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Democracy and Financial Order—Legal Perspectives

Public Law's Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become?

By Isabel Feichtner[*]

Abstract

Many of the ills afflicting democratic capitalism have their source in the current legal architecture of money and finance. At the same time the reimagination of institutions of money and finance promise an avenue for reform to democratize the economy and prevent the perpetuation of austerity politics. Such institutional reimagination requires a perspective that recognizes money as an institution linking state and civil society, politics and the economy. Economics in great part eschews such a perspective and perceives of money as a medium of exchange largely independent of government and politics. Legal analysis, by contrast, should be ideally suited for the endeavor to analyse the various ways in which the institutional design of money configures political economy.

To start paving the way for such analysis, I seek to clarify how German public law scholarship has been obstructing a reimagination of monetary design. It has adopted an understanding of money that is informed by economics and on this basis has rationalized the particular legal architecture of money in Germany and in the European Economic and Monetary Union as necessary to protect individual freedom and democratic constitutionalism. Recent practice of the European Central Bank reveals that the strict separation between monetary and economic policy, between money and public finance that characterizes the European Economic and Monetary Union, and its rationalization by legal scholarship and case law cannot be maintained. I argue that a growing body of literature on the political economy of money can inspire a legal analysis that overcomes the current fetishization of the legal architecture of money. This literature provides a starting point for imagining institutions that operationalize monetary sovereignty to serve the public interest and that decrease the hold of private creditors on democratic politics.

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A. Shifting Attention to Money as a Central Institution in Democratic Capitalism

Legal analyses seeking to identify institutions that may reform political economy to the effect of strengthening democracy should concentrate on money.[1] Focusing on money is promising, as the current institutional architecture of money and finance appears to be the source of many ills in the current formation of capitalism, such as financial instability, sovereign indebtedness, and accompanying austerity regimes, as well as increasing societal inequality.[2] Moreover, rethinking institutions of money and finance reveals opportunities for reform that may incrementally, but substantially, transform political economy to better reconcile sustainable prosperity with individual and collective self-determination.

Two characteristics of the current legal architecture of money pose specific dangers not only to the viability of the economy, but also to social cohesion and democracy: One is the extensive ability of commercial banks to create money; the other the conceptual and institutional separation of monetary policy and economic policy, in particular fiscal policy. As concerns money creation, monetary specialists agree that commercial banks are not mere intermediaries between savers and investors, but engage in money creation largely uncontrolled by central banks.[3] Commercial banks engage in money production through extending loans accompanied by the creation of bank deposits.[4] While commercial banks are required to hold a certain amount of reserves with the central bank, and this requirement is meant to limit the amount of loans they extend, in practice, reserve requirements do not determine the amount of loans, but rather reserve creation by central banks succeeds the decision of private banks to extend loans.[5] Central banks only have limited and indirect means to control the private process of money creation.[6] A number of

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[1] Subtitle and argument of this text are inspired by and build on ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996).

[2] For recent political economy analyses, *see* WOLFGANG STREECK, GEKAUFTE ZEIT: DIE VERTAGTE KRISE DES DEMOKRATISCHEN KAPITALISMUS (2013); Wolfgang Streeck, *The Crises of Democratic Capitalism,* 71 NEW LEFT REV. 5 (Sept.–Oct. 2011); David Kennedy, *International Legal Theory: Law and the Political Economy of the World*, 26 LEIDEN J. OF INT'L L. 7 (2013); SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY (2014).

[3] *See* Michael McLeay, Amar Radia & Ryland Thomas, *Money Creation in the Modern Economy*, BANK OF ENG.Q. BULL., 2014 Q1; Michael Kumhof & Zoltán Jakab, *The Truth about Banks, Finance & Development*, 53 FIN. & DEV. 1 (Mar. 2016); THOMAS MAYER, DIE NEUE ORDNUNG DES GELDES: WARUM WIR EINE GELDREFORM BRAUCHEN, 32 (2014). For references to various views in the literature on whether or not central banks can effectively control the money supply, *see* Philipp Degens, *Alternative Geldkonzepte – ein Literaturbericht*, MPIFG DISCUSSION PAPER 13/1 (Feb. 2013), at 7.

[4] Bank deposits by most accounts are considered money, as account transfers are today the preferred and widely accepted means of payment.

[5] MAYER, *supra* note 3, at 36.

[6] These indirect means include the setting of interest rates and purchase of sovereign and commercial bonds, *see* McLeay et al., *supra* note 3.

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economists identify the largely unchecked power of commercial banks to create money as an important source of financial instability, asset bubbles, and, eventually, economic crises, which in past years have enhanced social inequalities and severely limited governments' capacities to spend on social welfare.[7] Monetary theorists have responded with calls to reform monetary institutions. Proposals for sovereign money,[8] for plain, full, or positive money[9] share the aim of limiting the ability of commercial banks to create money; they differ with respect to the authority they would give to governmental institutions to create and allocate money, and the importance they accord to seigniorage as a side effect of governmental money creation and a means to increase public revenue.[10]

A second characteristic of the present legal architecture of money, and one which is particularly pronounced in the European Economic and Monetary Union, is the strict conceptual and institutional separation of monetary policy and economic policy, including fiscal policy. One consequence of this separation is the prohibition of monetary financing. According to this prohibition, governments may not exercise monetary sovereignty to generate the means to finance investments, public services, or social welfare. Rather governments need to rely on taxation and debt to finance their budgets. Dependence on taxation and debt has far reaching consequences for democracy and social cohesion. As governments become increasingly indebted to private creditors, the latter's influence on politics rises; Wolfgang Streeck identifies financial investors as a new constituency alongside, and outcompeting, the electorate.[11] Sovereign indebtedness has the further effect of undermining governments' power to tax. If tax income is mainly used to pay off debt, and not to improve living conditions, then the social acceptance of taxation wanes.[12] Restrictions on government spending on infrastructure, education, and social services—

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[7] JOSEF HUBER, MONETÄRE MODERNISIERUNG. ZUR ZUKUNFT DER GELDORDNUNG: VOLLGELD UND MONETATIVE (3d ed. 2013); MAYER, *supra* note 3, 51 et seq.; ADAIR TURNER, BETWEEN DEBT AND THE DEVIL: MONEY, CREDIT, AND FIXING GLOBAL FINANCE (2015); MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION (2015); Kumhof & Jakab, *supra* note 3.

[8] HUBER, *supra* note 7; FROSTI SIGURJONSSON, MONETARY REFORM: A BETTER MONETARY SYSTEM FOR ICELAND (2015) (report commissioned by the Prime Minister of Iceland).

[9] Jaromir Benes & Michael Kumhof, *The Chicago Plan Revisited* (IMF WP/12/202); MAYER, *supra* note 3.

[10] Josef Huber, who subsumes his reform proposal under the label 'New Currency Theory,' focuses on public revenue generation from seigniorage, such as the income accruing from money creation, and sees herein a distinguishing factor from other reform proposals. *See* Joseph Huber, *Modern Money Theory and New Currency Theory: A Comparative Discussion, Including an Assessment of Their Relevance to Monetary Reform*, REAL-WORLD ECON. REV. 38, 50 (issue no. 66, 2014); the proposal for monetary reform in Iceland, which is mainly the work of Josef Huber, attributes the power to decide how much money to create to the central bank and the power to decide how this money is allocated to the political institutions of government, *see* Sigurjonsson, *supra* note 8, at 78.

[11] STREECK, *supra* note 2; *see* also WILLIAM K. TABB, ECONOMIC GOVERNANCE IN THE AGE OF GLOBALIZATION 121 (2004).

[12] Wolfgang Streeck & Daniel Mertens, *Politik im Defizit: Austerität als fiskalpolitisches Regime*, 3 DER MODERNE STAAT 7 (2010).

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resulting from governments' efforts to reduce debt and balance budgets increasingly mandated by constitutional debt brakes or the conditionality accompanying financial assistance—threaten to erode the social cohesion necessary for a functioning democracy.[13] Today, even actors at the center of financial capitalism identify a lack of social cohesion and growing inequality as the breeding ground for the rise of populist movements that threaten not only peace and democracy, but also the capitalist economic system itself.[14] While most policy proposals on how to restore public finances and alleviate social inequality focus on taxation,[15] a number of heterodox economists seek to reform public finance through the reconceptualization and redesign of money as a source of public credit.[16]

In the remainder of this contribution I neither analyze the monetary causes of the crisis of democratic capitalism nor do I engage in depth with the various proposals to reform and redesign the legal architecture of money. Rather, I seek to make the case for legal scholarship to engage in research on money and the legal design of monetary institutions to better understand the current political economy and to identify institutions that may reconcile economic prosperity, individual freedom, and democracy. Other legal scholars have drawn attention to money before. Gunter Teubner recently, from a systems-theory perspective, identified money as the most promising locus of reform to contain destructive excesses of the economic system. As money constitutes the medium of the economic system, limiting money production through the legal reform of central banking, according to Teubner, may effectively transform the economic system from within.[17] In this contribution, by contrast, I propose that legal analysis should address money not as a medium exclusively of the economic system, not merely as a medium of exchange, store of value, or unit of account necessary for capitalist transactions. Rather, legal analysis should attempt to understand money as forging linkages between the economic activities of private actors and political collectives—as an institution that determines the relationship

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[13] *See also* Thomas Biebricher, *Neoliberalism and Law: The Case of the Constitutional Balanced-Budget Amendment*, in this special issue.

[14] *See* Interview by Shiv Malik with Mario Draghi on Feb. 18, 2016 (published on Mar. 11, 2016), https://www.ecb.europa.eu/press/inter/date/2016/html/sp160311.en.html.

[15] *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014).

[16] The most prominent proponents of so-called modern money theory are Randall Wray, William Mitchell, and Warren Mosler. *See* L. RANDALL WRAY, MODERN MONEY THEORY: A PRIMER ON MACROECONOMICS FOR SOVEREIGN MONETARY SYSTEMS (2d ed. 2015); WILLIAM MITCHELL, L. RANDALL WRAY & MARTIN WATTS, MODERN MONETARY THEORY AND PRACTICE: AN INTRODUCTORY TEXT (2016); WARREN MOSLER, THE SEVEN DEADLY INNOCENT FRAUDS OF ECONOMIC POLICY (2010).

[17] Gunther Teubner, *A Constitutional Moment? - The Logics of 'Hit the Bottom'*, *in* THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE: THE DARK SIDE OF FUNCTIONAL DIFFERENTIATION 3 (Poul Kjaer & Gunther Teubner eds., 2011). Teubner refers to Joseph Huber's and Jaromir Benes and Michael Kumhof's proposals to reform monetary institutions, *supra* notes 7 & 9.

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between civil society and the state, between the economy and politics.[18] Thus understood, money presents itself as a natural starting point for a reconfiguration of the political economy and bears the potential for a politicization and democratization of the economy.

Building on the work of Roberto Unger, I argue that it should be the objective of legal analysis, informed by political economy research, to propose reforms of monetary institutions to enable democratic experimentalism.[19] Currently, one obstacle for such legal analysis lies in legal scholarship itself and more specifically in what Unger has termed rationalizing legal analysis.[20] Focusing on the conceptual and institutional separation of monetary policy and economic policy, in particular fiscal policy, I, first, set out how German public law scholarship and the Federal Constitutional Court[21] rationalize the separation of money and finance not only with reference to economics, but also on the basis of constitutional principles. As a consequence of this rationalization, they come to "understand pieces of the law as a purposive social enterprise that reaches toward comprehensive schemes of welfare and right."[22] This rationalization, and its constitutionalization, consolidate a particular institutional design and shield it from critical analysis and change. Second, I critique public law's rationalization of the separation of money and public finance, of monetary and economic policy with reference to recent European Central Bank (ECB) practice. ECB practice not only calls into question this rationalization, but also reveals the close ties and interdependence between monetary and economic policy. Third, I contrast the conceptualization of money in public law scholarship with alternative understandings that emerge from research on the political economy of money. This research further demonstrates how the law's limited understanding of money and its rationalization of the current design of monetary institutions foreclose inquiries in the many different ways in which monetary institutions can shape state society relations. I conclude, fourth, that this research provides inspiration and guidance for a different legal analysis—namely legal analysis that aims at reimagining institutions of money and finance

[18] For legal scholarship that seeks to understand how different monetary designs shape political economy, *see* CHRISTINE DESAN, MAKING MONEY: COINS, CURRENCY, AND THE COMING OF CAPITALISM (2014); for a brief summary and indication of the promise her research holds for reform oriented legal analysis, *see* Christine Desan, *Decoding the Design of Money*, THE EUR. FIN. REV. 24 (Feb.–Mar. 2015); Streeck, *supra* note 2, also seeks to clarify the role of money and finance in political economy and to derive from this understanding proposals for monetary reform. Streeck concentrates on the external dimension of money, namely the potential of exchange rate policy to address economic imbalances.

[19] UNGER, *supra* note 1; ROBERTO UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (1998).

[20] UNGER, *supra* note 1, at 34.

[21] I concentrate on the German legal scholarship and jurisprudence because the separation was already very pronounced in Germany prior to the establishment of European Monetary Union and now is even more pronounced in the European Monetary Union in response to German demands for this particular institutional design.

[22] UNGER, *supra* note 1, at 36.

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to overcome the current crisis of democratic capitalism and to foster democratic experimentation rather than a state of perpetual austerity.

B. The Separation of Monetary and Economic Policy and Its Rationalization and Constitutionalization in Legal Scholarship and Case Law

For legal analysis to recognize the potential of the institutional design of money to transform the political economy and strengthen democracy requires recognition of the contingency and variability of monetary institutions, and also of the intricate linkages that money forges between state and economy, between government and civil society. In this section I seek to demonstrate how German public law scholarship and case law rationalize and constitutionalize a particular institutional design and thus immunize it from critique and politics. I begin by setting out the main institutional features which characterize the separation of monetary and economic policy in the current legal architecture of the European Economic and Monetary Union. I then lay out German public law scholarship's understanding of money, as the foundation of individual freedom and a precondition of modern statehood, that forms the conceptual basis of this separation. Finally, I reconstruct how, based on this understanding of money, scholarship and case law rationalize and the European Monetary Union constitutionalizes the legal architecture of money.

I. Separation of Monetary and Economic Policy in the Current Legal Architecture

The current legal architecture of the European Economic and Monetary Union[23] replicates and further consolidates the separation of monetary and economic policy, of money and public finance that had characterized the legal architecture of money in Germany already prior to European monetary integration. In Germany, the *Bundesbank*, since its establishment in 1957, has operated rather independently from other institutions of government in exercising its mandate to issue currency and conduct monetary policy.[24] The fiscal budget, by contrast, is the prerogative of the executive and parliament. German constitutional law specifies that taxation shall be the main source of public finance.[25] Apart from collecting taxes, and generating revenue in form of other dues, the state incurs debt to finance public investments, for example, by issuing sovereign bonds. The so-called debt

[23] It should be noted that while the treaties postulate that "[t]he Union shall establish an economic and monetary union" (today, Article 3:4 TEU), it would be more correct to speak just of monetary union as member states have not fully transferred their economic policy powers to the EU.

[24] On the objectives of the *Bundesbank's* monetary policy before monetary integration, which encompassed not only monetary stability, but arguably also full employment and economic growth, *see* Markus Roth, *Beschäftigung als gelpolitisches Ziel der Europäischen Zentralbank*, SOZIALES RECHT 141 (2015).

[25] Public law scholarship and the Federal Constitutional Court speak of the principle of the tax state (*Prinzip des Steuerstaats*), Bundesverfassungsgericht [BVerfGE] [Federal Constitution Court], 78 Entscheidungen des BverfGE 249, 266 et seq.

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brake, since its inclusion in the German Basic Law in 2011, quantitatively limits financing of the public budget through debt.[26]

The distinction between monetary policy and economic, including fiscal, policy is one of the defining features also of the European Economic and Monetary Union. It is reflected in Title VIII, Economic and Monetary Policy, of the Treaty on the Functioning of European Union (TFEU). Those member states which have completed the final stage of monetary integration and form part of the euroarea have transferred their monetary policy powers to the EU. Monetary policy, with respect to these states, is the exclusive competence of the EU, to be exercised by the European System of Central Banks (ESCB), consisting of the ECB and the national central banks.[27] The basic tasks of the ESCB include the definition and implementation of the monetary policy of the Union.[28] In exercising its tasks, the ECB and the national central banks must as their primary objective pursue the maintenance of price stability.[29] A number of legal provisions seek to secure the independence of the ECB and national central banks from other institutions of government.[30]

While the EU has the exclusive competence for monetary policy with respect to member states whose currency is the euro, its competences in the realm of economic, including fiscal, policy are more limited. Member states shall regard their economic policies as a matter of common concern and shall coordinate them within the Council.[31] Furthermore, EU law intends to impose fiscal discipline on member states, in particular through the Stability and Growth Pact, which obliges member states to avoid excessive deficits[32] and provides for procedures for the enforcement of this obligation.[33] The so-called no-bailout clause prohibits the European Union and member states from assuming commitments of governments or other public authorities;[34] according to the prohibition of monetary

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[26] *See* Article 109:3 Basic Law, §4 Stabilitätsgesetz.

[27] Article 282:1 TFEU.

[28] Article 127:2 TFEU.

[29] Article 127:1 TFEU.

[30] According to Article 130 TFEU, neither ECB nor national central banks shall seek or take instructions from EU institutions or member state governments; Article 282:3 obliges the ECB to independently exercise its powers and manage its finances.

[31] Article 121:1 TFEU.

[32] Article 126 TFEU. The reference values are 3% of GDP for government budget deficits and 60% of GDP for government debt.

[33] In the course of the eurocrisis, the Stability and Growth Pact was reformed *inter alia* through the so-called 6-pack legislation.

[34] Article 125 TFEU.

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financing[35] the ECB and central banks of the member states may not grant credit to governments and may not buy government bonds on the primary market.

II. *Money in German Public Law Scholarship: Foundation of Individual Freedom and Precondition of Modern Statehood*

Justifications of the institutional separation of monetary and economic policy, of money and public finance frequently draw on economic theory. While public law scholarship in Germany also takes its cues from economics, it has established its own understanding of money and its constitutional functions. On the basis of this understanding, German public law scholarship rationalizes the legal architecture of money and, in particular, the strict separation of monetary and fiscal policy that finds expression in the prohibition of monetary financing. The understanding of money and its constitutional functions that emerges from public law scholarship, is a rather uniform one. Given the wide agreement in scholars' understanding of money, one may wonder at their choice of sources and references, which is rather eclectic, and their style of argumentation that appears impressionistic; at times, quotations or aphorisms—by Jean Bodin, Vladimir Iljitsch Lenin, Fyodor Dostoyevsky, Georg Friedrich Wilhelm Hegel and others—all but replace legal analysis.[36]

When establishing the constitutional functions of money, public law scholarship follows closely, but mostly only implicitly, standard economic accounts of money that ascribe to money the functions to serve as medium of exchange, unit of account, and store of value.[37] Yet, public law scholarship does not stop here. It regards money not simply as the facilitator of economic transactions and a necessary element in a capitalist economy. Rather, in public law's account money becomes the foundation of individual freedom. Money makes freedom possible for the citizen;[38] without money, the realization of

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[35] Article 123:1 TFEU.

[36] My observations are mainly based on contributions to a prominent nine volume treatise on German constitutional law, JOSEF ISENSSEE & PAUL KIRCHHOF (EDS.), HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, as well as on CHRISTOPH HERRMANN, WÄHRUNGSHOHEIT, WÄHRUNGSVERFASSUNG UND SUBJEKTIVE RECHTE (2010) and CHRISTOPH OHLER, BANKENAUFSICHT UND GELDPOLITIK IN DER WÄHRUNGSUNION (2015).

[37] *See, e.g.*, HERRMANN, *supra* note 36, at 149. It should be noted that the function of money to serve as means of payment frequently appears to be subsumed under the function as medium of exchange. This lack of distinction indicates that money is taken to have an existence independent of the legal order that makes it into a means of payment by declaring it legal tender.

[38] Christian Waldhoff, *Grundzüge des Finanzrechts des Grundgesetzes*, *in* 5 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 813, § 116, para. 9 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2007).

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individual freedom in today's world is hardly possible.[39] Dostoyevsky provides the quote of choice in this respect: "Money is minted freedom."[40]

Apart from conceiving of money as the foundation of individual freedom, public law scholarship attributes to money a second constitutional function: Money is a precondition of modern statehood. Favorite quotes to underline this finding stem from Bodin, "*Les finances sont les nerfs de l'Etat*"[41] and Lenin, "The most effective way to destroy a society is to destroy its money."[42] This understanding is derived from an observation of a change in state functions. As the tasks of the modern state have multiplied, government can no longer rely on tributes in kind. It needs to generate revenue in the form of money to pay for public expenditures such as military services.[43] Capacity for governmental action comes to depend on money.[44] Based on the finding that money is a precondition of the modern state, public law scholars take a further step and denote money as a precondition of the constitution.[45] Even though this account acknowledges the intricate linkage between money and the state,[46] the depiction of their relationship remains surprisingly thin. The intimate connection between money and public finance is reduced to identifying the existence of money as a precondition for public finance generated, mostly, by taxation. Public law scholar Christoph Herrmann, for example, writes:

> From the perspective of the state it may be added [to money functioning as medium of exchange, unit of account and store of value] that only the existence of money enables the state to provide public goods and to pursue economic and social policies according to democratic objectives; as these objectives depend on the state being able to reap part of the economic success of its citizens not in natural produce but as

[39] HERRMANN, *supra* note 36, at 145.

[40] FYODOR DOSTOYEVSKY, NOTES FROM A DEAD HOUSE (1862).

[41] Klaus Vogel, *Der Finanz - und Steuerstaat*, *in* 2 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 843, §30 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2004); MICHAEL KLOEPFER, FINANZVERFASSUNGSRECHT MIT HAUSHALTSVERFASSUNGSRECHT 1 (2014).

[42] Quoted in MILTON FRIEDMAN, CAPITALISM AND FREEDOM 39 (2002) and from there requoted in numerous legal treatises on money.

[43] Waldhoff *supra* note 38, at para. 1.

[44] Vogel, *supra* note 41, at paras. 2, 3; Waldhoff, *supra* note 38, at para. 2.

[45] Vogel, *supra* note 41, at para. 19.

[46] Vogel, *supra* note 41, at para. 2. Waldhoff, *supra* note 38, at para. 9; HERRMANN, *supra* note 36, at 146.

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> fiscal and tax state in the form of money to be used for its own purposes.[47]

What remains unexamined is to what extent political organization and government are a precondition for money. The account of money as a precondition of modern statehood neglects the process of money creation and the role of government therein. Money is depicted as preceding the modern state and the task of government in this depiction is reduced to providing, administering, and spending this preexistent money.[48]

The understanding of money as having an existence independent of the state, and of the state as depending on the existence of money, may be explained with an uncritical takeover by public law scholarship of economists' accounts that depict the evolution of money as a process driven by private economic actors seeking to minimize transaction costs.[49] A further explanation for adherence to this view may lie in the distinction between the state and civil society that is fundamental to the liberal constitutionalism informing much of public law scholarship. Money is regarded as belonging to the sphere of civil society; it is the medium through which civil society conducts its economic relations. Recognition of a political role of the state in the creation of money, beyond its role as neutral protector of money's value, might undermine the conceptualization of civil society as a sphere separate from politics and the state.[50] Liberal constitutionalism acknowledges

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[47] HERRMANN, *supra* note 36, at 149 (author's translation); the original reads:

> *Aus der Sicht des Staates tritt hinzu [zur Funktion des Geldes als Tauschmittel, Maßeinheit und Wertübertragungs- und Wertaufbewahrungsmittel], dass erst die Existenz von Geld ihm die Bereitstellung öffentlicher Güter sowie die weitläufigen Möglichkeiten wirtschaftlicher und sozialer Lenkung nach Maßgabe eigener, demokratisch gesetzter Ziel- und Zweckvorstellungen ermöglicht; hängen diese doch davon ab, dass der Staat den von ihm beanspruchten Teil des wirtschaftlichen Erfolgs seiner Bürger nicht in Naturalien sondern als Finanz- und Steuerstaat in Geld abschöpfen und dann für seine Zwecke verwenden kann.*

Not only can money be used to discharge governments' fiscal obligations, the existence of money also makes possible the taxation of income, expenditures, and production of services. *See* Charles Goodhart, *The Two Concepts of Money: Implications for the Analysis of Optimal Currency Areas*, 14 EUR. J. OF POL. ECON. 407, 416 (1998).

[48] Vogel, *supra* note 41, at para. 3; Waldhoff, *supra* note 38, at para. 1.

[49] *Cf*. also Streeck's observation of the adherence by German sociology to the economic concept of money as a politically neutral medium of exchange: Wolfgang Streeck, *Why the Euro Divides Europe*, New Left Review 95, 5, 9–10 (2015). On the account of the evolution of money in mainstream economics and an alternative, cartalist, account, which stresses the central role of the state, *see* Goodhart, *supra* note 47. Regarding the success of economic accounts of money that explain its evolution independent of the state, Goodhart hypothesizes that it "may also reflect economists' normative preference for systems determined by private sector cost minimization rather than messier political factors." Goodhart, *supra* note 47, at 409.

[50] *Cf.* Charles Blankart's critique of Abba Lerner: CHARLES B. BLANKART, ÖFFENTLICHE FINANZEN IN DER DEMOKRATIE: EINE EINFÜHRUNG IN DIE FINANZWISSENSCHAFT 395 (8th ed. 2011). On Abba Lerner's theory of functional finance, *see* Section D.III below.

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taxation, not money, as the main link between state and civil society. As constitutional law scholar Klaus Vogel notes, it is a consequence of the separation of state and economy that the modern state is a tax state, meaning that it generates public revenue mainly through taxation and not through some direct participation in economic production.[51] Taxation not only provides government with the fiscal means, with the money to pay for its expenditures; it is also understood as an instrument to mitigate harmful effects of the exercise of individual economic freedom through redistribution. According to Vogel, the taxing state is a welfare state, a state of tamed capitalism. In the words of Paul Kirchhof, taxation is the flipside of the medal which on its frontside shows the principle of freedom.[52]

Thus, even though public law scholarship identifies a strong connection between money and public finance, the way this connection is perceived ultimately results in their separation. It is a separation not only reflected in institutional design, but also in the treatment of money and public finance as the subjects of separate subfields in public law scholarship. German public law scholarship conceptually distinguishes between the constitution of money/currency (*Geld-*/*Währungsverfassung*) that addresses fundamental questions of the legal order of money on the one hand and the constitution of public finance (*Finanzverfassung*) that concerns fundamental questions of public finance on the other hand. This distinction is reflected in scholarly monographs and treatises, which usually deal either with the law of money or the law of public finance.[53] The subdivision of the discipline of public law with some scholars focusing on the constitution of money and others on the constitution of public finance further reinforces the conceptual separation. It results in a research gap as concerns the analysis of the interconnections between the institutions of money and public finance.[54]

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[51] Vogel, *supra* note 41, at para. 52.

[52] Vogel, *supra* note 41, at para. 58; Paul Kirchhof, *Die Steuern, in* 5 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 959, § 118 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2007).

[53] JOSEF ISENSEE & PAUL KIRCHHOF (EDS.), HANDBUCH DES STAATSRECHTS, VOLUME 5: RECHTSQUELLEN, ORGANISATION, FINANZEN (3rd ed. 2007) contains separate chapters written by different authors on the constitution of finance and the constitution of money, including: Christian Waldhoff, *Grundzüge des Finanzrechts des Grundgesetzes* § 116, and Reiner Schmidt, *Geld und Währung* § 117; on the constitution of money, *see* HERRMANN, *supra* note 36; HUGO J. HAHN & ULRICH HÄDE, WÄHRUNGSRECHT (2d ed. 2010); on the constitution of finance, *see* KLOEPFER, *supra* note 41.

[54] *See also* Goodhart, *supra* note 47, at 416 (making a similar point with reference to economics and the lack of analysis of the linkages between money and taxation). The linkages between money and finance are manifold, including, but not limited to, the role of sovereign bonds in the money creation process, the impact of monetary policy on the interest yields of sovereign bonds and money creation by commercial banks. To close the research gap on these linkages collaboration also with private lawyers is needed. The work of Christine Desan fills the lacuna as concerns money and finance in early modern England: DESAN, *supra* note 18; on the links between sovereign bonds and money creation by central banks, *see* also GEOFFREY INGHAM, THE NATURE OF MONEY, ch. 7 (2004).

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III. *Rationalization and Constitutionalization of the Legal Architecture of Money*

Public law's understanding of money as the foundation of individual freedom and precondition not only of modern statehood, but also of the constitution, provides the conceptual basis for a rationalization and constitutionalization of the legal architecture of money. In a first argumentative step, public law scholarship derives from the constitutional functions of money the responsibility of the state to ensure a functioning monetary order, and to protect the value of money. In a second step, it rationalizes the given legal architecture of money—in particular, central bank independence and the prohibition of monetary financing—as necessary to meet this responsibility. With the European Monetary Union this legal architecture has become constitutionalized as it is enshrined in treaty law and thus no longer can be changed by simple legislation.

Given the way in which public law scholarship understands money as the foundation of individual freedom and the existential basis of modern statehood and its constitution, it is not surprising that public law scholarship derives from this understanding the primary responsibility of the state to guarantee a functioning monetary order.[55] Some scholars add that the state's responsibility for the monetary order stems from the fact that the state has assumed the authority to issue money and to conduct monetary policy[56]—a view that again points to the underlying assumption that money preexisted the state and owes its existence to private ordering and only subsequently was captured by the state.[57] In accordance with the understanding of money's functions as medium of exchange, unit of account and store of value, the responsibility to ensure a functioning monetary order is seen to mainly entail the protection of the value of money.

German public law scholarship locates the responsibility to protect the value of money in a number of constitutional provisions, neither of which expressly mentions it: Article 109:2 of the Basic Law (obligation to give due regard to the requirements of overall economic equilibrium), Article 20:1 of the Basic Law (social state principle), and Article 14 of the Basic Law (right to property).[58] According to the German Federal Constitutional Court, the right to property does not, as was argued by some legal scholars, entail an individual right to the

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[55] Waldhoff, *supra* note 38, at para. 9; Reiner Schmidt, *Geld und Währung*, *in* 5 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 935, § 117, para. 6 (Josef Isensee & Paul Kirchhof eds., 3rd ed. 2007).

[56] Additional support for the state's responsibility to protect the value of money is derived from the private law principle of nominalism, according to which the value of money depends on its nominal value; put differently nominalism means that the extent of a payment obligation is generally determined nominally and not by the purchasing power of money, HAHN & HÄDE, *supra* note 53, 32 et seq.

[57] As was already indicated, the view that money "can do without the state" finds ample support in economics; Friedrich Hayek, for example, advocated a denationalization of money. *See* FRIEDRICH A. HAYEK, ENTNATIONALISIERUNG DES GELDES (1977).

[58] Schmidt, *supra* note 55, at paras. 21, 22, 23; HERRMANN, *supra* note 36, at 185.

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protection of the value of money. The Court bases its reasoning mainly on the factual finding that the value of money depends on many different factors—including prices, wages, interest—and that due to these dependencies it is impossible for the state to guarantee the value of money.[59] Nonetheless, public law scholarship sees the constitutional property guarantee as establishing an objective responsibility of the state to provide for a functioning monetary order.[60] With the establishment of the European Monetary Union, it is no longer the German state alone which acts as the guarantor of a functioning monetary order, but rather the members of the Monetary Union and their economies have become the joint guarantors of money.[61]

Having established government's responsibility to provide for a functioning monetary order and to protect the value of money, public law scholarship then rationalizes the existing legal architecture of the monetary order as necessary to meet this responsibility. Public law scholars speak of the 'constitution of money' to denote the fundamental legal norms—in particular the independence of central banks, their primary mandate to pursue price stability, and the prohibition of monetary financing—that shall secure the functioning of money as the foundation of the market economy and, thus, of individual freedom and the existence of the state.[62]

This 'constitution of money' is based on the premise that the political institutions of government cannot be trusted to effectively protect money's value. Yet, trust is seen as crucial for the maintenance of money's value.[63] In a system of fiat money, democratically elected government officials, so the argument goes, may be tempted to misuse monetary power to pursue short term interests in reelection thus endangering the long term interest in monetary stability.[64] In particular monetary financing, the exercise of monetary sovereignty to generate public finance, is considered as a threat to the value of money as it may not only undermine trust in money's value, but also lead to inflation. To protect the value of money against the temptation of politicians "to start the money printing press,"

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[59] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 31, 1998, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, Case No. 2 BvR 1877/97, 97, 350.

[60] Schmidt, *supra* note 55, at para. 23.

[61] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 2134/92, 2 BvR 2159/92, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 174 (Oct. 12, 1993).

[62] HERRMANN, *supra* note 36, at 149; for such accounts of the constitution of money, apart from Christoph Herrmann's, *see* in particular OHLER, *supra* note 36, and Schmidt, *supra* note 55; on the prohibition of monetary financing, *see* Jörn A. Kämmerer, *Kommentar zur Europäischen Währungsunion: EWU* 150, para. 5 (Helmut Siekmann ed., 2013).

[63] OHLER, *supra* note 36, at 2 (citing Milton Friedman & Anna Schwartz).

[64] In public choice terms, this situation is referred to as the time inconsistency problem. *See* Emanuel Towfigh, *Rational Choice and its Limits*, in this special issue.

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central banks need to be established that operate independently of political government institutions. Independence is to enable central banks to conduct credible monetary policy in pursuit of the objective to protect price stability as an indicator of the stability of money's value.[65] Government, in turn, may not issue money to finance the public budget, but must rely on taxation or debt financing through capital markets. The prohibition of monetary financing is regarded as necessary to ensure the neutrality of public finance.[66] The public budget is treated analogously to private households and the conclusion drawn from this analogy is that a state should only be able to incur debt in capital markets according to its creditworthiness "like any other capital market participant."[67]

In the European Economic and Monetary Union, monetary and fiscal policy have been separated to an unprecedented extent and the fundamental norms of the 'constitution of money' have indeed been constitutionalized as they have become part of treaty law and, thus, are withdrawn from legislative change. Independence of the ECB and the prohibition of monetary financing in Article 123 of the TFEU rank in the legal hierarchy above member state constitutions and can only be modified through the treaty amendment procedure.[68] Insulation of the ECB from democratic government is thus greater than the *Bundesbank's* insulation from other government institutions ever was.[69] While this institutional design feature of the European Monetary Union has been the subject of some severe criticism, the Federal Constitutional Court endorsed public law's rationalization of the constitution of money also in relation to the legal architecture of the European Monetary Union.

Some economists have long criticized the integration of monetary and economic policy at different speeds. They have warned that giving up monetary autonomy would deprive EU member states of important policy instruments to address economic imbalances in the euroarea. Such economic imbalances or asymmetric shocks, according to the critics, were likely to persist and not be absorbed by full labor mobility, wage flexibility or fiscal transfers—the characteristics usually required for 'optimal currency areas'[70] yet not in place in the EU. Governments in the euroarea may no longer use monetary policy instruments—for example the lowering of interest rates to stimulate investment or

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[65] The link between the value of money and price stability is provided by purchasing power as a generally accepted expression of the value of money. *See* OHLER, *supra* note 36, at 8.

[66] *See* Schmidt, *supra* note 55, at para. 5.

[67] *See* Kämmerer, *supra* note 62, at para. 5.

[68] Article 48 TEU.

[69] CHIARA ZILIOLI & MARTIN SELMAYR, THE LAW OF THE EUROPEAN CENTRAL BANK 32–35 (2001). In preparation of monetary integration, the German constitution was amended and Article 88, clause 2 Basic Law now expressly provides for a European Central Bank "committed to the overriding goal of assuring price stability."

[70] *See* Robert A. Mundell, *A Theory of Optimum Currency Areas*, 51 AM. ECON. REV. 657 (1961).

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devaluation of the currency to enhance exports—to counter such economic shocks.[71] While they may still adopt fiscal measures, here too their policy space is restricted by EU norms that seek to impose fiscal discipline. A more fundamental critique, formulated by Charles Goodhart, holds that the optimal currency area model itself is to be criticized as based on a deficient understanding of money—namely one that, ignoring history and empirical facts, accords to money an existence independent of, and prior to, government and public finance. To Goodhart, the European Monetary Union represents not only an unprecedented, but also undesirable divorce between monetary and fiscal competences.[72]

Critics of the European Economic and Monetary Union have also formulated various legal objections. One of them, namely the critique that the institutional design of the Monetary Union violates the principle of democracy, poses a serious challenge to public law scholarship's rationalization of the strict separation of monetary policy from economic policy. It pits a high ranking constitutional principle, democratic government, against the function attributed to money as existential foundation of the constitutional state. Yet, in its *Maastricht* judgment, the Federal Constitutional Court in response to this challenge validated the rationalization of central bank independence put forward in public law scholarship. While on its face the decision presents central bank independence as an exception to the principle of democracy in need of justification, the decision can also be interpreted as arguing—closely following, and even going beyond, public law scholarship in this point—that central bank independence is a precondition of democracy.

The Court reformulated the democracy challenge as follows:

> A substantial political sphere which supports individual liberty by maintaining the value of the currency, and influences public finances and those areas of politics dependent on them by controlling the money supply, has been withdrawn from the authority of the holders of sovereign rights and (without an amendment of the Treaty) from legislative control over functions and procedures.[73]

This statement is obviously influenced by the *Bundesbank's* style of monetary policy, but it also reflects public law scholarship's rationalization of the constitutional order of money. It

[71] *See* Barry Eichengreen & Jeffry Frieden, *The Political Economy of European Monetary Unification: An Analytical Introduction*, 5 ECON. & POL. 85 (1993).

[72] Goodhart, *supra* note 47.

[73] Bundesverfassungsgericht, *supra* note 61; the English translation is available at: http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf (quote at 30).

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assumes that the primary objective of monetary policy is "maintaining the value of the currency" and adds that the way to achieve this objective is by "controlling the money supply." Given this particular conception of the affected "political sphere" then provides the basis for the Court to rebut the challenge that the principle of democracy is unduly impaired. Transferring competence to an independent ECB which is to give priority to monetary stability is justified according to the Court:

> because it takes account of the special factor, established in the German system and also *scientifically proven*, that an independent central bank is more likely to protect monetary value, and therefore the general economic basis for national budget policy and private planning and disposition, while maintaining economic liberty than are sovereign governmental institutions.[74]

The argument can be restated as follows: Mandating a central bank, which is insulated from politics, with the conduct of monetary policy to be aimed at monetary stability, rather than encroaching upon democratic self-government, in fact, protects the very bases of democracy—individual freedom and the material security required to exercise this freedom, as well as the national budget. In this reading, money is elevated from precondition of the modern state and its constitution to precondition of democracy to be protected by an independent central bank. Constitutionalization of central bank independence and of price stability as the overriding objective of monetary policy thus becomes an asset rather than a problem for democracy.

The Federal Constitutional Court in *Maastricht* also addressed the economic critique that it was unsustainable in the long run to allocate the power for monetary policy to the EU, while member states remained largely responsible for economic policy. It did so by deferring to the political process. In response to the complainants' fear that monetary union would introduce economic union through the backdoor, the Court conceded that "[t]here may be justifiable grounds for suggesting that, in political terms, the monetary

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[74] *Id.* at 31 (emphasis added). The Court reiterated this finding in its ruling of 14 January 2014 on OMT:

> Nevetheless, this restriction [of democratic legitimation] is still compatible with democratic principles because it takes the tested and scientifically documented special character of monetary policy into account that an independent central bank is more likely to safeguard monetary stability, and thus the economic basis, for budgetary policies, than state bodies whose actions depend on money supply and value and which need to rely on short-term approval by political forces.

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 2728/13, 134 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 366 (Jan. 14, 2014), para. 59 (note the weakening of "scientifically proven" into "scientifically documented").

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union may be implemented practically only if it is supplemented immediately by an economic union which exceeds simple coordination of the economic policies of the Member States and the Community."[75] Moreover, it referenced the *Bundesbank* Chairman's view that a monetary union among states with active economic and social policies could only be realized within a political union with all "essential functions of public finance."[76] Yet, while registering the doubts with respect to the feasibility of monetary union without economic and political union, the Court stated that to go ahead with monetary union was a political decision "for which the relevant governmental institutions must assume political responsibility."[77] Were monetary integration to fail, the treaty would need to be amended either to reverse monetary union or to complement it with economic and political union.

The latter alternative seems somewhat disingenuous in light of the Court's subsequent case law, which sets limits to fiscal integration derived from the constitutional identity as protected by Article 79:3 of the Basic Law. While the withdrawal of monetary policy from democratic government is rationalized in terms of individual freedom and the protection of democratic government, the Court considers public finance and budgetary authority to constitute core competences of democratic government. According to the Court, the right to approve the national budget lies at the heart of parliament's control functions with respect to the executive[78] and the power to tax also forms part of constitutional identity.[79] Thus, while the Court upholds the constitutionality of the transfer of monetary power to an independent ECB, it establishes constitutional hurdles for the transfer of substantial fiscal powers to the EU.[80]

To sum up, the following picture emerges of German public law's understanding and rationalization of money and its institutions: Public law's treatment of money is informed by the dominant economic model of money. According to this model, money constitutes a medium of exchange originally generated from within civil society. The state subsequently assumed authority over money; yet, despite this assumption of monetary authority the

[75] *Supra* note 61, at 29.

[76] *Id*. at 30.

[77] *Id.*

[78] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 987/10; 2 BvR 1485/10; 2 BvR 1099/10, 129 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 124 (Sept. 7, 2011).

[79] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvE 2/08; 2 BvE 5/08; 2 BvR 1010/08; 2 BvR 1022/08; 2 BvR 1259/08; 2 BvR 182/09, 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267 (Jun. 30, 2009) para. 252.

[80] *Cf.* Christoph Herrmann, *Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währungsverfassungsrechts*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 805, 807 (2012).

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state can, and should, be neutral as regards the process of money creation. This model is being increasingly criticized from within and outside the economic discipline, *inter alia* because it ignores politics and state involvement in money creation. [81] Yet, public law scholarship unquestioningly, and sometimes it seems unconsciously, bases its understanding of money on this economic model. It further valorizes this understanding by linking it to constitutional values, positing that money constitutes the foundation of individual freedom and democratic constitutionalism. The German Federal Constitutional Court even elevates the connection between central bank independence and containment of inflation to a matter of scientific truth thus abstracting from the particularities and contexts of social arrangements.[82] Legal scholarship's rationalizing legal analysis and its validation by the Federal Constitutional Court have the effect of immunizing the legal architecture of money from critique and foreclosing imagination of institutional alternatives.[83]

In the European Monetary Union then, the legal architecture of money has become fully constitutionalized. Central bank independence and mandate, as well as the prohibition of monetary financing have been enshrined in treaty law and, thus, been further insulated from politics. Even though the Federal Constitutional Court stresses the responsibility of politics in case of failure of the European Economic and Monetary Union it appears illusionary that politics live up to this responsibility—one reason being the power of facts, the other the constitutional hurdle towards fiscal integration, which the Court itself put up in its case law.

C. Collapse of the Separation of Monetary and Economic Policy in ECB Practice: Experimental Expertise and Expertocratic Politics

Current developments in the European Economic and Monetary Union seem to be proving the sceptics right. Instead of convergence of the economies in the euroarea, disparities increase between center and periphery. At the same time, the assumption of political responsibility by either reversing monetary union or complementing it with economic and political union is not in sight. Instead the ECB appears as the driving force in a reconstitution of the European Economic and Monetary Union through the adoption of so-called 'unconventional' or 'non-standard monetary policy instruments' in combination with calls for structural adjustment and the negotiation and monitoring of such structural

[81] *See* Goodhart, *supra* note 47; DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS (2011); Desan, *supra* note 18.

[82] *See supra* note 74.

[83] *Cf.* Roberto Unger's critique of rationalizing legal analysis in UNGER, *supra* note 1, at 8.

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adjustment as part of the conditionality of financial assistance. As a consequence the ECB has been called a "policy-maker of last resort."[84]

The ECB's non-standard monetary policy might be only the most visible sign that one of the fundamental principles on which the European Economic and Monetary Union is built—the strict separation between monetary policy and economic policy—collapses. Unconventional monetary policy and its justification demonstrate that the ECB is not the neutral, rules-based expert institution that the Federal Constitutional Court and rationalizing legal scholarship want it to be, but rather engages in experimental policy-making in reaction to the crisis. While the ECB justifies its policies with the pursuit of monetary objectives, these policies have consequences going far beyond the protection of the value of money—including financial instability and upward redistribution of income. The ECB recognizes these dangers. In response, it calls on the political institutions of government to implement further structural adjustments in order to contain them. As concerns the content of structural adjustment, the ECB has concise views which it regularly expounds in its communications. Consequently, it appears from recent ECB practice that rules-based expert governance in the ECB is being replaced with an experimental approach that blurs the distinction between monetary and (other) economic policy. Concomitantly, the political institutions of government increasingly come under pressure to implement the structural adjustments demanded by economic experts at the ECB.

I. Experimental Monetary Policy

The ECB added so-called unconventional or non-standard instruments, such as the announcement of an Outright Monetary Transactions (OMT) Programme on September 6, 2012 or the Asset Purchase Programme, to its arsenal of standard interest rate instruments in the course of the eurocrisis.[85] These instruments have been criticized as lying outside the ECB's mandate for the conduct of monetary policy in pursuit of price stability—the most vocal critics being German central bankers and economists who demand a return to standard monetary policy.[86] The ECB itself presents its policies as falling squarely within its

[84] Barry Eichengreen, *European Monetary Integration with Benefit of Hindsight*, 50 J. OF COMMON MKT. STUD. 123, 131 (2012). Ironically, the current expansive policy of the ECB, the governmental institution furthest removed from the electorate, appears motivated not only to stimulate the economy, but increasingly also to address a situation of social instability in Europe.

[85] Roubini speaks of unconventional unconventional monetary policy. *See* Nouriel Roubini, *Unconventional Monetary Policy on Stilts, Social Europe* (Apr. 5, 2016), https://www.socialeurope.eu/2016/04/unconventional-monetary-policy-stilts/. The ECB's newest addition to its unconventional monetary policy arsenal is the program commenced in June 2016 under which the ECB purchases company bonds: Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16), https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html.

[86] Philip Plickert, *Deutsche Ökonomen werfen der EZB Staatsfinanzierung vor*, FAZ (Sept. 11, 2013), http://www.faz.net/aktuell/wirtschaft/eurokrise/neuer-appell-deutsche-oekonomen-werfen-der-ezb-staatsfinanzierung-vor-12569316.html.

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mandate. Yet, their justification in terms of the ECB's primary objective to maintain the value of money reveals how porous the dividing line is between monetary and economic policy and that the determination of (unconventional) monetary policy depends on the experimental judgment of ECB experts which is largely intractable for outsiders.

Jean-Claude Trichet—under whose presidency the ECB first endorsed unconventional, non-standard monetary policy measures, including quantitative easing, i.e. large scale asset purchases—put forward an elaborate justification for this new practice. He was the one who explained their objective to be the removal of obstacles in the transmission of conventional interest rate policy.[87] In the euroarea non-standard instruments, according to Trichet, are not only a continuation of standard monetary instruments to be employed once the capacity of interest rate policy to inject new liquidity into the economy has been exhausted; rather non-standard measures are to accompany standard measures where this is necessary to ensure the effectiveness of monetary policy, its effective transmission, throughout the whole euroarea. Such effective transmission is obstructed, for example, where sovereign bonds of individual, financially distressed, states yield much higher interest than those of other euroarea members. This justification advanced by the ECB for unconventional monetary policy played a crucial role in the OMT proceeding before the Court of Justice of the European Union. Its restatement by the Advocate General Cruz Villalón presents an illuminating outside view on central bank expertise in the conduct of monetary policy.

In his opinion, Advocate General Cruz Villalón stresses the expert knowledge of the ECB which sets it apart from other institutions:

> In fact, the Treaties confer on the ECB sole responsibility for framing and implementing monetary policy, for which purpose it is given substantial resources with which to undertake its functions. On account of those resources the ECB also has access to knowledge and particularly valuable information, which permits it to perform its tasks more effectively whilst also, over time, bolstering its technical expertise and reputation.[88]

[87] Jean-Claude Trichet, *Reflections on the Nature of Monetary Policy Non-Standard Measures and Finance Theory*, ECB (Nov. 18, 2010), https://www.ecb.europa.eu/press/key/date/2010/html/sp101118.en.html.

[88] Case C-62/14, Gauweiler v. Deutscher Bundestag, para. 110 (Jan. 14, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=161370&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=.

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According to this view, it is due to its access to expert knowledge and information that the ECB can assess whether unconventional monetary policy measures are needed to "unblock" the Union's monetary transmission channels. Yet, the Advocate General may have been too optimistic in assuming that the ECB has privileged access to expert knowledge. Even though Mario Draghi does not tire of stressing that the ECB is not a political institution, but rather acts according to pre-existing rules,[89] its recent practice of employing non-standard policy measures reveals that there exist neither clear rules nor undisputed scientific knowledge that determine the content of monetary policy or the dividing line between monetary and other economic policy.[90] As Trichet, Draghi's predecessor, himself freely admitted, the ECB in the eurocrisis was acting in the "absence of guidance from existing analytical frameworks" and instead judgment and experience played a key role.[91] Moreover, Trichet called for "input from various theoretical perspectives and from a range of empirical approaches" and formulated the view that an "open debate and a diversity of views must be cultivated—admittedly not always an easy task in an institution such as the ECB."[92]

II. Expert-Led Structural Adjustment

The impossibility of cabining off monetary policy in pursuit of the protection of money's value is most apparent if one looks at the effects of monetary policy that go beyond influencing price stability. In response to these effects, the ECB ever more strongly advocates for economic reform, so-called structural adjustment. On the one hand, structural adjustment, including the flexibilization of the labor market, the reduction of entry barriers to protected sectors, as well as of administrative burdens on entrepreneurs, shall increase the effectiveness of ECB policy. Structural adjustment shall complement the ECB's efforts to secure price stability by improving the economy's ability to adjust to shocks and ensure that ECB interest rate policy is effective throughout the whole euroarea.[93] On the other hand, regulatory reform shall contain the potentially harmful effects of unconventional monetary policy, in particular the asset purchase programs.

Large-scale asset purchases by central banks have two immediate effects: First, they enhance commercial bank reserves with the central bank, and second, they lower the

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[89] *See, e.g.*, Mario Draghi, Introductory Statement, Hearing at the European Parliament's Economic and Monetary Affairs Committee, June 15, 2015, https://www.ecb.europa.eu/press/key/date/2015/html/sp150615_1.en.html.

[90] *See* Matthias Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 GERMAN L.J. 265 (2014).

[91] Trichet, *supra* note 84.

[92] *Id.*

[93] Yves Mersch, *On European Unity: Economic and Institutional Challenges Facing Europe*, ECB (June 25, 2015), https://www.ecb.europa.eu/press/key/date/2015/html/sp150625.en.html.

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interest yields of the assets that are being purchased. These effects shall stimulate the real economy by increasing bank loans and investments in riskier assets with higher interest yields. The mechanisms of quantitative easing may also, however, produce a number of secondary effects, including unequal distributional effects. The Bank of England found, in a study conducted on its own quantitative easing policy, that while the policy boosted households' wealth, the increase was distributed unevenly with 5% of households holding 40% of the financial assets of the household sector as a whole.[94] Moreover, quantitative easing may negatively affect revenue from investments by pension funds and insurers as these frequently face legal restrictions concerning their investments. If, by law, they are prevented from investing in the higher yielding, but riskier, assets while the interest rates of assets they are allowed to invest in drop, their income decreases. Finally, there are warnings that the money creation induced by quantitative easing may not stimulate the real economy, but rather lead to asset bubbles that increase the risk of repeated financial crisis.[95]

The ECB acknowledges these dangers. Yet, its current president, Draghi, defends the view that it is up to the political institutions to address such dangers—through, on the one hand, liberalizing the investment constraints of pension funds and insurers and, on the other hand, strengthening prudential regulation of the finance industry.[96] At the same time, the ECB rebuts calls for a more focused asset purchase program according to which the ECB would purchase specific assets with a view to strengthening particular economic sectors, such as the sustainable energy sector. In response to such suggestions, Draghi points to the ECB's mandate and interprets it as not allowing the ECB to purposefully promote any other economic objectives apart from price stability.[97] From the communications of the ECB there emerges, thus, a comprehensive plan for the monetary and economic order of the EU and ECB officials do not shy away from giving clear guidance to governments as to what in their view is needed to turn the European Economic and Monetary Union into a success. According to this plan, monetary and economic, including fiscal, policy complement each other—one cannot be successful without the other. It consequently implicates strict limitations on democratic choice.

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[94] Bank of England, *The Distributional Effects of Asset Purchases*, BANK OF ENG. Q. BULL. 186, 254 (2012 Q3).

[95] BANK OF INTERNATIONAL SETTLEMENTS, 86TH ANNUAL REPORT. 1 APRIL 2015 – 31 MARCH 2016*,* 63 (June 26, 2016).

[96] Mario Draghi, *Speech at the ECB and Its Watchers XVI Conference*, ECB (Mar. 11, 2015), https://www.ecb.europa.eu/press/key/date/2015/html/sp150311.en.html.

[97] Transcript of the Hearing at the European Parliament's Economic and Monetary Affairs Committee, June 15, 2015, https://www.ecb.europa.eu/press/key/date/2015/html/sp150615_1.en.html. "You asked also whether this [higher inflation] is the only reason we are actually doing this, and whether price stability is the only reason? Well, the answer is yes; we are bound by the mandate. The mandate speaks only of price stability." *Id*. at 10.

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III. How to Square ECB Practice with the Rationalization of the Legal Architecture of Money?

Recent ECB practice proves public law's rationalization of the legal architecture of money to be untenable. It reveals how central bank policy is becoming increasingly experimental and puts democratic politics under pressure to adopt particular policies as advised by central bank experts. As a consequence, the main pillar of the argumentative support for the institutional arrangement collapses: Monetary policy is not a domain which can be easily isolated from the rest of economic policy in the interest of protecting individual freedom, the state, and democracy.

The two general reactions adopted by lawyers to the ECB's monetary policy present no convincing answers to the mismatch between practice and theory. The Federal Constitutional Court, following the *Bundesbank*, criticized the ECB for overstepping its mandate.[98] Yet, this critique does not provide a positive answer to the question how the ECB may conduct monetary policy in a way that conforms to the ideal of a politically neutral central bank that merely protects the value of money. The other response is offered by a number of legal scholars who, in reaction to the Federal Constitutional Court's first OMT decision, called for judicial restraint and deference to central bankers' expertise. They point to the formulation of the ECB's mandate, which encompasses the pursuit of economic objectives other than price stability, and further treaty provisions which leave leeway to interpret ECB policy as being in conformity with the law.[99] This stance of public law scholars—while it may accord to doctrines of separation of powers and judicial review of administrative acts—tends to undermine the discipline's understanding of money and its rationalization of monetary institutions as politically neutral institutions, controlling the money supply to protect the value of money. It also raises the question how ECB practice, which turns the ECB into an agenda setter for democratic politics to be conducted in the shadow of the power of private creditors,[100] may be reconciled with the principle of democracy. At the very least, this situation calls for public law scholarship to revisit its understanding of money.[101]

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[98] 2 BvR 2134/92, BvR 2159/92 In Re Maastrcht Treaty, BVerfG, Oct. 12, 1993.

[99] Goldmann, *supra* note 90; Herrmann, *supra* note 80.

[100] This shadow may explain why in Germany high tax income currently does not lead to increased public investments. While expansive monetary policy results in low interest rates on sovereign bonds and thus a good budgetary situation this may change at the hand of the ECB and the budget may again be strained due to increased debt service.

[101] *Cf*. also the critique by Christian Joerges of a missing theoretical paradigm to inform the European Economic Constitution: Christian Joerges, *Brother, Can You Paradigm?*, 12 ICON 769 (2014); Christian Joerges, *Pereat Iustitia, Fiat Mundus: What is Left of the European Economic Constitution After the OMT Litigation?*, 23 MJ 99 (2016).

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D. Reconceptualizing Money

In the endeavor to reconceptualize money, public law scholarship can build on a number of recent—and not so recent—works in sociology, anthropology, legal history and heterodox economics[102] which seek to clarify the political economy of money, i.e. the interplay of economics and politics in the creation and workings of money. These works expose the fetishism inherent in public law scholarship's rationalizations of the separation of monetary and economic policy, of money and public finance and illustrate the contingency of the current institutional arrangement.

In the following, I contrast public law scholarship's understanding of money with a number of insights that are produced by this research. First, historical and anthropological research dispel the standard account in economics, on which public law scholarship builds, that money emerged as an exchange commodity with the purpose of reducing transaction costs in a barter economy. This research further supports a conceptualization of money as credit as opposed to a conceptualization of money as medium of exchange. Second, research on the political economy of money reveals how money is the outcome of an intricate interplay between economic and political actors, economic and political rationalities, and how it resists subsumption under theories of sovereignty or division between state and civil society. Third, Abba Lerner's theory of functional finance illustrates how a reconceptualization of money could lead to a very different institutional design.

I. The Myth of Money's Origination as Exchange Commodity—Money as Credit

Public law scholarship understands money as precondition of modern statehood. It presents money as having emerged independently of, and prior to, the state in the sphere of private economic transactions. This understanding—more often implicitly than explicitly—builds on and potentially reinforces standard accounts in economics on the evolution of money. Possibly the most famous of such accounts is rendered by Adam Smith who, like so many economists after him, explains money as a solution to the problem of transaction costs in a barter economy.[103] Once economic actors had agreed on a particular commodity as exchange commodity, for example cod, this commodity could be exchanged for all other commodities, and thus the problem of the double coincidence of wants could be overcome. The butcher who needed bread whilst the baker did not need meat could pay the baker with cod instead of having to find someone who would take his meat in

[102] A. Mitchell-Innes, *What is Money?*, THE BANKING L. J. 377 (1913), *reprinted in* CREDIT AND STATE THEORIES OF MONEY. THE CONTRIBUTIONS OF A. MITCHELL-INNES 14 (L. Randall Wray ed., 2004); Goodhart*, supra* note 47; Ingham, supra note 54; GRAEBER, *supra* note 81; DESAN, *supra* note 18*;* WRAY, *supra* note 16; MITCHELL, *supra* note 16; MOSLER *supra* note 16.

[103] ADAM SMITH, THE WEALTH OF NATIONS (1776); *see* also Carl Menger, *On the Origin of Money*, 2 ECON. J. 238 (Caroline A. Foley trans., 1892).

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exchange for a commodity that the baker needed. The story continues by laying out how, over time, precious metals constituted preferred exchange commodities due to their qualities, such as durability, measurability and fungibility.[104]

Scholars of money have forcefully pointed out how this account of the historical emergence of money has been disproven time and again. David Graeber refers to anthropological research that falsifies the assumption that barter economies preceded money economies.[105] More important for my argument is the finding by Alfred Mitchell-Innes—writing a century earlier than Graeber—that coins hardly ever functioned as an exchange commodity, either in the sense that they had real value equaling their purchasing value or that they represented such value by being exchangeable into gold or silver.[106] Rather, coins constituted mere tokens which could be used in economic transaction because, for example, they were made legal tender or refusal to accept them was criminalized.[107] Drawing on commercial history, numismatics and archeology, Mitchell-Innes concludes that economic theories on the emergence of money do not rest on historical proof and are simply false.[108]

On the empirical findings that "there never was, a monetary unit which depended on the value of a coin or on a weight of metal, that there never was, until quite modern days, any fixed relationship between the monetary unit and any metal,"[109] Mitchell-Innes builds his own theory of money. To him, money is credit and "credit alone is money."[110] Returning to Adam Smith he holds that a lack of a double coincidence of wants—say between butcher and baker—need not forfeit the transaction. The butcher might receive bread from the baker in exchange for an acknowledgment of debt—a transfer of credit on the baker. The baker now owns an IOU (I owe you) from the butcher. The value of this credit lies not so much in the fact that it can be presented to the butcher to demand payment of the debt, but rather that the holder can use it to liberate herself from a debt.[111] Money emerges when such IOUs are being linked to a unit of account and become transferable and acceptable as payment.

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[104] *Cf*. KARL MARX, DAS KAPITAL vol. 1, ch. 1 (1867).

[105] GRAEBER, *supra* note 81, at ch. 2.

[106] Mitchell-Innes, *supra* note 102, at 14.

[107] *Id.* at 19.

[108] *I*d. at 15

[109] *Id.* at 16.

[110] *Id.* at 31; with this theory Mitchell-Innes also dispels the standard economic account that credit succeeds the emergence of money, *id*. at 27.

[111] *Id.* at 31

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Thus understood, money originates in debt and signifies debt and its flipside credit. In economics, representatives of the so-called banking school agree with this concept of money in so far as they, too, see credit creation as the key link between money and the real economy.[112] With regard to today's monetary system, one may at first glance consider a debate about whether or not money represents credit to be obsolete. With the emergence of fiat money and fractional reserve banking, the understanding of money as credit has become even more plausible. Money is not convertible into gold or some other valuable commodity. Paper bills issued by the central bank constitute liabilities of the central bank which, however, can only be redeemed in kind: Central bank money can only be exchanged for central bank money.[113] The credit function of money is even clearer in relation to money creation by commercial banks. As stated in the introduction, commercial banks create money when they extend a loan and instead of paying out the loan in cash register a deposit. This deposit money represents not some real economic value but credit which the bank extends based on the debtor's "promise of productivity."[114]

Yet, despite the purchase of the credit theory of money—not only in light of historical and anthropological research, but also current banking practice—the account of money as an exchange commodity lives on in economics and in public law scholarship. Representatives of the currency school—banking school's opponent—consider money to ideally be neutral concerning its effects on the real economy, to constitute not more than a veil behind which exchanges between goods and services take place. To achieve such neutrality, commercial banks should not engage in money creation, but merely in financial intermediation and the central bank should control the money supply in accordance with predefined rules.[115] When German public law scholarship depicts money as a medium of exchange (rather than a means of payment[116]), when Reiner Schmidt writes that liquidity creation by commercial banks must be restricted and the Federal Constitutional Court describes the task of the central bank as controlling the money supply,[117] they appear to have in mind just such an understanding of money.

[112] *See* Charles Goodhart, *Currency School versus Banking School: an ongoing confrontation*, 4 ECON. THOUGHT 20 (2015).

[113] Michael McLeay, Amar Radia & Ryland Thomas, *Money Creation in the Modern Economy: an Introduction*, BANK OF ENG. Q. BULL. 1, 7 (2014 Q1).

[114] Desan, *supra* note 18, at 27

[115] Goodhart, *supra* note 112.

[116] *See* HERRMANN *supra* note 36.

[117] Schmidt, *supra* note 55, at para. 5; Bundesverfassungsgericht, *supra* note 61, at 31.

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II. *Money as Public Private Partnership*

Historical and anthropological studies not only show how an account of money as exchange commodity emerging from barter misrepresents history and provide the basis for an understanding of money as credit. They also call into doubt whether money can ever exist independently of government or rather some political organization of society. While Mitchell-Innes expresses skepticism with regard to the view that money is always a function of government,[118] he does acknowledge that credit money depends on a recognition by society to make it transferable and thus turn it into a means of payment.[119] Graeber is more explicit in his finding that money depends on political organization for its existence.[120] The less an economy is based on codes of honor and trust, the more plausible it seems that for credit money to become a generally accepted means of payment governmental authority is required. Governmental authority can take the form of legislation designating money as legal tender, tax legislation that requires that debts owed to the states be redeemed in money or the criminalization of the refusal to accept money as a means of payment.[121] Accordingly, for Friedrich Knapp, money is a creature of the legal order.[122] Christine Desan, abstracting from her historical study of money in premodern and early modern England, defines money and points to its collective and political dimension in the following way:

> In both early and modern worlds, money arises in groups that draw on the contribution of members to support themselves or their activities. It is created when a stakeholder, acting for the group, uses its singular position to specify and entail value in a way that no individual or bargaining pair of individuals can do.[123]

Desan, too, with her definition points to the credit function of money as well as to political organization as essential for the emergence of money.

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[118] *See* Mitchell-Innes, *supra* note 102, at 27.

[119] *Id.* at 29.

[120] GRAEBER, *supra* note 81, ch. 2.

[121] For examples *see* Mitchell-Innes, *supra* note 102, at 19, 26.

[122] GEORG FRIEDRICH KNAPP, STAATLICHE THEORIE DES GELDES (1905).

[123] DESAN, *supra* note 18, at 24.

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Yet, even though studies of the political economy of money clarify the significant role of political organization and government in premodern, as well as modern capitalist societies, they also caution against simple classifications. They reveal the intricate interplay of economic and political actors and rationalities which varies over time. Joseph Vogl points out how money and finance have always posed a great challenge for theories of sovereignty,[124] how questions of public revenue, sovereign debt, taxation and fiscal affairs resist resolution with the help of a unitary concept of the political.[125] For him, public finance and money constitute sites where political power, commercial operations and interactions between private citizens become linked.[126] Contrary to German public law scholarship, Vogl does not locate the foundation of modern statehood in an account of money, but rather in the relationship between fiscal needs, sovereign indebtedness to private creditors and taxation that required institutionalization.[127] Desan's study of the legal history of the Bank of England[128] supplements this story. For Desan, the novel institutional design represented by the Bank of England[129] marks the transition in political economy to a capitalist system. In this system, government's fiscal position depends on private bondholders, a class of creditors takes an interest in sufficient taxation as assurance that government can meet its debt obligations, and money to a large extent is produced by commercial banks making loans based on promises of profitability.[130] While both Vogl and Desan provide a wealth of material and argument for public law scholarship to refine its understanding of money and in particular the relationship between money and public finance, Abba Lerner's theory of functional finance gives us an idea how money and monetary design might be used for the purpose of reconfiguring political economy.

III. Abba Lerner's Theory of Functional Finance

From a conceptualization of money as credit, it is only a small step to see how money could serve as a direct source of public finance. The public finance function of money is the focus of Abba Lerner's theory of functional finance[131] and the more recent modern money

[124] *See* JOSEF VOGL, DER SOUVERÄNITÄTSEFFEKT 75 (2015).

[125] *Id.* at 76.

[126] *Id.* at 80.

[127] *Id.* at 94.

[128] DESAN, *supra* note 18, ch. 8.

[129] The Bank of England was created when a group of private investors extended a loan to the government of England to be dispensed in the form of bank notes. These notes became acceptable as means of payment as they could be exchanged for species and could be used to redeem tax obligations to the government.

[130] Desan*, supra* note 18, at 27.

[131] Abba P. Lerner, *Functional Finance and the Federal Debt*, 10 SOC. RES. 38, 38 (1943); Abba P. Lerner, *Money as a Creature of the State*, 37 AM. ECON. REV. 312 (1947).

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theory.[132] I reference them here in order to illustrate how an alternative understanding of money can inform a very different institutional design of monetary institutions, one which might significantly lessen government's dependence on private creditors. While according to public law scholarship's understanding of money and public finance, the state, like any private household, should obtain credit according to its creditworthiness,[133] the theory of functional finance holds that the power to issue money can render the state independent from private creditors' assessment of its creditworthiness. Government spending on this account truly can become a function of democratic politics instead of capital market preferences.[134]

According to Lerner, building on Georg Friedrich Knapp,[135] the state can create money by denoting any thing as money if concurrently it creates liabilities, such as tax liabilities, owed to the state. The state brings this token money into circulation through paying with it for goods and services provided by society. It further creates a demand for this money by imposing taxes or other liabilities to be redeemed through payment of this money to the state. Thus, the state can generate public finance through the issuance of money. Note the difference to German public law accounts of money and taxation: According to Lerner not taxation, but money is the primary source of public finance. The theory of functional finance also addresses the relationship between the public finance function of money and the value of money or inflation. According to Lerner, in order to keep the value of money stable and to ensure full employment, it should be the financial responsibility of government to "keep the total rate of spending in the country on goods and services neither greater nor less than that rate which at current prices would buy all the goods and services that it is possible to produce."[136] If government spends too much so that the optimal rate is exceeded, the result will be inflation; if it spends too little, the result is unemployment.[137] Taxation becomes an instrument to contain inflation by reducing the money that taxpayers can spend.[138]

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[132] *See* L. Randall Wray, *From the State Theory of Money to Modern Money Theory: An Alternative to Economic Orthodoxy*, Levy Economics Institute Working Paper No 792 (Mar. 2014); WRAY *supra* note 16; MITCHELL *supra* note 16; MOSLER *supra* note 16.

[133] *See* Kämmerer, *supra* note 62, at para. 5.

[134] *See* MOSLER, *supra* note 16. To be sure, the legal architecture of money in the European Union currently does not allow an implementation of Lerner's theory of functional finance. Implementation would require a different institutional design.

[135] KNAPP, *supra* note 122.

[136] Lerner, *Functional Finance and the Federal Debt, supra* note 131, at 39.

[137] Spending can be financed either by borrowing or issuing money. According to Lerner, governments should only borrow if they hold it desirable that the public has less money and more government bonds (Lerner's 2nd law of functional finance). *Id.* at 40.

[138] *Id.*

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The understanding of money and monetary sovereignty put forward by Lerner enables government to judge fiscal measures by their effects on the economy and not by any traditional doctrines of what constitutes sound or unsound budgetary policies.[139] Modern money theory builds on Lerner's theory of functional finance to argue, for example, that the state should use the power to issue money in order to establish a job guarantee that would function like a buffer stock in the commodities sector, i.e. create jobs in times of high unemployment which would then be absorbed by the private sector in times of economic upswing.[140]

Lerner's theory of functional finance not only points towards an alternative institutional design of money and public finance, it also sheds light on the dark side of the rationalization of the separation of money and public finance in terms of individual economic freedom and democratic government. With the prohibition of monetary financing, public finance becomes dependent on capital markets and private investment driven by profit. With governments increasingly indebted to private capital, citizens compete with creditors to hold governments accountable. The competition is an unequal one and the latter—given their economic power—are likely to be more successful in getting governments to cater to their special interests. Reimagining money as a source of public credit might enable governments to tap a society's productive potential and to finance investments that generate value independent from a profit rationale.

E. Freeing Legal Analysis of Money for Institutional Imagination and Democratic Experimentation

"The one thing that's clear is that new ideas won't emerge without jettisoning of much of our accustomed categories of thought—which have become mostly sheer dead weight, if not intrinsic parts of the very apparatus of hopelessness—and formulating new ones."[141]

With this text I aimed to show how public law's understanding of money and its rationalization of the legal architecture of money fetishize current institutions—such as independent central banks and the prohibition of monetary financing—and thus stand in the way of new ideas. The recognition of legal scholarship's complicity in consolidating a political economy, perceived by many as unjust, can, of course, be but a preparation for the real work of legal analysis, one that aims at institutional imagination and democratic

[139] Lerner, *Money as a Creature of the State*, *supra* note 131.

[140] *See* WILLIAM MITCHELL AND JOAN MUYSKEN, FULL EMPLOYMENT ABANDONED: SHIFTING SANDS AND POLICY FAILURES (2008); Fadhel Kaboub, *Employment Guarantee Programs: A Survey of Theories and Policy Experiences*, Levy Economics Institute Working Paper No. 498 (May 2007); *see* also WRAY, *supra* note 16, at 221.

[141] GRAEBER, *supra* note 81, at 384.

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experimentation, to begin. This legal analysis finds inspiration and can build on a number of studies on the political economy of money, *inter alia* from historical and anthropological perspectives. These studies remind us that the separation of monetary and economic policy, of money and public finance, and its institutional implementation is neither a matter of scientific truth nor the only possible social arrangement. They challenge us to consider monetary policy as fiscal policy and inquire into ways to make public finance dependent on democratic choice instead of the preferences of capital markets. They form a valuable source to inform programmatic thinking on how to reconfigure political economy through monetary design and thus to address the crisis of democratic capitalism.[142]

Legal scholars should be ideally suited to take up the project of an institutional reimagination of money. Economists may have been eager to minimize the role of government in their conception of money, be it to establish economics as an independent discipline[143] or, for ideological reasons, to minimize interference of politics in their domain of competence.[144] But why would lawyers follow suit and not assert their competence over exactly the messy interplay of politics and economics, individual freedom and collective restraint? Legal scholarship can build on what Unger considers to be the "genius of contemporary law" which is that it seeks to realize "a binary system of rights of choice and of arrangements withdrawn from the scope of choice the better to make the exercise of choice real and effective"[145] without assuming—like 19th century legal thought—that particular sets of legal rights and institutions will automatically protect political and economic freedom.[146] Taking the contingency of sociolegal arrangements as a starting point, legal analysis must probe more boldly whether our existing arrangements indeed achieve a reconciliation of individual freedom of choice with the protection of the material bases for effective choice.

In devising new institutions, experimentation must point the way. Experimentation already today characterizes much of monetary policy. If we acknowledge that current experimentation, though highly political, is not only devoid democratic accountability, but worse is further undermining parliamentary democracy, we should be able to muster the courage to detach ourselves from the "the cross of our arrangements"[147] and start a different experiment.

[142] *Cf*. Leopold Specht, *Review of Christine Desan, Making Money. Coin, Currency, and the Coming of Capitalism*, 13 ICON 774 (2015).

[143] GRAEBER, *supra* note 81, at 25.

[144] Goodhart, *supra* note 47, at 409.

[145] Unger, *supra* note 1, at 27.

[146] *Id.*

[147] *Id.* at 189.

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