through taxation (since people, firms and capital can relocate), and it curtails the power of certain organised interests within the state.[22]

As Hayek emphasises, the powers denied to the individual states can only to a limited extent be transferred to the federal level. On the one hand, this is because the federation implies the continued existence of the constituent states as autonomous entities, instead of the creation of a sovereign federal state with superior political authority. On the other hand, the federal level can act only on a common agreement among the constituent states. As such, nothing in principle prevents it from adopting whatever policy the states agree to, but the difficulty is in reaching agreement. The limited power of the federation is thus not a necessary principle of federalism but a consequence of the relation between the constitutional structure of the federation and the 'material constitutions' of its constituent parts.[23]

In principle, the federation's governmental capacity is open-ended.[24] However, 'agreement will be limited in inverse proportion to the homogeneity and the similarity in outlook and traditions possessed by the inhabitants of an area.'[25] A federation cannot to the same extent as the nation-state rely on 'common ideals and common values.'[26] It cannot, in other words, rely on the national myths and ideologies that justify the sacrifice of the interests of some members of the community in the name of the *common* good.[27]

An interstate economic federation, with a single market and a single currency as the two most important structural features, thereby introduces (or reintroduces) a governmental order of relative *laissez faire*.[28] While it does not dismantle existing programmes of market intervention in one stroke, it reduces the general governmental capacity of the states, without at the same time generating a corresponding Union level governmental capacity to respond to socio-economic developments as they arise.[29] While the constitution may not explicitly provide for neoliberal policies (privatisation,

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[21] Scharpf, *Governing in Europe*, ch. 2.

[22] Hayek, "The Economic Conditions," 261; see also Poul F. Kjaer, "The Transnational Constitution of Europe's Social Market Economies: A Question of Constitutional Imbalances?" 57:1 *Journal of Common Market Studies* (2019), 143-58, who highlights that European integration has to a large extent strengthened the state vis-à-vis corporate interests within the state.

[23] Marco Goldoni and Michael A. Wilkinson, "The Material Constitution," 81:4 *The Modern Law Review* (2018), 567-97. As Hayek, "The Economic Conditions," 266 (emphasis in original), notes: 'Whether the federation will exercise these powers [of governmental intervention in economic activity] will depend on the possibility of reaching true agreement, not only on *whether* these powers are to be used, but on *how* they are to be used.'

[24] Hayek, "The Economic Conditions," 268: there can be 'ample scope for economic policy in a federation … there is no need for extreme laissez faire in economic matters.' See Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Oxford: Hart Publishing, 2016), for an analysis of the EU that stresses this point.

[25] Hayek, "The Economic Conditions," 264.

[26] Ibid.

[27] Ibid., 262-3.

[28] Ibid., 259-60.

[29] Scharpf, *Governing in Europe*; on this process in history of the US, see Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton, NJ: Princeton University Press, 2017).

deregulation, labour flexibility etc.), it orients the exercise of governmental authority in a manner that gradually reduces the possibility for any other effective intervention in economic life. The 'proper' liberal distinction between state and society, the political and the economic, can thereby (once again) be established through federation.[30]

Although Hayek's schema remained latent for several decades it would be awakened in the 1980's and 90's, when EMU was in the design process. It is beyond the scope of this paper to explain the full geopolitical, political, and economic circumstances of EMU's birth, but it is worth stressing one important problem that it was presented as addressing: the problem of governmental 'overload' or the 'crisis of governability' perceived to have affected Western democracies in the 1970s and 80s.[31]

The language of the 'crisis of governability' reflected the claim that electorates and interest groups placed increasing, excessive and often contradictory demands on the state. Democratic politics, according to some observers at the time, placed an 'excessive burden … on the "sharing out" function of government', understood as 'the activities of public authorities in influencing the allocation of resources, both through taxation and expenditure policies and through direct intervention in the market place'.[32] The state, in other words, was being asked to do more than it was able to accomplish effectively. This was tied to the observation that the Keynesian instruments of economic government, on which most capitalist democracies had to some extent relied since the end of World War II, were no longer working; at least not for capitalists, whose profits, as Marxist observers highlighted, were being squeezed by the wage demands of an increasingly self-confident working class.[33]

Whatever the nature of the crisis, the crisis of governability was seen to be epitomised by the failure of many Western states to control inflation, which in turn was presented as

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[30] See also Wilhelm Röpke, *International Order and Economic Integration,* 108 (emphasis in original), who, in the context of the debate on European economic integration, argued that 'little would be gained, if the sovereign right, which today the governments invoke to intervene in economic life, were taken away from them solely for the purpose of transferring it to an international authority … Certainly the lessening of national sovereignty is one of the most compelling commands of our time, but the excess of sovereignty should be *abolished* and not *transferred* to a higher geographical unit'.

[31] See, e.g., Michael J. Crozier, Samuel P. Huntington, and Joji Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York: New York University Press, 1975); Anthony King, "Overload: Problems of Governing in the 1970s," 23:2&3 *Political Studies* (1975), 284-96. In 1939, Hayek, "The Economic Conditions," 271, drew on a similar analysis: 'Government by agreement is only possible provided that we do not require the government to act in fields other than those in which we can obtain true agreement. If, in the international sphere, democratic government should only prove to be possible if the tasks of the international government are limited to an essentially liberal program, it would no more than confirm the experience in the national sphere, in which it is daily becoming more obvious that democracy will work only if we do not overload it and if the majorities do not abuse their power of interfering with individual freedom. Yet, if the price we have to pay for an international democratic government is the restriction of the power and scope of government, it is surely not too high a price.'

[32] Samuel Brittan, "The Economic Contradictions of Democracy," 5:2 *British Journal of Political Science* (1975), 130 (emphasis removed).

[33] See, e.g., Erik Olin Wright, "Alternative Perspectives in Marxist Theory of Accumulation and Crisis," 6:1 *Critical Sociology* (1975), 24–26. Crucially, Marxist analyses of the crisis of the 1970s emphasised that it was a crisis of capitalism whose roots were found in the relations of production and the process of capital accumulation, not in the democratic demands on the state.

a product of the democratic political process itself.[34] Inflation was thus presented as a product of democratic excesses: the people demanded too much of governments and governments tried to do too many (contradictory) things. This narrative rested in important part on the idea (and myth) that the economy operates according to immutable laws essentially beyond the control of political authorities. That is, governments might try to govern as if those laws did not apply, and they might even succeed in suspending them for a time, but at some point the consequences of not heeding them would be felt. The economy would strike back with a vengeance and the 1970s' combination of high inflation and high unemployment ('stagflation') was interpreted as evidence of this. In the last instance, the immutable laws of (capitalist) economics trump politics. This in turn meant that even in the absence of formal constraints on governmental capacity, this capacity was always already constrained by the conditions of the (world) market.[35] Ultimately, political elites argued, the failure to implement reforms that incorporated such constraints in the activity of governing itself threatened to put an end to liberal democracy as such.[36]

Concern that political demands were becoming excessive, on the one hand, and that the capacity of the state to deliver on those demands was waning, on the other, created an obvious problem of legitimacy. The conservative/neoliberal response, which fitted the dominant economic narrative of the crisis, was to take the fight to organised labour, and propagate new ideologies of individualism in tandem with increasing state centralisation and the move to internationalise markets for capital in particular.[37] This programme of neoliberalism was pushed most notably by Margaret Thatcher in the UK and Ronald Reagan in the US. But the neoliberal narrative became more generally hegemonic in Europe, bolstered by the failure of Francois Mitterand's attempt at 'Keynesianism in one country' in the early 1980's in France and later cemented by social democratic turns to the 'third way' across the Continent.

The EMU reflected an application of this newly dominant neoliberal logic: the transfer of 'sovereignty with regard to monetary policy to the Eurosystem'[38] would not be emulated with respect to other dimensions of economic policy. As Karl Otto Pöhl, then president of the Deutsche Bundesbank, put it in the context of the Maastricht negotiations: EMU would 'necessitate the surrender of sovereignty by the individual member states, but this need not mean corresponding gains in Community authority.'[39] In this narrative, EMU would break the link between the generation of societal demands on the state through the political process, on the one hand, and the governmental capacity to act on such demands, on the other. The power of large-scale political control of economic activity, which had existed in principle from the interwar period into the 1970s, would be surrendered.

[34] See, e.g., Samuel Brittan, "Inflation and Democracy," in R. Hirsch and J.H. Goldthorpe (eds) *The Political Economy of Inflation* (Cambridge, MA: Harvard University Press, 1978), 161–85; Alberto Alesina, "Macroeconomics and Politics," 3 *NBER Macroeconomics Annual* (1988), 13–52.
[35] For a critique of this perspective in both neoliberal and Marxist discourses, see Streeck, *Buying Time*.
[36] Crozier et al, *The Crisis of Democracy*, 1–3.
[37] See Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018).
[38] European Central Bank, "The Institutional Framework of the European System of Central Banks," *ECB Monthly Bulletin* (July 1999), 55.
[39] Pöhl, "Herr Pöhl Discusses," 1.

Macroeconomic federalism in the EU reduced state capacity by depriving governments of the control of the money supply and promising a legally backed market discipline to condition their fiscal autonomy. The problem that EMU was designed to address, in other words, was how to reconstitute European states in a manner that 'coerced them' into governing in accordance with the 'natural' constraints of the economy.[40] Rather than establishing a 'neoliberal sovereign' that could directly and politically coerce the Member States, EMU sought to construct an order in which the states would effectively be *subject to the same kind of budget constraints as households*.[41] As a draft of the Delors Report put it, 'all member countries will have to recognise and accept in their decision-making the existence of the constraints on national fiscal policy that emanate from participation in an economic and monetary union'.[42] The state's political freedom to act 'irrationally' by ignoring the limits of its means within the 'objective' constraints of the market economy was thus to be eliminated and with it the state's ability to act on the 'excessive' demands emerging from the democratic process.

In order to abolish its ability to govern 'excessively', the state would tie itself to an 'external constraint', empowering the technocratic bodies of the transnational realm and disempowering domestic democracy.[43] Moreover, this was not a temporary 'fix'. In the language of social contract theory, EMU looked like an alienation rather than an agency contract.[44] Although there is an obvious proviso, in that membership of the EU is in principle voluntary, and, at least since Lisbon, formally reversible, there is no legal avenue of exit from the single currency. The euro, like the European Economic Community at its outset at the Treaty of Rome, is meant to be 'irreversible'.[45] This would later become a motto of the ECB, effectively rubber-stamped by the European Court of Justice, enunciated to justify expansive interpretation of its formally limited mandate, notably with

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[40] On the notion of governing in accordance with the natural constraints of the market in neoliberal discourses, see Michel Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (London: Palgrave Macmillan, 2008); Werner Bonefeld, *The Strong State and the Free Economy* (London: Rowman & Littlefield International, 2017). See also Röpke, *International Order and Economic Integration*, 75, who presents the 'liberal principle' as being a 'thorough separation between the spheres of the government and of economy, between sovereignty and the apparatus which provides material goods.' Röpke thereby considers political and economic power to be distinct forms of power, corresponding to the Roman distinction between *Imperium* (public command associated above all with military affairs) and *Dominium* (control and disposition of private property above all in the household). Concentrating the two forms of power, he argues, the centralised, sovereign state tends to become 'total' and societal life becomes unfree.

[41] For a powerful critique of the notion that the state faces the same kind of budget constraint as a household, see William Mitchell and Thomas Fazi, *Reclaiming the State: A Progressive Vision of Sovereignty for a Post-Neoliberal World* (London: Pluto Press, 2017), ch. 8.

[42] Committee for the Study of Economic and Monetary Union, "II. How to define the final stage of economic and monetary union," draft of chapter 2 of the Delors Report (Historical Archives of the European Union, TPS-196, 31 January 1989), 2.

[43] Dyson and Featherstone, 'Italy and EMU.'

[44] Hjalte Lokdam, "Banking on Sovereignty: A Genealogy of the European Central Bank's Idependence" (PhD Thesis, London: London School of Economics and Political Science, 2019), ch. 5.

[45] See e.g., Chiara Zilioli and Martin Selmayr, "The European Central Bank: An Independent Specialized Organization of Community Law," 37:3 *Common Market Law Review* (2000), 604; *The Law of the European Central Bank*, 19–20; Smits, *The European Central Bank*, 133.

the Outright Monetary Transactions programme (OMT), when it promised to do 'whatever it takes' to rescue the euro.[46]

4. THE EURO-CRISIS: RESOLVING THE CRISIS OF UNGOVERNABILITY (OR 'WHEN HAYEK MET SCHMITT')

EMU rested on a commitment to the basic tenets of a neoliberal governmental order. These were in principle shared by all the constituent entities at the time, so externalising them in an international treaty that could not be easily reversed, if at all, appeared a natural way of entrenching the elite consensus. Unlike in the UK, where neoliberal governmentality would be produced by the construction of a new hegemonic domestic project, and which would be subject to the oscillations of party-political fortunes, for the countries of EMU, it would be set in constitutional stone.

This stone was not as solid as might be thought, however, for two reasons. First, the constitutionalised tenets of neoliberalism required the continued support of domestic forces and political elites.[47] The 'erosion of sovereignty' with regard to economic government, in other words, rested on the states' continued commitment to the 'self-limitations' implied by the external constraints of EMU since Member States retained their fiscal autonomy subject only to the 'soft constraint' of law unbacked by coercive authority. Thus, despite the apparent firmness of the constitutional foundations, the problem of governmental capacity with respect to economic government would re-emerge if one or more States contested or repudiated the basic tenets of the liberal order, whether in practice or in principle. The problem of sovereignty could not be overcome entirely as long as the Member States retained the political freedom to reject or ignore the constraints inherent in the structure. Despite attempts to pacify and constrain it, democracy at the Member State level had not been euthanised.

The *functioning* of the constitutional structure relied, secondly, on law and markets actually performing a disciplining role in the sense of punishing or penalising certain forms of state behaviour. In the post-Maastricht era, however, markets (and European institutions) could – and effectively did – disregard the Treaty (and underenforce the SGP). The material reality was that the 'closer economic and solidarity ties implied by membership of the union' generated 'market expectations that [a Member State] would ultimately be bailed out by other EMU members'.[48] The very existence of the project of the common currency, in other words, increased the ability of the individual state to engage

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[46] Mario Draghi, "Verbatim of the Remarks Made by Mario Draghi" (Speech, Global Investment Conference, London, July 26, 2012), available at: https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html (accessed 9 March 2021).

[47] See Bickerton, *European Integration.*

[48] C.E.V. Borio, "Macro-co-ordination of fiscal policies in an economic and monetary union in Europe," paper submitted for discussion in the Committee for the Study of Economic and Monetary Union (Historical Archives of the European Union, TPS-196, 1 February 1989), appendix II, p. 13; see also Alexandre Lamfalussy, "The need for co-ordination of fiscal policies in a European Economic and Monetary Union," (Historical Archives of the European Union, TPS-196, 31 January 1989), 1.

in 'excessive' government or moral hazard (including by indulging private sector excesses) if market actors operated on an assumption of 'solidarity' that allowed them to cease evaluating the economic fundamentals of the Member States on their own terms.

One of the main pillars of the EMU's constitutional structure – discipline enforced by rules and markets – could thus be undermined by States exercising their residual sovereignty to ignore the rules (the Union being too weak to enforce them), combined with markets not punishing such rule-breaking because of assumptions about how the constitution would operate in practice. Developments leading up to and after the introduction of the euro bore out this scenario; one that Hayek had failed to foresee. Sovereign bond yields converged in the years before the euro-crisis, without this necessarily reflecting actual economic performance or convergence. On the contrary, much suggests that the period was marked by increasingly divergent growth regimes and growing asymmetries between core and peripheral economies.[49]

When crisis struck, such asymmetries turned out to be a major source of vulnerability and they brought the neo/ordoliberal norms of the economic constitution (fiscal discipline, avoidance of moral hazard) into direct conflict with the existential narrative of irreversibility (the euro must not be allowed to fail). While the ideas of moral hazard and market discipline in principle militate against interventions to save Member States from bankruptcy, the notion of the euro's irreversibility demands a kind of 'solidarity' that was supposed to be impossible under the Treaty's no bailout (and no monetary financing) clause. The European solution to this dilemma, however, sought to square the circle by attaching punitive conditionality and austerity measures – justified in the name of restoring 'market confidence' – to any rescue packages deemed necessary to stave off the euro's collapse. In short, fiscal discipline by other means. At the same time, however, the crisis response suggested that markets had effectively been right in the years leading up to the crisis: the risks associated with sovereign default of Eurozone countries was negligible (and the costs would be socialised) because regardless of what the Treaties might say, the ECB and the other Eurozone Member States would come to the rescue of states. In that sense, the response to the Eurozone Crisis conformed to the well-known emergency political maxim that in the existential crisis the very survival of the constitutional order trumps the observance of the constitution. It highlighted, moreover, that emergency politics is an instrument of class politics.[50] Through various instruments of highly dubious legal standing such as the Memoranda of Understanding, the European Stability Mechanism (ESM), and the ECB's unconventional monetary policy programmes, Member States were bailed out, with minimal losses to investors. While investors were spared, however, populations of austerity-hit countries – particularly those parts of the population reliant on public services – were not.

The human costs of the austerity imposed in efforts to shore up investor confidence in banking systems within (and beyond) the Eurozone were carried over into the Covid-19 crisis in myriad ways, most notably in the form of understaffed and underfunded public

[49] See Giuseppe Celi, Andrea Ginzburg, Dario Guarascio, Annamaria Simonazzi, *Crisis in the European Monetary Union: A Core-Periphery Perspective* (Abingdon, Oxon and New York: Routledge, 2018).
[50] See, e.g., Carl Schmitt, *Dictatorship* (Cambridge: Polity Press, 2014), 2.

health services. But this is not the only legacy of the Eurozone's crisis response. The Eurozone Crisis demonstrated that the problem of governability had not been adequately addressed by the federal construct. Demands on the state arising from domestic political processes and interest groups had continued to inform the economic practices of the states to a significant degree. Neither rules nor institutions nor practices had resolved this 'problem'. Yet the federal construct had 'worked' in terms of constraining the governmental capacity of the Union level: the Union had only very limited means of intervening to 'correct' the behaviour of its Member States. It was this absence of governing capacity at the centre that meant that when crisis hit, the EU had to resort to extraordinary measures. The Eurozone Crisis thus revealed a 'governability' problem different from that experienced in the 1970s. In place of a problem of 'excessive' government, the problem was the impotence of both the federal and state governments. A crisis of *ungovernability* now threatened, less from excessive demands 'from below' than from insufficient capacity 'from above'.

Eurozone Crisis measures – bailouts, unconventional monetary policies, public sector reform and austerity measures, etc. – were improvised (and desperate) responses to this deficiency. Collectively, however, they amounted to the establishment of an executive emergency governmental apparatus at the European level that was able to implement highly intrusive interventions in the affairs of its Member States, sometimes even against the expressed will of Member State peoples.[51] Combined with the creation of new, and the reform of existing institutions, mechanisms and procedures at the European level, the EU underwent a considerable constitutional transformation.[52] Its goal was to secure the governmental means necessary to bring about the outcomes (fiscal discipline, labour market flexibilisation, privatisation of public infrastructures, etc.) that were, according to Hayek, supposed to emerge more or less spontaneously from the nature of the interstate federation. The transformation was thus, at least in its early phases, entirely conservative in its ideological orientation, seeking at every step to shore up a dysfunctional economic constitution.[53]

In tandem with the creation of new means of public intervention, the emergency politics of the Eurozone Crisis also saw the abandonment of some of the crucial structural and substantive features of the pre-crisis EMU.[54] Price stability became a more or less irrelevant concern and the empire of rules and market discipline was substituted with the

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[51] Larsen, *The Theory of the Federation and the European Union*, ch. 5; Federico Fabbrini, "The Fiscal Compact, the 'Golden Rule' and the Paradox of European Federalism," 36:1 *Boston College International and Comparative Law Review* (2013), 1-38.
[52] See, e.g., Christian Joerges, "The European Economic Constitution and Its Transformation Through the Financial Crisis," in D. Patterson and A. Södersten (eds) *A Companion to European Union Law and International Law* (Malden, MA & Oxford: John Wiley & Sons, Ltd, 2016), 242-61; Agustín José Menéndez, "Editorial: A European Union in Constitutional Mutation?" 20:2 *European Law Journal* (2014), 127-41.
[53] Wilkinson, "Authoritarian Liberalism: The Conjuncture Behind the Crisis."
[54] Thomas Beukers, Bruno de Witte, and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge: Cambridge University Press, 2017); Jonathan White, "Emergency Europe," 63:2 *Political Studies* (2015), 300-318.

authoritarian exercise of power.[55] That is, the concrete policy outcomes associated with neoliberalism were not abandoned, but were pursued using means that differed markedly from those associated with the neoliberal theory of government embodied in Hayek's vision of the interstate federation. They were imposed as a quid pro quo of financial rescue, inverting the myth of 'democratic *naissance*' of the founding Treaty: the political authority of the Member States was now to function as the agent of policies determined by principals external to the process of democratic legitimation.[56]

In Hayek's theory of interstate federalism, one of the crucial limits on the governmental capacity of the federal level was the heterogeneity of the constituent parts. As long as a plurality of economic conditions exists within the federation, it will inevitably, he thought, be more difficult to agree on the active use of federal power to regulate economic affairs. The experience of the Eurozone to a large extent bears this thesis out.[57] Despite 'convergence criteria', the Eurozone economies remained structurally distinct from each other in a number of important ways and evolved around different varieties of capitalism or different kinds of growth models.[58] However, in the Eurozone Crisis the continued, even increasing economic heterogeneity of the Eurozone was understood as a fundamental threat; not to price stability as the original concern had been, but to the survival of the EMU as such.

Measures and reforms to address the Eurozone Crisis have responded to the problem of heterogeneity in a number of distinct but interrelated ways. On the one hand, a number of general reforms have been implemented that seek to affect how Member States govern (e.g., European Semester, Fiscal Compact, Banking Union, Excessive Deficit Procedure, Macroeconomic Imbalance Procedure). On the other hand, the Union level has sought to intervene in and control a radical politico-economic overhaul of individual Member States. The response to the Eurozone Crisis has thus sought to address the problem of economic heterogeneity through measures of an explicitly emergency nature that suspended the ordinary political process in particular Member States, and through the construction of governmental arrangements that reshape that process into the future.

In other words, what is presented now is less the interstate federalism of Hayek (or the rule-based structure of ordoliberalism), which aims to erode or abolish the exercise of

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[55] Alexander Somek, "Delegation and Authority: Authoritarian Liberalism Today," 21:3 *European Law Journal* (2015), 340-60; Streeck, *Buying Time*; Wilkinson, "Authoritarian Liberalism: The Conjuncture Behind the Crisis," 101–21.

[56] Peter Lindseth, "The Perils of 'As-if' Constitutionalism," 22:5 *European Law Journal* (2016), 696-718: 'Supranational bodies appear to take on the character of principals in the integration process as a whole, supervising the conduct of Member States as their agents—the ultimate principal-agent inversion in EU public law' (p. 714). See also Streeck, *Buying Time,* who introduces the concept of *Marktvolk* to suggest that investors beyond the state have come to serve as a subject of political authorisation that rivals the traditional notion of *Staatsvolk* (or the peoples of the Member States).

[57] See, e.g., Höpner and Schäfer, "Embeddedness and Regional Integration."

[58] Engelbert Stockhammer, Cédric Durand and Ludwig List, "European Growth Models and Working Class Restructuring: An International Post-Keynesian Political Economy Perspective," 48:9 *Environment and Planning A: Economy and Space* (2016), 1804-28; Alison Johnston and Aidan Regan, "Introduction: Is the European Union Capable of Integrating Diverse Models of Capitalism?" 23:2 *New Political Economy* (2018), 145-59; Bickerton, *European Integration*, ch. 4.

political sovereignty, than the federation of Schmitt,[59] which demands a strong sovereign in order to install or enforce a degree of homogeneity in the name of unity. To maintain the economic constitution now requires the transfer to and exercise of sovereignty by a 'higher geographical unit'. Or alternatively, it requires one (or more) leading states to assume a position of hegemony within the federation (which in terms of the political freedom of non-hegemonic Member States amounts to more or less the same thing). Plurality, once considered a blessing of the European project, is now considered a burden, a problem to be overcome.

This shift in constitutional outlook is apparent from the language of European elites, and the way they conceptualise both the problem and the response. The project of 'completing,' 'deepening' and making the EMU 'genuine,'[60] pursued in emergency mode, now requires a 'European sovereignty'. The EMU must shift towards a system in which the Union level has 'its own fiscal capacity and a means of *imposing budgetary and economic decisions on its members*'.[61] The realisation of the ideology enshrined in the EMU, in other words, is now said to demand a comprehensive European governmental capacity to intervene in and direct Member State economic policies. This is presented with an added urgency in order to forestall or repress the movement towards euro-scepticism, or political populism (which are themselves often combined, or conflated).

The need for concentrating sovereign power is often conveyed in the context of Europe's place in the world, as indicated by the title of Jean-Claude Juncker's 2018 'State of the Union' address, 'The Hour of European Sovereignty', where Juncker claims that: '*The geopolitical situation makes this Europe's hour: the time for European sovereignty has come.*' [62] National leaders such as French president Emmanuel Macron have similarly invoked the necessity of European sovereignty on number of occasions. In one speech, Macron described European sovereignty as the first of four 'commandments' or 'categorical imperatives for action' that should guide European reform. Like Juncker, Macron explicitly links the construction of European sovereignty to the problem of the capacity for European self-determination, the refusal 'to allow others to decide for us.' However, for Europe to take its rightful place in global politics, Macron suggests, Europe must follow a second commandment: 'let's not be divided.' In particular, Europe must work towards 'a

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[59] On the links between Schmitt, Hayek and the ordoliberals, see Werner Bonefeld, "Authoritarian Liberalism: From Schmitt via Ordoliberalism to the Euro" 43 *Critical Sociology* (2017), 747-761; Sean Irving, "Limiting democracy and framing the economy: Hayek, Schmitt and ordoliberalism" 44:1 *History of European Ideas* (2018), 113-127; on the affinities between Schmitt and Hayek, William Scheuerman, "The Unholy Alliance of Carl Schmitt and Friedrich A Hayek" 4:2 *Constellations* (1997), 172-188.

[60] Jean-Claude Juncker, Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, "Completing Europe's Economic and Monetary Union" [aka 'The Five Presidents' Report'] (Brussels: European Commission, 2015); European Commission, "Reflection Paper on the Deepening of the Economic and Monetary Union" (Brussels: European Commission, 2017); Herman Van Rompuy, "Towards a Genuine Economic and Monetary Union," report by the President of the European Council, EUCO 120/12, PRESSE 296 (Brussels: European Council, 2012).

[61] European Commission, "A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate," (Brussels: European Commission, 2012), 31 (emphasis added).

[62] Jean-Claude Juncker, "State of the Union 2018: The Hour of European Sovereignty," (speech, Brussels, 11 September 2018), 5 (emphasis in original), available at: https://ec.europa.eu/info/sites/info/files/soteu2018-speech_en_0.pdf (accessed 11 March 2021).

stronger, more integrated Euro Area with its own budget,'[63] since 'sustainable economic power can only be constructed around a single currency'.[64] The external dimension of sovereignty is thus intricately linked to its internal dimension. In order to realise European sovereignty, Europe must move towards further 'economic, fiscal and social convergence'.

5. GOVERNING EUROPE: SOVEREIGNTY AS *POTENTIA*

The upscaling of sovereignty to the European level remains largely utopian, or dystopian, depending upon one's perspective. Its feasibility depends not only on support from above, but on the constitutional imaginary 'from below'. This at present ties European states to the mast of European integration but without flying the flag of European federation. If this appears to remain relatively obdurate, Brexit notwithstanding, in practice the integration process and the liberal economic ideology embodied in EMU have to be detached from the narrative of a rules-based order founded on an expression of democratic will, with the Maastricht foundation receding into an ever more distant past. The political authorisation of the governmental order, in other words, is insulated *from* democracy – as expressed in the past and in the present. The understanding of sovereignty in the discourse of European elites such as Juncker, Macron and, as discussed below, Mario Draghi, contributes precisely to this disconnect by eliding the difference between *potestas* and *potentia*, legitimate government and effective government.[65]

The distinction between these concepts is well illustrated in practice by the emergence of the ECB as a central political actor. Although the constraints on the governmental capacity of the Member States did not function as envisioned by the original framers of EMU, the crisis revealed, as noted above, that the EMU as a whole lacked a general governmental capacity. When it came to the federal level, in other words, the neoliberal theory of federation was largely correct in its prediction: Member State governments could neither reach a true agreement on general economic reforms prior to the crisis nor could they, to begin with at least, agree on a suitable Eurozone-wide crisis response. Because the crisis threatened the existence of the EMU specifically and the general belief in and support for a competitive market economy more broadly, however, this erosion of governmental capacity, and thus of sovereign power, turned out to be a problem that required solving. Governing the Member States from the centre became crucial, but

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[63] Emmanuel Macron, "Speech by M. Emmanuel Macron, President of the Republic, on receiving the Charlemagne Prize" (speech, Aix-la-Chapelle, 10 May 2018), available at https://www.elysee.fr/emmanuel-macron/2018/05/10/speech-by-m-emmanuel-macron-president-of-the-republic-on-receiving-the-charlemagne-prize-1.en (accessed 11 March 2021).

[64] Emmanuel Macron, "Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie, démocratique" (speech, Paris, 26 September 26, 2017) (our translation), available at: https://www.elysee.fr/emmanuel-macron/2017/09/26/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique (accessed 11 March 2021). In the French original: "une puissance économique durable ne peut se construire qu'autour d'une même monnaie."

[65] Martin Loughlin, "The Erosion of Sovereignty," 2 *Netherlands Journal of Legal Philosophy* (2016), 57–81. See also Markus Ojala, "Doing Away with the Sovereign: Neoliberalism and the Promotion of Market Discipline in European Economic Governance," 26:1 *New Political Economy* (2020), 1–13.

without its own means of doing so, the governmental capacity of the European level remained incomplete.[66]

Within the monetary dimension of the EMU, however, the European level did have its own means of governmental intervention: the ECB's monetary policy. While the substantive content of the Maastricht Treaty envisioned this instrument to be strictly circumscribed by the price stability mandate, the ECB's actions in addressing the Eurozone Crisis have moved well beyond this limited remit. Through (in)formal threats to (or promises to protect) Member State governments; through its role in designing, supervising and executing reforms in 'programme' countries; through the 'whatever it takes' message of the OMT and QE programmes, the ECB's involvement in governing the Eurozone and its constituent economies is broad and deep. While the ECB was not originally 'meant' to take on such a role, there is a certain logic to the ECB assuming it. If the crisis was a true existential crisis for the Eurozone, the ECB was the only institution with both a clear Union-wide mandate *and* the available means of acting directly and immediately on the crisis without first having to secure formal agreement, without having to 'consult a senate or the people'.[67] It could fill the governmental or 'political vacuum created at the centre of the EMU',[68] without the involvement of political authorities.

Although not the kind of sweeping power associated with the emergency politics exercised by the US federal administration, the ECB demonstrated the potential capacity of a European level government. This informed the vision of the Eurozone's constitutional future presented by members of the ECB's Executive Board. In the 'whatever it takes' speech, Draghi noted that the Eurozone would have to undergo reforms, meaning that 'much more of what is national sovereignty is going to be exercised at supranational level.' Specifically, he noted 'that common fiscal rules will bind government actions on the fiscal side.'[69] This notion is to a large extent in line with the discussion above. In public addresses *after* the OMT intervention, however, Draghi developed a specific conception of sovereignty that is, presumably, shaped by the experience of the OMT and QE programmes and which, according to him, would have to inform Eurozone governance in the future.

According to Draghi, there are two ways to look at sovereignty. The former, 'Bodinian' view, sees it as a 'normative' concept, which 'is defined in relation to rights: the right to declare war, and treat the conditions of the peace, to raise taxes, to mint money and to judge in last resort',[70] and, one might add, the right to make laws autonomously. To Draghi, however, '[t]rue sovereignty is reflected not in the power of making laws'.[71]

[66] See also Federico Fabbrini, "A Fiscal Capacity for the Eurozone: Constitutional Perspectives" (Brussels: European Parliament, February 2019), available at https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608862/IPOL_IDA(2019)608862_EN.pdf (accessed 11 March 2021).
[67] Schmitt, *Dictatorship*, 9, referring to Bodin.
[68] Wolfgang Streeck, "Heller, Schmitt and the Euro," 21:3 *European Law Journal* (2015), 370.
[69] Draghi, "Verbatim."
[70] Mario Draghi, "Europe's Pursuit of 'a More Perfect Union'" (Lecture, Harvard Kennedy School, Cambridge, MA, 9 October 2013), available at: https://www.ecb.europa.eu/press/key/date/2013/html/sp131009_1.en.html (accessed 11 March 2021).
[71] Mario Draghi, "Sovereignty in a Globalised World" (speech, Award of Laurea honoris causa in law from Università degli Studi di Bologna, 22 February 2019), available at:

Sovereignty, rather, is 'the ability to deliver in practice the essential services that people expect from government'.[72] That is, sovereignty is 'the ability to control outcomes and respond to the fundamental needs of the people: what John Locke defines as their "peace, safety, and public good".'[73] Conversely, '[a] sovereign that is not capable of effectively discharging its mandate would be sovereign only in name'.[74] This 'positive' conception of sovereignty, derived from Draghi's reading of Locke and Madison's Federalist No. 45, offers 'essentially the right way to think about sovereignty' and 'it needs to be the guiding principle when deciding which powers should be at national or European levels'. In the final instance, then, 'the sovereign exists only as a fiduciary power to act for certain ends. *It is the ability to achieve those ends that defines, and legitimises, sovereignty.*'[75]

In Draghi's conception, sovereignty is thus defined through the question of 'the actual ability to control things' or the concept of *potentia*.[76] He dismisses the reverse definition, i.e., from the perspective of 'rightful or legitimate authority' or *potestas,*[77] because '[t]he ability to make independent decisions does not guarantee countries such control. In other words, independence does not guarantee sovereignty.'[78] Or, as Draghi put it to the Italian Senate shortly after becoming Italy's Prime Minister in February 2021: 'There is no sovereignty in solitude. There is only the illusion of what we are, in the oblivion of what we were and the denial of what we could be.'[79] The link between *potentia* and *potestas*, however, does not disappear. In the original EMU structure, Member States retained the 'rightful authority' not only to authorise the construct as a whole but also to define economic policy according to their will, subject only to coordination and as constrained by the federal structure. In the 'new EMU', the relationship between rightful authority and capacity is reconstituted on the basis of *potentia*: rightful authority is said to follow from the capacity to exercise it effectively. The reference to Federalist No. 45 is notable in this respect. Devoted to the question of the 'danger from the powers of the Union to the state governments',[80] Madison outlines a conception of the distribution of powers between the different levels as resting on the question of how best to ensure 'the public good, the real welfare of the great body of the people'.[81] The question of the sovereignty of the States versus the governmental powers of the Union is thus presented as one regarding which level is best capable of realising the will of the people. The Union's powers are presented

https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190222~fc5501c1b1.en.html (accessed 11 March 2021).

[72] Draghi, "Europe's Pursuit."
[73] Draghi, "Sovereignty."
[74] Draghi, "Europe's Pursuit."
[75] Ibid. (emphasis added).
[76] Loughlin, "The Erosion of Sovereignty," 63.
[77] Ibid.
[78] Draghi, "Sovereignty."
[79] Mario Draghi as cited in Sergio Fabbrini, "Mario Draghi has bigger ambitions than just seeing Italy through to the next general election," *The Loop* (blog), no date, available at: https://theloop.ecpr.eu/mario-draghi-has-bigger-ambitions-than-just-seeing-italy-through-to-the-next-general-election/ (accessed 12 March 2021).
[80] James Madison, "Federalist No. 45," in *The Federalist Papers*, by Alexander Hamilton, James Madison, and John Jay, ed. Michael A. Genovese (New York: Palgrave Macmillan, 2009), 97.
[81] Ibid., 98.

as legitimate because they make self-government possible, and thus sovereignty meaningful, through superior governmental capacity.[82]

In this view, the individual state is unable on its own to affect the factual conditions of global trade and finance in a meaningful way. National states may 'remain the reference point for our citizens,' as Draghi puts it, 'but in the areas marked out by their weakness they cede national sovereignty in order to gain shared sovereignty.'[83] From this perspective, assertions of popular sovereignty against this project (e.g., Brexit) thus, in line with Madison, diminish sovereignty. Because the federal level is the only level of government that can meaningfully control the fate of Europe in the face of threats arising from the market, pandemics, the environment or from foreign powers, Europe must channel sovereignty. It must be in a position to govern effectively on behalf of the Eurozone as a whole. In order to do so, however, the European level must be empowered to intervene in and control to a certain extent and for certain ends the internal affairs of the Member States. Citizens for their part must acquiesce in this and are, following Draghi, deluded if they do not.

This vision is not one of free democratic authorisation of the exercise of legitimate authority. It is based on pure output legitimacy. It reduces democracy to the functional output that emerges from the activity of governing. The demos as such, is merely ruled. This emphasis on an entity's functional capacity for self-mastery (*potentia*) entirely swallows up the meaning of self-determination as the right to authorise *how* and *for what ends* the community is governed (*potestas*). The question of control is necessarily two-sided, as the desire to 'take back control' over the laws of the community – manifested, for example, in the Brexit referendum – displays. This alternative understanding emphasises the right to make laws and govern according to popular will (*potestas*), whatever the consequences. From the perspective of European sovereignty, however, because such acts are likely to fail to produce the desired outcomes – with potentially destabilising consequences – *potestas* ought to be abandoned in favour of a technical or technocratic [*staatstechnische*] understanding of governmental power.[84] The unruliness and unpredictability of democracy, the element of political freedom that makes it so surprising and creative,[85] ought, in other words, to be abandoned in the name of generating effective European governmental capacity (*potentia*).

[82] See also Benoit Cœuré, "Taking Back Control of Globalisation: Sovereignty through European Integration" (Contribution to 2018 Schuman Report on Europe, Frankfurt am Main, 2018), available at https://www.ecb.europa.eu/press/inter/date/2018/html/ecb.in180328.en.html (accessed 11 March 2021). According to Cœuré the struggle against 'Brussels' or 'Frankfurt' is fundamentally misguided because the relevant contemporary problems concern developments at the global level. And in the global realm sovereignty is only possible 'through European integration' because only this gives Europe and its states and citizens the capacity to determine their own fates. This statement captures the notion of sovereignty as the people's capacity for self-determination succinctly. Only by acting through the European level can 'the people of Europe' be the master of its own fate. See also Lokdam, "'We Serve the People of Europe.'"
[83] Draghi as cited in Fabbrini, "Mario Draghi has bigger ambitions."
[84] Schmitt, *Dictatorship,* ch. 1.
[85] David Runciman, "Why is Democracy so Surprising?" 90:S1 *Rethinking Democracy* (2019), 36-46.

6. CONCLUSION: CRACKS IN THE NEOLIBERAL ARMOUR?

Despite the many reforms of EMU in emergency mode, 'European sovereignty' as an expression of a comprehensive European governmental capacity with respect to economic affairs remains unrealised (not least because political forces at the Member State level continue to resist the idea). This is highlighted by the response to the Covid-19 crisis that struck in the spring of 2020. The ECB, despite the German Constitutional Court's insistence that its QE programme was unconstitutional, remained Europe's first line of defence in responding. The crisis, however, also highlighted the inadequacy of ECB interventions. The ECB can stabilise financial markets but it cannot generate full capacity, let alone a legitimate authority, to pursue broader measures of economic government. Governmental capacity at the European level remains incomplete and asymmetric as well as lacking in democratic accountability.

That said, the European response to the Covid-19 crisis has not taken place in the same vacuum of governmental capacity as the response to the Eurozone Crisis. It has, rather, drawn on the emergency political governmental apparatus established during that earlier crisis. The European Commission's proposed 'Recovery and Resilience Facility' will, for instance, be closely linked to the European Semester, which will allow the Commission to attach conditionality to the funds released through the facility and oversee how they are spent by the Member States.[86] The Facility thereby reflects a desire to increase the capacity of the EU level (*potentia*) to direct economic developments across the Union and gives the Commission significant means for doing so. As such, it extends the logic of constraining and directing the political energies of the Member States discussed above in relation to the idea of European sovereignty, thus further narrowing the space for democratic control of economic policymaking decisions (in the sense of *potestas*).

While the strengthening of governmental authority at the European centre continues, however, the ends pursued are not as strictly neoliberal as those pursued during the Eurozone Crisis. The record so far is, at the very least, more mixed. The introduction of the possibility of raising funds through the issue of common debt, earmarked through conditionality for green public investments for instance, is a departure from the one-sided focus on slashing public spending during the Eurozone Crisis. So, too, the relaxation of budget deficit rules and the suspension of state-aid rules sits uneasily with neoliberal ideas of fiscal discipline and competitive markets. While it remains to be seen whether the ends of neo/ordoliberalism will be abandoned or relaxed, early signs in the context of the Covid-19 crisis highlight at the very least that the instruments introduced during the euro-crisis can be employed for ends other than those associated with neoliberalism.

In the Eurozone context, this represents a peculiar conundrum for progressive political imaginaries. Eurozone Crisis reforms at both the Member State and European levels have been largely neoliberal and have taken place in emergency mode with little or no democratic input. As in earlier periods of capitalist crises – the interwar period and the 1970s in particular – crisis responses have sought to 'protect democracy from itself' (or

[86] European Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility," (Brussels: European Commission, 28 May 2020).

viewed differently, protect capitalism from democracy) by narrowing the space of democratic politics and, when 'necessary', suspending it. In the Eurozone as a Union of multiple democratic publics, moreover, threats to the norms of capitalist market society arising from divergent democratic expressions of will have been countered through a centralisation of governmental capacity. This centralisation, however, has created the possibility for Eurozone-wide programmes that potentially point in a different ideological direction, towards more socially inclined ends. The reforms, in other words, have shifted the structural framework of economic policymaking from a modality of governing that relies on de-politicisation and the 'primacy of the market' to one that embraces the use of (coercive) public authority to achieve (and protect) certain economic outcomes. In that sense, 'planning' – that long discredited term and practice – has returned and replaced the market as the means to pursue economic ends. While the instruments of planning remain too detached from the democratic process, they carry with them the potential for pursuing more progressive ends. The question, however, is whether and how planning and its technocratic conception of governmental capacity can be made to serve democracy; and how democracy can enjoy freedom, creativity and unpredictability. From the perspective of those seeking to make Europe 'governable', democracy remains a threat to be contained rather than a potential to be realised.