Introduction:

The New Constitutional Architecture of European Economic Governance

1. Introduction

Since the outburst of the Euro-crisis in 2009, the member states and the institutions of the European Union (EU) have hectically adopted new legal instruments and devised new policy strategies which have profoundly increased the degree of integration in the European Economic and Monetary Union (EMU). Between 2010 and 2014 a new constitutional architecture of economic governance has gradually emerged in the EU. Tighter budgetary constraints have been enacted at national and supranational level; new tools of fiscal stabilization have been created in the EU and international legal order; and a complex decision-making framework has been put in place to coordinate states’ economic policies and dictate programs of economic adjustment for countries in fiscal distress. Yet, the overhaul of the European system of economic governance has been heavily influenced by the state of emergency in which the EU and the member states found themselves after the explosion of the Euro-crisis. The legal and institutional responses to the Euro-crisis have been taken in a context of urgency, and with limited reflection on their long-term effects. How has economic governance in Europe changed as a result of the Euro-crisis and the responses to it? How should we evaluate the new EU architecture of economic governance from a constitutionalist perspective? And what steps should be taken to create a more perfect EMU?

The book aims to offer a legal analysis of the new constitutional architecture of European economic governance, by examining how the Euro-crisis and the responses to it have changed relations of powers in the EU. In particular, the book seeks to illuminate through the use of the comparative method several paradoxes in the new EMU constitutional architecture and considers their problematic implications for the long-term sustainability of the EU. At the same time, the book aspires to contribute to the ongoing debate about the future of economic governance in Europe and
discusses the constitutional challenges that arise along the way towards towards a deeper and more genuine EMU. While the book underlines problems in the new constitutional architecture of EMU governance, it also proposes possible solutions to address them, advancing targeted legal and institutional reforms aimed at perfecting the governance of economic affairs in Europe. In this Introduction I outline the core themes of the book. Section 2 provides a quick summary of the main legal and institutional developments that have taken place in the EU since the beginning of the Euro-crisis. Section 3 defines the research question of this book and explains its methodology. Section 4 summarizes the core arguments of the book. Section 5 reports its main policy proposals. Section 6, finally, maps the structure of the book.

2. Legal and institutional reforms following the Euro-crisis

Since the outburst of the Euro-crisis, EU institutions and member states have engaged in a major effort to overhaul the architecture of economic governance of the EMU.\(^1\) Although the causes of the Euro-crisis specifically, and of the global financial crisis more generally, are heavily contested in the economic literature,\(^2\) the main political narrative that prevailed in Europe since 2009 has been that the deterioration of the European economy found its roots in the irresponsible fiscal behavior of several member states. As Miguel Maduro has argued,\(^3\) another plausible narrative of the Euro-crisis could have put the blame on the banking sector, and their irresponsible lending to debtors lacking sufficient creditworthiness. Nevertheless, the EU institutions and the member states unequivocally embraced an interpretation of the crisis as a problem of sovereign debt and reformed the set-up of EMU accordingly.\(^4\) Regardless of the real socio-economic roots of the crisis, the EMU constitution architecture has been profoundly changed in specific directions.

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\(^1\) Note that in this book I will use the expressions EMU and Eurozone interchangeably. According to Article 3 TEU, “[t]he Union shall establish an economic and monetary union whose currency is the euro” – hence the expression ‘Eurozone’. Participation in the EMU is an obligation for all EU member states. However, at the moment, two states have obtained a specific opt-out from the single currency, while seven states do not yet fulfil the technical criteria to become part of the single currency. See European Commission, *Who can Join and When?* available at http://ec.europa.eu/economy_finance/euro/ adaptation/who_can_join/index_en.htm (last visited 15 July 2015). See generally Pier Carlo Padoan, “EMU as an Evolutionary Process” in David M. Andrews et al (eds), *Governing the World’s Money* (Cornell UP 2002), 105 (describing the process of EMU integration and resultant benefits).


\(^4\) See e.g. Benjamin Friedman, “The Pathology of Europe’s Debt”, 31 The New York Review of Books, 9-22 October
The 1992 Maastricht Treaty—while setting up a purely federal framework on monetary affairs, centered on a common currency and the role of the European Central Bank (ECB) to maintain “price stability”—relied, in fiscal affairs, on mild budgetary constraints, economic policy coordination, and unlimited faith in the capacity of the markets to rein in governmental fiscal mismanagement. The constitutional architecture of EMU that has recently emerged from the responses to the Euro-crisis, on the contrary, is based on three main components. First, the EMU is characterized by tighter budgetary constraints, which subject state fiscal policies to hard domestic limits and pervasive supranational controls. Second, it is endowed with novel instruments of financial stabilization, aimed at providing solidarity to countries in economic difficulties and preventing contagious effects from sovereigns’ or banks’ defaults in the EMU. Third, it provides a clear mandate for economic adjustment, introducing powers for the EU institutions to dictate—and, simultaneously, duties for the member states (especially those which receive financial support) to implement—reforms to their economies as a condition for benefitting from transnational aid. Given the by-now extensive literature on this topic, few words will suffice here to describe the elements of the new EMU constitutional architecture.

First, on the assumption that the root causes of the crisis lay in unsustainable public finances, one of the main reforms adopted by both the member states and the EU institutions since 2009 has been the introduction of tighter budgetary constraints aimed at strengthening fiscal discipline and limiting government spending. The objective of ensuring the sustainability of state budgets was already enshrined in the Stability and Growth Pact (SGP) originally enacted in two Council regulations in 1997, and currently attached as Protocol 12 to the EU Treaties, which requires member states to maintain their public deficit below the yearly ratio of 3% of GDP and the total public debt below 60% of GDP. The weaknesses of the enforcement mechanisms of the SGP, however, ensured widespread non-compliance by EMU countries with the SGP debt and deficit criteria. In response to the failure of the existing legal mechanism, the EU institutions and the member states adopted a two-pronged legal strategy.

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5 See Barry Eichengreen, European Monetary Unification: Theory, Practice, Analysis (OUP 1997).
6 See Art 127 TFEU.
8 See text accompanying nn 59-66.
On the one hand, several EU legislative acts were enacted to improve the capacity of the EU institutions to supervise and correct budgetary policies of the member states. Pursuant to the so-called “six-pack” of five regulations and one directive of November 2011, the preventive and corrective arms of the SGP were changed, creating new capacities for the European Commission to sanction and fine member states for breaches of the deficit and debt rules, as well as establishing a new “macro-economic imbalance procedure” to alert member states of the destabilizing elements of their economies. At the same time, EU law introduced minimum requirements for the design and operation of state budgetary laws, which will be assessed in the framework of the so-called “European semester” in which member states submit their draft budgets to the Commission for compliance with the broader economic forecasts of the EU. Moreover, pursuant to the so-called “two-pack” of regulations of May 2013, the Commission’s power of surveillance over the budgetary policies of the member states was increased even further, with the ability to object to budget bills drafted by national governments and to require further changes before they are tabled for approval in state parliaments.

On the other hand, new rules were introduced in the domestic legislation of member states to secure balanced budget obligations and internal mechanisms of automatic correction. The Euro-Plus Pact, adopted by the European Council in March 2011, encouraged member states to enhance the sustainability of public finances by translating EU fiscal rules into national legislation. But it was especially the Treaty on the Stability, Coordination and Governance of the EMU, the so-called Fiscal Compact, initially signed by twenty-five EU Heads of State and Government in March 2012, which required member states to tighten internal fiscal controls. The Fiscal Compact mandated

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13 See also European Council Conclusions, 17 June 2010, EUCO 13/10, at 5.


15 See European Council Conclusions, 24/25 March 2011, EUCO 10/1/11, Annex 1, par c.

that signatory parties enact at the state level a balanced budget requirement through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected throughout the national budgetary process.\textsuperscript{17} The Fiscal Compact, moreover, empowered the ECJ to review whether member states duly comply with this obligation.\textsuperscript{18} As a result of these pressures, following the German constitutional reform of 2009,\textsuperscript{19} most EU member states have amended their domestic constitutions to include a balanced budget requirement, prohibiting structural deficits and the accumulation of excessive debt.\textsuperscript{20}

Second, on the understanding that the states or bank defaults in the Eurozone could produce deleterious, contagious effects throughout the EMU, EU institutions and member states have devised \textit{new mechanisms of financial stabilization} for countries or credit institutions in financial distress. These tools represent an entirely new addition to the architecture of the EMU constitution. The original design of the EMU was based on the idea—enshrined in Article 125 Treaty on the Functioning of the EU (TFEU), the so-called “no bail-out clause”\textsuperscript{21}—that member states would be solely responsible for the service of their debt and that other EU member states or the ECB would be prohibited from taking up the debt burden of another state.\textsuperscript{22} Nevertheless, the eruption of the Euro-crisis and the complex interconnection between sovereigns and banks revealed that it was actually much easier on paper than in reality to let a country of the Eurozone default without this producing a systemic effect on the stability of the Eurozone as a whole.\textsuperscript{23} Hence, the EU institutions and the member states endowed themselves with new mechanisms to face this challenge.\textsuperscript{24}

The legal response proceeded in several steps. In May 2010, the Council of the EU adopted, on the basis of the powers of Article 122(2) TFEU,\textsuperscript{25} a regulation establishing a European Financial
Stabilization Mechanism (EFSM) to grant immediate bilateral financial assistance to Greece. Subsequently, through a private company incorporated under Luxembourg law, the Heads of State and Government of the Eurozone established a European Financial Stability Facility (EFSF), charged to operate beyond the short-term emergency which had prompted the creation of the EFSM and effectively providing support to Ireland, Portugal, and (for a second time) Greece. Finally, with the aim to set up a long-term mechanism to stabilize the Eurozone, and on the assumption that a brand new legal basis was needed in the Treaty to avoid incompatibilities with Article 125 TFEU, the EU member states unanimously secured through a simplified revision procedure an amendment to Article 136 TFEU: This allowed the establishment of a permanent stability mechanism for the EMU. On this basis, the Eurozone countries created a European Stability Mechanism (ESM) through an international treaty. A first version of the treaty establishing the ESM was concluded in 2011. It was then revised and signed again by the member states of the Eurozone in February 2012, and it entered into force in November 2012.

The ESM, in particular, is an international institution, modelled on the International Monetary Fund (IMF), whose purpose is “to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.” Eurozone member states contribute to the authorized capital stock of the ESM—totalling 700 billion Euros—pro-quota on the basis of the subscription by their national central banks to the ECB’s capital. The ESM can grant financial support to a state in need, provide precautionary financial assistance, directly (since the entry into force of a single EU supervisory mechanism) recapitalize banks, grant loans, and purchase government bonds on the primary and secondary

30 See Giulio Napolitano, “Il Meccanismo Europeo di Stabilità e la nuova frontiera costituzionale dell’Unione” [2012] Giornale di Diritto Amministrativo 461. As any international organization, also the ESM enjoys several privileges, including the immunity of persons (Art 35 ESM Treaty), the inviolability of the premises (Art 32 ESM Treaty) and the privilege of professional secrecy (Art 34 ESM Treaty).
31 Art 3 ESM Treaty.
32 Art 8 ESM Treaty.
33 Art 11 and Annex 1 ESM Treaty.
34 Art 13 ESM Treaty.
35 Art 14 ESM Treaty.
36 Art 15 ESM Treaty.
Decisions about the ESM are mainly made by the Board of Governors—consisting of the Ministries of Finance of the Eurozone member states—on the basis of unanimity rule. Nevertheless, pursuant to Article 4(4), “an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance [. . .] would threaten the economic and financial sustainability of the euro area.” In this case, a decision requires only a qualified majority of 85% of the votes cast, calculated on the basis of the contributing shares to the ESM capital. Any dispute involving the ESM Treaty can, however, be subject to adjudication before the ECJ, thus contributing to the constitutional anchoring of the ESM to the EU institutional regime.

Associated to the new mechanism of financial stabilization designed to support states in fiscal distress, the EU and its member states have also created a new legal framework for bank supervision and resolution at the supranational level. In order to break the negative loop between banks and sovereign in the Eurozone, and with the aim to strengthen prudential supervision of transnational financial establishment, the European Parliament and the Council established on the basis of Article 127(6) TFEU a Single Supervisory Mechanism, granting to the ECB the power to supervise – in cooperation with national authorities – the functioning of the banking sector. At the same time, the EU Banking Union was complemented by a Single Deposit Guarantee Scheme, securing harmonized protection of bank account holders throughout the EU in case of bank defaults, and by a Single Resolution Mechanism, creating a back-stop to wind down failing banks. With regard to the latter, the EU institutions adopted a regulation establishing a Single Resolution Fund (SRF), with an ad hoc Board tasked to decide about the resolution of credit institutions, while 26 EU member states opted to conclude in May 2014 a separate intergovernmental agreement to

37 Art 16 ESM Treaty.
38 Arts 17 and 18 ESM Treaty.
39 Art 4 ESM Treaty.
40 Art 37 ESM Treaty.
41 Pursuant to Art 44 ESM Treaty, any new state of the EU who adopts the Euro as its currency shall become a member to the ESM by ratifying its founding Treaty.
42 See Art 127(6) TFEU (stating that “[t]he Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions.”).
regulate the transfer of state contributions (levied from the national banking sector) into national compartments within the SRF and their progressive mutualization over an eight-year time-span.47

Third, a last key innovation in the constitution of EMU emerging from the Euro-crisis is the creation of a new framework of economic adjustment, based on the principle of conditionality as the counterweight to increasing financial solidarity. Pursuant to this criterion, EU member states that obtain financial aid to address a situation of quasi-default are not only required to enact tight budgetary constraints (as any other country of the EU),48 but are also subject to specific economic adjustment programs designed to reform the fundamentals of their economy and address structural weaknesses in their domestic systems in areas as far ranging as the flexibility of the labor market, the effectiveness of tax collection, the size and organization of the public administration, the nature and degree of social entitlements, and the characteristics of the banking sector.49 The last component of the legal response to the Euro-crisis designed in EU legislation and treaties, therefore, comprises a set of measures whereby the European Commission and the ECB, mostly together with the IMF in what came to be known as the troika,50 are empowered to elaborate country-specific programs of economic adjustments and member states contractually agree to implement them within their domestic regimes under supranational supervision.51

Besides Article 5(2) of the Fiscal Compact, which foresees the possibility of adopting an economic partnership program, the ESM Treaty now codifies the general legal template for the negotiation of a program of economic adjustment. Pursuant to Article 13(3), if the ESM Board of Governors decides to grant assistance to a Eurozone member state, it shall entrust the European Commission—in liaison with the ECB and, wherever possible, together with the IMF—with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (MoU) detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. As the MoUs signed by Greece, Portugal, Ireland, Spain, and Cyprus make clear, these instruments constitute a binding road map that member states receiving financial assistance must

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48 See text accompanying nn 13-17.
49 See Damian Chalmers, “The European Redistributive State and a European Law of Struggle” (2012) 18 European Law Journal 667 (emphasizing capacity of the EU institutions to dictate to member states policy reforms in a broad range of fields).
50 See also European Parliament resolution of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, P7_TA(2014)0239 (criticizing the invasive role of troika in the EU member states subject to economic adjustment program).
respect in order to continue obtaining financial assistance. The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of EU law, including any opinion, warning, recommendation or decision addressed to the state concerned. At the same time, the troika is empowered to constantly monitor progress by the state under an assistance program and demand the adoption of new policies to reach the agreed goals.

Economic adjustment programs are carried out domestically by national governments and legislatures through appropriate legislation. Nevertheless, as Kenneth Armstrong has underlined, for those Eurozone states that have received financial support to stabilize their economies, the degree and manner of the constraint on their policy autonomy is significantly heightened. Indeed, the regular mechanisms of accountability and governance are typically suspended for such states which are subject instead to the discipline imposed via MoU and controls exercised in the context of ‘macroeconomic adjustment programmes.’ In sum, in the aftermath of the crisis the EU institutions have acquired significant competences to intervene in the field of economic policy, while states receiving financial support have been mandated to implement domestically economic reform programs – which often include a profound restructuring of the welfare state system.

In connection with this, the new EMU institutional system has also experienced a rise in importance of the ECB, which has played a crucial role in supporting economic recovery in peripheral Eurozone countries. In particular, after the adoption ad hoc policies of government bonds purchase subject to the implementation of domestic reforms, the ECB devised the Outright Monetary Transaction (OMT) program, which foresees the purchase of states’ bonds on the secondary market subject to a state entering into a ESM-led assistance program with related conditionality rules, and launched a

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52 See, e.g., Greece: Memorandum of Understanding on Specific Economic Policy Conditionality, 3 May 2010 available at http://www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/a8/52/57/a85257bc11624aa0a2f89a6bebea2219687ce5f0/application/pdf/EU%2BBundle2.pdf (last visited 1 June 2014).
53 Art 13(3) ESM Treaty.
54 Art 13(7) ESM Treaty.
56 See Klaus Busch et al, “Euro Crisis, Austerity Policy and the European Social Model: How Crisis in Southern Europe Threatens the EU’s Social Dimension”, Friederich Ebert Stiftung International Policy Analysis 2013 (discussing the threat that austerity policies produce on the welfare state).
59 See ECB, Press release, “Technical Features of Outright Monetary Transactions”, 6 September 2012 (stating that the ECB can buy government bonds on the secondary market with the aim to safeguard an appropriate monetary policy transmission and the singleness of the monetary policy conditional to the member state concerned entering into an agreement with the ESM).
vast program of quantitative easing, consisting in the purchase of public and private securities as a way to restore a healthy degree of inflation within the Eurozone.\textsuperscript{60}

In conclusion, reforms in the area of budgetary constraints, financial stabilization and economic adjustment, with steps taken toward Economic, Banking and Fiscal Union, have profoundly affected the system of European economic governace.

3. The research question and the methodology of the book

The primary purpose of this book is to assess how the Euro-crisis and the legal and institutional responses to it have changed the constitutional architecture of economic governance in Europe. The book adopts a legal perspective, and is not concerned with the economic causes of the Euro-crisis. Rather, the project fits in the scholarly remit of European constitutional law and essentially focuses on structural issues of relations of powers.\textsuperscript{61} The book explores how the legal and institutional reforms following the Euro-crisis and summarized in the previous Section have changed the allocation of powers in the EU, shifting authority among levels of government, and re-shaping relations between institutions. As such, I wish to answer the following research question: What are the constitutional implications of the Euro-crisis and the responses to it on the relations of power within the EU? To achieve this goal, I disarticulate the research question into three sub-questions, considering how the Euro-crisis and the responses to it affected:

1) the vertical relations of power between the member states and the EU;
2) the horizontal relations of power between courts and political branches;
3) the horizontal relations of power between the member states themselves.

Whereas the new constitutional architecture of economic governance in the EU has grown since the outburst of the crisis in bits and pieces, and without a comprehensive design, the aim of this book is to take a step back and to explain how the constitutional structure of the EU looks like today. According to several accounts, the Euro-crisis is still far from being over.\textsuperscript{62} Yet, the time seems ripe to analyze the substance of power-relations in the new EMU constitutional architecture. This in turn will set the ground for a critical discussion of how the new EMU regime fares in terms of constitutional principles of balance-of-powers and how it could be reformed in the future.


\textsuperscript{61} See Martin Redish, \textit{The Constitution as Political Structure} (OUP 1995) (discussing the role of a constitution as structuring relations of power) and Miguel Poiares Maduro, “The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism” (2005) 3 International Journal of Constitutional Law 332 (discussing alternative concepts of constitutionalism in the EU, including the idea of separation of powers).

To answer the research questions, this project adopts a comparative perspective. While this book focuses on economic governance in Europe, it uses a comparative approach to inform and enlighten our understanding of the constitutional implications of the Euro-crisis and the responses to it. Whereas the issue of the implications of the Euro-crisis and the responses to it has increasingly attracted scholarly attention, the studies dealing with the topic have mainly examined the new constitutional architecture of EMU in isolation. Lawyers, economists and political scientists are dedicating greater attention to the legal reforms and institutional changes brought about by the Euro-crisis. Scholars compared the structure of EMU before and after the crisis, discussed the correlation between the various components of the new EMU architecture, and examined how the new EMU governance functions. Specific courts’ decisions dealing with EMU have been the subject of scholarly focus, and attention has been given to the relations between the EU member states and between the EU institutions since the beginning of the crisis.

The ideographic approach which has been followed in analyzing the Euro-crisis and its implications, however, presents relevant methodological limits. Most crucially, a study which focuses exclusively on the EMU and its historical evolution is unable to provide an external benchmark by which to measure the nature of the developments brought about by the Euro-crisis and the responses to it. In the general constitutional law literature the weakness of single-system

63 See Kaarlo Tuori and Klaus Tuori, The Eurozone Crisis: A Constitutional Analysis (CUP 2014); and Alicia Hinarejos, The Euro Area Crisis in Constitutional Perspective (OUP 2015).
68 See e.g. Dermot Hodson, Governing the Euro Area in Good Times and Bad (OUP 2011) and Uwe Puetter, “New Intergovernmentalism: the European Council and its President”, in Federico Fabbrini et al (eds), What Form of Government or the European Union and the Eurozone? (Hart Publishing 2015).
studies have been repeatedly emphasized. Because legal science does not have a laboratory in which to test its theses, it is only by resorting to the comparative method that the validity of a legal hypothesis can be verified. In the specific field of European constitutional law, moreover, Robert Schütze has convincingly criticized sui generis approaches to questions of EU law and governance, and in another book I have emphasized the added value of using a comparative approach to the study of fundamental rights in Europe.

In this book, therefore, I seek to examine the new EU constitutional architecture of economic governance in light of a comparative benchmark with the aim to unveil the implications of the Euro-crisis and the responses to it on the constitutional fabric of the EU. As I will point out, a comparative outlook reveals several unexpected developments occurring in the EU, shedding new light on the dynamics at play in the European system of economic governance. In particular, the book follows Ran Hirschl’s “most similar cases logic of comparison.” According to this logic of case selection, the object of study A is compared to another case B, which shares with A similarities on most independent variables. This permits the isolation of the dependent variable – where case A and case B differ – and its specific analysis. The “most similar cases logic of comparison” is particularly appropriate to study the effects that an intervening variable plays in a legal system, and thus seems well suited to assess the effects of the legal and institutional changed produced by the Euro-crisis and the responses to it.

To explore the implications of the Euro-crisis and the responses to it on structures of power in Europe, the book selects as a comparator the United States of America (US). Why is the US chosen here as the most similar comparative case? To begin with, the US is a pluralist constitutional system, characterized by multiple separations-of-powers aimed at ensuring a balance between the federal government and the states, between the political and the judicial branches, and between the states themselves. Like the EU, therefore, the US is a system constitutionally founded on the idea

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73 Robert Schütze, From Dual to Cooperative Federalism. The Changing Structure of European Law (OUP 2009), 59 (stating that by “not providing any external standard, the sui generis [approach to EU studies] cannot detect, let alone measure, the European Union’s evolution”).
75 See Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law” (2005) 53 American Journal of Comparative Law 125 (distinguishing between different logics of comparative analysis – the most similar cases logic, the most different cases logic, the prototypical cases logic and the most difficult cases logic).
76 Ibid 134.
78 See generally Laurence Tribe, American Constitutional Law. Volume 1 (Foundation Press 1999) and Bruce
that power should be divided and balanced along multiple vertical and horizontal axes.\textsuperscript{79} Moreover, as a system creating an economic and monetary union endowed with a single currency, the US has had to deal with many of the challenges that the EMU is currently facing – for instance, where to strike the balance between centralization and decentralization in budgetary policy,\textsuperscript{80} what role to recognize to courts in economic and monetary affairs,\textsuperscript{81} and how to ensure an equilibrium between states of asymmetrical size and different economic performances.\textsuperscript{82}

Certainly, the existence of multiple separations of powers is not a feature which is exclusive of the US, since it can be found also in systems such as Australia, Brazil, Canada, India or Switzerland. However, compared to these other regimes, the US appears more similar to the EU also for reasons of economic development,\textsuperscript{83} and population size.\textsuperscript{84} In fact, whether one likes it or not, the US is systematically taken as a model or anti-model in European debates. From Joseph Weiler’s idea of the “Sonderweg”\textsuperscript{85} to Mario Draghi’s reflection on the “more perfect Union”\textsuperscript{86} the US is always considered as an example of what Europe should – or should not – become, and thus appears as an inevitable comparative example with which to engage. Last but not least, a final reasons prominently pleads in favor of using the US as a comparative benchmark to analyze the constitutional implications of the Euro-crisis and the responses to it in the EU: the US is today typically regarded in the comparative constitutional law literature as the emblematic case of a political regime with a strong central government,\textsuperscript{87} an all-powerful judiciary,\textsuperscript{88} and a limited

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\textsuperscript{79} The most well-known statement of this vision can be found in The Federalist Papers No. 51 where James Madison defined the US constitutional architecture as a system in which “the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.” See The Federalist Papers ([1787] Penguin 1987), 321.
\textsuperscript{80} See e.g. Jonathan A. Rodden, Hamilton’s Paradox: The Promise and Peril of Fiscal Discipline (CUP 2006).
\textsuperscript{81} See e.g. Richard Timberlake, Constitutional Money: A Review of the Supreme Court’s Monetary Decisions (CUP 2013).
\textsuperscript{82} See e.g. Peter Conti-Brown and David Skeel (eds), When States Go Broke: The Origins, Context, and Solutions for the American States in Fiscal Crisis (CUP 2012).
\textsuperscript{83} See e.g. IMF, World Economic Outlook Database, available at http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx (reporting that in 2013 the GPD in current prices of the EU amounted to 17,512.109 billion $, and that of the US to 16,760.050 billion $ – while for instance Brazil had a GDP of 2,246.037 billion $ and India of 1,876.811 billion $).
\textsuperscript{84} See e.g. World Bank, World Development Indicators: Population (total), available at http://databank.worldbank.org/data/views/reports/tableview.aspx# (reporting that in 2013 the Euro-area had a population of 334 million inhabitants, and the US of 316 million – while for instance Australia had a population of 23 million, Canada of 35 million, and Switzerland of 8 million).
\textsuperscript{86} See Mario Draghi, “Europe’s Pursuit of ‘A More Perfect Union’”, Speech at the Harvard Kennedy School of Government, Cambridge, USA, 9 October 2013 (explaining that the process of European integration follows the same logic stated in the Preamble of the US Constitution, of creating “a more perfect Union”).
\textsuperscript{87} See Stanley Elkins and Eric McKitrick, The Age of Federalism (OUP 1993) (contrasting the initial experience of the US federation with the ensuing process of centralization) and Susan Low Block and Vicki Jackson, Federalism (Prager 2013) (analyzing US federalism in historical perspective).
recognition of the states at the federal level. Exploring how the EU now allocates powers vertically and horizontally in the field of economic governance in comparison to the US can therefore provide an enlightening yardstick to appreciate the paradoxical implications of the Euro-crisis and the responses to it on the structural relations of powers in the EU.

4. The arguments of the book

The book advances three claims. It answers the research questions posed above arguing that the EMU constitutional system has developed since the beginning of the Euro-crisis in ways which are striking when measured with the comparative benchmark offered by the US case. As I will suggest, each of these developments reflects a paradox, because it reveals an unexpected feature of the new EU constitutional architecture of economic governance. As the book argues, the constitutional architecture of economic governance in Europe is characterized today by:

1) great centralization of powers in the vertical relations of power between the states and the EU. While EMU reforms were inspired by the desire to preserve states’ fiscal sovereignty, in fact, the power shift from the states to the EU in budgetary affairs is greater than that existing in a fully-fledged federal state like the US. Paradoxically, the states of the US enjoy greater autonomy than the EU member states vis-à-vis the central government in budgetary affairs. I call this development, the paradox of centralization;

2) major role of the courts vis-à-vis the political branches. While EMU reforms were based on an intergovernmental strategy centered on the role of national executives, in fact, in the EU courts now play in economic affairs a greater role than the one played by courts even in a system of strong judicial review par excellence like the US. Paradoxically, courts in the US are less involved than courts in the EU in reviewing measures adopted by the political branches in the economic domain. I call this development, the paradox of judicialization;

3) domination by some states over others. While the EU highest decision-making forum (the European Council) is based on the rule “one-state-one-vote”, and the EU is supposed to

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88 See Stephen Garabum, The New Commonwealth Model of Constitutionalism (CUP 2013) 4-6 (contrasting the new Commonwealth model of constitutionalism of e.g. the United Kingdom to the model of judicial supremacy epitomized by the US) and Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (CUP 2003) 17 (stating that, despite some obvious idiosyncrasies, “the experience of the U.S. is helpful” as a model case when discussing judicial review, and the emergence thereof, in new Asian democracies) (emphasis in original).


90 See also Webster’s 7th New Collegiate Dictionary (Merriam Co. 1965) (defining paradox as “1. A tenet contrary to received opinion; 2a. A statement that is seemingly contradictory or oppose to common sense and yet is perhaps true”).
protect the principle of states’ equality more than the US, in fact, the relationship between the EU member states has turned out to be less balanced than that existing in a system like the US where the states are not represented in the central executive. Paradoxically, states in the US remain more equal than in the EU, where states’ economic power has trumped long-standing attention for states’ equality. I call this development, the paradox of domination.

This book project builds upon a growing body of scholarly literature on the Euro-crisis and the EMU discussed above. However, it goes beyond the existing scholarship by drawing on comparative analysis to offer a comprehensive picture of the implications that the Euro-crisis and the responses to it have had on structural relations of powers within the European constitutional architecture. Whereas in the public discourse the reforms of EMU inaugurated since the beginning of the Euro-crisis have been described as resisting pulls towards centralization,91 promoting the centrality of political branches,92 and ensuring the balance between the states in the European Council,93 the research provides a reality check to these statements. Resorting to comparative analysis, the book explores the implications of the legal and institutional reforms enacted in the state of financial emergency, and argues that – paradoxically – the new EU constitutional architecture of economic governance has become characterized by greater centralization, greater judicialization and greater asymmetry between states than what occurs in a fully-fledged federal regime with all-powerful judicial review like the US.

At the same time, the book critically evaluates the developments taking place in the new architecture of EMU and assesses them in light of important constitutional imperatives such as the need to ensure a degree of autonomy to the budgetary processes of the states, the need to ensure democratic decision-making in economic affairs, and the need to ensure an equilibrium between states’ power and states’ equality within the EU institutional system. As the book claims, from a normative perspective the preservation of a balance between levels of governments, between institutions and between states, is necessary for the long term sustainability of the EU. In fact, centralization undermines state autonomy, judicialization threatens democratic self-governance and domination strikes at the heart of the EU post-war anti-hegemonic project. Each of these

91 See e.g. European Commission President, Manuel D. Barroso, Speech at the “State of the Union” Conference of the European University Institute, Florence, 9 May 2013 (stating that “‘More Europe’ does not mean ‘more Brussels’, in the sense of more centralization. […] Subsidiarity is indeed an essential democratic concept and should be practiced. […] And this is precisely what we are doing [in the EMU].”).

92 See French President, Nicolas Sarkozy, Speech, Toulon, 1 December 2011 (stating that “L’Europe a besoin de plus de démocratie. […] La refondation de l’Europe, ce ne pas la marche vers plus de supranationalité. […] La crise a poussé les Chefs d’Etats et du gouvernements à assumer des responsabilités croissantes parce qu’au fond eux seuls disposaient de la légitimité démocratique qui lui permettai de décider.”).

93 See German Chancellor, Angela Merkel, Speech at Opening Ceremony of the 61st academic year of the College of Europe, Bruges, 2 November 2010 (expressing the view that within the European Council “the Heads of State and Government of the 27 member states and the President of the European Commission lay down jointly [gemeinsam] with the President of the European Council guidelines on how the Union should develop.”).
developments is therefore problematic. As such, the book endeavors to discuss alternative institutional arrangements which, while suitable to govern the complexities of an economic and monetary union, are able to restore a new *balance of powers* in the EU constitutional architecture of economic governance.

5. **The policy proposals of the book**

Given the problematic aspects of the developments which have occurred in the European architecture of economic governance as a result of the Euro-crisis and the responses to it, the book also seeks to propose ways to redress the paradoxical problems of centralization, judicialization and domination identified through the use of the comparative method. As such, after a primary, analytical, and critical, assessment of the implications of the Euro-crisis and the responses to it on the architecture of EMU, the book also engages in a subsequent, normative, and propositive, discussion of the possible ways forward to restore a vertical and horizontal constitutional balance in the European architecture of economic governance. By doing so, the book joins the debate about the future of EMU and offers its contribution to it with several policy proposals aimed at improving the constitutional architecture of economic governance in Europe.

The debate on the future of EMU is currently ongoing at the highest policy-making level in Europe. Following an explicit mandate of the European Council, the President of the European Council, jointly with the Presidents of the European Commission, the Eurogroup and the ECB, delivered in December 2012 a report “Towards a Genuine EMU,”94 which outlines a road-map of reform for EMU, including deeper economic, banking and fiscal union coupled with a new framework of democratic legitimacy and accountability. In November 2012 also the European Commission published a Communication outlining a blueprint for a deep and genuine EMU and opening a debate on future reforms.95 And following the European Parliament’s election in May 2014, and the appointment of a new European Commission in October 2014, the heads of state and government of the Eurozone entrusted the President of the European Commission, in close cooperation with the Presidents of the European Council, the Eurogroup, and the ECB, with the task to bring forward the work on the future of EMU96 – an effort which resulted in the publication in June 2015 of a new report, signed also by the President of the European Parliament, on

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96 Euro Summit Statement, 24 October 2014, §2.
“Completing Europe’s EMU.”

At the same time, the European Parliament has repeatedly expressed its desire that constitutional changes be brought back on the agenda of the EU institutions, including by reviving the Convention method to re-discuss the architecture of the EU for a new era. And it has stated that the EU member states shall live up to the obligation enshrined in the Fiscal Compact to bring back the content of that treaty within EU law by 2018 at the latest, using this as a window of opportunity for a broader overhaul of the EU constitutional system. Moreover, several member states’ governments have made the case for further reforms in the EU, including a new round of changes to the EU treaties, aimed at achieving a new constitutional settlement in the EU. And last but not least, a growing emphasis has emerged in academia and the public debate on the need for institutional reforms in the EU and the Eurozone, aimed at improving the effectiveness and legitimacy of its constitutional architecture of economic governance. Notwithstanding obvious resistances, therefore, pressures seem to be mounting for a new round of legal and constitutional changes in Europe.

This book contributes to the debate about the constitutional future of the European architecture of economic governance by advancing several options for EMU reform. These proposals specifically address the paradoxical, and problematic, dynamics previously identified: centralization, judicialization and domination. Hence, the book’s normative part outlines possible ways to restore a vertical and horizontal constitutional balance in the European architecture of economic governance. In doing so, the book again seeks to take advantage from comparative law, drawing lessons from the examples of other legal systems, and benefitting from the trials and errors

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99 See Art. 16 Fiscal Compact (requiring the signatory states to incorporate the content of the treaty within the law of the EU by 2018 at the latest). See now also Art. 16 SRF Agreement (requiring the signatory states to incorporate the content of the treaty within the law of the EU by 2024 at the latest).
101 See e.g. French President François Hollande, Intervention liminaire de lors de la conférence de presse, Paris, 16 May 2013, 7 (speaking in favour of new steps in the integration process) and German Chancellor Angela Merkel, Speech at the Bundestag, Berlin, 18 December 2013 (indicating need for Treaty change in the EU). But see also British Prime Minister David Cameron, Speech, London, 23 January 2013 (recognizing need for treaty changes especially to integrate the Eurozone further).
102 See e.g. Ingolf Pernice et al., A Democratic Solution to the Crisis: Reform Steps Towards a Democratically Based Economic and Financial Constitution for Europe (Nomos 2012); Jean-Claude Piris, The Future of Europe: Toward a Two-Speed EU? (CUP 2011).
103 See e.g. Glienicker Group, “Toward a Euro Union”, 17 October 2013 (demanding new institutional arrangement for the Eurozone) and Eiffel Group, “For a Euro Community”, 14 February 2014 (same).
that these have undergone to address problems analogous to those currently facing the EU. Moreover, while in critically analyzing the implications of the Euro-crisis and the responses to it on the EU constitutional architecture of economic governance the book uses as a comparative benchmark the US case, in articulating options for future reforms, the books moves beyond a focus on the US only, by including references to the legal and institutional experience also of other nations, such as Argentina, Australia, Brazil, Canada, France, Germany, India, Indonesia, Israel, Japan, Switzerland and the United Kingdom.

In particular, from a policy perspective, the book suggests that:

1) the dynamic of centralization can be mitigated by raising a separate fiscal capacity for EMU, which reduces asymmetric economic shocks but preserves a degree of autonomy for the states in budgetary affairs;

2) the dynamic of judicialization can be reverted by restoring the centrality of the EU legislative process, enhancing the role of supranational democratic institutions in the decision-making process in economic affairs;

3) the balance between the member states can be achieved through a new system of executive decision-making and legitimation at the supranational level which is able to control, rather than suffer, pressures from the largest states.

Needless to say, each of these proposals is controversial and would likely face a number of challenges. The possibility to reform the EU legal and institutional system is constrained by legal obstacles. At the EU level, most visibly, the principle of conferral and the unanimity requirement to change the EU treaties poses an important impediment to a reform of the EMU. And at the national level, several hurdles have been raised by legislatures, or courts, in authorizing further steps forward in the process of EU integration. At the same time, the possibility to reform EMU is hampered by political obstacles: in the recent rounds of national and European Parliament elections, voters have increasingly cast their ballots for anti-European parties, expressing their

105 See e.g. Tom Ginsburg (ed), *Comparative Constitutional Design* (CUP 2012).
discontent towards a governance system perceived as remote and unresponsive. These challenges must necessarily be taken into account in any discussion about constitutional change in the EU.

Yet the book does not adopt a naïve stand. It acknowledges the challenges that any prospect of reform would need to address and seeks to explain how and why these can be met. In fact, the book suggests that targeted reforms of the EU constitutional system, increasing the autonomy of the member states and clarifying the separation of powers of the EU executive and legislative branches may actually go a long way toward addressing the concerns of citizens across the EU. In pragmatic fashion, then, the book underlines what are the potentials of the legal mechanisms currently existing in the armory of the EU legal order, and discusses what would be the advantages for the relevant stakeholders in pursuing a strategy of constitutional revision of the EU treaties along the lines set out above. As such, in discussing each of these alternative scenarios on how to restore a balance of powers of the EMU, the book considers the challenges that would arise along the way and yet emphasizes how reason and choice can lead the EU toward a more satisfactory constitutional settlement for the states, the EU institutions and the European people themselves.

6. The structure of the book

This book is opened by the celebrated citation from Alexander Hamilton’s The Federalist Papers No. 1, distinguishing constitutional arrangements established out of accident and force from constitutional systems designed on the basis of reflection and choice. This book illuminates beyond conventional wisdom the reality of power-relations in the EMU, critically evaluates this state of affairs in light of constitutionalist balance-of-powers principles and advances new ideas on how to perfect the constitutional architecture of EMU in the near future. As such, the book is structured along a dual logic, inspired by Hamilton’s pressing question.

Part 1 examines how developments occurred in the EMU after the beginning of the Euro-crisis have changed the constitutional architecture of the EU through accident and force. Chapter 1 examines the effects of the Euro-crisis and the responses to it on the vertical relations of power between the states and the EU, and underlines the paradox of centralization, visible in the growth in power of central institutions vis-à-vis the member states which is unparalleled even when compared

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with a highly centralized federal system like the US. Chapter 2 explores the effects of the Euro-crisis and the responses to it on the horizontal relations of power between the political branches and the courts and stresses the unprecedented judicialization of economic affairs that has recently occurred in the EU. Chapter 3, finally, considers the effects of the Euro-crisis and the responses to it on the horizontal relations of power between the member states themselves, and argues that a dynamic of domination of larger states over others has increasingly emerged since the eruption of the Euro-crisis, upsetting the original EU institutional balance.

Part 2 of the book, then, moves from the critical to the constructive part, and discusses how the paradoxes generated by the Euro-crisis and the responses to it could and should be addressed by reforming the EU constitutional architecture of economic governance through *reflection and choice*. Chapter 4 focuses on the idea to endow the EMU with a fiscal capacity and considers how this may constitute an alternative way to manage economic interdependencies in the EU and the Eurozone and yet avoid complete centralization of budgetary processes. Here I discuss the challenges towards a meaningful fiscal capacity and take as a case study the recent proposal for a financial transaction tax. Chapter 5 criticizes the use of intergovernmental agreement outside the EU legal order and makes the case in favor of a full legislative involvement in EMU affairs. To this end, I consider how restoring the centrality of the EU legislative process, while reforming the role of the European Parliament and the Council, can ensure proper control of decision-making in financial affairs, inverting the trend toward judicial aggrandizement in this field. Chapter 6, finally, reflects upon possible institutional solutions to restore a balance between the member states, discussing how an effective and properly legitimated executive government at the EU level may ensure greater equilibrium between states’ interests than what is the case under a regime of executive federalism in which larger states dominate the decision-making process. A brief conclusion ends the book, making the case for future steps towards a more perfect EMU.