

ARTICLE

Special Section: ‘The German Federal Constitutional Court’s *PSPP* Judgment’

The European Economic Constitution after the *PSPP* Judgment: Towards Integrative Liberalism?

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Abstract

This article argues that the *PSPP* judgment effectively buries the era of financial liberalism, which has dominated the European economic constitution for decades. It raises the curtain on a new political paradigm, which I call “integrative liberalism”. Whereas the financial crisis put financial liberalism under strain, the development since then has been contradictory, torn between state intervention and market liberalism, focused above all on buying time rather than finding a new constitutional equilibrium. Now, together with the measures adopted in response to COVID-19, the *PSPP* judgment paves the way for profound change. Integrative liberalism is characterized by an overall shift from the market to the state, mitigating the post-crisis insistence on austerity and conditionality. Contrary to the embedded liberalism of the post-war era, integrative liberalism operates in a corrective and reactive mode with a focus on goals and principles, lacking the emphasis on long-term planning. Like every political paradigm, integrative liberalism ushers in a new understanding of the law. It puts the emphasis on context instead of discipline, and it elevates the proportionality principle. If integrative liberalism is to succeed, however, the democratic legitimacy of the Eurosystem and its independence require serious reconsideration.

A. The *PSPP* Judgment and the European Economic Constitution

Considering the storm of negative reactions evoked by the *PSPP* judgment¹ of the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) both inside and outside Germany, one might wonder whether the judgment is good for anything. The storm, which seems to have taken the judges by surprise,² results from the fact that the judgment unsettles a whole cluster of delicate issues. It risks destabilizing judicial dialogue,³ which is premised upon the idea of avoiding escalation.⁴ It also boosts challenges to the primacy of European law in Member States that are

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¹Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 859/15, (May 5, 2020), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html [hereinafter *PSPP* judgment].

²See Reinhard Müller, “Das EZB-Urteil war zwingend”, FAZ (May 12, 2020), <https://www.faz.net/aktuell/politik/inland/peter-huber-im-gespraech-das-ezb-urteil-war-zwingend-16766682.html>.

³Franz C. Mayer, *To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court’s ultra vires Decision of May 5, 2020*, in this issue.

⁴See Niels Petersen, *Karlsruhe’s Lochner Moment?*, in this issue; Ana Bobic, *Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice*, 18 GERMAN L.J. 1395 (2017); Matthias Goldmann, *Constitutional Pluralism as Mutually Assured Discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB*, 23 MAASTRICHT J. OF EUROP. & COM LAW 119 (2016).

threatened by a decline into autocracy.⁵ And it drowns any positive signal the First Senate's judgment on the *Right to be forgotten* may have sent.⁶ Moreover, the *PSPP* judgment provides credence to the view that the multiple crises the European Union (EU) has confronted over the last decade precipitated a general erosion of the rule of law⁷—a position that enables the extreme right to posture as the true defenders of the rule of law in the attempt to gain credibility among more centrist conservatives worried about the course of the Union. Doctrinally, the *PSPP* judgment is based on a critique of the Court of Justice of the European Union's (CJEU) understanding of the proportionality principle, claiming it should serve as a yardstick not only for the conditions under which the EU may exercise its competences, but also for the establishment that the EU has such competence to begin with.⁸ On all of these counts, the BVerfG's methodological approach suggests that it is struggling with pluralism on an epistemic level.⁹ As if this were not enough, the judgment also casts a shadow over the EU measures adopted or envisaged in reaction to the COVID-19 crisis.¹⁰ When taken together, it is easy to see why the *PSPP* judgment prompted so many to characterize it as the harbinger of a dystopian future for the EU.

While I agree with much of that critique, I believe that the future does not look entirely bleak if one singles out one particular aspect of the *PSPP* judgment. The *PSPP* judgment marks a sea-change in the evolution of Europe's economic constitution. It even might represent the first signs of a new politico-economic and legal paradigm that replaces the limbo in which the European economic constitution has found itself since the dawn of the financial-turned-fiscal crisis. While the European economic constitution has often evolved incrementally, the judgment is one of those rare moments in which the evolution becomes palpable: The institution whose self-understanding cast it in the role of the strongest opponent of change has condoned and accelerated the opening of a new chapter in Europe's economic constitution. This claim derives from a single, apparently marginal paragraph of the *PSPP* judgment:

The fact that the ESCB has no mandate for economic or social policy decisions, even when using monetary policy instruments, does not rule out taking into account, in the proportionality assessment pursuant to Art. 5(1) second sentence and Art. 5(4) TEU, the effects that a programme for the purchase of government bonds has on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies, and—in an overall assessment and appraisal—weighing these

⁵Stanislaw Biernat, *How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland*, in this issue; Friedemann Kainer, *Aus der nationalen Brille: Das PSPP-Urteil des BVerfG*, 31 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 533, 536 (2020).

⁶Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 1 BvR 16/13 (Nov 6, 2019), http://www.bverfg.de/e/rs20191106_1bvr001613.html [*Right to be Forgotten I*]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 1 BvR 276/17 (Nov 6, 2019) http://www.bverfg.de/e/rs20191106_1bvr027617.html [*Right to be Forgotten II*]. It is possible to read these decisions against the background of the rule of law crisis in Poland. See Matthias Goldmann, *As Darkness Deepens: The Right to Be Forgotten in the Context of Authoritarian Constitutionalism*, 21 GERMAN L.J. 45 (2020).

⁷In the context of the refugee crisis: STEPHAN DETJEN & MAXIMILIAN STEINBEIS, *DIE ZAUBERLEHRLINGE* (2019).

⁸Mattias Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP-Decision and its Initial Reception*, in this issue; Ingolf Pernice, *Machtspruch aus Karlsruhe: "Nicht verhältnismäßig? Nicht verbindlich? Nicht zu fassen?"*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 508, 511 (2020).

⁹On the epistemic challenge of legal pluralism, see Sergio Dellavalle, *Addressing Diversity in Post-Unitary Theories of Order*, GlobalTrust Working Paper Series 05/2015 (2015) at <http://globaltrust.tau.ac.il/wps-2015-05-addressing-diversity-in-post-unitary-theories-of-order/>.

¹⁰Annamaria Viterbo, *The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank*, 5 EUROPEAN PAPERS (2020); but see Sebastian Grund, *Legal, Compliant and Suitable: The ECB'S Pandemic Emergency Purchase Programme* (Pepp), Jacques Delors Center Policy Brief (2020) at https://opus4.kobv.de/opus4-hsog/frontdoor/deliver/index/docId/35133/file/20200325_PEPP_GrundII.pdf. On the Union's fiscal recovery plans, see Federico Costamagna & Matthias Goldmann, *Constitutional Innovation, Democratic Stagnation?: The EU Recovery Plan*, VERFBLOG (May 30, 2020) <https://doi.org/10.17176/20200530-133220-0>.

effects against the monetary policy objective that the programme aims to achieve and is capable of achieving.¹¹

I argue that this paragraph in the *PSPP* judgment effectively buries the era of financial liberalism that has dominated the European economic constitution for decades and raises the curtain on a new political paradigm, which I call “integrative liberalism”. The financial crisis put financial liberalism under strain, but the development since then has been contradictory. It has been torn between state intervention and market liberalism, focused above all on buying time, rather than finding a new, viable constitutional equilibrium. Now, together with the measures adopted in response to COVID-19, the *PSPP* judgment paves the way for profound change. Integrative liberalism is characterized by an overall shift from the market to the state, mitigating the post-crisis insistence on austerity and conditionality. Contrary to the embedded liberalism of the post-war era, however, integrative liberalism operates in a dynamic, pluralistic environment and in a corrective and reactive mode with a focus on goals and principles, lacking a strong idea of long-term planning.

The purpose of this article is to track the evolution of the European economic constitution and to locate the place and meaning of the *PSPP* judgment in it. Of course, courts have played a key role in the evolutionary process I chart, often by dismantling old and stabilizing new paradigms. Each paradigm shift in the economic constitution usually corresponds to a shift in the understanding of the function of the law. The article first sets out the idea of political and legal paradigms as a way of mapping the evolution of the economic constitution, and with it, of the modern welfare state.¹² It then goes on to track the evolution of the political and legal paradigms dominating the European economic constitution over four stages from post-war embedded liberalism and the corporatist paradigm of law, via financial liberalism and the governance paradigm of law, via post-crisis technocracy, to integrative liberalism. I demonstrate how the *PSPP* judgment buries earlier convictions about the disciplinary role of law and heralds a new, contextual legal paradigm that is centered on the proportionality principle.¹³ If integrative liberalism is to succeed, however, the democratic legitimacy of the Eurosystem must be seriously reconsidered. One even might place the value and meaning of central bank independence in the European economic constitution on the table.¹⁴ I conclude by cautioning against risks that might emanate from integrative liberalism. Historically, rising social inclusion came at the expense of the exclusion of marginalized groups, both at home and abroad.¹⁵

B. Paradigms in the Economic Constitution

At the outset, a few notes are in order on the concept of paradigms. I use paradigms as a category for describing the evolution of the welfare state. This account follows Andreas Reckwitz, who, inspired by Thomas Kuhn’s concept of scientific paradigms,¹⁶ understands *political* paradigms to be discursive and governmental frameworks for the solution of societal problems in liberal democracies.¹⁷ In other words, a paradigm designates a set of preconceived understandings about societal problems and patterns of social behavior and policy meant to solve those problems. According to Reckwitz, modernity has been characterized by the alternation of more dynamic, liberalizing paradigms and more restrictive, regulatory paradigms. Reckwitz does not restrict his concept of paradigm to the politico-economic sphere, but finds that a paradigm’s cultural significance also is relevant.

¹¹*PSPP* judgment, at para. 139.

¹²Part B.

¹³Part C.

¹⁴Part D.

¹⁵Part E.

¹⁶THOMAS S KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

¹⁷ANDREAS RECKWITZ, *DAS ENDE DER ILLUSIONEN: POLITIK, ÖKONOMIE UND KULTUR IN DER SPÄTMODERNE* 239 et seq., 244 (2019).

Crucially, each paradigm exists in different varieties that reflect the entire political spectrum. One can approximately distinguish a conservative and an emancipatory variant of each paradigm. Paradigms thus reflect the shared background assumptions undergirding political discourse at a certain place and time. Only this allows a paradigm to be widely shared. The economic and cultural repercussions of a paradigm pose specific challenges for democratic legitimacy.

Paradigm shifts occur during periods of crisis whenever the dynamics of economic and cultural evolution exhaust the capacity of a paradigm to describe and solve relevant social problems. Such developments are not merely exogenous. In fact, they might result from unintended effects of the dominant paradigm, giving rise to paradoxical developments that undermine the paradigm's own descriptive and prescriptive capacity. Accordingly, Reckwitz reconstructs how the social-corporatist paradigm of the post-war era created economic conditions (market saturation and a decline of industrial production) and cultural conditions (civil rights movement) which it no longer could control. Strained by those conditions, and after a period of crisis during the 1970s, the social-corporatist paradigm was replaced by the era of overt liberalism, the collapse of which presumably began presumably even before the onset of the great financial crisis.¹⁸

As I mentioned earlier, my focus here is on the role of law, and specifically of courts, in the evolution of political paradigms. Political paradigms coincide, and are closely intertwined, with the evolution of corresponding legal paradigms.¹⁹ Legal rules do not operate in a vacuum. They are conditioned by, and condition, their context. As Habermas explained, we “interpret individual propositions not only in the context of the legal corpus as a whole but also within the horizon of a currently dominant preunderstanding of contemporary society. To this extent, the interpretation of law is also an answer to the perceived challenges of the present social situation.”²⁰ The parameters defining a legal paradigm include the role of courts and institutions, the role of rights, methodological approaches oscillating between form and substance, and more generally, theories of the state and of individual freedom which inform the making and the application of the law. As with political paradigms, there are variations within any prevailing legal paradigm. In fact, these variations can compete with each other, as the dispute between originalism and the living constitution in U.S. constitutional discourse amply demonstrates.²¹

In contrast to both public choice and Marx-inspired approaches to law and political economy,²² I assume that legal paradigms have a dual function. On the one hand, they provide the structures within which political paradigm change manifests itself. On the other hand, they serve as agents driving change in the political paradigm. Law, in other words, enjoys a degree of relative autonomy as against economics and culture, chiefly because it has its own mechanisms of reproduction.²³ Still, its reproduction is coupled to varying degrees with other social fields.²⁴ This is why law loosely reflects the prevailing political paradigm.

The history of European integration is rich in examples of paradigm change facilitated by legal evolution. As the subsequent part of this article will show, law has played a key role in this process. The current shift towards “integrative liberalism” is no exception. Of course, Minerva's Owl only spreads her wings at dusk, and paradigms only fully reveal themselves in hindsight. The following

¹⁸*Id.*

¹⁹I owe most of my knowledge on this subject to Poul Kjaer's writings. See, recently, Poul F. Kjaer, *The Law of Political Economy: An Introduction*, in *THE LAW OF POLITICAL ECONOMY: TRANSFORMATION IN THE FUNCTION OF LAW* 1, 14 et seq. (Poul F. Kjaer ed. 2020).

²⁰JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 388 (William Rehg trans. Repr. ed. 2008). See also Jürgen Habermas, *Paradigms of Law Habermas on Law and Democracy: Critical Exchanges - Part I*, 17 *CARDOZO L. REV.* 771 (1995).

²¹Kjaer, *supra* note 19, at 8.

²²*Id.*, at 3.

²³See already MAX WEBER, *ECONOMY AND SOCIETY* 883, 890 (Guenther Roth & Claus Wittich eds. 1978).

²⁴Cf. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *LAW AND SOCIETY REVIEW* 239, 249 (1983) (arguing that this is the common denominator of both Habermas's and Luhmann's theories of law); similarly *supra* note 19, at 12.

conceptualization of integrative liberalism and its evolution, at this early stage of its emergence, must be somewhat speculative. But the effort is worth it. It will provide a useful foil for the comprehension and critique of European integration at this crucial juncture.

C. The Evolution of the Economic Constitution

The evolution of the European economic constitution begins in principle before 1957. The Concert of Europe and the balance of power it established provided not only a political, but also an economic framework, stabilized by the rules of international law and domestic constitutional law.²⁵ Nevertheless, the following overview will paint with admittedly broad brushes the evolution of the economic constitution of Europe since the Treaties of Rome. Much of the following has been said before. But it is necessary to chart the past paradigms of the economic constitution in order to understand the fundamental change introduced by the *PSPP* judgment.

I. Embedded Liberalism: The Corporatist Paradigm

The characterization of the economic constitution established by the Treaties of Rome is the subject of a well-worn controversy as it combined market-based and interventionist aspects. On the one hand, it enumerated the common market as a basic principle and imposed on member states the duty to liberalize their economies,²⁶ supplemented by competition rules, ordoliberalism's pet project.²⁷ Also, the absence of European welfare state regulation has been a core tenet of the EU constitutional balance.²⁸ On the other hand, this absence did not necessarily reflect an anti-social bias in the early economic constitution as it was expected that national welfare states would converge towards high overall standards.²⁹ Moreover, sectoral policies for agriculture and the montane industry foresaw an interventionist role for the Communities, including price controls.³⁰ For these reasons, the ordoliberal camp had some misgivings about the treaties of Rome.³¹

It is this particular policy mix of the post-war arrangement that John Ruggie aptly described as embedded liberalism.³² In this respect, the European Communities shared many traits with the international economic order, characterized by the Bretton Woods system of fixed exchange rates, capital controls, and frequent interventionist monetary policy to stimulate growth. This provided the backbone for cautious trade liberalization in the GATT framework, while enabling the development of the welfare state—though only in the industrialized countries.³³ The West's competition with the Soviet Union helped to smooth capitalism's sharpest edges.³⁴

²⁵KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* ch. 1 and 2 (1944).

²⁶Articles 2, 3 lit. c, Treaty Establishing the European Economic Community. On the relationship with GATT rules, ROBERT SCHÜTZE, *FROM INTERNATIONAL TO FEDERAL MARKET: THE CHANGING STRUCTURE OF EUROPEAN LAW* 105-7 (2017).

²⁷Stressing the ordoliberal legacy: HAUKE BRUNKHORST, *DAS DOPPELTE GESICHT EUROPAS: ZWISCHEN KAPITALISMUS UND DEMOKRATIE* 63 (2014); Christian Joerges & Florian Rödl, *Social Market Economy as Europe's Social Model*, in *A EUROPEAN SOCIAL CITIZENSHIP* 125, 130 (Lars Magnusson & Bo Stråth eds., 2004).

²⁸Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution: A Reappraisal*, in *THE MANY CONSTITUTIONS OF EUROPE* 242 (Kaarlo Tuori & Suvi Sankari eds., 2010); Mark Dawson & Floris de Witte, *Constitutional Balance in the EU after the Euro-Crisis*, 76 *MODERN L. REV.* 817, 823 (2013).

²⁹Cf. International Labour Organisation, *Social Aspects of European Economic Co-operation. Report by a Group of Experts (summary)*, 74 *INTERNATIONAL LABOUR REVIEW* 99 (1956) (Ohlin Report).

³⁰Agustín José Menéndez, *The Existential Crisis of the European Union*, 14 *GERMAN L. J.* 453, 473 (2019).

³¹QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 182 et seq. (2018). This included Erhard, who disagreed with Hallstein over this, see Franz-Ulrich Willeke, *Die Europäische Integration aus ordoliberaler Sicht*, in *HEIDELBERGER JAHRBÜCHER* 227 (1994).

³²John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 *INTERNATIONAL ORGANIZATION* 379 (1982).

³³For a critique from the Global South, see e.g. Raul Prebisch, *The Economic Development of Latin America and Its Principal Problems*, 7 *ECONOMIC BULLETIN FOR LATIN AMERICA* (1962).

³⁴Reckwitz, *supra* note 17, at 256.

Embedded liberalism was entrenched by legal structures reflecting a corporatist paradigm originating in the interwar period.³⁵ It differed markedly from the methodological individualism characterizing liberal-bourgeois law with its focus on property and sovereignty, which came to be seen as the cause of severe social disruptions that culminated in the First World War. By contrast, the corporatist paradigm put the emphasis on the intermediary structures of society and their potential for social cohesion.³⁶ These structures, including trade unions and religious denominations, were constitutionally entrenched in the emerging economic constitutions for the purpose of (re-)embedding the economy in society and mitigating the effects of societal differentiation.³⁷ The quasi-official character of such societal structures in interwar constitutions called into question the state-society distinction. It culminated in the emergence of cartels³⁸—a development which provoked fierce opposition from liberals like Kelsen and Hayek, urging respect for legal formalism.³⁹

After the Second World War, the focus of the economic constitution shifted from associating intermediary structures with the state to the establishment of government institutions that would ensure the expansion of modern welfare states while at the same time protecting the state against intermediary structures, especially extremist groups, that were prone to undermine it.⁴⁰ Still, even the post-war variant of the corporatist paradigm did not assign particular significance to social rights.⁴¹ Instead, it chiefly relied on government discretion, planning, and purpose-oriented rules.⁴² The German Basic Law is paradigmatic in this regard. The extensive economic provisions of the Weimar constitution were replaced with an innate relationship between the principles of the social state and of democracy.⁴³ This made it the responsibility of the legislative and executive powers to ensure social equality.

The new corporatist paradigm also permeated international law, where the law of cooperation⁴⁴ replaced weak interwar structures with legally more powerful international organizations enjoying legal personality.⁴⁵ The European institutions shared these functionalist underpinnings,⁴⁶ and European law became instrumental to their program of integration by establishing itself as autonomous in the *Van Gent en Loos* and *Costa ENEL* judgments.⁴⁷ The early economic

³⁵Poul F Kjær, *From the Crisis of Corporatism to the Crisis of Governance*, in *CRITICAL THEORIES OF CRISIS IN EUROPE: FROM WEIMAR TO THE EURO* 125, 131 (Poul F Kjær & Niklas Olsen eds., 2016).

³⁶Notable: JOHN MAYNARD KEYNES, *THE END OF LAISSEZ-FAIRE* (3d impression. ed. 1927).

³⁷Brunkhorst, *supra* note 27, at 60 et seq.; Ruth Duker, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law*, 35 *JOURNAL OF LAW AND SOCIETY* (2008).

³⁸Kjær, *supra* note 35, at 131-2; J. T. Winkler, *Corporatism*, 17 *EUROPEAN JOURNAL OF SOCIOLOGY* 100 (1976).

³⁹HANS KELSEN, *PURE THEORY OF LAW* 285 (1967); FRIEDRICH A HAYEK, *THE ROAD TO SERFDOM* (1944).

⁴⁰Kjær, *supra* note 35, at 132-4.

⁴¹SAMUEL MOYN, *NOT ENOUGH. HUMAN RIGHTS IN AN UNEQUAL WORLD* 41 et seq. (2018).

⁴²Winkler, *supra* note 38, at 108; PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION* 78 et seq. (1978). From a critical vantage point: NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 195 et seq. (1993); JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* 520 (1992).

⁴³Florian Rödl, *Zu Begriff und Perspektiven demokratischer und sozialer Union*, in *Europarecht Beiheft 1: WOHLFAHRTSSTAATLICHKEIT UND SOZIALE DEMOKRATIE IN DER EUROPÄISCHEN UNION* 180 (Jürgen Bast & Florian Rödl eds., 2013).

⁴⁴WOLFGANG G. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

⁴⁵Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (April 11).

⁴⁶See HANS PETER IPSEN, *VERFASSUNGSPERSPEKTIVEN DER EUROPÄISCHEN GEMEINSCHAFTEN: VORTRAG GEHALTEN VOR DER BERLINER JURISTISCHEN GESELLSCHAFT AM 17. APRIL 1970* (1970). On functionalism in Europe's (early) constitution, see Turkuler Isiksel, *Constitutionalism as Limitation and License: Crisis Governance in the European Union*, in *CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS* 187, 190 et seq. (Tom Ginsburg, et al. eds., 2019).

⁴⁷Antoine Vauchez, *The Transnational Politics of Judicialization. Van Gent en Loos and the Making of EU Polity*, 16 *EUROPEAN L.J.* 1 (2010); Alec Stone Sweet, *The Juridical Coup D'état and the Problem of Authority*, 8 *GERMAN L.J.* 915, 924 (2007); Matthias Goldmann, *Hopes of Progress: European Integration in the History of International Law*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper 2018-26 (2018).

constitution had exhausted itself in establishing and entrenching European authority, while constraining both Member States and private actors.⁴⁸

The downside of the embedded liberalism and the corporatist paradigm was their lack of societal pluralism and deficient recognition of individual rights, especially economic, social, and cultural rights. The reduction of class differences came at the price of a cultural expectation of homogeneity and heteronormativity, which were to provide the necessary cohesion.⁴⁹

II. Financial Liberalism: The Governance Paradigm

1. The Constitutionalization of Governance

Embedded liberalism succumbed in the crises of the 1970s. Its economic model came to a breaking point as the consequence of industrial overproduction and a slowdown of growth, leading to rising sovereign debt and an ever-increasing current account deficit of the United States. This ultimately caused the decline of the Bretton Woods System. Contrary to contemporary expectations,⁵⁰ the new political paradigm emerging victorious from the crisis tilted the stakes decidedly in favor of liberalization and shifted hopes from the state to the market. The demise of Bretton Woods ushered in free-floating exchange rates and the liberalization of capital transfers, and the reorientation of the Bretton Woods institutions helped spread ideas of market liberalization and institutional reform.⁵¹ Together with technical innovation, especially in the fields of data processing, communication, and transport, these conditions provided the background for an unprecedented degree of market liberalization and financial, economic, political, and social globalization,⁵² particularly after the end of the Cold War removed the disciplining impact of the ideological confrontation that had dominated the northern hemisphere throughout the previous 70 years.⁵³

It would be misleading to call the new order the “neoliberal paradigm.” Neoliberalism has always been more of a theory existing in many different variations.⁵⁴ The political reality in some respects had deplorably little to do with neoliberal theory, as the endemic practice of tax evasion and persistent protectionism (e.g. in the agricultural sector) demonstrate. The same applies to ordoliberalism, its state-revering German cousin.⁵⁵

I believe that “financial liberalism” better describes the political paradigm that emerged in the (late) 1970s. A striking feature of this paradigm is the enormous growth of the financial sector relative to the real economy.⁵⁶ The financial sector also gained considerable political influence: As sovereign debt rose continuously due to the shift to inflation targeting,⁵⁷ developed economies increasingly needed to assure their creditors of their repayment capacity. This created pressure to reduce public expenditure, leading to waves of privatization and austerity.⁵⁸

⁴⁸Kaarlo Tuori, *The Many Constitutions of Europe*, in *THE MANY CONSTITUTIONS OF EUROPE* 3, 15 (Suvi Sankari & Kaarlo Tuori eds., 2010). The early economic constitution was therefore notably different from present-day value constitutionalism. See Frank Schorkopf, *Value Constitutionalism in the European Union*, in this issue.

⁴⁹Reckwitz, *supra* note 17, at 244 et seq.; ANDREAS RECKWITZ, *DIE GESELLSCHAFT DER SINGULARITÄTEN* (2018).

⁵⁰E.g. Jürgen Habermas, *What Does a Crisis Mean Today? Legitimation Problems in Late Capitalism*, *SOCIAL RESEARCH* 643 (1973).

⁵¹Alexander E. Kentikelenis & Sarah Babb, *The Making of Neoliberal Globalization: Norm Substitution and the Politics of Clandestine Institutional Change*, 124 *AMERICAN JOURNAL OF SOCIOLOGY*, 1720 (2019).

⁵²ANTHONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALISATION IS RESHAPING OUR LIVES* (1999).

⁵³Reckwitz, *supra* note 17, at 256.

⁵⁴THOMAS BIEBRICHER, *THE POLITICAL THEORY OF NEOLIBERALISM* (2019).

⁵⁵Brigitte Young, *German Ordoliberalism as Agenda Setter for the Euro Crisis: Myth Trumps Reality*, 22 *JOURNAL OF CONTEMPORARY EUROPEAN STUDIES* (2014); Josef Hien, *The Ordoliberalism That Never Was*, 12 *CONTEMPORARY POLITICAL THEORY* 349 (2013).

⁵⁶Robin Greenwood & David Scharfstein, *The Growth of Finance*, 27 *THE JOURNAL OF ECONOMIC PERSPECTIVES* 3 (2013).

⁵⁷Based on data contained in SM Ali Abbas, et al., *Sovereign Debt Composition in Advanced Economies: A Historical Perspective*, IMF Working Paper No. 14-162 (2014).

⁵⁸Wolfgang Streeck, *The Rise of the European Consolidation State*, MPIfG Discussion Paper 15/1 (2015).

Like any other paradigm, financial liberalism came in different varieties. One can broadly distinguish a conservative variety and an emancipatory one. The former variety relied on a socially conservative agenda based on individual morality and frugality,⁵⁹ a strategy which was endorsed by some of the main proponents of the new paradigm including Reagan, Thatcher, and Kohl, and by reformers in Central and Eastern Europe like Wałęsa. The latter variety integrated the demands of the civil rights movement into its agenda and pressed for advances in civil and political rights, yet not necessarily social rights.⁶⁰ The civil rights movement and financial liberalism overlapped in respect of their shared methodological individualism and the focus on individual rights.⁶¹

Again, law played a crucial role in bringing about and stabilizing the new order, but this time on the basis of a markedly different understanding about the role of law in society. This understanding shifted towards the “governance paradigm” of law.⁶² This paradigm has two sides. The first side is the disciplinary one, championing binding rules, adjudication, and law enforcement to restrict political discretion. The second side is the governmentality side, resorting to private and informal modes of organization for efficient goal attainment without the strictures of the law.

As concerns the disciplinary side, European law and international law developed in parallel in many respects. International law saw the rise of rules-based governance by the proliferation of international courts and tribunals in the fields of trade and investment, and, catering to the emancipatory trends within the prevalent political paradigm, in human rights law and international criminal law. These processes culminated in the constitutionalization of international law, understood here as a discourse on the emergence of human rights, democracy, and the rule of law as international constitutional principles.⁶³ One view even considers the disciplinary rules of international economic law to have constitutional character.⁶⁴

In European law, the increase in disciplinary potential to some extent came as a result of improvements in political decision-making. The extensive interpretation of the Communities’ competences⁶⁵ and the introduction of qualified majority voting with the 1986 Single European Act allowed for an increase in secondary law-making. To an important extent, however, “integration through law” meant integration through courts.⁶⁶ The CJEU effectively constitutionalized an idea of market freedom⁶⁷ through a series of cases running from *Dassonville*⁶⁸ and *Cassis*⁶⁹ to *Inspire Art*,⁷⁰ *Viking*, and *Laval*.⁷¹ The point of this case law was to discipline the member states and align their policies with market freedoms.

⁵⁹DOMINIK GEPPERT, THATCHERS KONSERVATIVE REVOLUTION: DER RICHTUNGSWANDEL DER BRITISCHEN TORIES (1975-1979) (2011); JEREMY LEAMAN, THE BUNDESBANK MYTH. TOWARDS A CRITIQUE OF CENTRAL BANK INDEPENDENCE 193 (2001).

⁶⁰Reckwitz, *supra* note 17.

⁶¹Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 LAW & CONTEMP. PROBS. 147 (2014).

⁶²Kjaer, *supra* note 19, at 22.

⁶³E.g. Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism and Beyond the State, in RULING THE WORLD? INTERNATIONAL LAW, GLOBAL GOVERNANCE, CONSTITUTIONALISM* (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

⁶⁴Ernst-Ulrich Petersmann, *Constitutional Theories of International Economic Adjudication and Investor-State Arbitration, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 137 (Ernst-Ulrich Petersmann ed. 2009).

⁶⁵Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985). COM (85) 310 final (June 14, 1985); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2442 et seq. (1991).

⁶⁶Rebekka Byberg, *The History of the Integration through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe*, 18 GERMAN L.J. 1531 (2017).

⁶⁷Joseph H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods, in THE EVOLUTION OF EU LAW* 370 (Paul Craig & Grainne De Burca eds., 1999). This development did not come out of the blue, cf. Ernst-Joachim Mestmäcker, *Macht-Recht-Wirtschaftsverfassung*, 137 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 97 (1973).

⁶⁸Case C-8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82 (Jul. 11, 1974).

⁶⁹Case C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42 (Feb. 20, 1979).

⁷⁰Case C-167/01, *Inspire Art*, ECLI:EU:C:2003:512 (Sept. 30, 2003).

⁷¹Case C-438/05, *Viking* ECLI:EU:C:2007:772 (Dec. 11, 2007); Case C-341/05, *Laval* ECLI:EU:C:2007:809 (Dec. 18, 2007).

The BVerfG, by contrast, used a disciplinary approach to the law to define limits for European institutions as well as for European integration as a whole. To protect citizens' economic rights and interest, the BVerfG forced the CJEU into recognizing fundamental rights as general principles of community law.⁷² The CJEU gave an evasive response. It accepted fundamental rights in principle, but it consistently defended the European institutions and the remnants of their post-war embedded liberalism by holding that these rights had not been violated.⁷³ This changed only when the CJEU turned the tables in fundamental rights adjudication and recognized their potential for curbing member states' power when implementing European law.⁷⁴ Doctrinal alignment between fundamental rights and fundamental freedoms in European law effectively reduced the opportunity of the Member States to invoke (domestic) fundamental rights guarantees against EU law because this development put both concerns on par and constitutionalized economic freedoms.⁷⁵

In fact, the emergence of European value constitutionalism epitomizes the disciplinary side of the governance paradigm.⁷⁶ It represents a shift in thinking about the European constitution from a formal constitution governing a supranational institution⁷⁷ to a substantive constitution comprising fundamental principles for the exercise of public authority at the level of the member states, and at the European level.⁷⁸ Again, the impulse for the idea of a substantive constitution for Europe came from the BVerfG, this time in the form of the *Maastricht* decision, which was an attempt to curb the power of the emerging EU.⁷⁹ It should be added that the CJEU has meanwhile availed itself of constitutional thinking in order to restrain recalcitrant member states.⁸⁰

On the governmentality side of the governance paradigm, the use of private modes of coordination, soft regulation and "governance by information" has made it possible to isolate law-making, to some extent, from parliamentary processes.⁸¹ At times, however, soft mechanisms of coordination have been a means to avoid hard rules that influential constituencies considered to be overly burdensome. This applies particularly to guidelines on corporate social responsibility. The spread of governmentality at the international level was unprecedented.⁸² This trend also gained some ground in the EU, as the emergence of the Open Method of Coordination testifies.⁸³

⁷²Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271, 279 (mentioning constitutional identity for the first time).

⁷³Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1970:114 (Dec. 17, 1970); Case 4/73, Nold v. Commission, ECLI:EU:C:1974:51 (May 14, 1974); Case 44/79, Hauer v. Land Rheinland-Pfalz, ECLI:EU:C:1979:290 (Dec. 13, 1979); Case 120/86, J. Mulder v. Minister van Landbouw en Visserij, ECLI:EU:C:1988:213 (Apr. 28, 1988). See Matthias Goldmann, *The Great Recurrence: Karl Polanyi and the Crises of the European Union*, 23 EUROPEAN L.J. 272, 280 (2017).

⁷⁴Case 5/88, Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, ECLI:EU:C:1989:321 (July 13, 1989).

⁷⁵Case C-112/00, Schmidberger v. Austria, ECLI:EU:C:2003:333 (June 12, 2003).

⁷⁶On this evolution, see Frank Schorkopf, *Value Constitutionalism in the European Union*, in this issue; Goldmann, *supra* note 47, at 18-9.

⁷⁷Cf. Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

⁷⁸E.g. Ingolf Pernice, *Die Dritte Gewalt im europäischen Verfassungsverbund*, 31 EUROPARECHT 27 (1996);

⁷⁹Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 [hereinafter *Maastricht judgment*]; Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUROPEAN LAW JOURNAL 219 (1995).

⁸⁰C-64/16, Associação Sindical dos Juizes Portugueses, ECLI:EU:C:2018:117 (Feb. 28, 2017).

⁸¹Kjaer, *supra* note 35, at 134-6; see generally Martti Koskeniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241 (2004).

⁸²COMMITMENT AND COMPLIANCE. THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (D. Shelton ed. 2000); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY. TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); MATTHIAS GOLDMANN, INTERNATIONALE ÖFFENTLICHE GEWALT. HANDLUNGSFORMEN INTERNATIONALER INSTITUTIONEN IM ZEITALTER DER GLOBALISIERUNG 47 et seq. (2015); MICHAEL RIEGNER, INFORMATIONSVERWALTUNGSRECHT INTERNATIONALER INSTITUTIONEN: DARGESTELLT AM ENTWICKLUNGSVERWALTUNGSRECHT DER WELTBANK UND VEREINTEN NATIONEN (2018).

⁸³LINDA SENDEN, SOFT LAW IN EUROPEAN COMMUNITY LAW (2004).

The bifurcation of the governance paradigm might look odd and somewhat contradictory. It reflects a variegated pedigree. It was informed, among others, by neoliberal concepts of supposedly apolitical governance by rule,⁸⁴ and the managerialism characteristic of the law and economics movement.⁸⁵ Other impulses came from emancipatory reconstructions of liberalism.⁸⁶ Whether the alliance was always harmonious may be debated. For example, law and economics largely lacks the profound epistemological scepticism of neoliberal writers.⁸⁷ More importantly, the disciplinary side showed little interest in social rights. It was biased against the welfare state. The entrenchment of economic liberalism left downward adjustment of social standards as the only possible option.⁸⁸ The Lisbon treaty provided little relief as it only shifted the aim of the Union from “open market economy” to “social market economy.”⁸⁹ That, however, could only have worked by connecting social concerns with the principle of democracy. But the Lisbon treaty failed to expand the powers of the Union and the scope of application of ordinary legislative procedure in the crucial field of economic and monetary policy.⁹⁰

2. The Constitutionalization of Money

It is important to understand that the Maastricht Treaty establishing the EMU created and constitutionalized a profoundly new economic, institutional, and legal arrangement that is genuine to financial liberalism. It would be misleading to consider the EMU and the ECB as an independent, inflation-targeting central bank to simply have adopted German ordoliberal thought from the 1950s.⁹¹

Of course, there is no point in denying the preference of ordoliberalism for price stability. Writing even before Milton Friedman, Walter Eucken argued that fair competition required price stability. Price developments should reflect the unfettered results of market dynamics, rather than of political interference.⁹² In reality, however, the monetary policy strategy of the Bundesbank and its institutional self-understanding varied over time as a result of its interaction with the mix of liberal and interventionist policies characterizing Germany’s general economic policy.⁹³ After all,

⁸⁴On the impact of neoliberalism’s Geneva school on international law: Slobodian, *supra* note 31, at 224 et seq. It deserves further exploration to what extent this school aligned with originalism in constitutional thinking.

⁸⁵Seminal: Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 JOURNAL OF POLITICAL ECONOMY 385 (1993); James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONSTITUTIONAL POLITICAL ECONOMY 1 (1990).

⁸⁶Overview of the literature in Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984); Habermas, *supra* note 20; Gunther Teubner, *Transnational Economic Constitutionalism in the Varieties of Capitalism Essays*, 1 ITALIAN LAW JOURNAL 219 (2015).

⁸⁷FRIEDRICH AUGUST VON HAYEK, LAW, LEGISLATION AND LIBERTY. RULES AND ORDER 11 (1973).

⁸⁸Christian Joerges, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 15 GERMAN L.J. 985, 993 (2014). Disagreeing: LUIS MIGUEL POIARES PESSOA MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 159-160 (1998).

⁸⁹TEU, article 3 (3).

⁹⁰Martin Höpner, *Soziale Demokratie? Die Politökonomische Heterogenität Europas als Determinante des demokratischen und sozialen Potenzials der EU*, in *Europarecht Beiheft 1: Wohlfahrtsstaatlichkeit und soziale Demokratie in der Europäischen Union* 70 (Jürgen Bast & Florian Rödl eds., 2013).

⁹¹Jonathan White, *Between Rules and Discretion: Thoughts on Ordo-Liberalism*, LSE ‘Europe in Question’ Discussion Paper Series No. 126 (2017); differentiated: Johanna Oksala, *Ordoliberalism as Governmentality*, in *THE BIRTH OF AUSTERITY: GERMAN ORDOLIBERALISM AND CONTEMPORARY NEOLIBERALISM* 181, 189 (Thomas Biebricher & Frieder Vogelmann eds., 2017).

⁹²WALTER EUCKEN, GRUNDSÄTZE DER WIRTSCHAFTSPOLITIK 260 (1952).

⁹³Young, *supra* note 55; Hien, *supra* note 55, at 352; Lars P Feld, et al., *The “Dark Ages of German Macroeconomics” and Other Alleged Shortfalls in German Economic Thought*, in *ORDOLIBERALISM: A GERMAN ODDITY?* 41 (Thorsten Beck & Hans-Helmut Kotz eds., 2017). See, however, Charles Wyplosz, *The Euro and Ordoliberalism*, in *ORDOLIBERALISM: A GERMAN ODDITY?* 145 (Thorsten Beck & Hans-Helmut Kotz eds., 2017).

the economic neutrality of the Basic Law is beyond dispute. Any liberal bias within the German economic constitution resulted from processes of internationalization and Europeanization.⁹⁴

The independence of the Bundesbank (and its antecedents the Bank deutscher Länder) had nothing to do with price stability. Instead, it resulted from the insistence of the allied powers, especially of the American occupying power, on restricting the authority of the federal government.⁹⁵ But independence never became a constitutional requirement before the Treaty of Maastricht came into sight.⁹⁶

Moreover, the Bundesbank and the Bank deutscher Länder were not committed to price stability to the same degree at all times. The first presidents, Vocke and Blessing, put its policy on a monetarist track in order to instil trust in the new currency. They even weathered a confrontation with the federal government in the mid-1960s.⁹⁷ The Stability Law of 1967 defined price stability as only one of several targets of economic policy. This created some debate about the relevance of these objectives for the Bundesbank. In any event, President Klasen, the successor of Blessing, struck a much more accommodating note in his public communication in the early 1970s.⁹⁸ Price stability as a legal requirement, not to mention a constitutional one, was off the table; various attempts to stretch the law in this direction failed.⁹⁹

Only the monetary turmoil of the 1970s brought Klasen and his successor Emminger to shift to inflation targeting.¹⁰⁰ Even then they pursued that path for political rather than economic reasons. Their Weimar experience suggested that they would have to keep inflation low to save democracy as rampant inflation rates would ultimately destabilize the government.¹⁰¹ To sell the sacrifices of inflation targeting to the public and to avoid government intervention in credit growth, the Bundesbank created the myth that independence was indispensable for successful monetary policy, contrary to Friedman's writings¹⁰² and even before the notion was theorized in scholarship.¹⁰³ This created a powerful narrative. It narrative allowed the Bundesbank to focus on price stability regardless of the consequences, even to impose excruciatingly high interest rates in the 1990s that brought the European Monetary System to collapse and Germany into recession. Under this approach, the paths of the central bank had to be lined with socio-political blood, sweat and tears. Yet, at no point did price stability become a constitutional requirement.

The success of the Bundesbank in stabilizing the Deutsche Mark fuelled the worldwide trend towards rules-based, inflation targeting, independent central banks in the late 1970s and 1980s.¹⁰⁴ When it came to establishing the EMU, Germany had an interest in maintaining this arrangement to preserve its social model based on an export-oriented economy.¹⁰⁵ On the insistence of Bundesbank President Pöhl, with the support of the UK government and against French concerns, price stability and central bank independence became the standard for the EMU in the Treaty of Maastricht.¹⁰⁶

⁹⁴Matthias Ruffert, *Zur Leistungsfähigkeit der Wirtschaftsverfassung*, 134 ARCHIV DES ÖFFENTLICHEN RECHTS 197, 205, 215 (2009).

⁹⁵Christoph Buchheim, *Die Unabhängigkeit der Bundesbank*, 49 VIERTELJAHRESHEFTE FÜR ZEITGESCHICHTE 1 (2001)

⁹⁶CHRISTOPH HERRMANN, WÄHRUNGSHOHEIT, WÄHRUNGSVERFASSUNG UND SUBJEKTIVE RECHTE 181-2 (2010).

⁹⁷SIMON MEE, CENTRAL BANK INDEPENDENCE AND THE LEGACY OF THE GERMAN PAST 231 et seq. (2019).

⁹⁸*Id.*, at 258 et seq.

⁹⁹Herrmann, *supra* note 96, at 183 et seq.

¹⁰⁰Andreas Beyer, et al., *Opting out of the Great Inflation: German Monetary Policy after the Break Down of Bretton Woods*, National Bureau of Economic Research Paper No. w14596 (2008).

¹⁰¹Mee, *supra* note 97, at 274, 288 et seq., 300 et seq.

¹⁰²Milton Friedman, *Should There Be an Independent Monetary Authority?*, in *IN SEARCH OF A MONETARY CONSTITUTION* 219 (Leland Yeager ed. 1962).

¹⁰³Finn E. Kydland & Edward C. Prescott, *Rules Rather Than Discretion: The Inconsistency of Optimal Plans*, 85 THE JOURNAL OF POLITICAL ECONOMY 473 (1977).

¹⁰⁴HAROLD JAMES, MAKING THE EUROPEAN MONETARY UNION 265, 270 et seq. (2012).

¹⁰⁵DAVID MARSH, DIE BUNDESBANK: GESCHÄFTE MIT DER MACHT 304 et seq. (1992).

¹⁰⁶Full account: James, *supra* note 104, at 227 et seq.; Mee, *supra* note 97, at 251 et seq., 285 et seq.; MARKUS K BRUNNERMEIER, et al., THE EURO AND THE BATTLE OF IDEAS 318 (2016).

It was for this reason that price stability became a legal requirement. The treaty would deploy the restrictive, disciplinary character of EU law against discretionary decision-making at the European level.

Chancellor Kohl was aware of the potentially destabilizing effects of a currency union. He had advocated a political union for years. However, sovereignty concerns by France and the United Kingdom prevented the materialization of such ideas.¹⁰⁷ Instead, to compensate for the lack of effective executive and legislative powers at the European level, the Stability and Growth Pact (SGP) chiefly relied on techniques of governmentality to enable soft coordination, and, most importantly to instil market discipline by establishing rather arbitrary criteria for debt and deficits that would send signals to financial markets.¹⁰⁸ To back up the credibility of the SGP, the treaties further restricted the power of the European institutions to provide financial assistance or resort to monetary means for financing governments.¹⁰⁹

In the end, the EMU came to feature a unique combination of discipline and governmentality. It established legal discipline for the European institutions, and market discipline for the Member States. The social fault lines of that arrangement have been known since the outset.¹¹⁰ But the governance paradigm made them worse by enabling the selective constitutionalization of the disciplinary parts.

By constitutionalization, I mean the process by which the BVerfG aligned the disciplinary elements of EMU with the emerging value constitutionalism and made it sacrosanct like few other treaty rules. In the *Maastricht* judgment, the BVerfG gave price stability and central bank independence a constitutional significance that they had never had before under the Basic Law. What used to be based on economic reason and political choice, now became a matter of democracy backed up by the eternity clause of the Basic Law and the BVerfG's exercise of integration control.¹¹¹ Ironically, looking at the controversies afflicting the Bundesbank in the 1960s and 1970s, one may have argued that democracy required the exact opposite of an independent central bank. The BVerfG intensified this selective approach to constitutionalization in the *Lisbon* judgment by focussing exclusively on restricting the transfer of competences to the European level to safeguard the identity of the Basic Law.¹¹² It turned a blind eye on the fact that further transfers of powers might have safeguarded the social state, a constitutional principle that also enjoys the protection of the Basic Law's eternity clause, against the distributive effects of monetary policy.¹¹³

III. Post-Crisis Technocracy

The crisis rescue measures adopted since about 2010 profoundly shook up the European economic constitution. The economic constitution during the past decade became a heterogeneous, essentially contradictory mix of features that both mitigated and exacerbated the fault lines of financial liberalism. The contradictions resulted not least from shifts among the two strands of the

¹⁰⁷Jürgen Elvert, *Helmut Kohl und die Europäische Integration 1982-1992*, Konrad Adenauer Stiftung, The Political Opinion No. 485 (2010). This view was shared by Lamfalussy, see James, *supra* note 104, at 249.

¹⁰⁸Articles 121, 126 TFEU.

¹⁰⁹Articles 122, 123, 125, TFEU.

¹¹⁰See Dawson & de Witte, *supra* note 28, at 821-2 ("ring-fencing" welfare and other redistributive issues); Alexander Somek, *Sozialpolitik in Europa: Von der Domestizierung zur Entwaffnung*, in *Europarecht Beiheft 1: WOHLFAHRTSSTAATLICHKEIT UND SOZIALE DEMOKRATIE IN DER EUROPÄISCHEN UNION 50* (Jürgen Bast & Florian Rödl eds., 2013).

¹¹¹*Maastricht* judgment, 207 et seq.; this was confirmed and entrenched in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 31, 1998, 97 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 350, 372, 375. See Christian Joerges, *Europas Wirtschaftsverfassung in der Krise*, 51 DER STAAT 357, 366-7 (2012).

¹¹²Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267 [hereinafter *Lisbon* judgment].

¹¹³See Rödl, *supra* note 43, at 191 et seq.; on the distributive effects of monetary policy, see Isabel Feichtner, *The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe*, in this issue.

governance paradigm.¹¹⁴ On the one hand, the European institutions adopted measures that set aside the disciplinary constraints established for them in the original EMU framework. They adopted a series of highly discretionary, intrusive governmentality techniques. This includes the European Stability Mechanism (ESM) to bail out Member States in financial trouble, the reforms to the Stability and Growth Pact, especially the introduction of the European Semester to control fiscal policy at Member State level more effectively,¹¹⁵ the Banking Union, and an array of controversial monetary policies ranging from the 2010 Securities Markets Program to Quantitative Easing.¹¹⁶ On the other hand, in a reverse development, the disciplinary framework applicable to the Member States toughened. For lack of other power resources,¹¹⁷ the European level committed itself to imposing strict conditionalities on program countries and adopted the Fiscal Compact, which made constitutional deficit breaks obligatory.¹¹⁸

These shifts towards technocratic governance created much-debated legitimacy problems.¹¹⁹ The treaty framework no longer narrowly restricted the power of the Institutions. Ratcheting up governmentality techniques strengthened the position of independent and executive institutions, namely the ECB and the Commission,¹²⁰ while the power of the purse and the creation of new structures in parallel to the treaties assigned a powerful role to the Council and other inter-governmental constellations like the Eurogroup.¹²¹ Judicial review could hardly compensate for these power gains.¹²² Together with the new wave of discipline exercised over the Member States, especially the peripheral ones, some classified the post-crisis constellation as an example of authoritarian liberalism.¹²³ The predicate “liberalism” alludes to the heavy impact of the

¹¹⁴In my eyes, it is therefore misleading to qualify the reforms as ordoliberal. This has been the subject of some discussion. See Thomas Biebricher, *Europe and the Political Philosophy of Neoliberalism*, 12 CONTEMPORARY POLITICAL THEORY 338 (2013); MARK BLYTH, *AUSTERITY: THE HISTORY OF A DANGEROUS IDEA* 141 (2013); similarly, explaining the crisis rescue measures as the results of a battle between German and French economic thinking: Brunnermeier, et al., *supra* note 106, at 97 et seq., 148 et seq.; for a detailed discussion Josef Hien & Christian Joerges, *Das aktuelle europäische Interesse an der ordoliberalen Tradition*, 45 LEVIATHAN 459 (2017).

¹¹⁵Michael Ioannidis, *Europe's New Transformations: How the Eu Economic Constitution Changed During the Eurozone Crisis*, COMMON MT. L REV. 1237 (2016).

¹¹⁶Hjalte Lokdam, ‘We Serve the People of Europe’: Reimagining the ECB’s Political Master in the Wake of Its Emergency Politics, 58 JCMS: JOURNAL OF COMMON MARKET STUDIES 978, 980 et seq. (2020).

¹¹⁷Damian Chalmers, et al., *The Retransformation of Europe, in THE END OF THE EUROCRATS’ DREAM: ADJUSTING TO EUROPEAN DIVERSITY* 1, 9 (Damian Chalmers, et al. eds., 2016).

¹¹⁸On these shifts, cf. Menéndez, *supra* note 123, at 515; R. Daniel Kelemen, *Commitment for Cowards: Why the Judicialization of Austerity Is Bad Policy and Even Worse Politics*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 146, 153 et seq. (Tom Ginsburg, et al. eds., 2019); Antonia Baraggia, *Conditionality Measures within the Euro Area Crisis: A Challenge to Democratic Principle*, 4 CAMBRIDGE J. INT’L & COMP. L. 268, 272 (2015).

¹¹⁹JÜRGEN HABERMAS, *THE LURE OF TECHNOCRACY* (2015); Brunkhorst, *supra* note 27, at 143 et seq.; Stefan Kadelbach, *Lehren aus der Finanzkrise – Ein Vorschlag zur Reform der politischen Institutionen der Europäischen Union*, 48 EUROPARECHT 489, 495 (2013);

¹²⁰ANTOINE VAUCHEZ, *DÉMOCRATISER L’EUROPE* (2014); Menéndez, *supra* note 123, 74; Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 EUROP. L.J. 667 (2012); Annamaria Viterbo, *Legal and Accountability Issues Arising from the ECB’s Conditionality*, 1 EUROPEAN PAPERS 501 (2016).

¹²¹Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, 77 THE MODERN LAW REVIEW 1 (2014); ALICIA HINAREJOS, *EURO AREA CRISIS IN CONSTITUTIONAL PERSPECTIVE* 95 et seq. (2015); Dawson & de Witte, *supra* note 28, at 833; Ralph Alexander Lorz & Heiko Sauer, *Ersatzunionsrecht und Grundgesetz*, 65 DIE ÖFFENTLICHE VERWALTUNG 573 (2012); Jörn Axel Kämmerer, *Verfassung im Nationalstaat: Von der Gesamtordnung zur Europäischen Teilordnung?*, 34 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1321, 1327 (2015).

¹²²Mark Dawson, et al., *Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism*, 25 EUROP. L.J. (2019); Matthias Goldmann, *Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 GERMAN L.J. 265 (2014).

¹²³Agustín J. Menéndez, *The Crisis of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)Technocratic Governance*, 44 JOURNAL OF LAW AND SOCIETY (2017). Michael A Wilkinson, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14 GERMAN L.J. 527, 537 et seq. (2013).

European institutions on welfare issues, obliterating the erstwhile balance between European economic integration and domestic welfare.¹²⁴

As at earlier turning points, courts were instrumental in bringing about this change.¹²⁵ It has been argued that the CJEU's path dependence left it unprepared for the post-crisis constellation and the stricter control of the European institutions that constellation required.¹²⁶ While this does not appear implausible, one should not overlook that the approach of the BVerfG constrained the ability of the CJEU to alleviate the plight of citizens suffering from austerity. The *Pringle*¹²⁷ and *Gauweiler*¹²⁸ decisions need to be read against cases brought before the BVerfG raising challenges against the ESM treaty and the ECB's Outright Monetary Transactions program,¹²⁹ even though the preliminary reference in *Pringle* came from the Irish Supreme Court. In both cases, the BVerfG was less concerned about the power increase at the European level than it was about preventing fundamental changes to the model of the EMU and its core components, price stability and fiscal discipline, which it had constitutionalized through its *Maastricht* and *Lisbon* judgments. Had the BVerfG's chief concern been to curb increases in European authority, it would have refrained from requesting and accepting the constitutionalization of conditionality and austerity in the ESM and OMT cases—two governmentality mechanisms that could in theory hit Germany like any other member state.

The CJEU in *Pringle* and *Gauweiler* reacted by shifting the scope of the disciplinary framework from the European institutions to the Member States. On the basis of purposive treaty interpretations, it replaced the constraints imposed on the Union by articles 123, 125, and 127 TFEU with the constraints of Member State action deriving from conditionality.¹³⁰ Consequently, the BVerfG accepted both judgments as they left the essential elements of the EMU framework untouched. Bailouts and unorthodox monetary policy would come at the price of unpopular financial hardship to instil fiscal discipline. From this perspective it is no wonder that the CJEU left the issue of fundamental rights untouched in both cases, choosing to introduce them only later in the *Ledra* and *Mallis* cases, though in very different contexts because those suits were lodged by investors in sovereign debt.¹³¹ It seemed that anything that would distract from the disciplinary constraints on Member States had to be avoided.

The BVerfG was content. The monetary model of financial liberalism involving social hardship to achieve price stability would continue; moral hazard was averted. Defending domestic democratic self-determination apparently did not require curbing European executive and intergovernmental powers. Hence, the European economic constitution was entrapped in technocracy and missed the chance for constitutional reform.¹³² It is therefore hardly surprising that

¹²⁴Dawson & de Witte, *supra* note 28, 824 et seq.; Caroline de la Porte & Elke Heins, *Introduction: Is the European Union More Involved in Welfare State Reform Following the Sovereign Debt Crisis?*, in THE SOVEREIGN DEBT CRISIS, THE EU AND WELFARE STATE REFORM 1, 4 (Caroline de La Porte & Elke Heins eds., 2016); Francesco Costamagna, *National Social Spaces as Adjustment Variables in the Emu: A Critical Legal Appraisal*, 24 EUROPEAN L.J. 163 (2018).

¹²⁵FEDERICO FABBRINI, ECONOMIC GOVERNANCE IN EUROPE: COMPARATIVE PARADOXES AND CONSTITUTIONAL CHALLENGES 108 (2016).

¹²⁶Anusheh Farahat & Christoph Krenn, *Der Europäische Gerichtshof in der Eurokrise: Eine konflikttheoretische Perspektive*, 57 DER STAAT 357, 367 et seq. (2018).

¹²⁷Case C-370/12, *Pringle*, ECLI:EU:C:2012:756 (Nov. 27, 2012).

¹²⁸Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400 (June 16, 2015).

¹²⁹Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 14, 2014, 135 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 317; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 2016, 142 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 123 [hereinafter OMT judgment].

¹³⁰For a reconstruction of this shift, see Frank Schorkopf, *Gestaltung mit Recht: Prägestand und Selbststand des Rechts in einer Rechtsgemeinschaft*, 136 ARCHIV DES ÖFFENTLICHEN RECHTS 323 (2011).

¹³¹Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v. Commission and European Central Bank*, ECLI:EU:C:2016:701 (Sep. 20, 2016); Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*, ECLI:EU:C:2016:702 (Sep. 20, 2016).

¹³²Cf. Menéndez, *supra* note 123, 63.

subsequent reforms that sought to increase the fiscal capacity of the Union or to “unionize” the ESM failed¹³³ and that the social rights pillar had a difficult time gaining traction.

IV. Towards Integrative Liberalism and a Contextual Paradigm?

1. Integrative Liberalism in Times of COVID-19

It took another crisis for the post-crisis arrangement to change. The urgency of addressing COVID-19 led to a profound reconsideration of the technocratic constellation in the European economic constitution. While it is still early for any definite claims, it seems that a number of developments will call into question the disciplinary character of the post-crisis European economic constitution. The ECB was quick to set up a 750bn Pandemic Emergency Purchase Program (PEPP) providing additional quantitative easing at relatively flexible conditions in respect of both the qualifying collateral, and the allocation of purchases.¹³⁴ Like the existing programs for quantitative easing, it has not been tied to any conditionality, which immediately brought up the question of its legality.¹³⁵

In this respect, several additional developments are crucial. First, the European council quickly suspended the application of the stability criteria in the SGP on the basis of the general exception clause.¹³⁶

Second, the Eurogroup finance ministers decided in April 2020 to establish a rescue package, which gave the ESM only a minor role to play.¹³⁷ Instead, substantial amounts are to be disbursed in the form of grants, be it the SURE program¹³⁸ for employment support established on the basis of Article 122 TFEU, or the comprehensive package known as Next Generation EU with the Recovery and Resilience Facility (RRF) at its heart.¹³⁹ True, the Commission’s proposal to disburse the majority of the originally planned 750bn as grants faced stiff opposition at the European Council meeting in July 2020, and the ultimate package became trimmed down in several respects. But the tides have changed decisively. The combination of loans-cum-conditionality no longer represents the default option.¹⁴⁰ As applications for the RRF will be integrated into the European Semester, the recovery plan strengthens the technocratic side of the EMU. But overall, it reduces its disciplinary, sanctioning potential. Using the European Semester as a bureaucratic vehicle normalizes financial assistance from EU level and diminishes the potentially disruptive effect of extended bargaining over individual country’s applications for larger rescue packages.

¹³³Cf. Mauro Megliani, *From the European Stability Mechanism to the European Monetary Fund: There and Back Again*, 21 GERMAN LAW JOURNAL 674 (2020).

¹³⁴Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91/1 (Mar. 25, 2020).

¹³⁵Viterbo, *supra* note 10; Sebastian Grund, *Legal, compliant and suitable: The ECB’s Pandemic Emergency Purchase Programme (PEPP)*, Jacques Delors Center Policy Brief (2020), https://hertieschool-f4e6.kxcdn.com/fileadmin/20200325_PEPP_GrundII.pdf; Matthias Goldmann, *Borrowing Time. The ECB’s Pandemic Emergency Purchase Programme*, VERFBLOG (Mar. 27, 2020), <https://doi.org/10.17176/20200328-002904-0>.

¹³⁶Article 2(2), Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure as amended.

¹³⁷Report on the comprehensive economic policy response to the COVID-19 pandemic, Eurogroup press statement (Apr. 9, 2020), <https://www.consilium.europa.eu/de/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/>.

¹³⁸Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L 159/1 (May 5, 2020); see René Repasi, *A Dwarf in Size, But a Giant in Shifting a Paradigm – The European Instrument for Temporary Support to Mitigate Unemployment Risks (SURE)*, 19 EULAWLIVE 8 (2020) <https://eulawlive.com/weekend-edition/weekend-edition-no19/>.

¹³⁹See Costamagna & Goldmann, *supra* note 10, with further references.

¹⁴⁰Reflecting a significant change in attitude: Wolfgang Schäuble, *Aus eigener Stärke*, FAZ (May 7, 2020) <https://www.faz.net/aktuell/politik/inland/gastbeitrag-wolfgang-schauble-aus-eigener-staerke-16846887.html>.

Third, the financing of the rescue package might have long-term consequences for the architecture of the economic constitution. The Commission intends to finance the RRF by borrowing on the financial markets via a special vehicle based on Article 122 TFEU, constructing a creative way around the prohibition to issue debt at the European level. This might make the RRF look like an on-off measure, despite its long-term refinancing plan. But to finance debt payments, the EU intends to adopt new, genuinely European taxes. It is certainly still a long way for this proposal to materialize, if ever. In case it does, however, it would fundamentally alter the balance in the European economic constitution. The fiscal capacity of the Union would increase independent of Member State contributions. That would deprive financially powerful Member States of some of their capacity to insist on pet-agendas, such as conditionality and austerity.

With some caution, it is therefore suggested that recent developments might give rise to an “integrative paradigm.” The new political paradigm seems to be characterized by a general shift towards greater reliance on the state and on supranational institutions for economic governance. It does not, however, amount to a return to mid-century embedded liberalism. There is not a revival of classical mechanisms of planning and intervention. They cannot be reproduced in a global economy characterized by service, knowledge, and global competition rather than industrial production. Rather, economic planning exhausts itself in providing funding to public institutions and competitive economic actors. Such funding is to a considerable extent provided in the form of safety nets. Integrative liberalism has a predominantly reactive character, promising protection against major risks. It is a bit like a welfare state for states, a European safety net for major European events. Like the latter, the integrative paradigm also includes more forward-looking elements to confront potentially aggravating crises such as digital transformation and climate degradation.

2. The PSPP Judgment

One can read the *PSPP* judgment as the harbinger of a new legal paradigm corresponding to integrative liberalism. It allows a glimpse of the possible role of law in the future economic constitution. Again, it is the courts spearheading the transformation.

By and large, in *Weiss* the CJEU followed the test established in the *Gauweiler* judgment. In an essentially purposive reading of the treaty, it accepted the Eurosystem’s unorthodox policy without any disciplinary strings attached. It allowed large quantities of sovereign debt purchases to pass with comparatively little assurance from the debtors.¹⁴¹ Given the disciplinary character of the economic constitution after Maastricht and its entrenchment during post-crisis technocracy, one could expect that those clinging to the Maastricht compromise on the EMU, including the plaintiffs in the case at hand, would consider the approach taken by the CJEU in *Weiss* as *ultra vires*.

The big surprise in the *PSPP* judgment is that the BVerfG only *prima facie* gives the plaintiffs their way. In principle, though grudgingly, it accepts the CJEU’s shift towards austerity-free monetary expansion. As the following contextualization of the *PSPP* judgment shows, the significance of this shift is enormous. It almost dwarfs the differences with the CJEU concerning *ultra vires* review. The BVerfG replaces the disciplinary function of the economic constitution with the flexibility and context-sensitivity of the proportionality test, representing a shift from discipline to welfare.

In its 2014 request for a preliminary ruling in the *OMT* case the BVerfG did not mention proportionality at all. Rather, it understood the distinction between monetary and economic policy to be rigid and inflexible, going as far as to claim that the OMT program “objectively” fell outside the scope of monetary policy.¹⁴² At that point, there was no doubt about the disciplinary function of the economic constitution.

¹⁴¹Case C-493/17, *Weiss*, ECLI:EU:C:2018:1000 (Dec 11, 2018).

¹⁴²Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 7, 2014, 134 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 336, paras. 56 et seq., 63, 69 et seq.

The BVerfG accepted in the *OMT* judgment of 2016 that proportionality had a role to play, as the CJEU had ruled in *Gauweiler*.¹⁴³ However, it created a new cliff-edge by holding that proportionality concerned the existence of a competence, rather than its exercise.¹⁴⁴ The lack of proportionality could therefore render a measure *ultra vires* regardless of the CJEU's understanding of proportionality and the wording of article 5 TEU.¹⁴⁵ At the same time, the BVerfG strengthened the disciplinary character of the legal framework by emphasizing the need for strict, substantive legal review.¹⁴⁶

In its referral in the *Weiss* case, the BVerfG did not even put much weight on the proportionality principle, but relied on its old cliff-edge, the objective of the PSPP program. In its view, the economic effects intrinsic to the PSPP program would reveal its non-monetary character, irrespective of the proportionality question.¹⁴⁷ In fact, in the referral, the BVerfG examines proportionality only in one paragraph and only *after* it established that the effects of PSPP would undermine its monetary policy character.¹⁴⁸ This proportionality test appears redundant as the BVerfG reached the conclusion before that point that the program pursued undue economic policy objectives. In any event, the BVerfG again presented the dividing line between monetary and economic policy as a hard border, related to proportionality only in the sense that measures to be qualified as economic policy would at the same time constitute disproportionate monetary policy measures.¹⁴⁹ The BVerfG's view of the economic constitution continued being governed by the idea of discipline, imposing definite barriers.

In 2019, the BVerfG had another opportunity to confirm the disciplinary character of the EMU in the *Banking Union* case.¹⁵⁰ In this judgment, the BVerfG missed an *ultra vires* finding by only a few inches, and only because the BVerfG turned the judgment of the General Court in *L-Bank* on its head. The General Court had ruled that the Regulation establishing the Single Supervisory Mechanism (SSM)¹⁵¹ put all Eurozone banks under the supervision of the SSM, which could then delegate back the supervision of non-systemic institutions to National Competent Authorities.¹⁵² For the BVerfG this finding was incompatible with article 127(6) TFEU, the legal basis of the SSM Regulation. It therefore established that the Member States had retained the competence to supervise non-systemic institutions, while the SSM was entitled to expand its competence (*Selbsteintrittsrecht*)¹⁵³ according to mutually agreed criteria.¹⁵⁴ This stance, like the related (rather hopeless) German insistence on insulation walls between supervisory and monetary prongs,¹⁵⁵

¹⁴³*OMT* judgment, at para. 177.

¹⁴⁴*Id.*, at 179.

¹⁴⁵Pernice, *supra* note 8; Wendel, *supra* note 8.

¹⁴⁶*OMT* judgment, at paras. 186, 194.

¹⁴⁷Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jul. 18, 2017, 146 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 216, paras. 109 et seq.

¹⁴⁸*Id.*, at paras. 119 and 122.

¹⁴⁹Consequently, even Mark Dawson & Ana Bobic, *Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: Weiss and Others*, 56 COMMON MKT. L. REV. 1005 (2019), though extensively cited by the BVerfG in the PSPP judgment, discuss the effects of the measure without any connection to the proportionality principle, *id.*, at 1019. In respect of the latter, they argue that procedural review needs to assess the “adequacy of the process”, *id.* at 1033. The question is what one should consider as adequate, i.e. whether impact assessments or cost-benefit analyses should be part of it.

¹⁵⁰Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jul. 30., 2019, 151 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202 [hereinafter *Banking Union* judgment].

¹⁵¹Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63 (Oct. 29, 2013) [hereinafter SSM Regulation].

¹⁵²Case T-122/15, *L-Bank*, ECLI:EU:T:2017:337 (May 16, 2017).

¹⁵³Deutscher Bundestag, *Entwurf eines Gesetzes zum Vorschlag für eine Verordnung des Rates zur Übertragung besonderer Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute auf die Europäische Zentralbank*, May 14, 2013, BT-Drs. 17/13470, 4.

¹⁵⁴Art. 5 para. 7, SSM Regulation.

¹⁵⁵*Banking Union* judgment, para. 169; cf. Edoardo Chiti & Fabio Recine, *The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position*, 24 EUROPEAN PUBLIC LAW (2018), 108 et seq.;

reflects the legal paradigm of the *Maastricht* and *Lisbon* judgments. The economic constitution should discipline discretionary European institutions and prevent them from establishing a European welfare state. A holistic, discretionary approach to banking supervision that comprises all banks and takes all policy instruments into account would have considerable impact on welfare and was therefore to be reprimanded.

In the *PSPP* judgment the much-entrenched, rigid border between monetary and economic affairs suddenly disappears. The BVerfG shifts the focus of the dispute from the objective of the measure to its proportionality, arguing that proportionality should refer to the relation between the means and the effects instead of the means and the objective of a measure.¹⁵⁶ This turn nothing but transforms the delimitation between monetary and economic policy from a cliff-edge into a context-sensitive balancing exercise. The need to consider the social impact of monetary policy in the context of the proportionality test relativizes the notion of price stability. The test applied in the *Weiss* referral with respect to the objectives of the measure had in principle only one variable: The monetary policy objective provided the constant, while the non-monetary side-effects of the measure were the variable that would undermine the objective as of a certain point. A proportionality test, by contrast, has two variables or more, as monetary policy may cause a myriad of effects. Rather than enforcing price stability regardless of its adverse social effects, which had always been the hallmark of the disciplinary approach to monetary policy, price stability becomes subject to the careful examination of the economic, social, and perhaps also political costs and benefits of a measure. The *PSPP* judgment not only allows, but actually demands a more holistic, integrative approach to monetary policy. The BVerfG accepts that the delimitation between economic and monetary policy is situational and highly context-dependent, making it a suitable candidate for the proportionality principle.

This shift directly contravenes the intentions of the plaintiffs.¹⁵⁷ The existence of para. 139 of the *PSPP* judgment, the passage quoted in the introduction to this article, and its reiteration in the headnotes of the judgment, indicates that the Second Senate was fully aware of the potential implications. I would go so far as to speculate that the *ultra vires* finding may have been the price to be paid by some of the judges for the shift from discipline to context-sensitivity in the regulatory approach to monetary policy. The BVerfG stands its ground in respect of judicial dialogue, but cedes in matters of political economy, offering the ECB time and the opportunity to “improve” its proportionality analysis to meet the standards of the BVerfG. After all, the shift to proportionality ties in with the logic behind the dissenting opinion of Judge König in the *Treaty Override* case. Being one of the Europe-friendly members of the Second Senate, she proposed using a balancing test when parliament overrules an international treaty.¹⁵⁸

One might wonder whether the new constellation will give rise to a new legal paradigm. The judgment combines contextualism with judicial control. It uses the proportionality principle as a structural coupling between the economic constitution and the specific economic and social context. I propose calling this understanding of the function of the law the contextual paradigm.

D. The Eurosystem, Democracy, and Independence

Looking at the *PSPP* judgment, integrative liberalism and the contextual paradigm in the economic constitution carry the technocratic burden of the post-crisis constellation into the COVID-19 era. The distributive effects of integrative liberalism so far do not find an adequate

Matthias Goldmann, *United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union*, 14 EUR. CONST. L. REV. (2018).

¹⁵⁶*PSPP* judgment, at paras. 138 et seq.

¹⁵⁷Alexander Thiele, *VB vom Blatt: Das BVerfG und die Büchse der ultra-vires-Pandora*, VERFBLOG (May 5, 2020), <https://verfassungsblog.de/vb-vom-blatt-das-bverfg-und-die-buechse-der-ultra-vires-pandora/>.

¹⁵⁸Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 2015, 141 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 44; on the Solomonic aspects of the judgment see also Theresa Violante, *Bring Back the Politics: The PSPP Ruling in its Institutional Context*, in this issue.

embedding in democratic decision-making. This applies both to the ECB measures and the Recovery Fund.¹⁵⁹ This is problematic because the reactive nature of integrative liberalism requires continuous democratic reflection on necessary adjustments to economic governance. At the same time, the state of democracy seems in decline in some Member States, and the consequences do not spare central banking.¹⁶⁰

How can the Eurosystem's democratic legitimacy be ensured in the new context? Proportionality assessments are effective as governments and courts use them in specific institutional settings that provide constraints,¹⁶¹ such as European constitutional pluralism and the related judicial dialogue. Nevertheless, in light of the distributive impact of monetary policy decisions, mere legal accountability appears inappropriate. Weak forms of democratic accountability, such as parliamentary or public scrutiny, seem preferable.¹⁶² But it is doubtful whether they will suffice.¹⁶³ It should therefore no longer count as heresy to scrutinize the significance of central bank independence under integrative liberalism. If monetary policy makers need to deeply immerse themselves into socio-economic policy questions, one may wonder whether they should still be shielded from democratic legitimacy. Three options come to mind in this regard.

First, monetary policy could be handed over to a politically more legitimate body such as the Commission, or one could give the Commission the right to override the decisions of the Eurosystem.¹⁶⁴ As things stand the time inconsistency problem no longer applies in the same way. The risk of inflation seems to remain consistently low as a result of major economic and demographic transformations. There is no risk of a return of the 1970s for the time being. The potential to abuse monetary policy for government funding persists, though, at least in theory. Temporarily selective purchases of a troubled Member State's debt may help to bring spreads down. Following the *OMT* judgment, such purchases are justified if accompanied by conditionality. That conditionality may now have to be revisited in light of the more integrative approach to the economic constitution. It stands to reason to consider the budgetary surveillance carried out in the frame of the modified SGP as sufficient.

One might, however, argue that charging the Commission with monetary policy would lead to a concentration of power that should be avoided. As a second option, the Eurosystem could be treated as a second pillar of the executive power, fully democratic, yet independent from the Commission and the Council. Under this model the members of the Executive Board and national central bank governors would have to be democratically elected, by Parliament or even by direct election, on the basis of an economic and social policy programme.¹⁶⁵ This model would redefine the separation of powers for the 21st century. It is unclear how much leeway this model would leave for judicial intervention from Karlsruhe.

Third, one could leave the institutional arrangement as is and revisit the meaning of independence. The present meaning emerged only in the run-up of the Maastricht Treaty, and it owes a lot to the specific context of the time.¹⁶⁶ One could shift the perception of independence into the

¹⁵⁹On the latter, see Costamagna & Goldmann, *supra* note 10.

¹⁶⁰Charles Goodhart & Rosa Lastra, *Populism and Central Bank Independence*, 29 *OPEN ECONOMIES REVIEW* 49 (2018).

¹⁶¹In the context of fundamental rights adjudication: NIELS PETERSEN, *PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA* (2017).

¹⁶²Deirdre Curtin, 'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency, 23 *EUROP. L.J.* (2017); Fabian Amtenbrink, *The European Central Bank's Intricate Independence Versus Accountability Conundrum in the Post-Crisis Governance Framework*, 26 *MAASTRICHT J. OF EUR. & COMP. L.* 165 (2019); Diane Fromage, *Guaranteeing the ECB's Democratic Accountability in the Post-Banking Union Era: An Ever More Difficult Task?*, 26 *MAASTRICHT J. OF EUR. & COMP. L.* 48 (2019).

¹⁶³Cf. Klaus Tuori, *The ECB's Quantitative Easing Programme as a Constitutional Game Changer*, 26 *MAASTRICHT J. OF EUR. & COMP. L.* 94 (2019).

¹⁶⁴FABIAN AMTENBRINK, *THE DEMOCRATIC ACCOUNTABILITY OF CENTRAL BANKS: A COMPARATIVE STUDY OF THE EUROPEAN CENTRAL BANK* 354 (1999).

¹⁶⁵On the involvement of the European Parliament, see Amtenbrink, *supra* note 164, at 368.

¹⁶⁶James, *supra* note 104, at 270 et seq.

direction of autonomy in the sense that it was used by the Bundesbank in the early 1970s. Accordingly, the central bank would align its policy with economic policy more generally. The Eurosystem is already required to do so, but only to the extent that it does not affect price stability.¹⁶⁷ The contextual approach to the economic constitution calls into question the mere possibility of understanding and defining price stability in isolation of the Union's economic policy goals. Price stability would become the Eurosystem's priority, but the barrier between price stability and other economic objectives would become fluid. That in itself would only be the first step. The Eurosystem would then have to align its monetary policy with the Council recommendations on the economic policy of the euro area.¹⁶⁸ The practice of these recommendations could be changed; they could provide more specific guidance for the Eurosystem concerning economic policy issues. Ultimately, the European Parliament would have to play a much stronger role in EMU generally and also with respect to these recommendations.

E. The Perils of Integrative Liberalism

The above exposition of integrative liberalism as a new political paradigm is still tentative. The evolutionary character of many of the described developments cautions against drawing definitive conclusions at this point in time. It is by no means clear that the bull carrying Europa is off the ice. Major risks of economic and social disintegration remain, including the crises of the rule of law and of migration.¹⁶⁹ Nevertheless, the transformation that the *PSPP* judgment reveals has been prepared over years. It results from profound shifts in attitudes, ongoing not only since the outbreak of the COVID-19 crisis. Moreover, one should not underestimate the significance of a global confrontation between the United States and China that threatens to squeeze Europe in between. It would not be the first time for external pressure to stabilize the economic constitution.

Should integrative liberalism therefore emerge as the paradigm governing the European economic constitution, then the challenges would be considerable. The democratic deficit of the current economic constitution is by no means restricted to the ECB. Moreover, there is a risk that a more welfarist, supportive European Union would seal itself off from the rest of the world. While Europe might have little interest in raising tariffs, it might restrict the movement of persons even further. Integration comes at the expense of exclusion.¹⁷⁰ One can only hope that the rule of law, and specifically of the proportionality principle, will govern migration and border control issues just as much as monetary policy.

¹⁶⁷Article 127(1), first and second sentence, TFEU.

¹⁶⁸Cf. articles 121(2), 136, TFEU.

¹⁶⁹Cf. IVAN KRASSTEV, *AFTER EUROPE* (2020). *But see* Armin von Bogdandy & Luke Dimitrios Spieker, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, 15 EUR. CONST. L. REV. 426 (2019).

¹⁷⁰Hans Lindahl, *European Integration: Popular Sovereignty and a Politics of Boundaries*, 6 EUROP. L.J. 239 (2000).