



Towards a constitutional theory of money: opening Europe's money up to public discourse

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(Received 22 November 2022; accepted 2 December 2022)

Abstract

Stefan Eich's *The Currency of Politics* reconstructs and contextualises the monetary understanding of some of the most renowned political thinkers in history. By contextualising each author's conceptualisation (subjective perception) against their respective contemporary monetary frameworks (objective institutional dimension), Eich elaborates a narrative composed of cumulative layers leading to a double conclusion: that money is political at its core, and that current policies are actively de-politicizing money. These relevant findings are the point of departure of a reflection on the role that law, and constitutional theory in particular, must play in the configuration of Europe's common currency to overcome some of the most acute difficulties the process of integration is currently experiencing. If the triad law, money and public discourse is supposed to articulate social life in the polity, European monetary integration has neutralised them by neglecting the relevance of one of their key features: civic reciprocity. Reactivating the three mechanisms of social integration requires an exercise of constitutional imagination able to integrate interdisciplinary knowledge about money within an institutional framework able to prevent the concentration of unlimited power in unaccountable institutions and to promote and fully exploit the democratic potential of money.

Keywords: Constitutional law; constitutional theory; money; public discourse; European integration

1. *The Currency of Politics*: money is political

In our current shared experience, we are socialised in a context where money is perceived basically as a neutral social phenomenon. We learn to sell and buy by exchanging coins or banknotes for items of the same value. Although those coins and banknotes are being gradually substituted by electronic means of payment, in our most general understanding the act of swiping a credit card or of bringing an electronic device closer to a payment point replaces, by representing it in our minds, the physical exchange of tokens. Therefore, none of these innovations alter what we perceive as the merely transactional essence of money. We must admit to ourselves, nonetheless, that regardless how hard we are predisposed to inhabit the fantasy resulting from such a perception, its authenticity starts to vanish each time it is confronted with reality: inflation challenges money's *prima facie* neutrality by depreciating its value, showing up the cracks of our otherwise comfortable collective illusion.

The falsity of our subjective experience is further cloaked by policies that in the end reinforce our illusion. For more than half a century policymakers and economists have tried to prevent inflation for the sake of the continuity and reliability of market exchanges – and, subsequently, for the stability of the polity. Those efforts have resulted in institutionalised policies of

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stabilisation deeply engrained in the political system. Their goal is to create the conditions for money to work *as if* it was neutral, or as neutral as possible. However, such arrangements hide the actual costs of those policies, usually detrimental for labour while consistent with the interest of capital.¹ At a time when the consequences of those policies are quantifiable through the mounting inequality² and when, despite those institutional safeguards, rampant inflation spreads throughout Western economies, money is a more disputed concept than our most naïve social experience seems to indicate. However, due to the overlap of the fantasy induced by the practicality of exchanges with the established policy framework, critical reflections on money only result from an extremely counterintuitive learning process that hardly has any echo in the public debate. Understanding money thus demands an *individual* intellectual effort countering the *collective* experience, an effort whose outcome, so far, has lacked major repercussion.

Moreover, the deep connection between money and the epoch and social context to which it refers is at the heart of the difficulties for grasping its full implications, not to mention for the elaboration of a general theory, which by force would be limited to ‘meaningless generalities’.³ After all, ‘[a] monetary system is as tied to its times as are the theories adduced to explain it.’⁴ This said, it is also true that in periods of crisis, when social conflicts emerge and options challenging systemic choices are voiced, new questions about the features of money and its societal implications abound. This explains why the long decade since the global financial crisis has witnessed an increasing interest for money among the social sciences.⁵ The latest contribution to this expanding body of literature is the book object of discussion in this symposium.⁶ Against the backdrop of alleged neutrality described above, in *The Currency of Politics* Stefan Eich aims at revealing the political nature of the currency. To do so, the book traces back the socio-political thinking about money in different historical periods, focusing on perspectives and understandings elaborated by prominent social thinkers in critical junctures of monetary history – moments of change, uncertainty and instability where money revealed one or more of its many political features or dimensions.⁷ The final goal is to make explicit the critical character of money for the political system and, in particular, to show how the policies of money currently in force are but the latest stage in a long historical process leading, due to a number of both structural

¹Due to its perceived neutrality, for some economic thinkers, money is irrelevant for understanding economic reality, and therefore is just a veil that must be discarded to fully appreciate the face behind it. However, Schumpeter made clear that both veil and face are closely interrelated: ‘it has to be recognized that essential features of the capitalist process may depend upon the “veil” and that the “face behind it” is incomplete without it.’ JA Schumpeter, *History of Economic Analysis* (Routledge [1954] 2006) 265.

²T Piketty, *Le capital au XXI^e siècle* (Éditions du Seuil 2013).

³JA Schumpeter, *Treatise on Money* (WordBridge Publishing 2014) 15.

⁴A Zwass, *Money, Banking and Credit in the Soviet Union & Eastern Europe* (MacMillan Press 1979).

⁵A shortlist of references from various social disciplines could include D Graeber, *Debt: The First 5000 Years* (Melville House 2011); N Dodd, *The Social Life of Money* (Princeton University Press 2014); C Desan, *Making Money: Coin, Currency and the Coming of Capitalism* (Oxford University Press 2014); WN Goetzmann, *Money Changes Everything: How Finance Made Civilization Possible* (Princeton University Press 2016); M Nishibe, *The Enigma of Money: Gold, Central Banknotes, and Bitcoin* (Springer 2016); L Zelmanovitz, *The Ontology and Function of Money: The Philosophical Fundamentals of Monetary Institutions* (Lexington Books 2016); AE Davis, *Money as a Social Institution: The Institutional Development of Capitalism* (Routledge 2017); T di Muzio and RH Robbins, *An Anthropology of Money: A Critical Introduction* (Routledge 2017); M Aglietta, *Money: 5000 Years of Debt and Power* (Verso 2018); S Gleeson, *The Legal Concept of Money* (Oxford University Press 2018); or M Mellor, *Money: Myths, Truths and Alternatives* (Policy Press 2019).

⁶S Eich, *The Currency of Politics: The Political Theory of Money from Aristotle to Keynes* (Princeton University Press 2022).

⁷‘Whereas periods of calm continuously reproduce meaning based on repeated enactment, moments of crisis are marked by rupture and an openness to new ideas.’ Eich, *Ibid.*, xiv.

and circumstantial reasons, to the consolidation of active policies of monetary de-politicisation⁸ – or, as expressed in another monograph published in the book series co-edited by Eich himself, to ‘monetary silencing’.⁹

There are numerous virtues on Eich’s approach that deserve recognition. First, with the exception of Keynes, expertise on money is neither the defining feature nor the main focus of interest of any of the authors explored in detail – Aristotle, Locke, Fichte and Marx.¹⁰ Instead, for them money is but another element, yet an important one, of the societal whole, an element they incorporate into their own explanatory theories of society. Therefore, identification of the place and role assigned to the currency in those theories and, in particular, in each author’s specific theoretical framework constitutes a critical task to understand the evolution of the political thought revolving around money. With this goal in mind, Eich proceeds to the *reconstruction* of each author’s conceptualisation of money, a task not exempt of difficulties, because most of their texts lacked a scientific character, were rarely exhaustive, and remained subject to eventual changes of mind and inconsistencies resulting from the evolution in the thinking of the author.¹¹ However, this reconstructive effort would be insufficient if it was not accompanied by the *contextualisation* of each author’s conceptualisation of money. This additional effort requires acquaintance with the monetary events and developments of the period at hand to understand the main concerns and issues driving the interest on money for each author. Accordingly, we witness through their eyes the major transformations in the study of the monetary phenomenon: from the viewpoint of the polity, the contrast between the domestic and the international dimension of the currency; from the perspective of the currency itself, its transition from commodity to fiat money. An extensive command of each author’s oeuvre is thus required in the double effort of reconstruction and contextualisation.¹² The outcome is that each conceptualisation of money is coherently integrated within the corresponding author’s specific period and theoretical framework.¹³

A complementary feature is, second, that this reconstruction is not a mere juxtaposition of the political and philosophical theories of the most renowned monetary thinkers in history. Rather, the book adds an additional level of analysis by building up a narrative based on the interaction

⁸To appreciate the last stage of this long evolution, focussing on the raise of the economic as a challenge to political thought, see U Tellmann, *Life & Money: A Genealogy of the Liberal Economy and the Displacement of the Politics* (Columbia University Press 2018).

⁹J Feinig, *Moral Economies of Money: Politics and the Monetary Constitution of Society* (Stanford University Press 2022).

¹⁰In addition to these thinkers, according to which the structure of the book is arranged, the narrative also integrates the views and contributions of other relevant authors like Burke, Prudhon or Weber. However, there is no leading voice when analysing the current state of monetary affairs. Instead, the monetary thinking of the post-Bretton Woods age is presented through a less structured combination of scattered ideas by a number of authors, like Hayek, Foucault, Habermas, or Waltzer. Eich (n 6), Ch 6.

¹¹Despite substantially increasing the scientific nature of their writings, this is still most evident in the authors of the latest centuries because we keep records of the evolution in their respective monetary thinking. For instance, the epistolary relation between Marx and Engels shows that theirs were ideas in formation and constant revision. The evolution in Keynes’ monetary thinking is perhaps more noticeable, the end of the British Empire spurring him to rethink his own previous assumptions. Eich (n 6), 146.

¹²The project of reconstructing and contextualising monetary thinking of classic authors is not original. During a series of books, Caffentzis has explored the monetary philosophy of Locke, Hume and Berkeley, although the outcome is different from what Eich is proposing in a single monograph for the reasons that will be exposed. See CG Caffentzis, *Exciting the Industry of Mankind: George Berkeley’s Philosophy of Money* (Springer 2000); *Clipped Coins, Abused Words, and Civil Government: John Locke’s Philosophy of Money* (Pluto Press 2021 [Autonomea 1989]); and *Civilizing Money: Hume, his Monetary Project and the Scottish Enlightenment* (Pluto Press 2021).

¹³This eventually leads Eich to persuasively argue that previous analysis of the work and thinking of those authors, based on particular rather than comprehensive readings of their texts, misinterpreted their respective understanding of money. Illustrative in this regard is the chapter on Aristotle and the new reading, convincingly articulated by Eich, regarding reciprocity as foundational feature of coinage (Eich (n 6), 25 ff). According to this new reading, money becomes a key aspect in Aristotle’s oeuvre as an element able to articulate reciprocal justice, in coherence with his understanding of law and public discourse.

between the specific economic, political and institutional contexts in which monetary developments took place (the objective reality of the period) and each authors' respective conceptualisations of money (their subjective understanding). The mutual interaction between these two dimensions results in a history of monetary thinking and thought that responds to contemporary events by questioning and challenging previous theoretical assumptions. Hence, each author's understanding of money is not only the product of the events of their time, but it also encompasses a dialogue with, as well as the revision and challenge of, previous assumptions elaborated earlier in history for very different politico-economic contexts.¹⁴ The key element of this narrative is that subjective experience about money, on which any conceptualisation is forcedly based, is so powerfully engrained in our individual thinking that only moments of rupture allow for their challenge and revision. Furthermore, the resulting narrative has the virtue of showing clearly how reality shapes the construction of ideas and how, in turn, ideas participate in the construction of reality.¹⁵

A final virtue of the book, third, is that it transcends the strictly academic debate it engages with. *The Currency of Politics* not only constitutes a major contribution to the literature on monetary thinking because of the detailed reconstruction and contextualisation of the reviewed authors, but also because the narrative put forward by the author widens the scope of the discussion about monetary issues in our time. Despite the widespread assumption that money is an economic phenomenon that, correspondingly, is mainly for economists to study, interpret and understand¹⁶ Eich shows how alternative views can make key contributions to the monetary debate. Moreover, by bringing the currency to the broad political arena, instead of keeping it constrained by the established policies of monetary silencing, Eich's narrative regains for money its full political voice. In an extremely reductionist way, one could summarise the main argument of the book with the sentence 'Money is political'. Such a bold statement would not be deemed radical if we were not raised and socialised under the aegis of the abovementioned active policies of monetary de-politicisation, which shroud money with an aura of neutrality – de-democratising money as a result.¹⁷ However, according to mainstream economics, the latter is the right way to understand money.¹⁸ Within this context and widespread mind-set, we can only engage with counter-intuitive ideas that reveal the political nature of money through an individual effort. The rupture of the mutually reinforcing link between the subjective experience of our use of money and the objective policies of de-politicisation of money, which this book persuasively achieves, contributes to elevating to the collective level what so far was an individual process. In this regard, it opens up a broader political space where new possibilities and alternatives may emerge.

2. The euro: a laboratory for new monetary thinking

It is to the exploration of the new political possibilities that money entails that the remainder of this contribution is devoted. But rather than doing so from a practical point of view, for instance explaining concrete formulations and proposals about how to actually arrange money and

¹⁴Eich (n 6), 8.

¹⁵'Like language, money does not merely represent reality but constitutes it.' Eich (n 6), 19.

¹⁶'In focussing on the role of money as a tool of commodification against which emancipatory politics could at best be defended, political theorists often inadvertently accepted the dubious premise that money is merely economic in the first place.' Eich (n 6), 180. The same can be said of legal scholars, too.

¹⁷'Much of what passes as "depoliticization" would be more accurately described as the de-democratization of monetary politics, which itself ought to be subjected to democratic scrutiny.' Eich (n 6), xv.

¹⁸'Current economics regularly considers events refuting its major hypothesis as one-time exceptions. The outcome is that rather than formulating new hypothesis (or than re-formulating existing ones) to integrate consistently those events, ideological and reputational interests prevent economists from rejecting widely accepted but falsified hypothesis, and even from engaging in discussions with those who actually support those critical positions. See S Keen, *The New Economics: A Manifesto* (Polity Press 2022). A similar challenge to mainstream methods and alleged truths takes place in astrophysics regarding the dark matter. See P Kroupa, 'The Dark Matter Crisis: Falsification of the Current Standard Model of Cosmology' 29 (4) (2012) *Publications of the Astronomical Society of Australia* 395–433.

monetary institutions, the intention is to reflect about the role law must play in such a task. The point of departure is that law and money are both hybrid social phenomena suspended between the state and the market.¹⁹ Law has a relevant dual role in shaping these two omnipresent categories, because it simultaneously *limits the action of the state*, constraining its powers, and *regulates the markets*, establishing the contours within which economic actors can operate freely. Law thus constitutes the border between state powers and market freedoms, a border that can be displaced and readjusted once and again depending on context and circumstances.

Although less widely acknowledged, money operates in a similarly hybrid fashion to law at the intersection between state and market. By allowing both commercial transactions (as credit) and payment of taxes (as debt) it simultaneously *enables the market* and *constitutes the polity*.²⁰ Moreover, money nowadays relies on trust to carry out commercial activities on the basis of a currency lacking any intrinsic value, and on violence to impose the exaction of taxes.²¹ Money is thus a foundational element of our society that is deeply rooted in socio-economic relations. As a matter of fact, money can be understood as the manifestation of a social (credit-debt) relation that, as such, is observed and interpreted differently by each social discipline, depending on its specific operational tools, conceptual apparatuses and perspective emphases. Hence, while economics can understand money as a balance sheet reflecting the assets and liabilities of each actor in society,²² a sociological perspective would focus on the very underlying relationship,²³ and while politics would explain the power struggle between the creditor and debtor sides of the relation,²⁴ law would explore the features of the contract between those two parties.²⁵ The hybrid essence of money, suspended between state and market, together with the perspectivism resulting from the different conceptualizations of money by each social science (respectively focussing on its quantitative, relational, power-based and contractual dimensions), explain both the numerous political and scholar controversies on its behalf and the necessity of interdisciplinary research to explain its nature.

A holistic comprehension of the monetary phenomenon nevertheless requires a level of abstraction beyond the understanding of our daily social experience. Depending on the specific socio-economic context at hand, the features of money openly displayed or disclosed by research may differ, as Eich's book demonstrates. This is why contextual, comparative and historical analyses are required to unveil concrete aspects of each manifestation of money, which in the end may contribute to understanding some of its critical features and implications. However, this contribution is written with the strong conviction that the final reconstruction and reconciliation of those different perspectives should be carried out within the framework of constitutional theory. Despite its legal form (the language, vocabulary and techniques are those of the legal science), constitutional theory substantively encompasses all social disciplines – or at least aspires to encompass them all. In this regard, European monetary integration constitutes an exceptional laboratory for the study of money. It is not only that the process of European integration proceeds across disciplines, rearranging the classic borders between them, but also that the common currency has been detached from the institutional setting typical of the nation-state, which for the euro has been replaced by the unprecedented legal design of the Economic and Monetary

¹⁹Eich acknowledges the suspension of money between this and other classic social dichotomies. Eich (n 6), 5.

²⁰Desan (n 5); Aglietta (n 5).

²¹M Aglietta and A Orléan, *La Monnaie: Entre Violence et Confiance* (Odile Jacob 2002).

²²L Randall Wray, *Money and Credit in Capitalist Economies: The Endogenous Money Approach* (Edward Elgar 1990) 267–86; M Hudson, . . . and Forgive them their debts: *Lending, Foreclosure and Redemption from Bronze Age Finance to the Jubilee Year* (ISLET 2018).

²³VA Zelizer, *The Social Meaning of Money* (Basic Books 1994); G Ingham, *The Nature of Money* (Polity Press 2004); Graeber (n 5); Dodd (n 5).

²⁴K Dyson, *States, Debt, and Power: 'Saints' and 'Sinners' in European History and Integration* (Oxford University Press 2014).

²⁵Desan (n 5).

Union (EMU). Accordingly, the study of Europe's common currency, in this radically new context, offers a unique opportunity to reveal new and undiscovered features of money.²⁶

In line with the research interests of this journal, which revolve around law (understood in a broad sense) set in its wider social, economic, political and cultural context, in what follows this article pays special attention to the relation between law and money in all matters related to the euro. The focus will be on specific constitutional problems the common currency has revealed or even provoked, such as the need to (re)organise the powers related to monetary integration, currently *de facto* concentrated in the European Central Bank (ECB) without adequate accountability mechanisms,²⁷ or the need to articulate democratic and representative procedures in all decision-making concerning monetary affairs.²⁸ In a nutshell, the objective is to use the political dimension of money unveiled by Eich to put forward some ideas about how constitutional theory should engage with monetary issues if the democratic credentials of the European polity are to be increased. The argument proceeds in three steps, first introducing the various legal approaches to money and identifying the need for promoting and advancing a constitutional perspective on monetary issues (subsection A); second, discussing how the triad of law, money and public discourse interact, as mechanisms of social integration, in the process of European integration (subsection B); and third, suggesting that a new separation of powers in monetary affairs is needed in order to prevent the concentration of unlimited power in unaccountable institutions and to promote and fully exploit the democratic potential of money (subsection C).

A. Law and money: a debate lacking a constitutional theory perspective

Before delving deeper on the intricacies of European monetary integration, it is convenient to expound the different perspectives from which legal scholars usually approach monetary affairs – which in these pages are framed around three different perspectives (*regulative*, *constitutive* and *normative*, depending on their standpoint vis-à-vis money). Just a general overview provides insights about the currently limited understanding of money, its societal implications and its democratic potential among legal research. The first noticeable thing when approaching this legal literature is that the vast majority of writings dealing with monetary issues do not discuss money itself. The meagre contribution from the legal domain to the wider, cross-disciplinary debate about the nature of money is as unfortunate as regrettable. Moreover, by taking for granted concepts established from mainstream economics, legal scholars have instead contributed not only to spreading, but also to consolidating the idea of money as a neutral social institution. Perhaps the reason behind this shallow interest and, consequently, of the lack of deeper legal research on money results from the pre-eminence of the pragmatic interests mobilised by legal practitioners, usually limited to determining if a given asset should be considered legal tender. This purely legal matter does not address the ontological question of what money is – it rather contents itself with the practical answer to a self-referential legal discussion formulated in binary (either-or) terms, ignoring that in economic terms there are various degrees between money and non-money and that different assets may, under certain circumstances, fulfil such functions without being proper money in legal terms.

Leaving practitioners and their everyday pragmatic view aside, general legal scholarship has not engaged with the nature of money and its related conundrums either. With the praiseworthy objective of solving specific practical problems through legal means, legal scholars examine regulations that are certainly connected to money, although without discussing its essence.

²⁶A superb example in A Chadwick, 'Rethinking the EU's "Monetary Constitution": Legal Theories of Money, the Euro, and Transnational Law' 1 (2022) *European Law Open* 468–509.

²⁷M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020).

²⁸P Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2018).

These usually are extremely technical analyses, sometimes addressing challenging dilemmas that by their very nature extend across various fields of law and that forcefully lead authors to resort to sophisticated argumentations.²⁹ Financial and banking law are among the most evident of these fields, but civil law and tax law are also recurrently involved in these discussions. Regardless of the legal discipline or field these authors write about, what characterises this encyclopaedic amount of work is that it focuses on the regulation of issues on the periphery of money and its attached problems, rather than exploring money itself. When observed from the perspective revealed by Eich's work, it is noticeable that works produced from this *regulative* approach neglect the political nature of money and they therefore contribute to spreading the perception about its alleged neutrality.

There are nonetheless exceptions in the legal literature that adopt a different approach towards monetary issues. These are works that engage with the hybrid and multidimensional features of money or that straightforwardly recognise its political nature. And this irrespectively of the actual field that serves as point of departure for the reflection. Hence, from this *constitutive* approach it is possible to find lawyers who offer new analyses that represent substantial contributions to the understanding of the nature of money and its critical role in the formation and actual shaping of the polity. There have been notable but punctual efforts exploring public law's understanding of money,³⁰ addressing legal inquires on the social ontology of money,³¹ discussing the legal concept of money in the light of the new virtual currencies,³² and even attempting to elaborate a critical legal theory of money from a private law perspective – thus distinguishing between the legal and the economic concepts of money, that is, understood respectively as immaterial property or as medium of exchange.³³ More structured efforts have been articulated from the perspective of historical research on law and money,³⁴ or highlighting the constitutive dimension of tax law.³⁵ But two contributions stand out as relevant for the cross-disciplinary discussion about the monetary phenomenon. On the one hand, the efforts to elaborate a legal theory of finance departing from the essential hybridity of law and money³⁶ that finally resulted in the recognition of the infrastructural role of law in finance.³⁷ This legal analysis shows how law, as the code of capital, is able to selectively endow certain assets with the capacity to protect and produce private wealth. From this perspective law, especially in common law systems, where private actors have enormous agency over its content, determines major distributional consequences among society that, if neglected, can notably increase and reinforce systemic inequalities. And on the other hand, the recognition that money is not only a legal institution,³⁸ but that at its core it also is a constitutive element of the polity establishing a shared project of governance, amplified the awareness about the constitutional relevance of money.³⁹ The significance of these contributions results from the echo they had not only among legal scholars, but especially in other disciplines.⁴⁰ Law is finally

²⁹See, for instance, G Gimigliano and V Cattelan (eds) *Money Law, Capital, and the Changing Identity of the European Union* (Hart Publishing 2022).

³⁰I Feichtner, 'Public Law's Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become?' 17 (2016) *German Law Journal* 879.

³¹A Condello, M Ferraris and J Rogers Searle, *Money, Social Ontology and Law* (Routledge 2019).

³²Gleeson (n 5).

³³A Rahmatian, *Credit and Creed: A Critical Legal Theory of Money* (Routledge 2020).

³⁴D Fox and W Ernst (eds), *Money in the Western Legal Tradition: Middle Ages to Bretton Woods* (Oxford University Press 2016).

³⁵D de Cogan, *Tax Law, State-Building and the Constitution* (Hart Publishing 2020).

³⁶K Pistor, 'A Legal Theory of Finance' 41 (2013) *Journal of Comparative Economics* 315–30.

³⁷K Pistor, *The Code of Capital: How Law Creates Wealth and Inequality* (Princeton University Press 2019).

³⁸C Desan, 'Money as a Legal Institution' in D Fox and W Ernst (eds) *Money in the Western Legal Tradition: Middle Ages to Bretton Woods* (Oxford University Press 2016) 18–35.

³⁹Desan (n 5); W Bateman and J Allen, 'The Law of Central Bank Reserve Creation' 85 (2022) *Modern Law Review* 401–34.

⁴⁰GM Hodgson, 'Observations on the Legal Theory of Finance' 41 (2013) *Journal of Comparative Economics* 331–7; P Mehrling, 'Essential Hybridity: A Money View of FX' 41 (2013) *Journal of Comparative Economics* 355–63; M Reis

engaging with the interdisciplinary discussion about money by making original and relevant contributions to the debate.

Lastly, legal writing on money can make proposals for amendment and reform of existing monetary regulations and institutions in order to address specific societal problems – even with the intention of fully exploiting the democratic potential of money. These are thoughtful texts delving deeper into money and its social implications, giving legal shape to alternatives solving deficiencies in the current institutional and regulatory design of money.⁴¹ But commendable and exemplary contributions as they are, writings from this *normative* approach have a constant and irresolvable tension recurrently appearing in all of them: they are context-dependent, and therefore they cannot make generally applicable proposals to be implemented regardless of the contextual framework within which they have been conceived and designed for.⁴² This is one of the conundrums of constitutional theory: under the legal dressing, its flesh and blood is a given social reality. Such a reality can be studied from different disciplines that, when put together, offer a holistic perspective over it. Integrating all these perspectives under a single constitutional reflection is a task for constitutional theory, and the actual distillation of its conclusions in the form of legal writing a task for constitutional law. But the outcome, the actual constitution, always refers to one concrete polity, reflecting its history, culture and idiosyncrasy and therefore cannot be directly translated into other societies.

There are nevertheless common trends and principles that are shared by all constitutional systems in the world, like the need to arrange the functions of the state, usually organizing them according to the separation of powers.⁴³ However, despite their relevance monetary issues are not among those shared commonalities. Ignored by most constitutions, which barely allude to it, money is only mentioned, if at all, from a *regulative* perspective. It therefore seems that the neglect about the constitutive dimension of money is the rule among constitutional theorists and lawyers. Accordingly, it seems critical to address this gap in the theory if we want to exploit the democratic potential of money unveiled by Eich. Democratizing monetary decision-making procedures may rebalance the uneven relationship between capital and labour, currently a core reason of the rampant inequality. This is a task constitutional theory must seriously consider embarking on.

B. Paying attention to the context: law, money and public discourse as mechanisms of social integration in the context of European integration

Following the structure proposed for this contribution, a brief contextualisation of the process of European integration is required before returning to general proposals to address the gap in constitutional theory identified above. The idea is to first reflect on the way that the triad law, money and public discourse interact in the context of European integration. This will provide the setting in which our constitutional theory reflection on money should be framed – a context extremely adequate for innovation due to the detachment of Europe's money from classic nation-state structures.

Our point of departure is thus the political theory of money historically traced in by Eich in *The Currency of Politics*. From this grand narrative, encompassing 'from Aristotle to Keynes',

and D Vasconcelos, 'The Legal Theory of Finance and the Financial Instability Hypothesis: Convergences and Possible Integration' 39 (2016) *Journal of Post-Keynesian Economics* 206–27; or J Moudud, 'Analyzing the Constitutional Theory of Money: Governance, Power, and Instability' 31 (2018) *Leiden Journal of International Law* 289–313.

⁴¹Paradigmatic examples are M Ricks, *The Money Problem: Rethinking Financial Regulation* (University of Chicago Press 2016) and ST Omarova, 'The People's Ledger: How to Democratize Money and Finance the Economy' 74 (2021) *Vanderbilt Law Review* 1231–300.

⁴²To follow Omarova's suggestions (*Ibid.*) in the Eurozone, for instance, would have different effects than in the United States (US), given at least the distinctive institutional setting of the euro and the hierarchy of their respective currencies in the global monetary system.

⁴³M García-Pelayo, *Derecho constitucional comparado* (Alianza Editorial 1993).

as the subtitle suggests, we can distil the main guidelines according to which money could operate without contradicting the fundamentals of any democratic society. The critical element is the conceptualisation of money, together with law and public discourse, as key elements of the political system. Their openness to society, their capability and availability to assimilate their demands and preferences will result in a responsive polity integrating its citizens. Accordingly, based on Aristotle's theoretical construction of a virtuous society around the idea of reciprocal justice,⁴⁴ Eich refers to these three mechanisms of social integration (law, money and public discourse) as 'tools of reciprocity to achieve civic relations among citizens',⁴⁵ and he uses this triad consistently throughout the whole book. The terminology 'mechanisms of social integration' refers to the intrinsic ability of these elements for organizing social life – each one according to its specific features.

Based on their potential for harmonizing shared experiences, it would also be possible to consider scientific knowledge, technology and certain public and civil policies as mechanisms of social integration: through widely accepted scientific certainties, empirically demonstrated and therefore considered truths, uniform foundations are applicable to all members of the community; technological progress, by generalising the use of certain devices and interfaces to work and interact with in the digital world, subject human beings to the same rationale regardless of the polity in which their life takes place; and certain obligatory public policies, like education or military service, integrate members of the polity into a specific set of social values. However, this would discard the reciprocity element that Eich considers vital for his analysis of the mechanisms of social integration, because it is the ability to participate and influence in the content and result of the process that is actually conducive to a healthful integration. Therefore, if this is a requirement for a mechanism of social integration to being considered as such, then neither the harmonizing patterns of scientific knowledge, technology and most instances of education models would fit into the definition. And most importantly, neither would money if it is considered as politically neutral.

Focussing on the process of European integration, it is possible to distinguish two substantive dimensions of integration arranging differently the interaction between law, money and public discourse. The first corresponds to *market integration*, where common rules aiming at the establishment and deepening of the internal market are agreed by all Member States, whereas in *monetary integration* the objective is to achieve and support the establishment of a common currency.⁴⁶ Although these two dimensions of European integration currently overlap, they have proceeded in sequential terms. The establishment and development of the EU legal order was closely related to market integration and, subsequently, monetary integration proceeded on the basis of previous achievements (provoking itself the need for new adjustments).⁴⁷

During the foundational period and first decades of the process of integration, when market integration was the main objective of the interactions between Member States, currencies were national although they were progressively coordinated. Hence, money did not play a critical role per se in European integration, although monetary events were crucial for political decisions affecting the general direction of the process. Within this context, integration at the European

⁴⁴Eich includes quotations from *Nicomachean Ethics* ('A polis is maintained by doing things in return according to proportion') and from *Politics* ('Reciprocal equality preserves city-states'). Eich (n 6), 25.

⁴⁵Eich (n 6), 7.

⁴⁶The distinction between market and monetary integration is based on the substantive content of integration. See S Frerichs and F Losada, 'The Role of Law in European Monetary Integration: A Critical Reconstruction and a Response to Klein' 2 (2021) *Global Perspectives*. These categories parallel the distinction between micro- and macroeconomic integration, which relies on the application of an economic lens over the object of integration to determine to what extent it corresponds to the aggregated or disaggregated level. See K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014).

⁴⁷F Losada and K Tuori, 'Integrating Macroeconomics into the EU Single Legal Order: The Role of Financial Stability in Post-crisis Europe' 6 (2021) *European Papers: A Journal on Law and Integration* 1367–93.

level proceeded mainly through legal means. In particular, EU law operated as if it was (materially even if not formally) constitutional law, defining the functions of political institutions and establishing limits to the use of power through the language of rights,⁴⁸ as the effective establishment and consolidation of the main legal doctrines of EU law during that period confirms. Success of the project was based on the acceptance of EU law by national judges, who relied on the rational authority of law, in principle resulting from a bottom-up democratic process of will formation, for implementing directly applicable European rules into their respective national legal systems. Importantly, by reputed European law as valid they in turn borrowed the legitimacy stemming from the national legal systems to the brand new European legal order. As is well known, the preliminary ruling procedure played a critical role in this double process.⁴⁹ As to public discourse, the social acceptance of the project was mostly taken for granted. Since the discourse on integration was pitched as a peace-forging one, in line with the spirit of post-war constitutions (and in contrast to the reality of the cold war), and was complemented by the economic development and well-being resulting from the participation in the by then common market, a benign neglect over European affairs and its legal development gradually consolidated.⁵⁰ Along these lines, to achieve support for the project public discourse could limit itself to top-down, unidirectional claims.

Interestingly, with the passing of time the more technical the regulation of the market became, the more discussion among experts was needed at European decision-making fora. Various models of technical committees were established to cope with the need of regulating extremely sensitive technical issues from the supranational level. However, it is noteworthy that in these new institutional arrangements articulating knowledge-dependent negotiations, labelled comitology procedures, neither the legal outcome nor the deliberation process reflected the purely democratic bottom-up dimension expected from law and from public discourse. However, under these procedures law and public discourse still operated as mechanisms of societal integration based on civic reciprocity, because their combination resulted in the two complementing each other, to the point of infusing the outcome with the legitimation support resulting from a deliberative process⁵¹ which could be plausibly depicted, even if with an element of exaggeration, as being of Habermasian character.⁵² In the end, in market integration, two of the three mechanisms of social integration (law and public discourse) worked relatively well given the circumstances, although by any means in a coordinated fashion. Money's role as a mechanism of social integration still operated exclusively at the national level, though.

Things became more convoluted when monetary integration was actively pursued. According to the Maastricht Treaty and its provisions on the EMU, money became by design the most prominent mechanism of societal integration in the process of European integration. However, it is extremely important to note that this was the case because the monetary conception enshrined in the Treaties shaped money as an exceptionally neutral instrument.⁵³ All kinds of legal limits and

⁴⁸Not least, the right to private property as operationalised in economic freedoms, mainly through the free movement of goods.

⁴⁹KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003).

⁵⁰E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' 75 (1981) *American Journal of International Law* 1–27 at 1.

⁵¹C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' 3 (1997) *European Law Journal* 273–99; and 'Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuffs Sector' 4 (1997) *Journal of European Public Policy* 609–25.

⁵²Within the help of his theory of communicative action, Habermas has studied the deep connection between law and discourse, highlighting the primacy of democratic legislation and the subordination of administrative power to communicative power. J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998).

⁵³According to Fichte, a state-controlled fiat currency avoiding exchange with third countries will allow political institutions to decide on the actual value of goods by determining the amount of money available in the polity. 'Once a national fiat currency had been introduced and the commercial state been closed, the rational state was free to conduct its independent monetary policy' Eich (n 6), 100. EU Member States, when signing the Treaty of Maastricht, prevented this kind of control

institutional safeguards were established to guarantee that this neutral conception of money was an observed part of the agreement. Europe's new money is therefore detached from any political feature that, as Eich demonstrates, is by definition an intrinsic element of the nature of money. European monetary integration is thus the ultimate and most refined example of an active policy of de-politicisation of money.

The overlap of monetary integration, including all its attached safeguards and limits guaranteeing the neutrality of the euro, with the structures already established for the functioning of market integration resulted in several inconsistencies and malfunctions. In particular, Europe's neutral money prevented the smooth functioning of law and public discourse as mechanisms of social integration, a task they were barely able to fulfil under the circumstances of market integration. The problem is that monetary integration finally deprived law and public discourse from any access to public support. In monetary integration, law works as a guarantee of the observance of intergovernmental agreements that consolidate the result of the power struggle as crystallised at the negotiating moment.⁵⁴ Its working rationale therefore corresponds more to the logic of international law than to the language of limits and rights proper of constitutional law. When the financial and euro crisis arrived and 'innovative' interpretations of those agreements were preemptory, the double soul of EU law was put to the test, but its international dimension prevailed over the constitutional one. Consequently, European law was used to impose, on a top-down basis, certain solutions over certain European citizens. The price to pay was the decreasing relevance of law as a rational problem-solving mechanism and its perception as a mere enforcement mechanism of power-based decisions. Public discourse is also irrelevant for monetary integration, at least on its bottom-up dimension, as proved the radical opposition between the intense public debate among Greek people, manifested in the results of the referendum on the bailout conditions held in 2015, and the actual decision finally agreed between the Greek government and the Eurogroup barely a week later. In European monetary integration the three mechanisms of social integration were thus deprived of the feature of civic reciprocity required to integrate members of the polity. In the best of cases, European citizens became alienated; a more pessimistic view would interpret that they were directly expelled from the polity.

But things get even more convoluted if we explore the new relation between money and public discourse resulting from the layout of the common currency. As per treaty design, the constituencies of the EMU are both national citizens (political constituency) and market actors (market constituency).⁵⁵ All central banks play a pivotal role at the intersection of the state and the market, as the hybrid nature of money requires. However, the specific design of the EMU not only places the ECB, with its extremely independent status, at the apex of the process of integration, but also limits the access of all representative institutions (thus embodying citizen's interests and preferences) to the process of decision-making in monetary issues. Hence, public discourse on monetary affairs among the political constituency is merely top-down, despite the apparent efforts of the ECB to promote inclusiveness by inviting experts to share their views on issues under discussion. Because of the design of the EMU, which delegates on markets the actual enforcement of political agreements about fiscal performance of Eurozone members, market constituents are more powerful than their counterparts of the political constituency. In 2012, in the mist of the sovereign bond crisis, the ECB president found himself in the difficult position of reacting to market pressures against the common currency that were considered not only an existential threat for the euro, but even a true menace to the process of European integration. What must be noted is that

over monetary issues from happening by allowing the free movement of capital towards third countries and by assigning the exclusive competence over monetary policy to a central bank extremely independent from any instance of political power.

⁵⁴M Kaelberer, *Money and Power in Europe: The Political Economy of European Monetary Cooperation* (State University of New York Press 2001); F Losada, 'A Europe of Creditors and Debtors: Three Orders of Debt Relations in European Integration' 28 (2020) *Journal of Common Market Studies* 787–802.

⁵⁵On this see W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014).

the ECB president's reaction took the form of a speech act – and was extremely effective to contain the markets.⁵⁶ However, legal complaints were raised against such a discursive act, which together with a press release was the object of legal review by the German Constitutional Court (GCC)⁵⁷ and the Court of Justice of the European Union (CJEU).⁵⁸ This was the first of a saga of cases whose well-known outcome was the clash between the two courts, a conflict jeopardizing the whole legal construction of the EU.⁵⁹ Money, law and public discourse were related again, but since under monetary integration they were all preventing civic reciprocity, this new configuration had damaging effects for their work as mechanisms of social integration.

C. Towards a new separation of powers in monetary affairs?

European monetary integration shows the perils of precluding the political dimension of money. The pernicious consequences of imposing neutral money by design could be delayed, though, if the operation of other means of social integration were able to compensate for it, as happened within the Member States before the signature of the Treaty of Maastricht. However, in the context of European monetary integration both law and public discourse have been deprived of their civic reciprocity features in the name of guaranteeing the neutrality of Europe's money. The consequence is that there are no active mechanisms of societal integration operating at European level, resulting in an increasing challenge for a political project that until a couple of decades ago was considered an epic story of success.

But the neutrality of money is not only questioned in the context of European integration. Improving citizenry's agency over monetary issues has been an intensifying concern among engaged scholars, practitioners and activists alike during the last decade.⁶⁰ In this regard, the entitlement of financial institutions to engage in the creation of money is another element raising apprehension among movements advocating for the democratisation of money.⁶¹ This entitlement, when coupled with the removal of banks from the scope of application of the general rules on property, is at the core of raising inequalities.⁶² To address this situation, some suggest implementing an updated version of seigniorage (the canon to be paid by money forgers to the state) applicable to financial institutions.⁶³ Other proposals suggest that the emphasis should be in promoting sovereign money rather than bank money.⁶⁴ Eich, by distinguishing between the power to issue currency and the power to regulate such a power,⁶⁵ establishes a separation of powers among monetary functions that could work as a system of checks and balances. Finally, some even propose a complete revamping of the whole monetary order to accommodate money to

⁵⁶A critical aspect of central banking activity is precisely to manage private economic actors' expectations. For this, credibility resulting from observance of previous announcements and from public explanations in press conferences is decisive. Again, central banking reliance on public discourse is mainly unidirectional, lacking the civic virtue of reciprocity. A similar example of a speech act immediately settling down markets was Secretary of State McAdoo announcement of the US government readiness to issue emergency currency in June 1913. See R Lowenstein, *America's Bank: The Epic Struggle to Create the Federal Reserve* (Penguin Press 2015) 209.

⁵⁷BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13.

⁵⁸Case C-62/14 *Gauweiler* ECLI:EU:C:2015:400.

⁵⁹See, in particular the ruling of the GCC on the *Weiss* affair (BVerfG Judgment of the Second Senate of 5 May 2020 2 BvR 859/15) and the plain reaction by the Court of Justice in a concise press release (available here: <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>> accessed 13 December 2022).

⁶⁰B Weber, *Democratizing Money? Debating Legitimacy in Monetary Reform Proposals* (Cambridge University Press 2018).

⁶¹M Mellor, *The Future of Money: From Financial Crisis to Public Resource* (Pluto Press 2010); A Pettifor, *The Production of Money: How to Break the Power of the Bankers* (Verso 2017); F Block and R Hockett (eds), *Democratizing Finance: Restructuring Credit to Transform Society* (Verso 2022).

⁶²A Sahr, *Keystroke Capitalism: How Banks Create Money for the Few* (Verso 2022).

⁶³J Reich, *Seigniorage: On the Revenue from the Creation of Money* (Springer 2017).

⁶⁴J Huber, *Sovereign Money: Beyond Reserve Banking* (Palgrave 2017).

⁶⁵'Who gets to create money and who gets to decide who gets to create money reflect themselves the contingent outcomes of political struggles'. Eich (n 6), 19.

democratic needs.⁶⁶ All these acute proposals, coming from different disciplines and institutional backgrounds, have in common that they address the monetary problem departing from a practical point of view, therefore lacking the structured, systematic and normative approach characteristic of constitutional theory. And this is precisely the gap that constitutional lawyers have the opportunity to fill up.

When approaching the monetary problem, a constitutional theory should depart from acknowledging the power intrinsic to money.⁶⁷ The function of constitutions is to give shape to raw power and to legitimate it by opening its exercise to the public without pre-establishing the content of the decisions, but only their absolute limits.⁶⁸ Consequently, constitutional theory should embark on the search for democratic means to shape and legitimate the power-based social relations intrinsic to money. Fichte already suggested that in fiat money systems constitutional law should consecrate the imperative of safeguarding the currency's value by aligning the government's interest with that of the public.⁶⁹ More than a century later Keynes, aiming at a monetary system inspired by and compatible with social justice, 'provided a conceptual tool kit for a constitutional theory of money that takes mutual dependencies [intrinsic to money] into account'.⁷⁰ Aware of previous efforts, we currently need to combine the rigour of constitutional law with an imaginative approach able to propose original solutions to problems that are now presented from a different angle. In this regard, the experimental character of the process of European integration offers an unprecedented opportunity to elaborate alternative views that radically depart from what have been the classic monetary structures within the nation state. In particular, proposals need to take account of the three approaches to money mentioned above (regulative, constitutive and normative) and integrate them in a consistent fashion.

A key element in such a reflection is, obviously, the discussion about the role to be played by central banks in the constitutional framework.⁷¹ Originally private institutions, central banks became part of governmental activities operating at the intersection between market and state, finance and politics. Throughout history their powers have notably increased in accordance with the needs of finance in capitalist societies. Perhaps resulting from this distinct evolution, current constitutional frameworks applicable to central bank powers are rather insufficient, to the point that most constitutions do not even mention them. Usually central banks are either considered administrative bodies, deeply connected and thus dependent on political institutions like ministries; or independent agencies, resulting in the medium or long term in the erosion of the main principles of constitutionalism.⁷² In any case, these different constitutional models have proved outdated especially during the last decade, when pressing events forced the emergence of unexpected developments and innovative functions in central banking.⁷³ This is particularly the case in the EU, where the new tasks and powers implemented by the ECB have been brought to court, revealing the tension between a given constitutional design and the specific and contextual needs that central banking implies.⁷⁴

⁶⁶C Felber, *Money: The New Rules of the Game* (Springer 2017).

⁶⁷[M]oney is a conduit of power. An adequate understanding of the effects of the monetary policy and of proposals for monetary reform require[s] an articulation of questions of power, rule, and justice'. Eich (n 6), 21.

⁶⁸F Rubio Llorente, *La Forma del Poder: Estudios sobre la Constitución* 3rd ed (Centro de Estudios Políticos y Constitucionales 2012).

⁶⁹Eich (n 6), 100–01.

⁷⁰Eich (n 6), 174.

⁷¹'At the intersection of state currencies and private credit, central Banks stand today as peculiar institutions of public-private money creation with an uncertain constitutional status'. Eich (n 6), 6.

⁷²P Tucker, 'How the European Central Bank and Other Independent Agencies Reveal a Gap in Constitutionalism: A Spectrum of Institutions for Commitment' 22 (2021) *German Law Journal* 999–1027.

⁷³B Bernanke, *21st Century Monetary Policy: The Federal Reserve from the Great Inflation to COVID-19* (WW Norton 2022); A Tooze, 'The Death of the Central Bank Myth' (2022) *Foreign Policy*, available at: <<https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/>> accessed 13 December 2022.

⁷⁴K Tuori, *The European Central Bank and the European Macroeconomic Constitution: From Ensuring Stability to Fighting Crises* (Cambridge University Press 2022).

A reflection on the actual constitutional limits appropriate to the increased monetary power at the disposal of central banks is thus required. Constitutional theorists, given their awareness about the social relevance of money, their command of the conceptual apparatus and vocabulary employed in legal studies, as well as their ability to understand the intricacies of financial and banking regulation, are best placed to make the effort of elaborating a constitutional design for central banks soundly integrating all these dimensions into a consistent constitutional view. Equally important, however, will be their openness to new, sometimes challenging ideas coming from other disciplines, as the ones mentioned above. This reflection concludes by making a first approach to one of such ideas: the consideration of institutions dealing in general with monetary affairs as a fourth branch of power.

When Montesquieu wrote *The Spirit of the Laws* his goal was to compare and classify different political regimes using the elaboration and implementation of law as yardstick.⁷⁵ His construction was based on the identification of three basic governmental functions in relation to law: the legislative, the executive and the judicial. The vast influence of this seminal study is widely acknowledged. Since then, the tripartite approach to the powers of the state has become canonical among political scientists and constitutional lawyers, and it is reflected in the structure of most written constitutions world-wide. Some authors have engaged in the endeavour of updating the doctrine of separation of powers to adapt it to the social state,⁷⁶ characterised by the provision of services, and to take account of the increasing amount of decisions adopted by administrative bodies,⁷⁷ especially under the current state of affairs where independent experts and unelected officials exert more powers⁷⁸ and where sovereignty is shared at international and, more specifically, EU level.⁷⁹ With variations, these theories conceive of the administration as a counter-power to the classic three branches. However, these laudable efforts share with Montesquieu's theoretical construction the fact that they are still based on the relation between law and the state – accordingly, the administration as counter-power might exert one or many of the (law-based) functions originally assigned to the three powers.

But precisely because it explores the relation between governmental functions and law, the theory of the separation of powers does not capture the influence of money neither as the expression of governmental power nor as mechanism of social integration. This is particularly relevant once the power of finance has detached itself from almost any constraint imposed by state powers. It is therefore worth questioning to what extent introducing money into the equation of the separation of powers will result in the identification of a money-based, instead of a law-based, fourth branch of state power.⁸⁰ It would then be possible to establish the normative foundations of this fourth power in order to integrate money in constitutional theory.

Of course, sceptics will immediately raise doubts not only about the pertinence of the revision of such a solidly established categorisation as the (law-based) separation of powers is, but they will also show reservations regarding its actual implementation. However, experimentation in the process of European integration has proved that deviations from the classic three branches of power are not only applicable but effective. As a matter of fact, rather than separating them

⁷⁵C Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1989 [1748]).

⁷⁶Baraggia, Fasone and Vanoni (2020) G Bognetti, *Dividing Powers: A Theory of the Separation of Powers* (Wolters Kluwer 2017); D Bilchitz and D Landau (eds) *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Edward Elgar 2018); A Baraggia, C Fasone and LP Vanoni (eds), *New Challenges to the Separation of Powers: Dividing Power* (Edward Elgar 2020).

⁷⁷B Ackerman, 'The New Separation of Powers' 113 (2000) *Harvard Law Review* 633–729; E Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009).

⁷⁸S Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Harvard University Press 1998); F Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press 2007).

⁷⁹G Conway, 'Recovering a Separation of Powers in the European Union', 17 (2011) *European Law Journal* 304–22; C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013).

⁸⁰W Streeck, *Critical Encounters: Democracy, Capitalism, Ideas* (Verso 2020) Ch 2.

according to their function in relation to law (adoption, implementation or adjudication), original European institutions were arranged according to the interests they represented: the European Parliament giving voice to the peoples of Europe (later to the people of Europe), the Council to the Member States, and the Commission representing European interests.⁸¹ Innovativeness has proved to work. Constitutional imagination is now needed to distinguish the various monetary functions and to design a framework arranging them accordingly. A framework that must acknowledge the power of money by restricting and limiting it to prevent any illegitimate use of it, while channelling in the democratic inputs that society may have to open up its civic reciprocity dimension. By doing so, the product of constitutional imagination will restore not only to money, but also to law and public discourse, the exercise of their social functions in the context of European integration.

Acknowledgments. This contribution constitutes a research outcome of the project ‘The European Community of Debt: Formation, Institutionalization, Legitimation’, funded by the Academy of Finland (decision 307781), and has benefited from discussions and debates with colleagues from two reading groups on money, one based at the University of Helsinki’s Faculty of Law, the other held remotely with international researchers. Opinions and errors are the authors’ only.

Competing interests. The author has no conflicts of interest to declare.

⁸¹G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005).