Note

Ultra Vires:

The Eurozone Crisis and the European Central Bank's Lost Independence

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"It would be tragic and fatal if we were to lose democracy on the road to saving the euro . . . ."[1]

I. INTRODUCTION

As a compliment to nations' republican apparatus, technocratic central banks theoretically perform a crucial service. They support national economies as a lender of last resort,[2] ensure price stability,[3] and supervise the safety and soundness of financial institutions.[4] To achieve these foundational and far-too-often challenging objectives, our

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1. Mats Persson, *Democracy and Transparency Remain the Biggest Victims of the Euro Crisis*, DAILY TELEGRAPH (Feb. 13, 2012), http://blogs.telegraph.co.uk/finance/matspersson/100014896/democracy-and-transparency-remain-the-biggest-victims-of-the-euro-crisis/ (citing Andreas Voßkuhle, Pres., German Federal Constitutional Court).

2. BANK FOR INT'L SETTLEMENTS, ISSUES IN THE GOVERNANCE OF CENTRAL BANKS 8–16 (2009).

3. *Role of the Bundesbank*, DEUTSCHE BUNDESBANK, http://www.bundesbank.de/Redaktion/EN/Standardartikel/Tasks/Financial_and_monetary_system/central_bank_tasks.html (last visited Apr. 4, 2016).

4. BANK FOR INT'L SETTLEMENTS, *supra* note 2, at 33–37.

political structures often grant them a measure of independence from the normal demands of government, as well as plenary control over the monetary supply.[5]

The introduction of the European single currency, the euro, in 2000 was intended to unite Europe's diverse cultures and economies into a global economic powerhouse that could compete against the U.S. dollar as the world's reserve currency.[6] In the first decade of the euro, however, the European Union largely ignored the institutional building blocks needed to balance key legal issues in its fledgling currency union.

The protean events of the last seven years—the 2008 financial crisis and the sovereign debt woes of Greece, Italy, Ireland, Spain, and Portugal—have fully exposed these structural flaws. In lieu of establishing a responsive political decision-making structure that could continue to function under market stress, the European Central Bank (ECB) has filled this gap and evolved into a body that is largely immune from democratic accountability.[7]

Assuming *ultra vires*[8] authority for a monetary overseer, the Bank has wielded its influence over the last six years to effect political change in recalcitrant Member States. Much literature has been devoted to the legality of the rescue mechanisms established by the European Union and the International Monetary Fund (IMF),[9] and recent jurisprudence from the

5. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2007 O.J. (C 326), at art. 128 [hereinafter Consolidated Treaty].

6. *See* Benjamin J. Cohen, *The Future of Reserve Currencies*, FINANCE & DEV. 27 (Sept. 2009), http://www.imf.org/external/pubs/ft/fandd/2009/09/pdf/cohen.pdf.

7. *See* Jacques Mistral, *Uncomfortable Exits: A Tale of Two Lenders of Last Resort*, *in* THINK TANK 20: THE G-20 AND CENTRAL BANKS IN THE NEW WORLD OF UNCONVENTIONAL MONETARY POLICY 32 (2013), http://www.brookings.edu/~/media/Research/Files/Reports/2013/08/g20-central-banks-monetary-policy/TT20-france_mistral.pdf?la=en; *see also* Paul De Grauwe, *Why the ECB Refuses to Be a Lender of Last Resort*, VOXEU (Nov. 28, 2011), http://www.voxeu.org/article/why-ecb-refuses-be-lender-last-resort.

8. *Ultra Vires*, BLACK'S LAW DICTIONARY (3d pocket ed. 2006) ("unauthorized" or "beyond the scope of power allowed or granted").

9. *See, e.g.*, Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, 32 BERKELEY J. INT'L L. 64 (2014) (describing the reforms adopted by the EU in response to the crisis and subsequent judicial decisions); Dagmar Scheck, *The German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT)—Another Step Towards National Closure?*, 15 GER. L.J. 329 (2014) (analyzing the German Federal Constitutional Court's 2014 decision, and asserting that it was

German Constitutional Court places the constitutionality of these operations in grave doubt.[10] However, little attention has focused on the ECB's direct political pressure on national governments and damaged independence.

Understanding that Europe continues to persist in economic depression today,[11] Part II of this Note will analyze the ongoing

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aimed at restricting the impact of EU law in Germany); *see also* Jared Curzan, Note, *A Critical Linkage: The Role of German Constitutional Law in the European Economic Crisis and the Future of the Eurozone*, 35 FORDHAM INT'L L.J. 1543 (2011) (describing the tension between German Basic Law and the European Union); Boris Ryvkin, Note, *Saving the Euro: Tensions with European Treaty Law in the European Union's Efforts to Protect the Common Currency*, 45 CORNELL INT'L L.J. 227 (2012) (examining the bailout mechanisms created by EU institutions).

10. *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], 2 BvR 2728/13, ¶¶ 59–60, Jan. 14, 2014 (Ger.). In this case, the Constitutional Court held that certain bond purchases conducted by the ECB were likely beyond this institution's treaty-based authority, but referred the case to the European Court of Justice (ECJ) for a preliminary advisory opinion. *Id. See* Case C-62/14, Gauweiler et al. v. Deutscher Bundestag (June 16, 2015), http://curia.europa.eu/juris/documents.jsf?num=C-62/14# (holding the Outright Monetary Transactions (OMT) program compatible with the treaty mandate of the ECB). It remains to be seen what action, if any, that the German Constitutional Court will take in response to the ECJ opinion, especially since the *Bundesverfassungsgericht* explicitly reserved the right to enjoin German participation if it found the preliminary ECJ decision unsatisfactory:

> If necessary, [this Court] would have to examine this on the basis of the Court of Justice's interpretation of the OMT Decision without another question referred for a preliminary ruling, and it would have to determine the inapplicability of the respective act of implementation in Germany, because the identity review is not to be assessed according to Union law but exclusively according to German constitutional law . . . After completion of the proceedings for a preliminary ruling, the Federal Constitutional Court will resume the proceedings *ex officio*.

2 BvR 2728/13, ¶¶ 99–104. For one view on the potential effects of an adverse Constitutional Court ruling, see Sean O'Grady, *The Day the Euro Died*, THE INDEPENDENT (Nov. 28, 2010), http://www.independent.co.uk/news/business/analysis-and-features/the-day-the-euro-died-2146288.html ("Almost before the words had dropped from the judge's lips, the plate-glass windows of Europe's banks were being caved in, farmers were blocking motorways, and the unions were out on strike. The court declared the verdict at 11.11am. By noon, almost every bank in the eurozone had closed its doors.").

11. Parts of Europe have been referred to by commentators as "the new third world." *See, e.g.*, MICHAEL LEWIS, BOOMERANG: TRAVELS IN THE NEW THIRD WORLD (2012). *But see* Press Release, Eur. Union, Euro Summit Statement ¶ 1 (Oct. 26, 2011), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf (avowing that the "euro continues to rest

Eurozone crisis, establishing Europe's separation of powers relationship and the ECB's independence, while connecting events of the crisis. Through the ECB's actions in forcing the resignation of key leaders and threatening nations with bankruptcy, Part III will demonstrate how the Bank's *ultra vires* actions have vitiated its mandate as a politically neutral monetary overseer. Finally, Part IV concludes by arguing that reform and democratic legitimacy are necessary to restore the Bank's legitimacy and give it the tools necessary to ensure the euro can weather current storms.

II. AN EXISTENTIAL CRISIS OF THE EUROPEAN UNION

A. LEGAL FRAMEWORK

The European Union relies on a number of founding treaties as its constitutional bedrock,[12] instead of a single, once-ratified framework.[13] The treaties currently in force allocate the Union's authority among three bodies: the European Parliament, the European Commission, and the Council of Europe.[14] The European Council, comprised of the heads of government[15] of every Member State of the European Union (EU), sets the strategic policy agenda and oversees the work of the Commission.[16] The Presidency of the Council, a largely ceremonial role, is rotated among Member States every six months, with each officeholder advancing preferences on the Union's future, but little else.[17] Confusingly, a 'President of the

on solid fundamentals").

12. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) [hereinafter Lisbon Treaty]; *see also* Consolidated Treaty, *supra* note 5.

13. France and the Netherlands rejected a proposed European constitution in 2005, forcing its abandonment. The vast majority was repackaged into the Lisbon Treaty. *See* Elizabeth F. Defeis, *A Constitution for the European Union—A Transatlantic Perspective*, 19 TEMP. INT'L & COMP. L.J. 351 (2005) (outlining the failed ratification of the Constitutional Treaty for the European Union).

14. Consolidated Treaty, *supra* note 5, at title I.

15. 'Head of government' refers to the elected prime minister or president, while a monarch or ceremonial president is typically referred to as a 'head of state.'

16. Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) at art. 15 [hereinafter Maastricht Treaty].

17. *Presidency of the Council*, EUR. UNION, https://eu2015.lv/the-presidency-and-eu/presidency-of-the-council (last visited Apr. 4, 2016).

European Council' also exists to supervise the Council's regular policy work.[18] The Council also deliberates on the most pressing political questions facing the European Union,[19] and as a result, most contentious decisions regarding the fate of the euro taken before 2011 occurred in this body.

The Economic and Financial Affairs Council is a standing committee of the Council, and includes the twenty-eight finance members of the EU.[20] Within this seemingly important body, however, lies the informal, de facto political authority over the European single currency. The Eurogroup—nineteen national finance ministers and an elected president—is responsible for day-to-day strategic policy decisions—e.g., membership criteria and economic/fiscal guidelines—that govern the euro.[21]

Prior to 2012, the Eurogroup was limited in its influence, as most key decisions were made in the full European Council and required unanimous consent.[22] However, after British Prime Minister David Cameron vetoed a proposed treaty change that would have granted the Union new fiscal powers in late 2011, the authority of the Eurogroup was strengthened, centralized, and placed on a formal basis to avoid similar vetoes.[23]

B. AN INDEPENDENT CENTRAL BANK—IN THEORY

Monetary policy is distinct from economic and fiscal policy in that the former is primarily focused on policy objectives (e.g.,

18. *General Secretariat of the Council of the EU*, EUR. COUNCIL (2009), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111298.pdf.

19. *See, e.g.*, Roger J. Goebel, *The European Council After the Treaty of Lisbon,* 34 FORDHAM INT'L L.J. 1251, 1256 (2011) (stating that the European Council establishes "general political directions and priorities" and provides "policy guidance at the highest level[s]"); *see also* Federico Fabbrini, *Austerity, the European Council, and the Institutional Future of the European Union*, 22 IND. J. GLOBAL L. STUD. 269 (2015).

20. *Economic and Financial Affairs Council Configuration (Ecofin)*, EUR. COUNCIL, http://www.consilium.europa.eu/en/council-eu/configurations/ecofin/ (last visited Apr. 4, 2016).

21. *See, e.g.*, Imelda Maher, *Economic Governance: Hybridity, Accountability and Control*, 13 COLUM. J. EUR. L. 679, 685–702 (2006); *How the Eurogroup Works*, EUR. COUNCIL, http://www.consilium.europa.eu/en/council-eu/eurogroup/how-the-eurogroup-works/ (last visited Apr. 4, 2016).

22. *See* Maher, *supra* note 21.

23. *See Fear of a Two-Speed Europe: Britain Vetoes Changes to EU Treaties*, DER SPIEGEL (Nov. 9, 2011, 11:27 AM), http://www.spiegel.de/international/europe/fear-of-a-two-speed-europe-britain-vetoes-changes-to-eu-treaties-a-802674.html.

full employment, balanced budgets) while the latter is based on the means of achieving these goals (e.g., low interest rates, the quantity of currency in circulation).[24] As the manager of monetary policy in the Eurozone, the ECB is tasked by treaty to manage technical operations of the euro, to "maintain price stability," and to "support the general economic policies in the Union [as set by the Eurogroup] with a view to contributing to the achievement of the objectives of the Union."[25]

In this way, the ECB issues euro banknotes, conducts foreign exchange operations with key markets, manages liabilities among national central banks, and leverages the macroeconomic performance of the Eurozone.[26] Most crucially in the context of the Eurozone crisis, however, the ECB also extends liquidity as the "lender of last resort" to Member State central banks and individual banks in periods of liquidity stress.[27] The Bank is supervised by a Governing Council composed of national central bank presidents and appointed financial experts, with an Executive Board led by President Mario Draghi of Italy overseeing the Bank's daily operations.[28]

The ECB is required via treaty to be completely independent from influence by other European Union institutions, Member States, and supranational institutions—members of the Governing Council are even required to renounce national interests and pledge to act in furtherance of the euro and the

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24. *What is the Difference Between Monetary Policy and Fiscal Policy, and How Are They Related*?, FED. RESERVE BD. OF GOVERNORS, http://www.federalreserve.gov/faqs/money_12855.htm (last visited Apr. 4, 2016).

25. Consolidated Treaty, *supra* note 5, at art. 127(1).

26. Philip Brentford, *Constitutional Aspects of the Independence of the European Central Bank*, 47 INT'L & COMP. L.Q. 89 (1998); Stephen G. Cecchetti, Robert N. McCauley & Patrick M. McGuire, *Interpreting Target2 Balances* (Bank of Int'l Settlements Working Paper No. 393, 2012), http://www.bis.org/publ/work393.pdf.

27. *See* ELA PROCEDURES, EUR. CENT. BANK 1–2 (2014), https://www.ecb.europa.eu/pub/pdf/other/201402_elaprocedures.en.pdf?e716d1d560392b1014 2724f50c6bf66a. The term 'lender of last resort' refers to two somewhat related roles of a central bank and is used in different contexts throughout this Note. First, central banks provide cash liquidity to member banks to meet depositor demands. Secondly, in the case of sovereigns within the same currency union, like the Eurozone, the central bank usually has the ability to purchase the bonds issued by governments. The ECB has always provided liquidity under the first rationale, but only recently began purchasing sovereign bonds on a large scale via quantitative easing, largely because of reticence surrounding the Lisbon Treaty's financing prohibition. *See supra* note 10, *infra* notes 67, 171.

28. *Governing Council*, EUR. CENT. BANK, http://www.ecb.europa.eu/ecb/orga/decisions/govc/html/index.en.html (last visited Apr. 4, 2016).

Union.[29] Based on the successful model of the German *Bundesbank*, the Maastricht Treaty explicitly requires that neither the ECB nor national central banks:

> shall seek or take instructions from Community [Union] institutions or bodies, from any government of a Member State or other body. The Community [Union] institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence members of the decision-making bodies of the ECB or of the national central banks . . . .[30]

Constitutions and framework legislation have traditionally stressed that the independence of central banks benefits long-term macroeconomic performance. It is an assumption of modern economic theory that central banking officials—generally well-respected economists—alone possess the econometric knowledge needed to ensure economic stability and performance.[31] In this way, their specialized knowledge is cultivated and isolated from outside pressures, as history has shown that "governments and parliaments are tempted to use the printing press to meet their financial needs, thus neglecting the risks and detriments of inflation."[32] Utilizing a traditional separation of functions argument, this reasoning emphasizes that political leaders appropriate funds to pay government liabilities, and therefore should not be responsible for printing money, since they can make their lives immeasurably easier in the short-term by increasing the amount of funds in circulation.[33]

The greatest example of government abuse of the printing press, now almost a cliché, was the 1920's Weimar example in Germany, where the *Reichsmark* went from an exchange rate of 4.2 to 1 against the U.S. dollar in 1914 to approximately 4.2

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29. *See* KARL KALTENTHALER, POLICYMAKING IN THE EUROPEAN CENTRAL BANK 70–71 (2006).

30. Maastricht Treaty, *supra* note 16, at art. 107.

31. *See* Alessandra Chirico, *How to Apply the Issue of Good Governance to Central Banks: Theoretical Clarifications on the Modalities of the Exercise of Monetary Power*, 17 EUR. BUS. L. REV. 1651, 1653 (2006).

32. Rosa Maria Lastra, *The Independence of the European System of Central Banks*, 33 HARV. INT'L L.J. 475, 476 (1992). *See* Eric Duncan, Note, *Legalizing European Central Bank Bond Purchases: How the ECB Can Protect its Own Legitimacy and the Future of the Euro*, 45 GEO. WASH. INT'L L. REV. 183, 190–92 (2013) (discussing the importance of ECB independence and "political intrusion" by the rest of the European Union community).

33. *See* Lastra, *supra* note 32, at 476.

trillion to 1 in November 1923.[34] As a result, after the Second World War, the new German *Bundesbank* stressed its structural independence and control of inflation above all else, ideas that heavily influenced the design of the ECB.[35] Today, in the German view of central banking, these institutions utilize their expertise only to pursue long-term monetary strategy, guaranteeing "a more objective, more 'neutral,' and faster decision-making process."[36]

The Swedish *Riksbank*, founded in 1668, is the oldest central bank in the world.[37] Laying the groundwork for modern central banks and the Federal Reserve System, Alexander Hamilton played an integral role in the establishment of the (First) Bank of the United States in 1791.[38] Hamilton believed that the United States' new central bank was essential to the economic growth of the fledgling nation because of the country's Revolutionary War debts and the low level of economic integration among the former colonies.[39] In studying other contemporary banks, e.g., the Banks of England and Amsterdam, he concluded that the First Bank of the United States would be most effective beyond the reach of political control.[40] "To attach full confidence to an institution of this nature, it appears to be an essential ingredient in its structure that it shall be under a private not a public direction, under the guidance of individual interest, not of public policy."[41] The First Bank's modern descendant, the Federal Reserve, has maintained this tradition of independence, with the seven members of its Board of Governors appointed for fourteen-year

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34. *Germany's Hyperinflation Phobia*, THE ECONOMIST (Nov. 15, 2013, 4:23 PM), http://www.economist.com/blogs/freeexchange/2013/11/economic-history-1. *But cf.* Timothy A. Canova, *Black Swans and Black Elephants in Plain Sight: An Empirical Review of Central Bank Independence*, 14 CHAP. L. REV. 237, 241 (2010) (arguing that the root cause of the German hyperinflation of 1923 was the country's inability to pay its large foreign debt rather than "any purported political control" of Germany's central bank).

35. *See* KALTENTHALER, *supra* note 29, at 3, 37, 55.

36. Lastra, *supra* note 32, at 477.

37. Christopher Crowe, Ellen E. Meade, *The Evolution of Central Bank Governance Around the World*, 21 J. ECON. PERSP. 69, 69 (2007).

38. FED. RESERVE BANK OF KANSAS CITY, THE BALANCE OF POWER 1 (2d ed. 2012); *see also* RON CHERNOW, ALEXANDER HAMILTON (2004).

39. *See id.*; Phil Davies, *The Bank that Hamilton Built*, FED. RESERVE BANK OF MINNEAPOLIS, https://minneapolisfed.org/publications/the-region/the-bank-that-hamilton-built (last visited Apr. 4, 2016).

40. 7 ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 308 (Harold C. Syrett & Jacob E. Cooke eds., 1987).

41. *Id.*

terms under the terms of the statutory Federal Reserve Act and given a narrow mandate.[42]

When it was founded in 1998, observers widely considered the ECB to be the most independent in the history of central banking.[43] The 'insulated' appointment system of Bank officers, rules written into founding treaties that barred monetary financing, and required fealty to price stability were each intended to isolate the Bank's officials from politics—as was locating the Bank in Frankfurt, Germany near the seat of the *Bundesbank*.[44] Over the first decade of its life, the first (and current de jure) iteration of the ECB existed only to control price stability and issue euro banknotes—not to act as a lender of last resort for national governments or exercise the political authority to set fiscal policy.

C. "GREECE WILL NOT IN ANY REALISTIC SCENARIO REPAY ITS DEBTS"[45]

The European Union has pursued a course of "ever closer union"[46] since its precursor, the European Coal and Steel Community, was founded in 1951, progressing through the implementation of the Maastricht (1993) and Lisbon (2009) Treaties.[47] After the euro launched in 2000, the pace of integration escalated significantly, with many grounding the formation of a "United States of Europe" on the shoulders of the new institutions of the Eurozone and the European Union.[48]

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42. Federal Reserve Act, 38 Stat. 691 (1914), *codified at* 12 U.S.C. § 3 *et seq*. (2015).

43. *See* Kathleen McNamara, *Banking on Legitimacy: The ECB and the Euro Zone Crisis*, 13 GEO. J. INT'L AFF. 143, 146 (2012).

44. *See id*. at 146.

45. Alex Brazier, Exec. Dir., Bank of Eng., Testimony Before the Treasury Select Comm., U.K. House of Commons, PARLIAMENT LIVE, at 55:02 min. (Mar. 17, 2015), http://www.parliamentlive.tv/Event/Index/0c16a331-3c2d-4b6b-85ef-7565a4b23a62.

46. Treaty Establishing the European Economic Community pmbl., Mar. 25, 1957, 298 U.N.T.S. 11.

47. *See generally* Roger J. Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon*, 20 COLUM. J. EUR. L. 77, 80–81 (2013) (describing the far-reaching impact of the Maastricht and Lisbon treaties, which created the European Community and merged the European Community into the European Union, respectively); Ian Ward, *An Ever Closer Union?: The Continuing Travails of the Peoples of Europe*, 15 TEMP. INT'L & COMP. L.J. 247, 247–55 (2001).

48. *See, e.g.*, T.R. REID, THE UNITED STATES OF EUROPE: THE NEW

The systemic crisis that faced the global economy in late 2008 was born on the cobblestones of Wall Street and quickly spread to the trading floors of Frankfurt, Paris, and the primal fabric of the European economy.[49] Panic stemmed from "acute liquidity shortage among financial institutions as they experienced ever stiffer market conditions for rolling over their (typically short-term) debt."[50] By mid-2009, "[t]he transmission of financial distress to the real economy [was] evolv[ing] at record speed, with credit restraint and sagging confidence hitting business investment and household demand"—launching a pan-European recession that ended a decade of significant credit flow into southern Europe.[51]

Though an incipient worldwide economic recovery was beginning to take shape, Europe would soon be consigned to the sidelines. Prime Minister George Papandreou shocked the world on February 2, 2010, announcing that the Bank of Greece had discovered a statistical calculation 'error' in the method the institution previously used to calculate the country's national debt, and accordingly, Greece's annual budget deficit was projected to skyrocket to 12.7% of Gross Domestic Product (GDP) that year.[52] As this announcement set off a panic in the markets, Papandreou made an impassioned plea to Greek citizens urging them to fulfill their "duty towards [their homeland] to work together . . . to protect our economy."[53] He then pledged to cut Greece's annual budget deficit of 12.7% GDP to the EU's permissible level of 3% by 2012.[54]

Leaders across the world began to openly remark that "the market ha[d] zero confidence in what the Greeks [were] saying,"[55] and, as a result, yields on Greek government bonds

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49. *See* DIRECTORATE-GEN. FOR ECON. AFFAIRS, EUR. COMM'N, ECONOMIC CRISIS IN EUROPE: CAUSES, CONSEQUENCES, AND RESPONSES 1 (2010), http://ec.europa.eu/economy_finance/publications/publication15887_en.pdf.

50. *Id.*

51. *Id.*

52. *See* Helena Smith, *Greece's Papandreou Makes TV Appeal for Unity Over Financial Crisis*, THE GUARDIAN (Feb. 2, 2010, 5:57 PM), http://www.theguardian.com/world/2010/feb/02/papandreou-tv-appeal-financial-crisis; Jerome L. Stein, *The Diversity of Debt Crises in Europe*, 31 CATO J. 199, 210 (2011).

53. *Id.*

54. *Id.* For a discussion of Greece's large fiscal deficit and trends, see Stein, *supra* note 52.

55. Maria Petrakis, *Papandreou Faces Bond Rout as Budget Outlook Worsens*, BLOOMBERG (Apr. 22, 2010, 10:16 AM), http://www.bloomberg.com/

increased sharply, making it nearly impossible for the Greek government to fund routine government operations. This forced Papandreou's government to implement draconian cuts in services, i.e., 'austerity'—including the layoffs of public sector employees,[56] and preparations for a bailout from the EU and IMF.[57]

Facing a sharp revenue shortfall, and unable to access liquidity on international bond markets, Greece announced in May 2010 that it had reduced its budget deficit by 41.5% in the first four months of that year[58] and had agreed upon a $147 billion rescue package jointly backed by the European Union and IMF—representing "the largest bailout ever assembled for a country."[59] The European Council also met in Brussels in the first of many all-night summits to create the European Financial Stability Facility (EFSF), an intergovernmental body outside the European Union charged with raising funds on the international bond markets to provide interest-bearing loans.[60] The EFSF's ability to lend to troubled nations was grounded in collateral guarantees jointly and severally given by Eurozone countries in proportion to their share of capital at the ECB.[61]

An "irrevocable and unconditional"[62] agreement, Germany alone provided $211 billion in collateral.[63] Access to the EFSF's $340 billion war chest was tied to "appropriate conditionality,"

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news/articles/2010-04-21/papandreou-caught-between-strikes-and-imf-as-bond-yields-surge-to-record.

56. Greece's public sector was disproportionately large at this time. *See* John Sfakianasis, *The Cost of Protecting Greece's Public Sector*, N.Y. TIMES (Oct. 10, 2012), http://www.nytimes.com/2012/10/11/opinion/the-cost-of-protecting-greeces-public-sector.

57. *Id.*

58. Jason Voss, *European Sovereign Debt Crisis: Overview, Analysis, and Timeline of Major Events*, CFA INST. BLOG (Nov. 21, 2011), https://blogs.cfainstitute.org/investor/2011/11/21/european-sovereign-debt-crisis-overview-analysis-and-timeline-of-major-events/.

59. *See* Lefteris Papadimas & Jan Strupczewski, *EU, IMF Agree $147 Billion Bailout for Greece*, REUTERS (May 2, 2010, 6:13 PM), http://www.reuters.com/article/2010/05/02/us-Eurozone-idUSTRE6400PJ20100502.

60. *See* EUR. FIN. STABILITY FACILITY, EUROPEAN FINANCIAL STABILITY FACILITY 1–2 (2013), http://www.efsf.europa.eu/attachments/faq_en.pdf. Countries used these funds to recapitalize troubled banks, fund government operations, or issue debt through bonds purchased by the EFSF. *See* Andre Prum, *The European Union Crisis Responses*, 20 COLUM. J. EUR. L. 1, 24–25 (2013).

61. EUR. FIN. STABILITY FACILITY, *supra* note 60, at 2.

62. *Id.* at 4.

63. *Id.* at 2.

e.g., agreement on a Memorandum of Understanding that outlined draconian fiscal and economic reforms in the debtor state.[64] As Greece began to receive assistance, the ECB, through its Securities Markets Program (SMP), prophylactically began purchasing moderate amounts of Italian and Spanish bonds on the international markets to hold down their yields,[65] because these mammoth European economies were heavily indebted themselves and effectively too large to be rescued.[66] The legality of the SMP was immediately questioned by German members of the ECB Executive Board—one of whom resigned in protest, asserting that Article 125 of the Lisbon Treaty prohibited direct monetary financing.[67]

Elsewhere, with its housing market still wounded by the havoc of the 2008 crisis, Ireland chose to prop up six faltering banks by issuing a two-year guarantee on new deposits and bonds.[68] As mortgage assets began to decline and its economy contracted further, the Irish government began to experience a massive funding shortfall as a crisis of confidence struck. A vicious circle resulted, with depositors withdrawing funds guaranteed by the scheme, causing banking assets to sharply

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64. *Id.* at 2, 6. *See* Memorandum of Understanding Between the European Commission Acting on Behalf of Euro Area Member States and the Hellenic Republic, Mar. 3, 2012, http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf.

65. A bond yield is the interest paid on a bond by the issuer. Yields are inversely proportional to demand, i.e., as demand for a bond falls, prices drop and interest rates rise, and vice versa. *See* Amy Wilson, *Eurozone Crisis: Why is the 7pc Bond Yield Important?*, YAHOO FINANCE (Nov. 9, 2011, 12:38 PM), https://uk.finance.yahoo.com/news/Eurozone-crisis-Why-7pc-bond-tele-1132721490.html.

66. Directive 2010/5, Decision of the European Central Bank Establishing a Securities Markets Programme, 2010 O.J. (L 124), http://www.ecb.europa.eu/ecb/legal/pdf/l_12420100520en00080009.pdf.

67. *See* Lisbon Treaty, *supra* note 12, at art. 125 (establishing that "[t]he Union shall not be liable for or assume the commitments of central governments," and that "A Member State shall not be liable for or assume the commitments of central governments . . . ."). Axel Weber was a popular German member of the ECB Executive Board who resigned in early 2011 because he believed the Bank was violating the express terms of art. 125 through its SMP bond purchases. *See* Christian Reiermann & Michael Sauga, *'Enormous Damage': Weber's Exit Highlights Merkel's Euro Problem*, DER SPIEGEL (Feb. 14, 2011, 4:41 PM), http://www.spiegel.de/international/germany/enormous-damage-weber-s-exit-highlights-merkel-s-euro-problem-a-745377.html.

68. *See* Paul B. Lewis, *Business Insolvency and the Irish Debt Crisis*, 11 RICH. J. GLOBAL L. & BUS. 407, 408–15 (2012); *see also Guarantee Bolsters Market*, RTE NEWS (Sept. 30, 2008, 11:50 PM), http://www.rte.ie/news/2008/0930/108605-economy/.

devalue. The Irish government was then forced to divert more budgetary revenues to cover the shortfall, which fatally undermined the country's credit rating.[69] Consequently, Ireland was forced to accept a $113 billion bailout, with controversial conditions that required the country to make labor market reforms and raise the rate of its corporate income tax—previously one of the most attractive features of the Irish business climate.[70]

Portugal, itself another victim of collapsing real estate investments and a sizeable public sector, succumbed to skyrocketing bond yields and was shut out of international bond markets in April 2011, prompting a similar rescue.[71] Initially funded through the EFSF, Portugal would later be shifted to the new European Stability Mechanism (ESM), which was formally approved by the European Council on July 7, 2011.[72] The new facility would have a lending capacity of approximately $800 billion.[73] Projections in 2011 indicated that the new ESM could manage rescues of Greece, Ireland, Portugal, and possibly Spain if requirements were low, but Italy's economy remained too large for rescue.[74]

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69. *Ireland's Economic Crisis: How Did It Happen and What is Being Done About It?*, EUR. COMM'N, http://ec.europa.eu/ireland/key-eu-policy-areas/economy/irelands-economic-crisis/index_en.htm (last visited Apr. 4, 2016).

70. *IMF Approves €22.5 Billion Loan for Ireland*, IMF (Dec. 16, 2010), http://www.imf.org/external/pubs/ft/survey/so/2010/CAR121610A.htm; James G. Neuger & Simon Kennedy, *Ireland Gets $113 Billion Bailout as EU Ministers Seek to Halt Debt Crisis*, BLOOMBERG (Nov. 29, 2010, 6:58 AM), http://www.bloomberg.com/news/2010-11-28/ireland-wins-eu85-billion-aid-germany-drops-threat-on-bonds.html. *See generally* Sara Dillon, *Anglo-Saxon/Celtic/Global: The Tax-Driven Tale of Ireland in the European Union*, 36 N.C. J. INT'L L. & COM. REG. 1 (2010) (discussing the political history of Ireland in the European Union and its corporate tax policy).

71. Patricia Kowsmann & Charles Forelle, *Portugal Pleads for Rescue*, WALL ST. J. (Apr. 7, 2011, 12:01 AM), http://online.wsj.com/articles/SB10001424052748704101604576246294138576346.

72. Treaty Establishing the European Stability Mechanism (ESM), July 7, 2011, 2011 O.J. (L 91), http://ec.europa.eu/economy_finance/articles/financial_operations/2011-07-11-esm-treaty_en.htm.

73. *See* EUR. FIN. STABILITY FACILITY, *supra* note 60, at 26.

74. *See* Garth Theunissen, *Italy Too Big to Bail Out as Crisis Enters 'New Phase'*, BLOOMBERG (July 13, 2011, 6:00 PM), http://www.bloomberg.com/news/2011-07-13/italy-too-big-to-bail-out-as-crisis-enters-new-phase-chart-of-the-day.html.

D. THE CANARY IS DEAD, BUT THE EURO STILL LIVES

The events of November 2011 were quietly among the most economically pivotal of the last century. In June of that year, Greece acknowledged the open secret that its record-setting $147 billion[75] rescue package was insufficient, and that approximately the same amount of funding would be needed in a second tranche alongside systemic debt restructuring (default).[76] Italy, $2.6 trillion in debt itself—larger than Greece, Ireland, Portugal, and Spain combined—also began to experience severe attack from international bond markets. This pressure drove its bond yield perilously close to the 7% point of no return, the point at which Ireland and Portugal sought aid and when debt financing merely became a self-reinforcing spiral.[77]

Europe's heads of government met in the European Council for an all-night summit on October 26–27, 2011 to agree to an orderly method for a Greek debt adjustment, an increase in the size of the ESM, and the promotion of economic reform in Italy.[78] With Italy's bond yield skimming the event horizon, the Council agreed to labor deregulation and other "structural reforms to increase competitiveness" and confidence in Italy's solvency.[79] Declaring that the continent was safe, the Council declared the end was in sight, and that "the euro . . . rest[ed] on solid fundamentals."[80]

Only days later, however, Greek Prime Minister George Papandreou left his fellow European leaders "speechless with rage" by announcing that a popular referendum would take place on the bailout conditions.[81] Since the European

75. *See* Papadimas & Strupczewski, *supra* note 59.

76. *See* Helena Smith, *Greece Needs Another €110 Billion Bailout to Avoid Debt Default, Says Papandreou*, THE GUARDIAN (June 19, 2011, 6:52 PM), http://www.theguardian.com/world/2011/jun/19/greece-papandreou-second-bailout-figure.

77. Neelabh Chaturvedi, *Italian Bond Yields Pass Key 7% Level*, WALL ST. J. (Nov. 9, 2011, 7:39 PM), http://www.wsj.com/articles/SB10001424052970204358004577027492657312740.

78. *See* Part III(B) *infra*.

79. Euro Summit Statement, *supra* note 11, at 2.

80. *Id.* at 1.

81. Ambrose Evans-Pritchard, *Revenge of the Sovereign Nation*, DAILY TELEGRAPH (Nov. 1, 2011), http://blogs.telegraph.co.uk/finance/ambroseevans-pritchard/100012986/revenge-of-the-sovereign-nation/. *See* Konstantinos Margaritis, *A Constitutional Discussion of Participatory Democracy in Greece*, 23 CONST. F. 29 (2014) (discussing the level of mistrust and lack of democratic

Constitution and Lisbon Treaty were rejected in 2005 and 2008 respectively, European leaders looked askance at popular referendums.[82] Less than a week later, Papandreou was forced to resign, the referendum was cancelled, and a new cross-party coalition was formed under the leadership of former ECB Vice President Lucas Papademos.[83]

Simultaneously, the Italian Parliament was considering the economic and labor market reforms agreed to in the October 27th summit. Prime Minister Berlusconi, never a true believer in the necessity of the reforms forced on him, failed to secure a majority for the proposals and European leaders soon began piling immense pressure on him to resign.[84] Interestingly, Italy's bond yield surpassed 7% for the first time at this moment in November 2011, even though the ECB was supposedly using its sizeable SMP resources to hold Italy's yields just below the point of insolvency. A technocratic government, led by former European Commission official Mario Monti, soon replaced Berlusconi.[85] At the same time, other solvent European nations, including Spain, France, and Germany, began experiencing contagion, as massive panic spiked their own bond yields close to insolvency.[86] The *dénouement* arrived soon after.

participation in Greece, using Prime Minister Papandreou's referendum as a supporting example).

82. *See* Maria Cahill, *Ireland's Constitutional Amendability and Europe's Constitutional Ambition*, 9 GER. L.J. 1191, 1191, 1218 (2008) ("The Open Europe survey conducted in Ireland after the visit . . . revealed that, by that stage, 71% of voters were against the idea of a revote on the Lisbon Treaty; 62% of them saying that they would reject the Treaty the second time around.").

83. Damien McElroy, *Euro Debt Crisis: Greek PM Papandreou to Resign*, DAILY TELEGRAPH (Nov. 6, 2011, 8:29 PM), http://www.telegraph.co.uk/news/worldnews/europe/greece/8873105/Euro-debt-crisis-Greek-PM-George-Papandreou-to-resign-when-new-coalition-government-formed.html.

84. *See* Anthony Faiola, *Italy's Debt Costs Soar as Pressure Builds on Berlusconi*, WASH. POST (Nov. 7, 2011), http://www.washingtonpost.com/world/europe/as-crisis-spreads-to-italy-berlusconi-under-pressure-to-resign/2011/11/07/gIQAiyIzuM_story.html; *see also* Barry Moody & James McKenzie, *Berlusconi to Resign after Parliamentary Setback*, REUTERS (Nov. 8, 2011, 6:28 PM), http://www.reuters.com/article/2011/11/08/us-italy-idUSTRE7A72NG20111108.

85. *The Full Monti*, THE ECONOMIST (Nov. 19, 2011), http://www.economist.com/node/21538778.

86. Jeremy Warner, *Death of a Currency as Eurogeddon Approaches*, DAILY TELEGRAPH (Nov. 24, 2011, 7:00 PM), http://www.telegraph.co.uk/finance/comment/jeremy-warner/8913884/Death-of-a-currency-as-eurogeddon-approaches.html ("The defining moment was the fiasco over Wednesday's *bund* auction, reinforced on Thursday by the spectacle of German sovereign bond yields rising above those of the UK . . . what this is about is the markets starting

Normally an incontrovertible investment, Germany failed to attract even a handful of buyers for its sovereign bonds during an auction on November 23.[87] As a result, financial analysts remarked that much like a dead canary in a mine, the failed auction meant that Europe had "crossed the point of no return" and that the euro was "no longer a serious currency."[88] Facing the imminent collapse of the European economy and the paralysis of European leadership in the face of fast-moving events,[89] the U.S. Federal Reserve extended an emergency line of dollar liquidity that allowed European banks and markets to resume functioning, thereby averting a second massive worldwide systemic crisis.[90]

The crisis would go into abeyance until May 2012, when international bond markets again focused on Spain's fundamentally insolvent banks and high debt load, causing bond yields on Spanish debt to approach 7%.[91] European leaders agreed to a deal on June 9 to inject $125 billion[92] into Spain's largest banks.[93] This bailout quickly failed to calm markets, however.[94] The crisis persisted throughout the summer, with Spanish bond yields persistently stuck near 7% and a Greek

to bet on what was previously a minority view—a complete collapse, or break-up, of the euro.").

87. *Id.*

88. *Id.*

89. Tom Gjelten, *Political Paralysis Worsens European Debt Crisis*, NPR (Nov. 11, 2011, 12:01 AM), http://www.npr.org/2011/11/11/142227475/political-paralysis-worsens-european-debt-crisis.

90. *See* Annalyn Censky, *Fed, ECB, Offer Aid to Global Financial System*, CNN (Nov. 30, 2011, 4:26 PM), http://money.cnn.com/2011/11/30/news/economy/fed_ecb_dollar_liquidity/; *see also* Ambrose Evans-Pritchard, *Fed Saves Europe's Banks as ECB Stands Pat* (Nov. 30, 2011, 9:01 PM), http://www.telegraph.co.uk/finance/financialcrisis/8926987/Fed-saves-Europes-banks-as-ECB-stands-pat.html ("The interwoven banking and sovereign debt crisis in the eurozone has become so dangerous for the world that the US Federal Reserve has been forced to take emergency action, acting as global lender of last resort to shore up Europe's banking system.").

91. *How to Save Spain*, THE ECONOMIST (June 2, 2012), http://www.economist.com/node/21556238.

92. Mark Koba, *Europe's Economic Crisis: What You Need to Know*, CNBC (June 18, 2012, 4:03 PM), http://www.cnbc.com/id/47689157 ("Euro zone finance ministers agreed . . . to lend Spain up to 100 billion euros ($125 billion) to shore up its teetering banks . . . .").

93. Giles Tremlett, *Spain to Get Bank Bailout That May Run Up to €100 Billion*, THE GUARDIAN (June 9, 2012, 3:24 PM), http://www.theguardian.com/world/2012/jun/09/spain-bank-bailout-eurozone-crisis.

94. *The Spanish Bailout: Going to Extra Time*, THE ECONOMIST (June 16, 2012), http://www.economist.com/node/21556953.

election that brought the radical SYRIZA party into view for the first time.[95]

In late July 2012, the crisis took a major shift. ECB President Mario Draghi casually remarked in a London speech that his institution was "ready to do whatever it takes to preserve the euro. And believe me, it will be enough."[96] Meaningless to the public, international bond markets understood Draghi's implication that the ECB was prepared to take a previously forbidden step in directly buying an unlimited amount of Member State sovereign bonds, thereby serving as a true lender of last resort. Spanish and Italian yields immediately plummeted.[97] Citing the Bank's need to "safeguard the monetary policy transmission mechanism in all countries of the euro area," Draghi stated the new Outright Monetary Transactions (OMT) program would "enable us to address severe distortions in government bond markets which originate from, in particular, unfounded fears on the part of investors of the reversibility of the euro"—a political motivation decidedly not focused on monetary indicia.[98]

Another false dawn then occurred across Europe from August 2012–December 2014. Outside of a limited Cypriot bailout in March 2013, the Eurozone quietly moved forward with budgetary reforms, while facing the headwinds of deflation and stagnant productivity. In January 2015, however, the Greek government, led by Antonis Samaras' pro-EU New Democracy party, collapsed and the radical SYRIZA party, led by Nicholas Tsipras, assumed control of the bankrupt nation.[99] Openly

95. Christine Theodorou, *Greek New Democracy Leader Hails 'Victory for All Europe'*, CNN (June 17, 2012, 10:38 PM), http://www.cnn.com/2012/06/17/world/europe/greece-election/. SYRIZA is an acronym that, loosely translated into English, means "coalition of the radical left." *Id.*

96. Mario Draghi, Pres., Eur. Cent. Bank, Speech at the Global Investment Conference (July 26, 2012), http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html. This speech was, at the time, hailed as a fundamental shift in the Eurozone crisis. *See* Duncan, *supra* note 32, at 199–200. Many in Germany continue to argue that these actions violate Article 125 of the Lisbon Treaty. *See supra* note 67.

97. Jamie Dunkley, *Debt Crisis: Mario Draghi Pledges to Do 'Whatever It Takes' to Save Euro*, DAILY TELEGRAPH (July 26, 2012, 12:41 PM), http://www.telegraph.co.uk/finance/financialcrisis/9428894/Debt-crisis-Mario-Draghi-pledges-to-do-whatever-it-takes-to-save-euro.html.

98. Press Release, Mario Draghi, Pres., Eur. Cent. Bank, Introductory Statement to the Press Conference (Sept. 6, 2012), http://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html.

99. Akis Georgakellos & Harris Mylonas, *Tsipras' Balancing Act Begins*, WASH. POST (Feb. 3, 2015), http://www.washingtonpost.com/blogs/ monkey-cage

describing itself as "the party of the radical left,"[100] the party's platform called for the cancellation of previous bailout agreements, broad debt restructuring, i.e., default, and the expansion of social welfare programs and the rehiring of laid-off government workers.[101]

After Tsipras declared that "austerity is history,"[102] a swift backlash occurred. Stating that "elections change nothing," German Finance Minister Wolfgang Schäuble quickly dismissed all of the Greek reform pledges.[103] In late February 2015, with bailout funds temporarily blocked by the European Union, Greece's government experienced an acute budgetary shortfall because of falling tax revenues. Greek banks also saw depositors withdraw their savings *en masse*, fearing default and devaluation.[104] Normally, the latter issue would not have been problematic as banks could draw fresh liquidity from the ECB as lender of last resort. However, the ECB took the unprecedented step[105] of denying Greek banks access to normal, unlimited liquidity programs, citing lack of quality collateral.[106]

A small, emergency program called Emergency Liquidity Assistance (ELA) was the only funding mechanism that stood between Greek banks and widespread default at that time. ELA forced national depository institutions to pay punitive interest rates for short-term liquidity, subject to a maximum cap.[107] As negotiations reached an impasse in mid-March 2015, the Bank

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/wp/2015/02/03/hey-alexis-tsipras-you-just-got-elected-prime-minister-of-greece-what-are-you-going-to-do-now/.

100. *See* Patrick Cockburn, *Greece Elections: Voters Will Choose the Syriza Party—and Send a Defiant Message to the EU*, IRISH INDEPENDENT (Jan. 25, 2015), http://www.independent.ie/world-news/europe/voters-will-choose-the-syriza-party-and-send-a-defiant-message-to-the-eu-30935817.html.

101. *See* Georgakellos & Mylonas, *supra* note 99.

102. *Greece Crisis: Germany's Schaeuble Warns Over Reform*, BBC NEWS (Dec. 30, 2014), http://www.bbc.com/news/world-europe-30629269.

103. *Id.*

104. Derek Gatopoulos, *As Greece Scrambles for Deal with Creditors, Bank Deposit Drain Adds Pressure*, CANADIAN BUS. (Mar. 26, 2015), http://www.canadianbusiness.com/business-news/as-greece-scrambles-for-deal-with-creditors-bank-deposit-drain-adds-pressure/.

105. Mehreen Khan, *How Greece Pushed Europe's Creditors to the Edge*, DAILY TELEGRAPH (Mar. 29, 2015, 8:30 AM), http://www.telegraph.co.uk/finance/economics/11500650/How-Greece-pushed-Europes-creditors-to-the-edge.html.

106. Press Release, Eur. Cent. Bank, Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations (Feb. 4, 2015), https://www.ecb.europa.eu/press/pr/date/2015/html/pr150204.en.html.

107. *See* ELA PROCEDURES, *supra* note 27.

announced that Greek banks would no longer be allowed to use short-term Greek government bonds (treasury bills or t-bills) as collateral for ELA, which was the method the Greek government was previously using to finance itself.[108] With the ECB seemingly using its funding mechanisms to leverage the Greek government into a deal, the Tsipras government was forced to raid pensions, public utility reserves, and trust funds to pay government wages and honor bailout obligations to the IMF and the ECB.[109]

As the Greek government continued to demand the renegotiation of past bailout agreements made by the Samaras and Papandreou governments, its European partners demanded new austerity measures that went further than prior agreements because of the continued decline of the Greek economy.[110] Facing an impasse, Prime Minister Tsipras called a referendum in June 2015 to gain a popular mandate against continued austerity that he could use at the negotiating table.[111]

As food shortages, bank runs, and widespread capital controls took hold of the country, the Eurogroup openly stated that joining Tsipras and the 'No' campaign would be seen as tantamount to Greece choosing to eject itself from the euro.[112] In spite of this, the No campaign won a shocking 61% of the vote in

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108. Jeff Black et al., *ECB Said to Limit Greek Lenders' Treasury Bill Holdings*, BLOOMBERG (Mar. 24, 2015, 1:47 PM), http://www.bloomberg.com/news/articles/2015-03-24/ecb-said-to-limit-greek-lenders-treasury-bill-holdings.

109. *See, e.g.*, Helena Smith, *Greek Government Takes Desperate Measures in Battle to Stay Afloat*, THE GUARDIAN (Mar. 25, 2015, 3:50 PM), http://www.theguardian.com/business/2015/mar/25/greek-government-takes-desperate-measures-in-battle-to-stay-afloat/; *see also* Kevin Hope et al., *Athens Raids Public Health Coffers in Hunt for Cash*, FIN. TIMES (Mar. 24, 2015), http://www.ft.com/intl/cms/s/0/2ed89606-d249-11e4-ae91-00144feab7de.html.

110. Renee Maltezou & Leigh Thomas, *Greece, Creditors Line Up Rival Reform Proposals to Unlock Aid*, KATHIMERINI (June 2, 2015), http://www.ekathimerini.com/197484/article/ekathimerini/news/greece-creditors-line-up-rival-reform-proposals-to-unlock-aid.

111. Press Release, Eur. Union, Eurogroup Statement on Greece (June 27, 2015), http://www.consilium.europa.eu/en/press/press-releases/2015/06/27-eurogroup-statement-greece/. Prime Minister George Papandreou called a similar referendum in November 2011, only to quickly be subverted by members of his own government and forced to resign. *See infra* note 142 and accompanying text. It is likely that Tsipras was able to successfully call a referendum because there were few other members of his government that had sufficient authority to challenge him.

112. *Greek Crisis: No Vote Would Mean Euro Exit, Leaders Warn*, BBC NEWS (June 29, 2015), http://www.bbc.com/news/world-europe-33319917.

the July 5 poll.[113]

With Greece seemingly finished as a Eurozone member, Prime Minister Tsipras performed a dramatic about-face on July 6, firing his charismatic finance minister and pledging a return to negotiation.[114] A preliminary package was agreed to on July 12, 2015 in exchange for resumed ECB liquidity assistance,[115] but nine months later, a full package has yet to be agreed upon by Greece and European leadership.

III. THE MODERN 'INDEPENDENCE' OF THE EUROPEAN CENTRAL BANK

A. THE ECB'S FRAMEWORK

Independence is read to mean political neutrality and insulation from politics in the central banking arena.[116] The technocratic nature of monetary policy requires specialists with "skills, expertise, and superior economic qualifications" vis-à-vis politicians.[117] This neutrality is required because of the immense control that these institutions have over an economy, literally having the authority to inject billions of currency into circulation at a moment's notice, and taking into account that such power is relatively unchecked by democratic accountability.[118]

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113. Stelios Bouras & Nektaria Stamouli, *New Greek Finance Minister Euclid Tsakalotos Thrown Into the Debt Crisis Hot Seat*, WALL ST. J. (July 6, 2015, 4:08 PM), http://www.wsj.com/articles/new-greek-finance-minister-tsakalotos-thrown-into-the-debt-crisis-hot-seat-1436213175.

114. *Id.*; *see also* Ambrose Evans-Pritchard, *Europe Is Blowing Itself Apart Over Greece and Nobody Can Stop It*, DAILY TELEGRAPH (July 7, 2015, 8:35 PM), http://www.telegraph.co.uk/finance/economics/11724924/Europe-is-blowing-itself-apart-over-Greece-and-nobody-can-stop-it.html (asserting that Prime Minister Tsipras never intended to win the July 5th referendum and initially planned to resign after what he saw as an inevitable 'Yes' victory).

115. Mark Thompson, *Greek Bailout: Europe Strikes Deal After Marathon Talks*, CNN (July 13, 2015, 10:15 AM), http://money.cnn.com/2015/07/12/news/economy/greece-bailout-europe-conditions/index.html.

116. *See id.*; Jonathan A.C. Wise, *Variable Geometry and the European Central Bank: How the ECB Can Assert Itself Against Attacks from Member States with Derogations*, 20 B.C. INT'L & COMP. L. REV. 407, 415 (1997); *see also* Alessandra Chirico, *How to Apply the Issue of Good Governance to Central Banks: Theoretical Clarifications on the Modalities of the Exercise of Monetary Power*, 17 EUR. BUS. L. REV. 1651, 1653 (2006).

117. Lastra, *supra* note 32, at 477.

118. *See id.* at 478 ("The main argument against central bank independence is that an institution which is free from the direct effect of political control lacks democratic legitimacy."). *See generally* Douglas R. Holmes, *Communicative*

The European Central Bank possesses a larger measure of authority than the typical national central bank today, understanding that its entrenched constitutional mandate cannot be amended via ordinary statutory law,[119] and it has broad authority to issue regulations, impose fines, and conduct enforcement proceedings.[120] This democratic insulation has been held to be constitutional across Europe, with the German Constitutional Court taking the lead in this area.

In its 2014 decision on bond purchasing by the ECB, the Constitutional Court noted that:

> [i]n the view of the majority . . . the independence of the ECB constitutes a deviation from the concept of democracy enshrined in Articles 20 and 79(3) of the Basic Law. It considers such independence to be in conformity with the said concept of democracy only under the condition that it is tied to a *narrowly interpreted legal mandate* and subject to full judicial review.[121]

The court viewed that the *Bundestag*'s carefully-balanced political decision to delegate competence over monetary policy operations to the hands of an independent, unaccountable institution was permissible because it more effectively guaranteed the value of money and property, and was therefore intrinsically important to the concept of democracy itself.[122] As

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Imperatives in Central Banks, 47 CORNELL INT'L L.J. 15 (2014) (discussing recent global transparency and accountability initiatives in central banks).

119. Unlike the U.S. Federal Reserve, which is a statutory creation and has been subject to varying mandates over the years, *inter alia*, "maximum employment" and "stable prices." *Compare* Federal Reserve Reform Act of 1997, 91 Stat. 1387 (1997), *with* Consolidated Treaty, *supra* note 5, at art. 127(1).

120. *Compare* Paivi Leino & Janne Salminen, *Should the Economic and Monetary Union Be Democratic After All? Some Reflections on the Current Crisis*, 14 GER. L.J. 844, 849–51 (2013) ("[T]he ECB . . . has powers . . . including its limited law-making competence and competence to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions."), *with* Richard Burchill, *The EU and European Democracy—Social Democracy or Democracy with a Social Dimension*, 17 CAN. J.L. & JURISPRUDENCE 185 (2004) (outlining shifts in how Europeans viewed democracy before and after the crisis).

121. *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], 2 BvR 2728/13, ¶¶ 59–60, Jan. 14, 2014 (Ger.) (emphasis added). *Contra* Matthias Goldman, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 GER. L.J. 265, 266 (2014) (asserting that the nature of the Basic Law's democratic principles warrant judicial deference to central bank actions).

122. *See* Leino & Salminen, *supra* note 120, at 851.

this distance from popular control brings about important accountability questions, control over the Bank's authority to expand its mandate at the margins becomes an issue that must be monitored, however.

The German Constitutional Court has repeatedly held that "emphasizing . . . the independence of the ECB cannot mean independence in defining—or setting—its own mandate," instead only permitting autonomous judgment "*within its mandate*."[123] As a result, "a systemic reading of Articles 20(2) and 88 of the Basic Law seems to require that the ECB follow a rules-based approach . . . and to rule out a discretionary approach" in fulfilling its sole treaty mandate to pursue price stability.[124]

This focus on price stability was the price that Germany demanded in exchange for giving up the *Deutschmark* and binding its economic future to the greater continent.[125] Therefore, as part of the broader landscape of the European separation of powers, a narrow interpretation of its mandate is the centerpiece of the ECB's plenary authority over price stability.

Prior to the Eurozone crisis, the practical operations and statements of European leaders stressed their commitment to the strict independence and political neutrality of the ECB. Jean-Claude Trichet, President of the Bank from 2003–11, stated that he was "inflexibly attached to [a] strict interpretation of the Treaty."[126] Additionally, German Chancellor Angela Merkel proclaimed that, "I will, on behalf of the whole German government, commit myself to the ECB's independence and *stop those who impose their political influence*" on the Bank.[127]

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123. Carsten Gerner-Beyerle et al., *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, 15 GER. L.J. 281, 318–19 (2014) (emphasis added).

124. Goldman, *supra* note 121, at 268; *see also* McNamara, *supra* note 43, at 143, 147 (outlining the standards-based approach the ECB must follow).

125. Gerner-Beyerle et al., *supra* note 123, at 295; Martin Feldman & Kathleen Feldman, *The Euro and Price Stability*, BOSTON GLOBE (Dec. 15, 1998), http://www.nber.org/feldstein/bg121598.html.

126. Rene Smits, *The European Central Bank's Independence and its Relations with Economic Policy Makers*, 31 FORDHAM INT'L L.J. 1614, 1631–32 (2008); *see also* Ralph Atkins, *Trichet Defends ECB Independence*, FIN. TIMES (June 4, 2009, 8:53 PM), http://www.ft.com/intl/cms/s/0/a85a56f4-513f-11de-84c3-00144feabdc0.html?siteedition=uk.

127. Marilyn Gerlach, *Germany's Merkel Defends ECB Independence*, REUTERS (Sept. 21, 2007), http://www.forexfactory.com/news_archive.php?id=48027 (emphasis added).

Most importantly, ECB President Mario Draghi, when asked why he could not take more aggressive action, e.g., a wide scale liquidity injection on the order of the Federal Reserve's actions in December 2011, calmly responded that he was "bound by the European treaty . . . which 'embodies the best tradition of the *Deutsche Bundesbank*.'"[128]

B. MODERN COUP D'ÉTATS

The last successful *coup d'état* in Europe took place in Greece in 1967. Although rumors of an imminent takeover by the military were rampant during the peak of the Greek crisis in November 2011,[129] this nation and another core European country experienced involuntary changes of government during this crisis.

As discussed *supra*, the ECB designed SMP as a last-ditch firewall that safeguarded Italy and Spain via targeted bond purchases on the international markets to cap yields just below insolvency at 7%, as these countries were universally understood to be too large to bailout.[130] The SMP was merely intended to be a stop-gap measure that gave distressed countries a limited window of time to enact the reforms necessary to regain the confidence of bond markets.[131] This program proved effective in

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128. McNamara, *supra* note 43, at 147.

129. *See, e.g.*, Palash Ghosh, *Does Papandreou Fear a Military Coup in Greece?*, INT'L BUS. TIMES (Nov. 2, 2011, 8:25 AM), http://www.ibtimes.com/does-papandreou-fear-military-coup-greece-364300 ("Prime Minister George Papandreou sparked even more outrage by replacing senior members of the Greek military with officials deemed to be more sympathetic to Papandreou.").

130. Decision of the Eur. Cent. Bank of May 14, 2010 on Establishing a Securities Markets Program, 2010 O.J. (L 124) 8. *See* Brian Blackstone, *What Does the ECB's "Sterilization Program" Do?*, WALL ST. J. (Mar. 4, 2014, 10:18 AM), http://blogs.wsj.com/moneybeat/2014/03/04/what-does-the-ecbs-sterilization-program-do/.

131. *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], 2 BvR 2728/13, ¶¶ 3, 15, Jan. 14, 2014 (Ger.); Richard Milne, *Italy and Spain Respond to ECB Treatment*, FIN. TIMES (Aug. 8, 2011, 8:18 PM), http://www.ft.com/intl/cms/s/0/93b358ba-c1d4-11e0-bc71-00144feabdc0.html. *Compare* Guntram B. Wolff, *The ECB's OMT Program and German Constitutional Concerns*, *in* THINK TANK 20: THE G-20 AND CENTRAL BANKS IN THE NEW WORLD OF UNCONVENTIONAL MONETARY POLICY 26 (2013), http://www.brookings.edu/~/media/Research/Files/Reports/2013/08/g20-central-banks-monetary-policy/TT20-european-union_wolff.pdf?la=en, *with* *EFSF Guideline on Interventions in the Secondary Market*, EFSF (2011), http://www.efsf.europa.eu/attachments/efsf_guideline_on_interventions_in_the_secondary_market.pdf.

early 2011, allowing the ECB to cap further increases in Irish and Portuguese bond yields after bailout programs commenced.[132]

In August 2011, ECB President Trichet wrote a seemingly innocuous letter to Prime Minister Berlusconi requesting that his government carry out a number of reforms, noting that while "[t]he Italian Government has decided to pursue a balanced budget in 2014 . . . [t]hese are important steps, but not sufficient," emphasizing that labor market reforms were "essential."[133]

Berlusconi was naturally cool to labor market reforms that deregulated the hiring and firing of union employees, as he was aware that two Italian labor officials were assassinated for proposing similar reforms in the 2000s, and that the issue was nevertheless within Italy's domestic policy sphere anyway—limiting the EU's ability to demand reform. Nevertheless, it was widely assumed the ECB would use the SMP to give the Italian Republic more time to regain the good graces of the market, while the details of a broader economic reform package were worked out amongst Prime Minister Berlusconi and the EU institutions.

European leaders believed Berlusconi had finally converted after the October 26 summit, but the premier's reform legislation began to run into political difficulties in the *Parlamento Italiano* days later.[134] French President Sarkozy and Chancellor Merkel pressured him to redouble his efforts, and tired of the pressure, Berlusconi took the unprecedented step of threatening to take Italy out of the euro.[135]

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132. *See* Keith Jenkins & Anchalee Worrachate, *ECB Said to Buy Bonds of Portugal, Ireland to Cap Decline*, BLOOMBERG (Aug. 4, 2011, 8:41 AM), http://www.bloomberg.com/news/articles/2010-11-17/ecb-buys-portuguese-greek-government-bonds-amid-irish-talks-traders-say.

133. Letter from the Eur. Cent. Bank to Silvio Berlusconi, Prime Minister of Italy (Aug. 5, 2011), http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml; *see also* Guy Dinmore & Ralph Atkins, *ECB Letter Shows Pressure on Berlusconi*, FIN. TIMES (Sept. 29, 2011, 5:49 PM), http://www.ft.com/intl/cms/s/0/3576e9c2-eaad-11e0-aeca-00144feab49a.html.

134. *See, e.g.*, Alan Friedman, *Italy: Monti's Secret Summer*, FIN. TIMES (Feb. 10, 2014, 6:54 AM), http://www.ft.com/intl/cms/s/0/b9474c88-8e98-11e3-b6f1-00144feab7de.html#axzz2sqyEviuP; Fraser Nelson, *Europe's Hit Squad*, SPECTATOR (Nov. 12, 2011), http://www.spectator.co.uk/features/7378428/europes-hit-squad/.

135. *See* LORENZO BINI SMAGHI, MORIRE DI AUSTERITÀ: DEMOCRAZIE EUROPEE CON LE SPALLE AL MURO 37 (2013) ("L'ipotesi d'uscita dall euro era stata ventilata in colloqui privati con i governi degli altri paesi dell'euro."/"*The*

According to Lorenzo Bini Smaghi, a former member of the ECB Executive Board, these horrifying remarks caused the ECB officials to completely shut down SMP support in an effort to persuade Prime Minister Berlusconi to resign.[136] Former U.S. Secretary of the Treasury Timothy Geithner recounted that Bank officials and other European leaders approached him during this time:

> . . . with a scheme to try to force Italian Prime Minister Silvio Berlusconi out of power; they wanted us to refuse to support IMF loans to Italy until he was gone. We told the President about this surprising invitation, but as helpful as it would have been to have better leadership in Europe, we couldn't get involved in a scheme like that. We couldn't have his blood on our hands.[137]

The British government was aware of this maneuvering as well. Cabinet Minister Iain Duncan Smith later recounted that he was "horrified" by what he had heard of the ECB's actions and raised the issue to Prime Minister Cameron at a Cabinet meeting.[138] Nevertheless, with bond yields above 7% and

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possibility of an exit from the euro had been discussed in private talks with the governments of other euro area countries.").

136. Ambrose Evans-Pritchard, *ECB's Treatment of Ireland and Italy is a Constitutional Scandal, Yet No One Held to Account*, DAILY TELEGRAPH (Oct. 3, 2014), http://www.telegraph.co.uk/finance/economics/11138980/ECBs-treatment-of-Ireland-and-Italy-is-a-constitutional-scandal-yet-nobody-held-to-account.html ("When Italy's Silvio Berlusconi failed to comply fully . . . the bond purchases [SMP] were shut down. Berlusconi was forced from office. The ECB had no legal or constitutional mandate for such action."); Aaron Smith, *Italian Bond Yields Nearing 'Danger Zone'*, CNN (Nov. 7, 2011, 12:55 PM), http://money.cnn.com/2011/11/07/markets/bondcenter/italian_bond_yield/index.htm ("[T]he ECB is unlikely to continue buying Italian bonds unless the Italians overhaul their leadership."); SMAGHI, *supra* note 135, at ch. 3. *See* Fabrizio Goria, *Italy on the Brink: The Hidden Story of the 2011 Near-Collapse and Analogies with Today*, LONDON SCH. ECON. (July 29, 2013), http://blogs.lse.ac.uk/eurocrisispress/2013/07/29/italy-on-the-brink-the-hidden-story-of-the-2011-near-collapse-and-analogies-with-today/ (recounting that European Commission chief José Manuel Barroso told Italian Internal Affairs Minister Roberto Maroni that "you need to 'unplug' Berlusconi"); Alan Johnston, *Italy: Umberto Bossi Urges Silvio Berlusconi to Quit*, BBC NEWS (Nov. 8, 2011), http://www.bbc.com/news/world-europe-15638773.

137. TIMOTHY GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISES 476 (2014).

138. Tim Ross, *IDS: No.10 Can Sack Me, But the EU Fight is Too Important to Back Down*, DAILY TELEGRAPH (Feb. 27, 2016, 10:00 PM), http://www.telegraph.co.uk/news/newstopics/eureferendum/12176291/IDS-No10-can-sack-me-but-the-EU-fight-is-too-important-to-back-down.html ("[A]m I the only one

predictions of the Italian government's inability to raise capital mounting, Berlusconi resigned on November 12, 2011.[139]

Further south, Greece's citizens were being asked to shoulder an enormous burden in 2011, ranging from sharp cuts in government services, unemployment near 25%,[140] and years of impending economic austerity. Therefore, it was natural for Greece's elected leadership to seek a political mandate from its citizens after the new bailout program and debt restructuring were agreed to in principle in late October 2011, allowing the Greek people—for the first time in the crisis—to have a say in the direction of their country, even if the desired alternative was default.[141] Prime Minister Papandreou announced a referendum on the terms of the bailout on November 2, 2011.[142] "Speechless with rage,"[143] ECB officials informed Papandreou that Greece would not receive additional funds until he resigned his office and allowed a new coalition government led by a former ECB official to take power.[144] Papandreou resigned three days later.[145]

These occurrences, though bloodless, are nevertheless no different from the *coup d'états* the European Union was created to prevent. The euro has always fundamentally been a political project[146] intended to drive Europe down the road of full-fledged

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here that feels distinctly uneasy about Big Brother turning around to the elected government [of Italy] and saying, you must go? I didn't think that's why my father and others fought the War. They fought it for democracy.").

139. Rachel Donadio & Elisabetta Povoledo, *Berlusconi Steps Down, and Italy Pulses With Change*, N.Y. TIMES (Nov. 12, 2011), http://www.nytimes.com/2011/11/13/world/europe/silvio-berlusconi-resign-italy-austerity-measures.html?_r=0.

140. *Greece Unemployment Rate*, TRADING ECON, http://www.tradingeconomics.com/greece/unemployment-rate (last visited Apr. 4, 2016).

141. Many economists agreed that allowing Greece to default and regain competitiveness via devaluing a 'New Drachma' was preferable to remaining within the euro. *See* Mark Weisbrot & Juan Antonio Montecino, *More Pain, No Gain For Greece: Is the Euro Worth the Costs of Pro-Cyclical Fiscal Policy and Internal Devaluation?*, CTR. FOR ECON. & POL'Y RES. (Feb. 2012), https://cepr.net/documents/publications/greece-2012-02.pdf.

142. *See* Mark Lowen, *Greek Cabinet Backs George Papandreou's Referendum Plan*, BBC NEWS (Nov. 2, 2011, 3:57 AM), http://www.bbc.com/news/world-europe-15549352.

143. Evans-Pritchard, *supra* note 81.

144. *See* Nelson, *supra* note 134.

145. *Id.*

146. Jens Weidmann, Pres., Deutsche Bundesbank, Introductory Statement at the Rencontres Économiques d' Aix-en-Provence (July 7, 2013), http://www.bundesbank.de/Redaktion/EN/Reden/2013/2013_07_07_weidmann_aix_en_provence.html.

political union. Nevertheless, the European Union is a Member State-centric political institution—the reason that treaties between sovereign states are at the center of the EU framework of governance, and not a 'European Constitution.'

C. LEVERAGE IN NEGOTIATIONS

Similar political maneuvers have occurred in Ireland, Greece, and Cyprus to gain an upper hand in negotiations. The Irish government received a letter from the ECB in November 2010, with an "explicit threat," warning the Bank would withdraw SMP support and EFSF funding, *forcing immediate default*,[147] if Ireland proceeded with plans to write down bonds held by foreign creditors, instead of forcing Irish taxpayers to shoulder this burden.

Former Bank of Ireland Governor Patrick Honohan stated that he was told "in categorical terms that burning the bondholders would mean no [assistance] program, and, accordingly, could not be countenanced."[148] Honohan was also careful to note that the demand was presented to him as a *fait accompli*, "which had apparently been taken at a very high-level teleconference to which no Irish representative was invited."[149]

In the white heat of the European crisis in 2011–12, the ECB fulfilled its mission as a lender of last resort to European banks, offering nearly $150 billion in ELA funds to Greek depository institutions alone when market funding could not be obtained—all of which was fully repaid.[150] Greece's ELA repayment obligation to the ECB was approximately $75 billion

147. *See* Brendan Keenan, *Revealed—Troika Threats to Bankrupt Ireland*, IRISH INDEPENDENT (Sept. 28, 2014, 2:30 AM), http://www.independent.ie/irish-news/politics/revealed-the-troika-threats-to-bankrupt-ireland-30621197.html; BRIAN MURPHY ET AL., BRIAN LENIHAN: IN CALM AND CRISIS (2014); *see also* Karl Whelan, *The ECB's Secret Letter to Ireland: Still Secret*, FORBES (Nov. 29, 2013, 9:38 AM), http://www.forbes.com/sites/karlwhelan/2013/11/29/the-ecbs-secret-letter-to-ireland-still-secret/. 'Troika' refers to the joint ECB-EU-IMF rescue consortium.

148. Keenan, *supra* note 147. *See also EU's Treatment of Ireland During Financial Crisis 'Outrageous'—Former European Commission Advisor*, RTE NEWS (May 7, 2014, 9:49 PM), http://www.rte.ie/news/business/2014/0507/615802-european-union-ireland/ (noting that "Ireland's treatment amounted to 'bullying' by the ECB" and while "it was a mistake for the previous Government to guarantee all Irish bank debts . . . it was outrageous for the ECB to threaten to force Ireland out of the monetary union if it failed to do so").

149. *Id.*

150. *See* Khan, *supra* note 105.

as of March 30, 2015, or exactly half of its 2012 drawdown during the previous peak of the crisis.[151] However, since January 2015, the ECB has shown unprecedented reluctance to extend ELA support to Greek banks, leading many to wonder whether the ECB is purposefully "pursuing a policy that can be considered asphyxiating toward [the Greek] government."[152]

ECB rules make ELA subject to a maximum cap that requires a two-thirds majority of the ECB Executive Board to be imposed.[153] ELA may only be extended "to a solvent financial institution, or group of solvent financial institutions, that is facing temporary liquidity problems" through the relevant national central bank.[154]

It was difficult for the ECB to argue in 2015 that Greece was any less solvent than it was in 2012, when its ELA balance was much higher. In 2012, Greece was in negotiations with creditors for debt restructuring, and markets were nervous that Greece would be officially declared in default, which would trigger the payment of billions in credit default swaps.[155] Creditors were aware of this risk and refused to lend Greek banks money or purchase any short-term t-bills, which placed Greece at the brink of insolvency, since its banks would potentially be exposed to new liabilities via credit default swaps. Nevertheless, vital ELA liquidity continued.

However, the ECB issued an unprecedented Executive Board decision in February 2015 stating that Greek banks had generally ran out of eligible collateral to swap for ELA funding

151. Rebecca Christie et al., *Euro Area Said to Give Greece Five Days to Deliver Plan*, BLOOMBERG (Mar. 25, 2015, 8:40 AM), http://www.bloomberg.com/news/articles/2015-03-25/euro-area-said-to-give-greece-five-days-to-deliver-plan.

152. Mehreen Khan, *Greco-German Relations Reach Breaking Point as ECB Warned to Stop 'Asphyxiating' Athens*, DAILY TELEGRAPH (Mar. 12, 2015, 5:30 PM), http://www.telegraph.co.uk/finance/economics/11466701/Greco-German-relations-reach-breaking-point-as-ECB-warned-to-stop-asphyxiating-Athens.html.

153. *See* ELA PROCEDURES, *supra* note 27.

154. *Id.*

155. Press Release, Int'l Swaps & Derivatives Assoc., Determinations Committee Statement (Mar. 9, 2012), http://www.isda.org/dc/docs/EMEA_Determinations_Committee_Statement_09032012.pdf. Greece restructured its debt in February 2012, extending maturities and lowering interest rates, causing most bondholders to suffer a loss. *See id.* ("[A] Restructuring Credit Event has occurred . . . following the exercise by The Hellenic Republic of collective action clauses to amend the terms of Greek law governed bonds issued by The Hellenic Republic (the Affected Bonds) such that the right of all holders of the Affected Bonds to receive payments has been reduced.").

at the Bank's discount window and banned Greek banks from using short-term t-bills as collateral—the vast majority of remaining Greek resources.[156]

After the near-collapse of the Eurozone in late November 2011, the ECB (again, fulfilling its important role as a lender of last resort) extended a $1 trillion wave of liquidity to Eurozone banks via its Long-Term Repurchasing Operation (LTRO).[157] The collateral requirements for the LTRO were significantly relaxed in relation to its normal standards to promote the free flow of credit at a time when the European economy nearly seized up.[158] All bonds not backed by an organization/country in default were eligible.[159] At many times larger than the Greek ELA drawdown, with similar collateral requirements,[160] the risk to the ECB was arguably greater in 2012 via the LTRO than its current ELA exposure to Greece at $75 billion in 2015, making the ECB's argument that Greece had expended its eligible collateral totally unsustainable.

Perhaps more importantly, the rate at which the Bank increased the ELA cap during the January–June 2015 period—for those few institutions with sufficient collateral—also exposed its motivation to leverage the Greek government into accepting a deal. In the months that followed the SYRIZA victory, panicked depositors removed approximately $1 billion each week from banks.[161] Over the same period, the ECB only raised the ELA cap by $5 billion, in weekly increments of $400–500 million.[162]

156. Press Release, *supra* note 106.

157. Press Release, Eur. Cent. Bank, ECB Announces Measures to Support Bank Lending and Money Market Activity (Dec. 8, 2011), https://www.ecb.europa.eu/press/pr/date/2011/html/pr111208_1.en.html.

158. *E.g.*, Izabella Kamiska, *On the Limits of Usable Collateral for the LTRO*, FIN. TIMES (Dec. 20, 2011, 12:05 PM), http://ftalphaville.ft.com/2011/12/20/807681/on-the-limits-of-usable-collateral-for-the-ltro/.

159. *See* ELA PROCEDURES, *supra* note 27; Catherine Boyle, *What is An LTRO Anyway?*, CNBC (Feb. 29, 2012, 2:12 AM), http://www.cnbc.com/id/46567837.

160. Most Greek banks were not in default in 2015—therefore their bonds would be, under LTRO standards, eligible collateral.

161. *See* Heather Stewart, *Greek Savers Withdrew $12bn in January, ECB Figures Show*, THE GUARDIAN (Feb. 26, 2015, 6:38 AM), http://www.theguardian.com/business/2015/feb/26/greek-saver-withdrew-euro-12bn-january-ecb-capital-flight-deal-eurozone-bailout.

162. *See* Jeff Black & Karl Stango Nararra, *ECB Grants Greece Less Emergency Liquidity Than Requested*, BLOOMBERG (Mar. 18, 2015, 4:01 PM), http://www.bloomberg.com/news/articles/2015-03-18/ecb-said-to-grant-greece-less-emergency-liquidity-than-requested.

The primary focus of ELA assistance is the ECB's ability to provide emergency funding to financial institutions when liquidity is unavailable on the markets during heightened periods of stress. Greek banks had no part in the ongoing negotiations between the Greek government and its European creditors. Similarly, pursuant to the Bank's own ELA procedures, liquidity must be extended to Member State banks in proportion to their funding shortfall, after a threshold finding of solvency.[163] Claims that the ECB was being risk-averse to a potential default are unpersuasive since the Greek Central Bank was and remains wholly responsible to the ECB for ELA obligations, even in the event of a Greek default and exit from the euro.[164]

A similar situation occurred in 2013 during negotiations over the Cypriot bailout. After that island nation's parliament rejected the bailout plan proposed by the European Union, the ECB immediately severed the country's banks from access to ELA funding, which would have forced an island-wide default.[165] The next day, the Cypriot Parliament voted again on the bailout program and approved it.[166]

These events underscore that the ECB was attempting to leverage Ireland, Greece, and Cyprus into accepting its proposed bailout terms *in toto* by applying pressure to their national banking systems. This was by all accounts an effective measure, as Ireland and Cyprus accepted the terms, and Greece was forced to raid government trust funds and pension plans to meet daily obligations.[167] While effective, these measures impermissibly violate the ECB's treaty-based separation of functions under Article 127(1) of the Lisbon Treaty—vitiating the Bank's independence.

163. *See* ELA PROCEDURES, *supra* note 27, at 1.

164. *See id.* at 2.

165. *See, e.g.*, Christopher Lawton, et al., *ECB Threatens to Cut Off Cypriot Banks*, WALL ST. J. (Mar. 21, 2013, 1:48 PM), http://www.wsj.com/articles/SB10001424127887324103504578373791775965374.

166. *See* Liz Alderman, *Cyprus' Passes Parts of Bailout Bill, But Delays Vote on Tax*, N.Y. TIMES (Mar. 22, 2013), http://www.nytimes.com/2013/03/23/business/global/cyprus-bailout-vote.html?_r=2&.

167. Fiachra Gibbons, *Greece Looks to Social Security Funds to Plug Debt Bills*, AGENCE FRANCE PRESSE (Mar. 12, 2015, 7:03 PM), http://news.yahoo.com/greece-looks-social-security-funds-plug-debt-bills-230315838.html.

D. THE MYTH OF ECB INDEPENDENCE

The very nature of an independent central bank within a country (or a European supranational confederation) is to preserve some measure of detachment from political processes so central bankers may make sound monetary policy decisions based on objective criteria—fulfilling the role of the modern central bank in providing liquidity during times of stress.[168] The President of the ECB is not an official subject to periodic election by constituents, and cannot be held accountable, short of extreme measures. Additionally, European treaties and policy guidance establish clear competencies,[169] areas where Member States have clear sovereignty over domestic policies and areas where the European Union is not permitted to influence Member State decisions without discrete consent.

Decisions made during the crisis over labor market reforms, budget austerity, and the long-term fiscal health of nations have deep and abiding effects on a country's population, and should therefore be made by the political institutions closest to them, instead of politically insulated central bankers thousands of miles away. The ECB, a statutorily independent apolitical body, is not permitted to issue ultimatums in policy areas reserved to Member States—much less exercise de facto control over a state's sovereignty in picking the leadership of recalcitrant Member States. Nor may it attempt to leverage compromise by denying access to needed liquidity in times of stress. Doing so invites a dangerous future precedent, with deeply troubling prospects for the European constitutional framework.

In its 2014 decision on the OMT bond-buying program, the German Federal Constitutional Court noted that the ECB's recent actions to preserve the membership of the Eurozone were fundamentally political decisions not within the Bank's competence, and that its powers only extended to technical monetary decisions.[170] The Court held that OMT did not fall

168. *See* Lastra, *supra* note 32; Brentford, *supra* note 26, at 89 (describing the benefit of economic policies that lead to price stability); KALTENTHALER, *supra* note 29, at 70 (discussing the independence and accountability of the ECB).

169. *Division of Competencies within the European Union*, EUR. UNION, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm (last accessed Nov. 2, 2014).

170. *See* Goldman, *supra* note 121, at 277. OMT was a program established by the ECB in 2012 to purchase the government bonds of Member States facing temporary liquidity shortages because of high bond yields. Member States were

within the field of monetary policy because of its (1) *fundamentally political objective* (holding the euro together); (2) *its selective use* (e.g., forcing Berlusconi's resignation); (3) the parallel nature of the OMT program with the EFSF/ESM; and (4) the lack of conditionality and "full discretion" of the ECB.[171]

As a result, ECB threats to withdraw vital monetary support at precisely the moment most effective in leveraging political change exceeded the Bank's authority. These actions have severely undermined the constitutional independence of the ECB, and continue today to represent a critical threat to the separation of powers within the European Union and the fledgling legitimacy of European institutions.

IV. CONCLUSION

From its inception, the ECB has enjoyed a level of independence unlike any other central bank. European treaties specifically emphasize, in the tradition of the German *Bundesbank*'s absolute independence, total separation between political institutions and the Bank. The structure was intended to allow the ECB to make difficult decisions regarding long-term monetary policy, understandably dismissive of the possibility that the ECB might use its independence to demand the resignation of elected European leaders or leverage economies into compliance with the threat of default. The ECB exists

required to sign a Memorandum of Understanding similar to the ones required under the EFSF/ESM programs and agree to economic reforms. The German Federal Constitutional Court held this last aspect was economic/fiscal policy—not monetary—and therefore, fundamentally a political issue beyond the ECB's mandate. *See generally* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], 2 BvR 2728/13, Jan. 14, 2014 (Ger.). Under another program, the ECB began large scale purchases of sovereign bonds in 2015 in an attempt to lift the European economy out of deflation. *Quantitative Easing and the Euro: Get the Machines Running*, THE ECONOMIST (Mar. 9, 2015, 3:26 PM), http://www.economist.com/blogs/freeexchange/2015/03/quantitative-easing-and-euro; *see also Germany Takes Aim at the European Central Bank*, DER SPIEGEL (Apr. 8, 2016, 7:04 PM), http://www.spiegel.de/international/europe/conflict-grows-between-germany-and-the-ecb-a-1086245.html (stating the German government may consider taking legal action if increased ECB bond purchases take place, and that political inaction has transformed the Bank into "a kind of faux economic government").

171. Gerner-Beuerle, *supra* note 123, at 297–98. Importantly, the Constitutional Court's holding that the ECB lacks "full discretion" implies that some limits to the Bank's authority do exist. Undoubtedly, the selective use of monetary policy resources to force political change would undoubtedly fall into this category.

merely to promote "stability"[172] in the European economy.

The European Union is not a federal state today, and much more closely resembles a confederation of sovereign states.[173] However, even if it was a federal state, federalism implies that some competencies are reserved for individual states at the expense of the central government.[174] Surely the right to freely elect a head of government and freedom from interference from the federal administration is a central component of even limited sovereignty. Consequently, the ECB's de facto replacement of the Greek and Italian governments certainly is *ultra vires* in light of existing European treaties, and dangerously aggrandizes power to officials not authorized—or even capable—to exercise it.

Threatening bankruptcy to achieve a change in political direction is hardly the role of the political branches of the EU, the European Commission and Council, in a system of dual sovereignty—let alone that of a central bank managed by unelected officials whose sole job is to promote the stability of the Eurozone currency union. The sole reason these mechanisms are placed in the hands of independent economic experts is to ensure they are used based on objective criteria, not politics.

These issues evidence a greater failure within the European Union—an *ultra vires* constitutional arrangement that allows the separation of functions and accountability among the ECB and political functions of the EU, namely the Eurogroup, to go unenforced.

A solution would require an amendment to the Consolidated Treaty to provide a robust accountability mechanism. Functional central bank independence, except in the German model, is normally offset by a "robust and representatives set of institutions" that have the limited authority to require information from the Bank, call its officers to testify, and in the worst-case scenario, amend the Bank's statutory mandate if necessary.[175] The current European system has none of these features and widely appears to both the public and international

172. *See* Lisbon Treaty, *supra* note 12.

173. John P. Flaherty & Maureen Lally-Green, *Fundamental Rights in the European Union*, 36 DUQ. L. REV. 249, 328 (1996).

174. *See* Patrick R. Hugg, *Transnational Convergence: European Union and American Federalism*, 32 CORNELL INT'L L.J. 43, 51–58, 96 (1999); *see also* Steven G. Calabresi & Kyle Bady, *Is the Separation of Powers Exportable?*, 33 HARV. J.L. & PUB. POL'Y 5 (2010).

175. *See* McNamara, *supra* note 43, at 148–49.

bond markets to lack democratic legitimacy—an arrangement that implies that future decisions could be reversed by a dramatic counter-reaction.[176]

Imagine that the Federal Reserve threatened the State of California's banks with bankruptcy, at the height of the state's financial troubles in 2012,[177] if the governor did not resign. Such a result would be roundly condemned, illegal under the Federal Reserve's mandate,[178] and more importantly, unconstitutional on federalism grounds. Congress would also undoubtedly enact swift changes to the Federal Reserve's statutory mandate as well. It is time European states leveraged their political influence to do the same in light of the ECB's demonstrated threat to their internal political sovereignty.

Democratic legitimacy has always been seen to be lacking in the EU.[179] The cornerstone of an effective system of separation of powers facilitates the democratic process by dividing power among equal partners, and promoting competition with checks and balances.[180] A properly balanced separation also promotes efficiency by incentivizing competition and promoting the adoption of processes that promote good policy outcomes.[181] This ideal structure cannot take shape without the contribution of a vibrant democratic ideal.

The Eurozone continues to grapple with one of the most complex and severe economic storms that has faced the continent since the Great Depression. The magnitude of these issues demands that every corner of society have the opportunity to voice an opinion on the best way forward—an opportunity that, while likely to produce good ideas, also has the important effect of making institutions appear legitimate.

The ECB's moves to force Papandreou and Berlusconi out of

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176. *Cf. id.* at 149.

177. *See* Jennifer Steinhauer, *Coffers Empty, California Pays with I.O.U.'s*, N.Y. TIMES (July 2, 2009), http://www.nytimes.com/2009/07/03/us/03calif.html?pagewanted=print.

178. *See generally* Federal Reserve Act, 38 Stat. 691 (1914), *codified at* 12 U.S.C. § 3 *et seq.* (2015).

179. *See* LISE RYE, DISTANT VOICES: IDEAS OF DEMOCRACY AND THE EUROZONE CRISIS (2013); Leino & Salminen, *supra* note 120, at 844.

180. *See* Glen E. Thurow, *The Separated and Balanced Constitution*, 21 TEX. TECH L. REV. 2389, 2400 (1990) (explaining James Madison's theory of liberty and the separation of powers).

181. *See* William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715 (1984); Jack M. Beerman, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 507 (2011).

office in November 2011, and its refusal to accept the internal political decisions of Ireland, Greece, and Cyprus evidences the chilling truth that democratic values are not fully entrenched within the European constitutional structure today. In this way, defenestration and bankruptcy threats have shattered citizens' faith in the motives of European leaders. With proper democratic control, the ECB would not have been able to take these actions, which convey to the public that principled, transparent decisions are unimportant in times of stress. How likely are individuals to participate in the political process at both the national and European Union level if they believe that a disconnected elite only solicits their opinions for confirmation, and is all too ready to ignore their democratically ratified choices? This sentiment, combined with intractable economic challenges, represents a mortal threat to the euro that continues to stalk the continent today.

Though the white heat of the Eurozone crisis experienced in 2011–12 is past, Europe is still in deep economic trouble, as sovereign debt levels continue to climb based on near-zero growth.[182] Greece's debt-to-GDP ratio is currently 179.0%, up from 156.9% in 2013, while Italy has risen from 127% to 132.5 from 2013–16.[183] Stefano Fassina, the former Deputy Italian Finance Minister, recently proclaimed that high debt levels have placed "Titanic Europe" on course for a shipwreck without investment, restructuring, and a radical change of course.[184] Consequently, many economists believe Europe is heading into a "lost decade" of high unemployment and deflation.[185]

Since none of the underlying economic challenges facing the continent have been solved, Europe is at the edge of the precipice again. Unlike 2008, however, this time the legitimacy of European institutions has been fatally undermined—with the ECB's actions undoubtedly representing some of the most controversial decisions ever made by a central bank.

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182. *See* Claire Jones, *Spectre of 'Lost Decade' Haunting Europe*, FIN. TIMES (Aug. 21, 2014, 6:53 PM), http://www.ft.com/intl/cms/s/0/64217ffa-2946-11e4-baec-00144feabdc0.html?siteedition= intl#axzz3HxXhPZe8.

183. *Country List: Government Debt to GDP*, TRADING ECON. (Apr. 2, 2016), http://www.tradingeconomics.com/country-list/government-debt-to-gdp (last visited Apr. 2, 2016).

184. *See* Ambrose Evans-Pritchard, *Eurozone Dodges Triple-Dip Recession, But Submerges in 'Lost Decade'*, DAILY TELEGRAPH (Nov. 14, 2014), http://www.telegraph.co.uk/finance/economics/11231618/Eurozone-dodges-triple-dip-recession-but-submerges-in-lost-decade.html.

185. *Id.*

The European Union's current challenges, however, demand that all hands be committed to the salvation of the euro. This cannot be achieved without first tending to the *ultra vires* malignancy sapping its democratic foundations. The ECB, mindful of the great authority and trust granted to it by the peoples of Europe, must quickly acknowledge its past flawed actions and commit to a reaffirmation of its treaty-based mandate of independence. Let us hope it happens in time.