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Paradise Lost: Can the European Union Expel Countries from the Eurozone

Jens Dammann

The University of Texas at Austin - School of Law

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Paradise Lost: Can the European Union Expel Countries from the Eurozone?

Jens Dammann*

ABSTRACT

There was a time, not too long ago, when the introduction of the euro was hailed as a tremendous success. Yet the Eurozone now faces an existential crisis. A number of member states have, since 2008, been prevented from defaulting on their sovereign debt only by massive bailouts. Greece has teetered on the verge of insolvency for years despite repeated such measures.

Many observers now believe that Greece should stay in the European Union but leave the Eurozone, a scenario often referred to as the “Grexit.” This would allow Greece to devalue its currency and thereby render its economy more competitive. But just as crucially, from the perspective of Greece’s sharpest critics, a Grexit would rid the Eurozone of a member state that may no longer be willing to abide by the Eurozone’s austerity-oriented economic policies, which aim at limiting budget deficits and government debt even in times of economic distress. The current Greek government is adamantly opposed to leaving the Eurozone, but this has not put an end to the debate. Rather, a growing chorus of politicians and pundits now argue that Greece should be expelled from the Eurozone.

Of course, this demand raises a fundamental legal question: Is it possible—and should it be—to terminate a country’s membership in the Eurozone without that country’s consent? This Article argues that in narrowly defined circumstances, a right to expel countries from the Eurozone not only is desirable as a matter of legal policy but also deserves recognition as a matter of black letter law. However, this Article also shows that such an expulsion has to remain an ultima ratio. As of now, Greece does not even come close to satisfying its conditions.

* Williams Stamps Farish Professor in Law, the University of Texas School of Law. For excellent research assistance, I wish to thank Megan Hyska and Kayla Davis.

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I. INTRODUCTION

A scenario in which the U.S. government forced one of the fifty states or the District of Columbia to abandon the dollar would plainly be ridiculous. Yet transposed across the Atlantic, where nineteen member states of the European Union now form the Eurozone, such a scenario elicits a mixed response.

The European Commission has traditionally taken the view that no country can or should be forced out of the Eurozone.¹ Those few authors in the legal literature who have addressed the question have generally shared this position.² However, at least as a matter of legal policy, this approach is no longer uncontested. German Chancellor Angela Merkel, viewed by many as Europe's most powerful head of state and de facto leader,³ has made it plain that she believes

1. Barroso: 'No Country Can Be Expelled from Eurozone', EURACTIV (Mar. 19, 2010) [hereinafter *Barroso*], <http://www.euractiv.com/priorities/barroso-no-country-can-be-expelled-eurozone-news-358343> [<https://perma.cc/Q4QA-S4UA>] (archived Feb. 12, 2016).

2. See, e.g., Thomas Giegerich, *Article 60: Termination or Suspension of the Operation of a Treaty*, in VIENNA CONVENTION ON THE LAW OF TREATIES 1021, 1042 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) [hereinafter *Giegerich, Article 60*]; Ulrich Häde, *Artikel 140 EUV*, in EUV/AEUV 62 (Christian Calliess & Matthias Ruffert eds., 4th ed. 2011) [hereinafter *Häde, Artikel 140*]; Ulrich Häde, *Die Europäische Währungsunion in der Internationalen Finanzkrise—An den Grenzen Europäischer Solidarität?* [*The European Monetary Union in the International Financial Crisis—At the Limits of European Solidarity?*], 45 EUROPARECHT [EUR] 854, 865 (2010) [hereinafter *Häde, Europäischer Solidarität*]; Christoph Herrmann, *Griechische Tragödie—Der Währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von Überschuldeten Staaten aus der Eurozone* [*Greek Tragedy—The Constitutional Framework for the Rescue, the Withdrawal, or the Expulsion from the Eurozone of States with Excessive Debts*], 13 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 413, 417 (2010); René Smits, *The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments*, 38 FORDHAM INT'L L.J. 1135, 1139–40 (2015); Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections* 33 (Eur. Cent. Bank, Legal Working Paper No. 10, 2009); cf. THOMAS OPPERMANN ET AL., EUROPARECHT § 9.7 (7th ed. 2014) (calling an expulsion from the Eurozone highly unrealistic). *But see* Norbert Horn, *Die Reform der Europäischen Währungsunion und die Zukunft des Euro* [*The Reform of the European Monetary Union and the Future of the Euro*], 64 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1398, 1403 (2011) (arguing that the Vienna Convention on the Law of Treaties provides a right to expel member states from the Eurozone in case of a grave violation of EU law).

3. See, e.g., Alison Smale & Andrew Higgins, *Debt Crisis May Be Defining Moment for Greece, and for Angela Merkel*, N.Y. TIMES (June 24, 2015), <http://www.nytimes.com/2015/06/25/world/europe/greek-debt-european-union-angela-merkel.html> [<https://perma.cc/6Q85-RM26>] (archived Mar. 3, 2016). Most observers agree that Germany has been the key power in determining the handling of the euro crisis. See, e.g., Andrew Higgins, *Setting a Deadline for Greece Proves Much Easier than Sealing a Fate*, N.Y. TIMES (July 8, 2015) [hereinafter *Higgins, Setting a Deadline*], <http://www.nytimes.com/2015/07/09/world/europe/setting-a-deadline-for-greece-proves-much-easier-than-sealing-a-fate.html> [<https://perma.cc/7YLS-TAV5>] (archived Mar. 3, 2016); Neil Irwin, *How Germany Prevailed in the Greek Bailout*, N.Y. TIMES (July 30, 2015), <http://www.nytimes.com/2015/07/30/world/europe/how-germany->

membership in the Eurozone ought to be contingent on good behavior: in Merkel's view, a member state that persistently breaches the rules governing the Eurozone should be subject to expulsion.⁴

Only a few years ago, this question might have seemed largely theoretical. However, as Greece's economy has descended into a downward spiral of repeated bailouts, ballooning government debt, soaring unemployment, and economic contraction, the question of an involuntary exit from the Eurozone has attained practical urgency.

The voices calling for Greece to leave the Eurozone are legion, and, in light of the Greek government's adamant refusal to contemplate such a step, a growing chorus of pundits and politicians in other member states has been willing to discuss Greece's involuntary expulsion from the Eurozone.⁵ These voices have become so loud that, in the summer of 2015, Janis Varoufakis, then Greece's finance minister, found it necessary to threaten legal action if an expulsion were attempted.⁶

Why does Greece face calls for expulsion when other economically troubled member states did not? One reason presumably lies in the sheer depth of Greece's economic crisis. Many observers simply no longer believe that it is possible for Greece to recover from its economic crisis while remaining in the Eurozone, or at least not at a price that the other member states would be willing to pay.⁷ Admittedly, the latest bailout, negotiated in 2015 and following on the heels of two prior bailouts, will stave off Greek insolvency for now.⁸ However, it is not clear how that bailout will help Greece exit

prevailed-in-the-greek-bailout.html [https://perma.cc/GHY6-P5HY] (archived Mar. 3, 2016) (quoting Finnish finance minister Alexander Stubb's statement that Germany was "in the driver's seat" during the negotiations with Greece).

4. Patrick McGroarty & Matthew Karnitschnig, *Merkel Floats Option of Euro-Zone Expulsion*, WALL ST. J. (Mar. 18, 2010), <http://www.wsj.com/articles/SB10001424052748704743404575127190480343692> [https://perma.cc/ZBC3-XXB8] (archived Feb. 12, 2016).

5. See Ambrose Evans-Pritchard, *Greece Threatens Top Court Action to Block Grexit*, TELEGRAPH (June 29, 2015), <http://www.telegraph.co.uk/finance/economics/11707092/Greece-threatens-top-court-action-to-block-Grexit.html> [https://perma.cc/H4FW-P3CD] (archived Feb. 12, 2016) (citing both the French President François Hollande and the head of the German social-democratic party, Sigmar Gabriel, as saying that a no vote in the Greek referendum would mean leaving the Eurozone).

6. *Id.*

7. See, e.g., Paul Krugman, *Greece over the Brink*, N.Y. TIMES (June 29, 2015), <http://www.nytimes.com/2015/06/29/opinion/paul-krugman-greece-over-the-brink.html> [https://perma.cc/8PC5-45TV] (archived Mar. 3, 2016) (arguing that without a Grexit, "Greece will face endless austerity, and a depression with no hint of an end"); cf. Desmond Lachman, *The Euro Is a Straitjacket for Greece*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/roomfordebate/2015/06/30/should-greece-abandon-the-euro/the-euro-is-a-straitjacket-for-greece> [https://perma.cc/F3MR-T3U9] (archived Feb. 12, 2016) (arguing that Greece should leave the Eurozone to avoid becoming a failed state).

8. See Suzanne Daley, *Greece's Leader Starts Big Economic Overhaul*, N.Y. TIMES (Sept. 21, 2015), http://www.nytimes.com/2015/09/22/world/europe/alexis-tsipras-of-greece-faces-bailout-mandates-in-next-test.html?_r=0 [https://perma.cc/MK7

the deep depression in which it now finds itself.⁹ Rather, many experts believe that Greece needs to reacquire, and subsequently devalue, its own currency in order for its economy to become competitive again.¹⁰

However, there exists another, perhaps more important, reason for Greece's facing calls for expulsion from the Eurozone where other member states did not. Unlike other member states that found themselves in economic difficulties, Greece has dared to rebel openly against the legal framework of the Eurozone, which heavily emphasizes budget discipline and monetary stability.¹¹ The European Commission, the International Monetary Fund, and a German-led majority of other member states want Greece to tackle its crisis through so-called austerity policies.¹² These include slashing the budget and raising taxes.¹³ This approach reflects the legal rules governing the Eurozone, which impose strict limits on government debt and budget deficits.¹⁴ By contrast, the current Greek government rose to power after campaigning against the very

J-ZC75] (archived Mar. 3, 2016) (noting that the 2015 bailout package allowed Greece to avoid default); Phillip Inman, *Where Did the Greek Bailout Money Go?*, GUARDIAN (June 29, 2015), <http://www.theguardian.com/world/2015/jun/29/where-did-the-greek-bailout-money-go> [https://perma.cc/E4L2-ACAW] (archived Feb. 12, 2016) (noting that Greece also received bailouts in 2010 and 2012).

9. See Liz Alderman, *Tentative Greek Debt Accord Might Do Little To Revive Economy*, N.Y. TIMES (Aug. 12, 2015) [hereinafter Alderman, *Tentative Greek Accord*], <http://www.nytimes.com/2015/08/12/business/international/greece-third-bailout-deal.html> [https://perma.cc/P4YW-GEA8] (archived Mar. 3, 2016) (noting that the bailout deal “would grant Greece billions of euros in fresh aid to avoid an imminent default but would not help revive the Greek economy, which has plunged into a deep recession,” and stressing that “[t]he deal . . . offers no relief on Greece's staggering debt”).

10. See, e.g., Nouriel Roubini, *Greece Must Go*, SLATE (May 18, 2012, 6:20 AM), http://www.slate.com/articles/news_and_politics/politics/2012/05/greece_will_leave_the_eurozone_sooner_or_later_sooner_is_better_.html [https://perma.cc/2PEH-VSJJ] (archived Feb. 12, 2016) (suggesting that Greece's only hope of escaping economic depression is to leave the Eurozone); Hans-Werner Sinn, *Why Greece Should Give Up the Euro*, N.Y. TIMES (July 24, 2015), <http://www.nytimes.com/2015/07/25/opinion/why-greece-should-leave-the-eurozone.html> [https://perma.cc/553X-FTDX] (archived Mar. 3, 2016) (arguing that a Grexit would lead to devaluation, which in turn would benefit the Greek economy). *But see* Nicholas Economides et al., *What's at Stake in the Greek Vote*, WALL ST. J. (June 14, 2012, 7:07 PM), <http://www.wsj.com/articles/SB10001424052702303822204577466541312448940> [https://perma.cc/B95L-G6YV] (archived Mar. 3, 2016) (equating an exit from the Eurozone with “fiscal suicide”).

11. Cf. Richard Barley, *Testing the Market's Greek Calm*, WALL ST. J., Feb. 18, 2015, at C12 [hereinafter Barley, *Testing the Market*] (pointing out that Greece is challenging “[t]he eurozone's economic orthodoxy”).

12. See *infra* Part II.

13. See, e.g., Rose Troup Buchanan, *Greece Debt Crisis Explained: A History of Just How the Country Landed Itself in Such a Mess*, INDEPENDENT (July 4, 2015), <http://www.independent.co.uk/news/world/europe/greece-debt-crisis-explainer-a-history-of-how-the-country-landed-itself-in-such-a-mess-10365798.html> [https://perma.cc/3LU F-FJJ3] (archived Feb. 12, 2016) (noting that the ECB, the IMF, and the European Commission gave Greece access to loans “in exchange for spending cuts and tax hikes”).

14. See *infra* Part II.

austerity policies that Greece is now asked to adopt.¹⁵ In a recent referendum, Greece's citizens made it clear that they share the government's skepticism towards austerity-based economic policy.¹⁶ Incidentally, this position is supported by many economists, particularly in the United States, who believe that cutting spending in the middle of a downturn is highly counterproductive.¹⁷

This clash of opinion between Greece and much of the rest of Europe has yet to be resolved. For the time being, the Greek government has promised to implement austerity-oriented reforms, but it has done so only in order to secure another bailout.¹⁸ Accordingly, many observers doubt the Greek Prime Minister's commitment to such reforms.¹⁹ It also remains unclear whether the Greek government is even able to implement the promised reforms, given that they face massive opposition from within the ranks of the ruling party.²⁰ Having won a snap election in September 2015,²¹ the Greek Prime Minister Alexis Tsipras now looks stronger than only a few months ago, but, in light of the Herculean tasks ahead of him, his current political support may well prove short lived.

15. See *infra* Part II.

16. See *infra* Part II.

17. See, e.g., Krugman, *supra* note 7 (blaming Greece's economic collapse on austerity policies); see also Irwin, *supra* note 3 (reporting that "many economists, particularly in the United States and Britain," believe "the continued imposition of a budget-cutting-first approach during an extended downturn is holding back recovery").

18. In fact, Prime Minister Tsipras made it very clear, when voting for a package of reforms in July 2015, that he only voted in favor to avoid financial collapse. Renee Maltezou & Angeliki Koutantou, *Greek Parliament Approves Bailout Measures as Syriza Fragments*, REUTERS (July 16, 2015) <http://www.reuters.com/article/us-eurozone-greece-idUSKBN0P40EO20150716> [<https://perma.cc/4MZV-SZMQ>] (archived Feb 12, 2016).

19. See, e.g., Henry Chu, *Key Players Doubt Greek Rescue Plan Has a Chance*, L.A. TIMES (Aug. 2, 2015), <http://www.latimes.com/world/la-fg-greece-bailout-talks-20150803-story.html> [<https://perma.cc/L6JD-894G>] (archived Feb. 12, 2016) (citing doubts by Greek economist Manos Matsaganis and others as to whether the Tsipras government will follow through with the reforms it promised); James Kanter, *Meeting on Greece Debt Breaks up with No Deal*, N.Y. TIMES (July 11, 2015), <http://www.nytimes.com/2015/07/12/business/greece-debt-plan-at-next-crucial-stage-as-finance-ministers-meet.html> [<https://perma.cc/X4UW-RJ8Y>] (archived Mar. 3, 2016) (noting other countries' doubts as to whether the Tsipras government is committed to reform).

20. See Jack Ewing & Niki Kitsantonis, *Greece Made Preparations to Exit Euro*, N.Y. TIMES (July 27, 2015), <http://www.nytimes.com/2015/07/28/business/greece-debt-varoufakis-recording.html> [<https://perma.cc/6LBA-LVVK>] (archived Mar. 3, 2016) (noting that the Greek Prime Minister Alexis Tsipras "is dealing with a revolt in his own party over conditions that other Eurozone countries are demanding," and pointing out that "Mr. Tsipras has been able to pass legislation demanded by creditors only with the help of opposition parties").

21. Jim Yardley, *In a Twist, Europe May Find Itself Relying on Success of Alexis Tsipras of Greece*, N.Y. TIMES (Aug. 21, 2015), <http://www.nytimes.com/2015/08/22/world/europe/alexis-tsipras-greece-syriza-popular-unity.html> [<https://perma.cc/A78Z-58S8>] (archived Mar. 3, 2016).

Against this backdrop, those who demand Greece's exit from the Eurozone have more on their mind than restoring Greece to economic health. They also view Greece's continued membership as a potential threat to the economic and monetary approach established by the Eurozone, and they worry that repeated bailouts are clearing the way for the Eurozone to become a "transfer union" in which economically stronger states are forced to support weaker economies.²² For them, such an exit would have the advantage of ridding the Eurozone of a country that may not only require future bailouts but also tempt other member states into abandoning economic austerity, thereby threatening the current order of the monetary union.²³

Of course, the crucial question is whether European law even allows for a member state to be expelled from the Eurozone. The potential ramifications of this question are enormous. What will happen if no such expulsion is allowed? Will this lead some states to continue to flout the restrictive rules of the Eurozone? Will the Eurozone eventually collapse as more and more member states grow accustomed to ever-expanding budget deficits and ever-increasing government debt, thereby eroding trust in the stability of the common currency?²⁴

And what will happen if a right to expel misbehaving member states from the Eurozone is in fact recognized? Will this deter other countries from joining the Eurozone in the first place for fear of later suffering the humiliation of being kicked out? Will such an expulsion inevitably destroy the European dream and fracture European unity by pitting economically strong member states against their less fortunate peers? Will it wreak havoc on the credibility of the International Monetary Fund (IMF)?²⁵ Will such an expulsion mean "the end for the euro"?²⁶

22. Irwin, *supra* note 3 (noting fears that the Eurozone will turn into a transfer union).

23. Cf. Landon Thomas, Jr., *In Eurozone, Growing Support for a Greek Exit*, N.Y. TIMES (June 18, 2015) [hereinafter Thomas, *Growing Support*], <http://www.nytimes.com/2015/06/19/business/dealbook/greek-exit-from-euro-appears-increasingly-likely.html> [https://perma.cc/8UCE-BCFK] (archived Mar. 3, 2016) (noting that "the view is taking hold in Europe that its ambitious currency project would be better served if Greece just left," and pointing to German concerns that further bailouts without budget cuts might bring the Eurozone closer to a "transfer union," where stronger states economically support weaker ones).

24. See, e.g., Horn, *supra* note 2, at 1403 (warning of the collapse of the Eurozone).

25. See Simon Nixon, *Greece and Creditors Head for the Brink: Hardened Positions Mean the Scope for Compromise Looks Vanishingly Small*, WALL ST. J. (June 7, 2015, 5:27 PM), <http://www.wsj.com/articles/greece-and-creditors-head-for-the-brink-1433712429> [https://perma.cc/EH8K-D7LH] (archived Mar. 3, 2016) (warning that "[i]f Greece ends up leaving the eurozone, the IMF will find itself sitting on a giant loss, which would devastate its credibility as the world's safest lender.").

26. See Simon Tisdall, *Is Europe Dead?*, CNN (June 29, 2015), <http://www.cnn.com/2015/06/19/opinions/is-europe-over-tisdall/> [https://perma.cc/M7K4-

Interestingly, while the political and economic importance of a Greek exit from the Eurozone—or “Grexit”—is widely recognized by economists,²⁷ pundits,²⁸ and politicians,²⁹ legal scholars have largely neglected the question of whether the European Union has the right to expel member states from the Eurozone. To the extent that legal scholars have even addressed the issue, they generally deny the existence of an expulsion right but, in support for this claim, usually limit themselves to pointing out that the Treaty on the Functioning of the European Union does not mention any right to expel misbehaving members.³⁰

This Article argues that this view is misguided. While expulsion should be considered an *ultima ratio* limited to extreme situations, it is unpersuasive as a matter of both black letter law and legal policy to take it off the table entirely. To the extent that a right of expulsion is needed to protect the functioning of the Eurozone—an unlikely but by no means impossible scenario—such a right should not be denied.

None of this justifies calls for Greece’s expulsion now. To the contrary, this Article shows that conduct like that of the Greek government does not come close to satisfying the conditions for expelling a country from the Eurozone. Accordingly, opposition to those voices who seek to expel Greece from the Eurozone is entirely justified. However, this should not give rise to the opposite mistake of denying the existence of an expulsion right entirely.

The structure of this Article is as follows: Part II explains the background of the current economic and political crisis. Part III gives an overview of various ways in which a member state might leave the Eurozone other than by expulsion. Part IV argues that an expulsion right should be recognized both as a matter of black letter law and as a matter of legal policy. Part V summarizes and concludes.

II. BACKGROUND

The history of European monetary unification did not start with the introduction of a common currency. Long before the euro was introduced on January 1, 1999, most member states of the European

6EZD] (archived Feb. 17, 2016) (claiming that Greece’s expulsion from the Eurozone could spell the end of the euro).

27. See, e.g., Economides et al., *supra* note 10 (warning that Greece’s economic crisis would become much worse if Greece were to leave the Eurozone).

28. See, e.g., Barley, *Testing the Market*, *supra* note 11 (noting that the “ripple effects of a Greek exit are hard to fathom.”); Nixon, *supra* note 25 (noting that “the stakes could not be higher.”).

29. See, e.g., Melissa Eddy & Jack Ewing, *Conciliatory Notes in Germany on Easing Greece’s Burden*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/business/global/daily-euro-zone-watch.html> [https://perma.cc/VP9E-697Y] (archived Mar. 3, 2016) (quoting German Chancellor Angela Merkel as saying that “the future of Europe” was tied to the question of whether Greece stayed in the Eurozone).

30. See *supra* note 2.

Union sought to stabilize their currency exchange rates by means of the so-called European Monetary System (EMS).³¹ At the core of EMS, which was created in 1979, was the so-called Exchange Rate Mechanism (ERM).³² Currency exchange rates were permitted to fluctuate within certain narrow boundaries—usually 2.25 percent up or down—but were otherwise fixed.³³

In practice, this system was not without limitations. Because the economies of the member states developed differently over time, the relevant exchange rates had to be adjusted—or “realigned”—regularly.³⁴ In addition, both the United Kingdom and Italy had to withdraw from the Exchange Rate Mechanism because their currencies came under too much pressure;³⁵ and whereas Italy eventually returned to the Exchange Rate Mechanism, the United Kingdom did not.³⁶

In any case, supporters of European integration had much loftier goals than the mere stabilization of currency exchange rates; they strove for a European currency.³⁷ However, this project faced both political and economic obstacles, and an understanding of these obstacles is crucial to comprehending the Eurozone’s current crisis.

Political opposition to a common currency arose from the fact that citizens in states with stable currencies were reluctant to exchange it for a common European currency and a common European monetary policy, which they feared might bring the high inflation rates common in Southern Europe.³⁸ This fear was

31. Jens C. Dammann, *The Right to Leave the Eurozone*, 48 TEX. INT’L L.J. 125, 132 (2013) [hereinafter Dammann, *Right to Leave*]; cf. Roger J. Goebel, *European Economic and Monetary Union: Will the EMU Ever Fly?*, 4 COLUM. J. EUR. L. 249, 258–62 (1998) (giving a short description of the European Monetary System).

32. Dammann, *Right to Leave*, *supra* note 31, at 140–41; Goebel, *supra* note 31, at 259. When the Eurozone was created in 1999, the existing version of the Exchange Rate Mechanism gave way to a new one, which permits exchange rates to fluctuate 15 percent up or down. Resolution of the European Council of 16 June 1997 on the Establishment of a New Exchange-Rate Mechanism in the Third Stage of Economic and Monetary Union, ¶ 2.1, 1997 O.J. (C 236) 5, http://ec.europa.eu/economy_finance/publications/publication6325_en.pdf [<https://perma.cc/H6NL-L9X4>] (archived Feb. 17, 2016).

33. JOHAN VAN OVERTVELDT, *THE END OF THE EURO: THE UNEASY FUTURE OF THE EUROPEAN UNION* 26 (2011); Dammann, *Right to Leave*, *supra* note 31, at 141.

34. Dammann, *Right to Leave*, *supra* note 31, at 141; Goebel, *supra* note 31, at 261.

35. Dammann, *Right to Leave*, *supra* note 31, at 141; Goebel, *supra* note 31, at 261.

36. Dammann, *Right to Leave*, *supra* note 31, at 141.

37. See VAN OVERTVELDT, *supra* note 33, at 30 (noting that the 1989 Delors plan, named after the then-President of the European Commission Jacques Delors, contemplated the creation of a single currency as an option for the final stage of the European Monetary Union). The 1992 Treaty of Maastricht then called for a single currency as the final stage of the European Monetary Union. *Id.* at 33.

38. Cf. Edmund L. Andrews & Steven Erlanger, *Euro Deposits the Mark, Grieving Many Germans*, N.Y. TIMES (August 30, 2001), <http://www.nytimes.com/2001/>

particularly pronounced in Germany, a country that had experienced hyperinflation after both World War I and World War II and whose citizens were therefore particularly afraid of exchanging a hard currency for a soft one.³⁹

To allay German fears of inflation, the member states went out of their way to design a European monetary system that would address this concern, and as a result, European constitutional law imposes much more rigid strictures on monetary policy than U.S. federal law, let alone U.S. constitutional law, does.⁴⁰

To begin with, the Treaty on the Functioning of the European Union⁴¹ explicitly provides that the European Central Bank must focus primarily on price stability in fashioning its monetary policy,⁴² a principle often referred to as the “primacy of price stability.”⁴³ This principle stands in obvious contrast to other areas of European law, where institutions can choose between a broad range of policy goals and weigh them according to political expediency.⁴⁴ It also contrasts quite vividly with U.S. law, since the Federal Reserve is authorized to balance the goal of stable prices with other competing policy goals, including “maximum employment” and “moderate long-term interest rates.”⁴⁵

Moreover, in order to become part of the Eurozone, a member state first has to meet the so-called convergence criteria.⁴⁶ These

08/30/world/euro-deposes-the-mark-grieving-many-germans.html [https://perma.cc/G953-CKS5] (archived Feb. 17, 2016) (noting that attitudes towards the introduction of the euro varied strongly across European countries and that Germans were particularly concerned about replacing their highly stable Deutsche Mark).

39. See, e.g., HORST KRATZMANN, *Der Staatsbankrott* [*Sovereign Default*], 37 JURISTENZEITUNG [J.Z.] 319, 320–21 (1982) (providing a brief summary of Germany’s experience with inflation in the Weimar Republic and after World War II).

40. Cf. Christian Kersting, *Combating the Financial Crisis: European and German Corporate and Securities Laws and the Case for Abolishing Sovereign Debtors’ Privileges*, 48 TEX. INT’L L.J. 269, 293 (2013) (pointing out that the European Union’s rigid commitment to price stability was “Germany’s condition for agreeing to enter the euro”).

41. See Consolidated Version of the Treaty on the Functioning of the European Union art. 238(3), Dec. 13, 2007, 2010 O.J. (C 83) 47 [hereinafter TFEU].

42. *Id.* art. 127(1) (providing that the “primary objective of the European System of Central Banks . . . shall be to maintain price stability.”).

43. E.g., Jens Dammann, *The Banking Union: Flawed by Design*, 45 GEO. J. INT’L L. 1057, 1076 (2014) [hereinafter Dammann, *Flawed by Design*].

44. Jens Dammann, *MATERIELLES RECHT UND BEWEISRECHT IM SYSTEM DER GRUNDFREIHEITEN* [SUBSTANTIVE LAW AND EVIDENTIARY RULES IN THE LAW OF THE FUNDAMENTAL FREEDOMS] 222 (2007) (noting that the European Court of Justice has repeatedly stressed the political discretion that the European institutions have in balancing the various goals set by the Treaties).

45. 12 U.S.C. § 225a (2014).

46. The convergence criteria are listed in Article 140 of the Treaty on the Functioning of the European Union [TFEU], and fleshed out in the so-called “Convergence Protocol” annexed to the TFEU. TFEU, *supra* note 41, art. 140 (listing the convergence criteria); Protocol (No. 13) on the Convergence Criteria, 2010 O.J.

criteria include, inter alia, a high degree of price stability, stable currency exchange rates, the sustainability of the government's financial position, as well as stable long-term interest-rate levels.⁴⁷ Of particular practical importance is the second one of these requirements. Under this criterion, a country's total government debt must not exceed 60 percent of GDP, and the budget deficit must not be more than 3 percent of GDP.⁴⁸

To enforce even greater fiscal discipline, the member states entered into the so-called Stability and Growth Pact.⁴⁹ The Stability and Growth Pact effectively perpetuates the convergence criteria by requiring each member state to stay within the limits on government debt and budget deficits described above even after joining the Eurozone.⁵⁰ Moreover, the requirements of the Stability and Growth Pact are accompanied by a regime of escalating interventions, culminating in the imposition of fines of up to 0.5 percent of a member state's GDP.⁵¹

In addition to these various legal mechanisms designed to safeguard monetary stability, the European Union took the symbolically important step of locating the European Central Bank in Frankfurt, the same city that is home to the Bundesbank, Germany's equivalent of the Federal Reserve.⁵² In the end, Germany was ready to part with the Deutsche Mark, thereby creating the political consensus necessary for a common European currency.⁵³

Of course, there were also challenges of an economic nature. The European Union simply did not satisfy the economic requirements for

(C83) 281 [hereinafter Convergence Protocol] (providing more detailed rules on the meaning and application of the convergence criteria).

47. TFEU, *supra* note 41, art. 140(1).

48. See Convergence Protocol, *supra* note 46.

49. Resolution of the European Council on the Stability and Growth Pact, 1997 O.J. (C 236) 1, 2 [hereinafter SGP Resolution]. The stability and growth pact actually consists of the Resolution on the Stability and Growth Pact and two regulations. See *id.* at III. These two regulations are Council Regulation 1466/97 of 7 July 1997 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 1997 O.J. (L 209) 1 [hereinafter Council Regulation 1466/97], and Council Regulation 1467/97 of 7 July 1997 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 1997 O.J. (L 209) 6 [hereinafter Council Regulation 1467/97].

50. See SGP Resolution, *supra* note 49.

51. See Council Regulation 1467/97, *supra* note 49, art. 12 (authorizing the imposition of fines of up to 0.5 percent of GDP).

52. Protocol (No. 6) on the Location of the Seats of the Institutions and of Certain Bodies, Offices, Agencies, and Departments of the European Union, 2012 O.J. (C 326) 287.

53. It has sometimes been suggested that Germany's willingness to embrace the euro may also have been due to pressure exerted by the French government. Allegedly, French President François Mitterrand threatened to derail German unification unless Germany consented to a European monetary union. VAN OVERTVELDT, *supra* note 33, at 32.

a successful common currency⁵⁴ that the literature on optimal currency areas had developed.⁵⁵ In particular, the member states remained in charge of fiscal policy,⁵⁶ the general level of political integration remained low,⁵⁷ and the same was true for interstate labor mobility.⁵⁸ Not surprisingly, therefore, many economists were pessimistic regarding the Eurozone's future.⁵⁹

In the end, these economic reservations were set aside; on January 1, 1999, eleven member states of the European Union, including France, Germany, Italy, and Spain, switched from their national currencies to the euro.⁶⁰ Only two years later, Greece followed.⁶¹ Since then, seven other member states have joined the Eurozone, which is now comprised of nineteen of the European Union's twenty-eight member states.⁶²

In the first years after the introduction of the euro, the new currency seemed to refute its skeptics.⁶³ Predictions that the euro might become a soft currency failed to come to pass. Rather, inflation remained low, and the euro held its own vis-à-vis other currencies.⁶⁴ Moreover, those member states that had had soft currencies before introducing the euro were now able to borrow at the low rates previously reserved for more stable economies.⁶⁵ For some of these member states, the result was rapid growth.⁶⁶ This was particularly true for Greece, whose economy expanded dramatically after it joined

54. Dammann, *Right to Leave* *supra* note 31, at 127.

55. In particular, see the groundbreaking work of Robert A. Mundell. See Robert A. Mundell, *A Theory of Optimum Currency Areas*, 50 AM. ECON. REV. 657 (1961).

56. MICHAEL HEINE & HANSJÖRG HERR, DIE EUROPÄISCHE ZENTRALBANK 206 (2004); Dammann, *Right to Leave*, *supra* note 31, at 127.

57. Dammann, *Right to Leave*, *supra* note 31, at 127.

58. VAN OVERTVELDT, *supra* note 33, at 61–62.

59. See, e.g., Martin Feldstein, *The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability*, 11 J. ECON. PERSP. 23 (1997).

60. Council Regulation 974/98 of 3 May 1998 on the Introduction of the Euro, Annex, 1998 O.J. (L 139).

61. Council Regulation 2596/2000 of 27 November 2000 Amending Regulation 974/98 on the Introduction of the Euro, art. 1, 2000 O.J. (L 300) 2.

62. Lehte Roots, Tanel Kerikmäe & Sandra Särav, *Article 139 TFEU on Derogations for Member States Without Euro*, in SMIT & HERZOG ON THE LAW OF THE EUROPEAN UNION § 139.03 (Hans Smit et al. eds., 2015).

63. Dammann, *Right to Leave*, *supra* note 31, at 127.

64. See Wilhelm Hankel et al., *The Euro-Project at Risk* (ZEI, Working Paper No. B04–2010, 2010), <http://econstor.eu/bitstream/10419/46218/1/638549396.pdf> [<https://perma.cc/HF5R-4K3Q>] (archived Feb. 18, 2016).

65. Floyd Norris, *While Germany Prospers, Unemployment Strangles Others*, N.Y. TIMES (Dec. 9, 2011), http://www.nytimes.com/2011/12/10/business/in-euro-zone-germany-prospers-while-unemployment-strangles-others.html?_r=0 [<https://perma.cc/ZJ79-CE2D>] (archived Mar. 5, 2016).

66. See *id.*

the Eurozone: In 2000, the year before Greece was admitted to the Eurozone, its per capita GDP was \$11,961.⁶⁷ By 2008, the year that the financial crisis began, Greek per capita GDP had risen to \$31,700.⁶⁸ During that same time, Greek government debt stayed fairly stable as a percentage of GDP.⁶⁹ Thus, in 2000, Greek national debt was 108.9 percent of GDP and rose to only 110.6 percent by 2008.⁷⁰

Not surprisingly, therefore, the euro was widely hailed as a stunning success.⁷¹ Indeed, in 2008, shortly before the financial crisis broke, the Chief European Economist at Goldman Sachs, Erik Nielsen, declared that “the Euro and the Euro-zone economy have all the hallmarks of a success, including . . . contributing to an unprecedented degree of financial stability.”⁷²

However, the financial crisis of 2008 proved that such initial enthusiasm had been too sanguine. In Europe, the financial crisis of 2008 quickly turned into a sovereign debt crisis as investors grew fearful that some of the more economically fragile member states—particularly Greece, Ireland, Italy, Portugal, and Spain—might no longer be able to shoulder their debts.⁷³ By 2010, Greece was on the verge of insolvency.⁷⁴ European institutions, in cooperation with

67. *World Development Indicators: Greece*, THE WORLD BANK (2016), <http://databank.worldbank.org/data> [<http://perma.cc/Y7HQ-JMH3>] (archived Feb. 16, 2016).

68. *Id.*

69. *Central Government Debt*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], <https://stats.oecd.org/index.aspx?queryid=8089> [<http://perma.cc/LLT3-RCLV>] (archived Feb. 16, 2016).

70. *Id.*

71. *See, e.g., Central Bank of Europe Leaves Rates Unchanged*, N.Y. TIMES (Jan. 4, 2002), <http://www.nytimes.com/2002/01/04/business/central-bank-of-europe-leaves-rates-unchanged.html> [<https://perma.cc/UJC6-KUKY>] (archived Mar. 6, 2016) (citing Wim Duisenberg, the first president of the European Central Bank, who called the introduction of the euro “a tremendous success”); Norris, *supra* note 65 (noting that the euro originally appeared to be “a great success for what are now called the peripheral countries of the euro zone”). Even after the beginning of the financial crisis, some of the initial enthusiasm for the euro remained. *See, e.g., Nicholas Kulish, No Fireworks for Euro as It Reaches the 10-Year Mark*, N.Y. TIMES (Dec. 31, 2011), <http://www.nytimes.com/2012/01/01/world/europe/euro-is-10-years-old-but-few-are-celebrating.html> [<https://perma.cc/B36A-B9JM>] (archived Mar. 6, 2016) (noting that “[b]y many measures, the euro has been a success.”).

72. VAN OVERTVELDT, *supra* note 33, at 78 (citing GOLDMAN SACHS, THE EURO AT TEN: PERFORMANCE AND CHALLENGES FOR THE NEXT DECADE 200 (2008)).

73. Dammann, *Right to Leave*, *supra* note 31, at 127–28; Landon Thomas, Jr., *The Worst May Not Be over for Europe*, N.Y. TIMES (Dec. 30, 2009), <http://www.nytimes.com/2009/12/31/business/global/31euro.html?mtrref=www.google.com&mtref=www.nytimes.com&r=0> [<https://perma.cc/Y8LK-Y3T7>] (archived Mar. 6, 2016).

74. *See* John Crace, *The Greek Debt Crisis*, GUARDIAN (June 23, 2015), <http://www.theguardian.com/world/2015/jun/23/the-greek-debt-crisis-digested-read> [<https://perma.cc/DAA5-LFUK>] (archived Mar. 6, 2016) (noting that as of 2010, credit agencies downgraded Greek government bonds to junk bond status based on a possible sovereign default); Catherine Rampell, *Greece’s Debt Crisis is Far from a Resolution, to*

member state governments and the IMF, managed to prevent that outcome via a 110 billion euro rescue package adopted in May 2010.⁷⁵ However, the financial crisis escalated further, resulting in bailouts for Ireland (2010),⁷⁶ Portugal (2011),⁷⁷ Greece (2012),⁷⁸ Spain (2012),⁷⁹ and Cyprus (2012).⁸⁰

Most of the countries that received bailouts later regained their footing, but Greece proved the exception to the rule: Having quickly expanded between 2000 and 2008,⁸¹ the Greek economy now seemed to unravel. By 2011, Greek unemployment exceeded 20 percent,⁸² and, in that same year, the Greek economy shrank by almost 7

Judge from History, WASH. POST (Jan. 13, 2015), https://www.washingtonpost.com/opinions/catherine-rampell-greeces-debt-crisis-is-far-from-a-resolution-to-judge-from-history/2015/01/12/8e331a0c-9a9c-11e4-96cc-e858eba91ced_story.html [https://perma.cc/L3CE-KQU6] (archived Mar. 6, 2016) (noting that in 2010, the so-called Troika—the IMF, the ECB, and the European Commission—saved Greece from sovereign default).

75. Dammann, *Right to Leave*, *supra* note 31, at 128; James Kanter & Judy Dempsey, *Europe Approves Rescue for Debt-Ridden Greece*, N.Y. TIMES (May 8, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9A0DEEDB1130F93BA35756C0A9669D8B63> [https://perma.cc/T435-VVDU] (archived Mar. 6, 2016).

76. Stephen Castle & Liz Alderman, *Europe Approves Irish Rescue and New Rules on Bailouts*, N.Y. TIMES (Nov. 28, 2010), <http://www.nytimes.com/2010/11/29/business/global/29euro.html> [https://perma.cc/PVS3-XCW9] (archived Mar. 6, 2016).

77. Patricia Kowsmann, *Portugal Bailout Plan Detailed*, WALL ST. J. (May 5, 2011), <http://www.wsj.com/articles/SB10001424052748703937104576302883922114642> [https://perma.cc/QV57-83C5] (archived Mar. 6, 2016).

78. Min Zeng, *Treasurys Bounce Back*, WALL ST. J., July 23, 2011, at B14.

79. The Spanish government originally refused to ask for a direct bailout and instead demanded that any bailout money should be provided directly to troubled Spanish banks. See Charles Forelle & David Enrich, *Bulls Retreat on Spain Bailout Plan: Global Markets Reverse Early Gains as Investor Confidence Wanes*, WALL ST. J. (June 12, 2012, 8:21 AM), <http://www.wsj.com/articles/SB10001424052702303768104577460442153217320> [https://perma.cc/V953-4HFS] (archived Mar. 6, 2016). That way, the bailout would not have created government liability, and therefore would not have increased Spain's government debt. See *id.* However, the other member states of the Eurozone did not consent to such a direct bailout and successfully insisted on granting the money to the Spanish government instead. See, e.g., Dammann, *Flawed by Design*, *supra* note 43, at 1072 n.88; Raphael Minder, *Bailout in Spain Leaves Taxpayers Liable for the Cost*, N.Y. TIMES (June 12, 2012), <http://www.nytimes.com/2012/06/13/business/global/bailout-in-spain-leaves-taxpayers-holding-the-bag.html> [https://perma.cc/X7L4-66BF] (archived Mar. 6, 2016); Raphael Minder & Paul Geitner, *Pressed to Seek a Bailout, Spain Assesses the Needs of Its Banks*, N.Y. TIMES (June 9, 2012), <http://query.nytimes.com/gst/fullpage.html?res=9403E0DC1330F93AA35755C0A9649D8B63&pagewanted=all> [https://perma.cc/6VB8-5V4Y] (archived Mar. 6, 2016); Gabriele Steinhäuser, *Euro Zone Turmoil: Continental Drift Adds to Challenge—With Crisis Deepening, Europe's Changing Cast of Leaders Demonstrates Little Rapport as G-20 Meeting Gets Under Way*, WALL ST. J., June 16, 2012, at A6.

80. Andrew Ross Sorkin, *Bank Levy in Cyprus, and Why Not to Worry*, N.Y. TIMES (Mar. 18, 2013, 8:49 PM), <http://dealbook.nytimes.com/2013/03/18/a-bank-levy-in-cyprus-and-why/> [https://perma.cc/T3DE-9MJQ] (archived Mar. 6, 2016).

81. See *supra* text accompanying notes 67–70.

82. William Horobin et al., *Jobless Rates Jump in France, Greece*, WALL ST. J. (June 7, 2012, 8:30 AM), <http://www.wsj.com/articles/SB10001424052702303753904577451933202241876> [https://perma.cc/2D9M-ADN8] (archived Mar. 6, 2016).

percent.⁸³ Part of the problem may have been that the 2010 bailout came with stringent conditions attached; in particular, it required Greece to curtail its budget.⁸⁴ These conditions aimed at committing Greece to financial austerity were highly controversial: many argued that austerity made an already disastrous economic situation worse.⁸⁵

In 2012, to stave off financial collapse, the European Commission, the IMF, and the European Central Bank—collectively known as the “Troika”—granted a second rescue package, this time to the tune of 130 billion euros.⁸⁶ Like the first one, it was tied to further budget cuts.⁸⁷ This second rescue package went hand in hand with a painstakingly negotiated partial government default: in March 2012, the private owners of Greek government bonds accepted a bond swap⁸⁸ that reduced their claims against the Greek government by 53.5 percent.⁸⁹ By way of this so-called “haircut,” the total amount of government debt cut was 107 billion euro.⁹⁰ The idea behind this haircut was to make Greece’s debt more manageable and also to ensure that the bailouts did not simply enrich Greece’s private creditors at the expense of European taxpayers.

Even after the second bailout and the 2012 haircut, however, the situation remained very difficult. By the end of 2014, Greek per capita GDP had shrunk to \$21,863, and government debt had

83. Landon Thomas, Jr., *As Greece’s Debt Plan Nears, Concerns About Bond Holdouts*, N.Y. TIMES (Feb. 14, 2012), <http://www.nytimes.com/2012/02/15/business/global/greece-expected-to-offer-debt-holders-a-deal-soon.html> [<https://perma.cc/XF64-KAXV>] (archived Mar. 6, 2016).

84. Dammann, *Right to Leave*, *supra* note 31, at 128.

85. See *Greek Tragedy*, N.Y. TIMES (Feb. 8, 2012), <http://www.nytimes.com/2012/02/09/opinion/greek-tragedy.html> [<https://perma.cc/YG9W-6DPH>] (archived Mar. 6, 2016); *Kicking the Can: Without Debt Relief, Greece Can’t Grow and the Crisis Won’t End*, N.Y. TIMES (June 6, 2011), <http://www.nytimes.com/2011/06/07/opinion/07tue2.html> [<https://perma.cc/5VMY-LAGY>] (archived Mar. 6, 2016).

86. David Jolly, *Greek Economy Shrank 6.2% in Second Quarter*, N.Y. TIMES (Aug. 13, 2012), <http://www.nytimes.com/2012/08/14/business/global/greek-economy-shrank-dramatically-in-2nd-quarter.html> [<https://perma.cc/6XNV-9JET>] (archived Mar. 6, 2016).

87. See Liz Alderman, *In Greece, Restlessness Amid a Push for Cuts*, N.Y. TIMES (Sept. 17, 2012), <http://www.nytimes.com/2012/09/18/business/global/in-greece-growing-restlessness-amid-push-for-cuts.html> [<https://perma.cc/4XDQ-FT8D>] (archived Mar. 6, 2016).

88. Stephen Fidler, *Despite Pact, Unease Lingers for Greece*, WALL ST. J. (Feb. 22, 2012), <http://www.wsj.com/articles/SB10001424052970203358704577236532135919266> [<https://perma.cc/TV64-VZF5>] (archived Mar. 6, 2016).

89. *Id.*; Marcus Walker, *How a Radical Greek Rescue Plan Fell Short*, WALL ST. J. (May 10, 2012, 9:07 AM), <http://www.wsj.com/articles/SB10001424052702304203604577393964198652568> [<https://perma.cc/Y9VB-D2TC>] (archived Mar. 6, 2016).

90. Fidler, *supra* note 88.

ballooned to 177.1 percent of GDP.⁹¹ Perhaps even more importantly, unemployment reached 26.5 percent.⁹² Younger workers were hit especially hard, with unemployment rates for workers under twenty-five years soaring to 52.5 percent.⁹³ As with the first bailout, many critics believed that the austerity measures imposed by the Troika contributed to Greece's economic decline by forcing Greece to cut government spending in the middle of a downturn.⁹⁴

The year 2014 finally brought some good news. Greece's GDP started growing again, showing an expansion of 0.8 percent⁹⁵ after having shrunk 3.9 percent the year before.⁹⁶ In addition, the Greek government regained access to the bond market, which it had previously lost.⁹⁷ However, by this time, Greece's citizens had thoroughly lost their appetite for more austerity policies. Parliamentary elections in 2014 meant the end of the center-right government that had supported, *nolens volens*, the Troika's austerity policies.⁹⁸ The strongest party to emerge from the election was the Coalition of the Radical Left, better known under its acronym SYRIZA, with 26.5 percent of the vote.⁹⁹ After the election, the Greek parliament failed to elect a new prime minister, leading the parliament to be dissolved and snap elections to be called for the

91. European Comm'n, *General Government Gross Debt—Annual Data*, EUROSTAT, <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=teina225&plugin=1> [<http://perma.cc/7GMV-4S4X>] (archived Feb. 16, 2016).

92. European Comm'n, *Unemployment Statistics*, EUROSTAT (Jan. 2016), http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics [<http://perma.cc/MW9U-X6C9>] (archived Feb. 16, 2016).

93. *Id.*

94. See e.g., Irwin, *supra* note 3; Krugman, *supra* note 7; cf. Andrew Ross Sorkin, *The Hard Line on Greece*, N.Y. TIMES (June 29, 2015), <http://www.nytimes.com/2015/06/30/business/dealbook/the-hard-line-on-greece.html> [<https://perma.cc/4VGA-EFPQ>] (archived Mar. 6, 2016) (reporting economist Joseph Stiglitz's condemnation of the economics behind the troika's austerity policies as "abysmal").

95. David Jolly, *Eurozone Growth Exceeds Expectations*, N.Y. TIMES (Feb. 13, 2015), <http://www.nytimes.com/2015/02/14/business/eurozone-growth-exceeds-expectations.html> [<https://perma.cc/CVW4-W595>] (archived Mar. 6, 2016).

96. European Comm'n, *National Accounts and GDP*, EUROSTAT (May 2015), http://ec.europa.eu/eurostat/statistics-explained/index.php/National_accounts_and_GDP [<http://perma.cc/LT6S-SCVX>] (archived Feb. 16, 2016).

97. Hugo Dixon, *No Veering on Greece's Path to Redemption*, N.Y. TIMES (June 23, 2014), <http://www.nytimes.com/2014/06/23/business/international/no-veering-on-greeces-path-to-redemption.html> [<http://perma.cc/9DDC-2GR8>] (archived Feb. 16, 2016).

98. See *id.* (noting that Greek prime minister Samaras stuck to a harsh reform program for two years).

99. Alexia Kafalas, *Grèce: Le Succès de la Gauche Radicale aux Européennes*, LE FIGARO (May 26, 2014), <http://www.lefigaro.fr/elections/europeennes-2014/2014/05/26/01053-20140526ARTFIG00027-grece-le-succes-de-la-gauche-radical-aux-europeennes.php> [<https://perma.cc/C5F6-CPDC>] (archived Mar. 6, 2016).

beginning of 2015.¹⁰⁰ This time around, SYRIZA managed to gather 36.3 percent of the vote and 149 out of 300 parliamentary seats.¹⁰¹ And while this was slightly short of a parliamentary majority, SYRIZA overcame this problem by coalescing with the ultra right-wing Independent Greeks.¹⁰²

SYRIZA and its new prime minister Alexis Tsipras had won the election by campaigning against the austerity policies imposed by the Troika.¹⁰³ It is therefore unsurprising that the new government dragged its heels on the implementation of various reforms promised by the previous government and even reversed some cuts already undertaken by the previous government.¹⁰⁴ For example, previously laid-off civil servants were reemployed.¹⁰⁵

The Troika reacted by suspending the payment of outstanding aid and refusing to make further payment until the Greek government promised to honor the existing bailout agreement, or until some other compromise was reached.¹⁰⁶ The subsequent failure to reach such a compromise resulted in acute liquidity problems for the Greek government and eroded the financial markets' trust in the ability of the Greek government to pay back Greece's debt.¹⁰⁷ By February 2015, yields of ten-year government bonds soared to over 10

100. See Alkman Granitsas, *Greek Opposition Still Holds Slim Lead in Polls Before Election*, WALL ST. J. (Jan. 7, 2015), <http://www.wsj.com/articles/greek-opposition-still-holds-slim-lead-in-polls-before-elections-1420661426> [<https://perma.cc/49Y4-CCL8>] (archived Mar. 6, 2016).

101. Daphne Halikiopoulou, *Greek Crisis: As Greece Spirals Towards Disaster, a New Era of Extremist Politics Begins*, INDEPENDENT (July 6, 2015), <http://www.independent.co.uk/voices/comment/greek-referendum-as-greece-spirals-towards-disaster-a-new-era-of-extremist-politics-begins-10368012.html> [<http://perma.cc/B3WZ-VLFQ>] (archived Feb. 16, 2016).

102. See Richard Barley, *Election Sees Greece Climb Back in the Ring with Eurozone*, WALL ST. J., Jan. 27, 2015, at C8.

103. See Suzanne Daley, *Greeks Reject Bailout Terms in Rebuff to European Leaders*, N.Y. TIMES (July 5, 2015), <http://www.nytimes.com/2015/07/06/world/europe/greek-referendum-debt-crisis-vote.html> [<https://perma.cc/4JZQ-SXCM>] (archived Mar. 6, 2016).

104. See Stelios Bouras, *Greece Rehires Laid Off Cleaners as Syriza Reverses Austerity*, WALL ST. J. (May 11, 2015, 1:58 PM), <http://www.wsj.com/articles/greek-government-agrees-to-rehire-cleaners-1431367128> [<https://perma.cc/UL3J-3B8A>] (archived Mar. 6, 2016).

105. *Id.* (noting that SYRIZA was rehiring 3,900 government workers laid off by the previous government).

106. See Andrew Higgins & James Kanter, *Fears of Greek Debt Default Overshadow European Union Gathering*, N.Y. TIMES (Mar. 19, 2015), <http://www.nytimes.com/2015/03/20/world/europe/greece-debt-default-european-union.html> [<https://perma.cc/72TD-JXQU>] (archived Mar. 6, 2016); David Jolly & Neil Gough, *European Stocks Shrug off Faltering Talks on Greek Debt*, N.Y. TIMES, Feb. 18, 2015, at B1.

107. *Cf. Greece's Debt Crisis Explained*, N.Y. TIMES, <http://www.nytimes.com/interactive/2015/business/international/greece-debt-crisis-euro.html> (last updated Nov. 19, 2015) [<https://perma.cc/2AFE-TWMM>] (archived Feb. 16, 2016) (reporting that the "bailout program has hit snags").

percent,¹⁰⁸ and, by May, it had once again become impossible for Greece to satisfy its need for liquidity on the bond market.¹⁰⁹

Meanwhile, the Greek government continued to negotiate with representatives of the Troika and other member states.¹¹⁰ These negotiations grew increasingly tense as there was a widespread sense that a compromise had to be found by the end of June at the latest to prevent Greece from defaulting on its sovereign debt.¹¹¹

It did not help that the Greek finance minister referred to foreign creditors as “terrorists”¹¹² or that the Greek government, in turn, was accused in the press of “behaving like clowns.”¹¹³ The atmosphere became one of mutual distrust.¹¹⁴ Greece became increasingly isolated during the negotiations and at some point was even excluded from them.¹¹⁵ At the end of June 2015, following months of negotiations, the other member states as well as the Troika finally presented Greece with a comprehensive bailout proposal, whose terms they felt were very generous to Greece. The Greek government, however, declared the proposal unacceptable and declared its intention to hold a referendum within a week.¹¹⁶

By this point, the situation in Greece had become dramatic. Anticipating a Greek return to the drachma and a forced conversion of savings placed with Greek banks, Greek citizens had been withdrawing billions of euros from their bank accounts, thereby depriving Greek banks of much-needed liquidity.¹¹⁷ To avoid a

108. Christopher Whittall, *Greece's Troubles Barely Ripple Its Neighbors*, WALL ST. J. (Feb. 19, 2015, 1:57 PM), <http://www.wsj.com/articles/greeces-troubles-barely-cause-a-ripple-1424370598> [<https://perma.cc/LVM8-B8GX>] (archived Mar. 6, 2016).

109. See Christopher Whittall & Tommy Stubbington, *Trading in Greek Government Bonds Slows to a Trickle*, WALL ST. J. (May 3, 2015, 4:28 PM), <http://www.wsj.com/articles/trading-in-greek-government-bonds-slows-to-a-trickle-1430684909> [<https://perma.cc/75E6-CXW2>] (archived Mar. 6, 2016).

110. James Kanter & Niki Kitsantonis, *Greece's Tense Talks with Its Creditors Escalate to the Next Phase*, N.Y. TIMES (Mar. 9, 2015), <http://www.nytimes.com/2015/03/10/business/greece-eurozone-finance-ministers.html> [<https://perma.cc/AV2T-24MS>] (archived Mar. 6, 2016).

111. See Marcus Walker, *Greek Creditors Move to Draw Line in Sand*, WALL ST. J., June 8, 2015, at A8.

112. See Andrew Higgins & James Kanter, *Greece Given Until Sunday to Settle Debt Crisis or Face Disaster*, N.Y. TIMES (July 7, 2015), <http://www.nytimes.com/2015/07/08/business/international/greece-debt-eurozone-meeting.html> [<https://perma.cc/2CGH-52HC>] (archived Mar. 6, 2016).

113. Tisdall, *supra* note 26.

114. See Niki Kitsantonis & James Kanter, *Greece Requests a 3-Year Loan but Is Vague on Its Financial Plans*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/business/international/tsipras-greece-debt.html> [<https://perma.cc/B3W6-MNBY>] (archived Mar. 6, 2016).

115. See Irwin, *supra* note 3.

116. Daley, *supra* note 103.

117. See Josie Cox, *Greek Stocks Fall 16% as Trading Resumes After Five-Week Closure*, WALL ST. J. (Aug. 3, 2015), <http://www.wsj.com/articles/greek-stocks-fall-as>

complete collapse of its banks, which were quickly running out of cash, the Greek government ordered the banks to shut down temporarily, imposed capital controls, and limited cash withdrawals to sixty euros per person per day.¹¹⁸ The Athens Stock Market was closed entirely.¹¹⁹

Blaming austerity policies for the country's economic decline, the Greek government campaigned against the bailout proposal, and, on the day of the referendum, a clear majority of Greeks rejected the proposed bailout agreement in what was generally perceived to be an important victory for the Greek prime minister and SYRIZA.¹²⁰ Nonetheless, the Greek finance minister resigned.¹²¹ Allegedly, this occurred at the request of Prime Minister Tsipras, who had been looking for a reason to replace Varoufakis for some time and found one when Varoufakis mused aloud about the possibility of introducing the drachma as a parallel currency.¹²² Meanwhile, the Greek government returned to the negotiating table with the declared intention of reaching a more generous agreement.¹²³ That hope, however, proved illusory. In the end, the Greek government found itself forced to accept essentially the same deal that had already been on the table, with the added burden that the amount of the bailout and the resulting Greek debt was even higher, since the delay caused by the referendum had done substantial damage to the Greek banking system.¹²⁴

To this day, the situation in Greece remains challenging. National insolvency has been avoided for now, but the outlook is grim. For one thing, it is not clear that Tsipras will be able to

trading-resumes-after-five-week-exchange-closure-1438589547 [https://perma.cc/95RT-5JP6] (archived Mar. 6, 2016).

118. Higgins, *Setting a Deadline*, *supra* note 3.

119. Jonathon Hopkins, *Foreign Troubles Hurt Travel Firms*, DAILY MAIL, June 30, 2015, at 70.

120. See Daley, *supra* note 103 (describing the no vote in the referendum as a "sweeping victory [for] Prime Minister Alexis Tsipras").

121. Stelios Bouras & Nektaria Stamouli, *Greek Finance Minister Yanis Varoufakis Resigns After Referendum*, WALL ST. J. (July 6, 2015, 2:44 PM), <http://www.wsj.com/articles/greek-finance-minister-yanis-varoufakis-resigns-after-referendum-1436162284> [https://perma.cc/7JN3-X8X7] (archived Mar. 6, 2016).

122. See *id.*

123. Apparently, the Greek prime minister assumed that the no vote would increase his bargaining power. See, e.g., Daley, *supra* note 103; Anna Sauerbrey, *European Political Poker*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/2015/08/10/opinion/anna-sauerbrey-european-political-poker.html> [http://perma.cc/6LNZ-L4RR] (archived Feb. 16, 2016).

124. See Liz Alderman, *With Greek 'No' Vote, Tsipras Wins a Victory That Could Carry a Steep Price*, N.Y. TIMES (July 5, 2015), <http://www.nytimes.com/2015/07/06/world/europe/with-no-greek-vote-tsipras-wins-a-victory-that-could-carry-a-steep-price.html> [https://perma.cc/XRX7-5CHL] (archived Mar. 6, 2016) (noting that the bailout package subject to the referendum was no longer on offer, that the economy had "worsened drastically amid the political and financial chaos," and that "the imposition of capital controls at Greek banks since Mr. Tsipras's call for a referendum may have doubled or tripled the cost of any new bailout").

implement the 2015 bailout agreement. Given his own campaign against austerity measures, many members of his own party appear reluctant to support the strictures imposed by the new bailout deal,¹²⁵ and some members of SYRIZA are openly calling for a return to the drachma.¹²⁶ Even Prime Minister Tsipras' success in the referendum is proving to be a double-edged sword, as his critics now lambast him for agreeing to a deal that is even more burdensome for Greece than the terms on which he called the referendum and that the Greeks rejected by a clear majority.¹²⁷

Setting aside these political hurdles, it is not clear how the 2015 bailout will help Greece exit the deep depression in which it now finds itself.¹²⁸ The newest data suggest that the Greek economy may have grown slightly in 2015,¹²⁹ but this is attributed to "panic purchases": when the Greek government limited cash withdrawals to sixty euros per person per day, many Greek citizens used their debit cards to purchase consumer and other goods that they did not need for fear that Greece might reintroduce the drachma and that any money left in their checking accounts would be converted into the new national currency and lose much of its value.¹³⁰ Hence, Greece's economic situation remains very difficult. There is furthermore a widespread sense among economists that cutting spending in a downturn—which the Greek government will have to do if it wants to implement the bailout conditions to which it has now agreed—is likely to make matters worse.¹³¹ Moreover, it is not clear how willing Greek lawmakers are to adopt reforms that tackle some of the country's more insidious systemic problems, such as widespread corruption and tax evasion.¹³²

As Greece's economic difficulties persist, so do speculations that the country will be forced to leave the Eurozone.¹³³ This threat was

125. See Ewing & Kitsantonis, *supra* note 20.

126. See Niki Kitsantonis, *Tsipras Seeks to Avert Party Split as Greece's Creditors Arrive for Talks*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/business/international/tsipras-seeks-to-avert-party-split-as-greeces-creditors-arrive-for-talks.html> [<http://perma.cc/SZA3-ZYDY>] (archived Feb. 16, 2016).

127. See *id.*

128. See Alderman, *Tentative Greek Accord*, *supra* note 9.

129. Marcus Walker & Stelios Bouras, *Dismal Debt Outlook for Greece Raises Pressure on European Creditors*, WALL ST. J. (Aug. 13, 2015, 7:37 PM), <http://www.wsj.com/articles/dismal-debt-outlook-for-greece-raises-pressure-on-european-creditors-1439491731> [<https://perma.cc/6ZKD-E8YE>] (archived Mar. 6, 2016).

130. *Griechenlands Wirtschaft Wächst Völlig Überraschend*, DIE WELT (Aug. 13, 2015), <http://www.welt.de/wirtschaft/article145185125/Griechenlands-Wirtschaft-waechst-voellig-ueberraschend.html> [<https://perma.cc/RDK5-CFEF>] (archived Feb. 16, 2016).

131. See Irwin, *supra* note 3.

132. See Alderman, *Tentative Greek Accord*, *supra* note 9.

133. See, e.g., Stephan-Andreas Casdorff, *Die Politik Steht vor Horrenden Aufgaben*, DER TAGESSPIEGEL (Jan. 9, 2016), <http://www.tagesspiegel.de/politik/was->

perhaps greatest when the Greeks voted “No” in their July referendum.¹³⁴ Immediately before the referendum, various EU officials as well as leaders from other member states had given subtle and not-so-subtle hints that a negative vote would mean that Greece would have to leave the Eurozone,¹³⁵ prompting Janis Varoufakis, then Greece’s prime minister, to threaten legal action if an expulsion were attempted.¹³⁶ Many pundits took it as given that a no-vote might lead to Greece’s expulsion from the Eurozone.¹³⁷

While the Greek prime minister’s return to the negotiating table after the referendum may have avoided such an outcome for the time being, the option of involuntary expulsion remains on the table. Leading politicians in various member states have called on Greece to leave the Eurozone at least temporarily,¹³⁸ with the most vocal proponent of this idea being the German Finance Minister, Wolfgang Schäuble.¹³⁹ Moreover, an increasing number of governments already face substantial opposition to the 2015 bailout from their own voters.¹⁴⁰ Against this backdrop, should the 2015 bailout fail to revive the Greek economy or should Greece fail to implement the bailout agreement, then calls to force Greece out of the Eurozone are likely to become overwhelming.

III. LEAVING THE EUROZONE WITHOUT BEING EXPELLED

Before addressing the possibility of an involuntary exit from the Eurozone, it will be helpful to briefly analyze other possible

fuer-ein-jahr-die-politik-steht-vor-horrenden-aufgaben/12810994.html [https://perma.cc/5GVG-A2YV] (archived Feb. 16, 2016) (arguing that the Grexit remains possible).

134. Cf. Daley, *supra* note 103 (describing the no vote and noting the possibility that Greece might face expulsion from the Eurozone or even the European Union as a result).

135. See Evans-Pritchard, *supra* note 5 (reporting that both French President François Hollande and the head of the German social-democratic party, Sigmar Gabriel, had made it clear that a no vote in the Greek referendum would mean leaving the Eurozone).

136. *Id.*

137. See, e.g., Annie Correal & Colleen Wright, *Greeks in New York Talk and Cheer, Then Debate Future After Referendum*, N.Y. TIMES (July 5, 2015), <http://www.nytimes.com/2015/07/06/world/greeks-in-new-york-talk-and-cheer-then-debate-future-after-referendum.html> [https://perma.cc/N2WA-AF3J] (archived Mar. 6, 2016); Daley, *supra* note 103.

138. See, e.g., Ewing & Kitsantonis, *supra* note 20; Higgins & Kanter, *supra* note 112; Irwin, *supra* note 3 (noting that Slovenia was the first member state to propose a temporary Greek exit from the Eurozone).

139. See Irwin, *supra* note 3.

140. See *id.* (noting that “[i]n Slovakia, a coalition government fell because of its support for a previous Greek bailout,” and that in Finland, one of the parties in the governing coalition is opposed any concessions to Greece, and reporting that German public opinion “strongly” favored a Grexit); see also Higgins, *Setting a Deadline*, *supra* note 3 (noting that German Chancellor Angela Merkel is facing increasing resistance to further bailouts).

circumstances of exit. These include an amendment to the Treaty on the Functioning of the European Union, a unilateral withdrawal from the European Union, or, more controversially, a unilateral withdrawal from the Eurozone. This Part will address these possibilities in turn.

A. *Exit by Treaty Amendment*

One option that would allow Greece—or any other member state—to leave the Eurozone while staying in the European Union would be to amend the Treaty on the Functioning of the European Union.¹⁴¹ By universal agreement, the member states remain the “masters of the treaties” and are therefore free to amend the treaties.¹⁴² Hence, one could complement the relevant rules with an explicit right to leave the Eurozone or with an explicit expulsion right. For example, one could provide that, once a member state’s total government debt exceeds a certain level relative to the member state’s GDP, the other member states can expel that member state by unanimous resolution.

Alternatively, one could amend the Treaty on the Functioning of the European Union on a case-by-case basis and simply include special rules for individual member states such as Greece. After all, there are already two member states, the United Kingdom and Denmark, that are subject to special treatment vis-à-vis the introduction of the euro: unlike other member states, which are under an obligation to join the Eurozone once they fulfill the relevant preconditions,¹⁴³ both the United Kingdom and Denmark have reserved the right to stay outside the Eurozone,¹⁴⁴ and, so far, both countries have made full use of that right.

However, amending the Treaties is a rather challenging task. Every single member state would have to sign and ratify such an amendment.¹⁴⁵ Given that the European Union now has twenty-eight different member states,¹⁴⁶ a unanimous consensus is rather difficult to achieve. In any case, given that the current Greek government is

141. Dammann, *Right to Leave*, *supra* note 31, at 132.

142. The Treaty on European Union even contains a procedure for amending the Treaties. Consolidated Version of the Treaty on European Union art. 48, Mar. 30, 2010, 2010 O.J. (C 83/13) [hereinafter TEU].

143. Dammann, *Right to Leave*, *supra* note 31, at 138.

144. Protocol (No. 16) on Certain Provisions Relating to Denmark, 2008 O.J. (C 83) 287; Protocol (No. 15) on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland, 2008 O.J. (C 83) 284 [hereinafter Protocol (No. 15)].

145. Dammann, *Right to Leave*, *supra* note 31, at 132.

146. *E.g.*, Freya Baetens et al., *Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know*, 47 VAND. J. TRANSNAT'L L. 1203, 1212 n.34 (2014).

firmly opposed to leaving the Eurozone, a treaty amendment aimed at facilitating such an exit seems out of the question for the time being.

B. *Withdrawal from the European Union*

Another way for a member state to leave the Eurozone is to leave the European Union entirely. This option has the advantage that it is legally uncontroversial. Article 50 of the Treaty on European Union (TEU) explicitly provides that each member state has the right to withdraw from the European Union.¹⁴⁷ Such a withdrawal would automatically terminate the member state's membership in the Eurozone as well.¹⁴⁸

Of course, even if a member state were willing to withdraw from the Eurozone, it would hardly be ready to withdraw from the European Union to achieve this aim. Membership in the European Union is the key to accessing Europe's markets. Under the so-called Fundamental Freedoms, firms from one member state can sell their goods and services in other member states without having to worry about customs duties or equivalent measures, workers are free to take up employment in other states, citizens of one state are free to establish companies in another state, and capital can be moved freely from member state to member state.¹⁴⁹ If a member state were to leave the European Union, its firms and citizens would lose these rights.¹⁵⁰ Of course, some access to European markets may still be granted via bilateral agreements. However, the outcome of bilateral negotiations is difficult to predict. All this suggests that leaving the European Union would be a recipe for economic disaster.

C. *Withdrawal from the Eurozone*

The question remains whether EU law allows a member state to withdraw unilaterally from the Eurozone, while remaining in the European Union. Neither the Treaty on European Union¹⁵¹ nor the Treaty on the Functioning of the European Union¹⁵² explicitly mentions a right to withdraw from the Eurozone. However, scholars disagree about how to interpret this silence.

147. TEU, *supra* note 142, art. 50(1).

148. Dammann, *Right to Leave*, *supra* note 31, at 131; Smits, *supra* note 2, at 1139–40.

149. Dammann, *Right to Leave*, *supra* note 31, at 131–32.

150. *Id.*

151. *See* TEU, *supra* note 142.

152. *See* TFEU, *supra* note 41.

The traditional view has been that EU law does not permit such a unilateral withdrawal.¹⁵³ However, in related work, I have argued that this traditional view is mistaken.¹⁵⁴ A more persuasive interpretation of the Treaty on the Functioning of the European Union is that any member state can withdraw from the Eurozone if it no longer fulfills the preconditions for joining the Eurozone in the first place.¹⁵⁵ This interpretation draws heavily on legal policy arguments: sometimes, withdrawal from the Eurozone may be the only way to stave off economic disaster, and alternative ways of leaving the Eurozone, such as a treaty amendment or an exit from the entire European Union, are typically impractical and, in the case of a treaty amendment, subject to obvious hold-up problems.¹⁵⁶ Incidentally, this second view seems to be gaining traction in the wake of the Greek crisis.¹⁵⁷ Of course, for the time being, the practical importance of this question is limited, since the current Greek government is adamantly opposed to leaving the Eurozone.

153. See, e.g., DAVID HOWDEN, INSTITUTIONS IN CRISIS: EUROPEAN PERSPECTIVES ON THE RECESSION 128 (2010); MARÍA LORCA-SUSINO, THE EURO IN THE 21ST CENTURY: ECONOMIC CRISIS AND FINANCIAL UPROAR 205 (2010); Athanassiou, *supra* note 2; Hans Diekmann & Carsten Bernauer, *Mögliche Rechtsfolgen für Vertragliche Verhältnisse bei einer Währungsumstellung eines Mitgliedstaates der Europäischen Währungsunion* [Possible Legal Implications for Contracts in Case of a Change of Currency in a Member State of the European Monetary Union], 15 NEUE ZEITSCHRIFT GESELLSCHAFTSRECHT [NZG] 1172, 1175 (2012); Herrmann, *supra* note 2, at 417; Hannes Hofmeister, *Goodbye Euro: Legal Aspects of Withdrawal from the Eurozone*, 18 COLUM. J. EUR. L. 111, 134 (2011); Werner Meng, *Artikel 50 EUV: Austritt aus der Europäischen Union* [Article 50 TEU: Withdrawal from the European Union], in VON DER GROEBEN/SCHWARZE/HATJE, EUROPAISCHES UNIONSRECHT (Jürgen Schwarze & Armin Hatje eds., 7th ed. 2015); Dirk Meyer, *Rechtliche Möglichkeiten eines Ausscheidens aus dem Euro und die Rückübertragung der Währungssouveränität* [Legal Options for Leaving the Euro and Reacquiring Monetary Sovereignty], 48 EUROPARECHT [EUR] 334, 347 (2013); Ingolf Pernice, *Ringens um den Euro* [Wrestling with the Euro], 23 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EUZW] 601, 602 (2012); Hal Scott, *When the Euro Falls Apart—A Sequel*, 6 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 12–16, 2011); Martin Seidel, *Der Euro—Schutzschild oder Falle?* [The Euro—Protective Shield or Trap?] 26 (ZEI, Working Paper No. B01, 2010).

154. See Dammann, *Right to Leave*, *supra* note 31, at 155.

155. *Id.*

156. *Id.* at 150.

157. See, e.g., *id.* at 155 (suggesting a unilateral right to withdraw from the Eurozone); Oliver Dörr, *Art. 50 EUV: Austritt aus der Union*, in GRABITZ/HILF/NETTESHEIM: DAS RECHT DER EUROPÄISCHEN UNION ¶ 30 (Martin Nettesheim ed., 56th ed. 2015) (suggesting that a withdrawal from the Eurozone might be conceptualized as a partial withdrawal from the European Union, and thus based on Article 50 of the TEU).

IV. EXPULSION

This leaves the central question of this Article, namely whether the European Union can expel a member state from the Eurozone against its will. The legal literature generally denies such an expulsion right.¹⁵⁸ This Part argues that this view is misguided.

It is true that those potential bases for such an expulsion right, which receive the most attention in the literature,¹⁵⁹ notably the Vienna Convention on the Law of Treaties and the suspension clause in Article 7 of the Treaty on European Union, cannot serve this purpose. However, the inquiry should not stop there. Rather, the question remains whether the Treaty on the Functioning of the European Union can be read to include an unwritten right to expel misbehaving member states from the Eurozone; and this Part will show that this question has to be answered in the affirmative. The expulsion of member states should only be allowed as an *ultima ratio*, but it should not be taken off the table entirely.

A. *The Vienna Convention on the Law of Treaties*

Some scholars have raised the question of whether the Vienna Convention on the Law of Treaties¹⁶⁰ might not justify an exclusion from the Eurozone.¹⁶¹ However, the answer to that question has to be no. The most promising basis for an expulsion right under the Vienna Convention lies in the so-called *clausula rebus sic stantibus*.¹⁶² According to this principle, codified in Article 62 of the Convention, a fundamental change in the circumstances underlying a treaty may sometimes justify the suspension or termination of the treaty.¹⁶³

However, any attempt to bring the *clausula rebus sic stantibus* to bear on the question of Eurozone membership faces at least three obstacles.¹⁶⁴ First, it is difficult to argue that the *clausula rebus sic*

158. See *supra* note 2.

159. See *infra* note 167.

160. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

161. Cf. Peter Behrens, *Ist ein Ausschluss aus der Euro-Zone Ausgeschlossen? [Is an Exclusion from the Eurozone Precluded?]*, 13 EUROPAISCHE ZEITSCHRIFT WIRTSCHAFTSRECHT [ZIW] 121, 121 (2010) (asking, though ultimately leaving open, the question of whether a grave treaty violation might not justify an exclusion from the Eurozone under the rules of the Vienna Convention); Horn, *supra* note 2, at 1403 (arguing that the Vienna Convention provides a right to expel member states from the Eurozone where there has been a grave violation of EU law or a fundamental change of circumstances).

162. See, e.g., DELANO VERWEY, *THE EUROPEAN COMMUNITY, THE EUROPEAN UNION, AND THE INTERNATIONAL LAW OF TREATIES* 146 (2004).

163. Vienna Convention, *supra* note 160, art. 62.

164. The following discussion draws heavily on Dammann, *Right to Leave*, *supra* note 31, at 133–37.

stantibus is even applicable to the Treaty on the Functioning of the European Union.¹⁶⁵ Second, even if that hurdle could somehow be overcome, it is even less persuasive to claim that an economic crisis like the one in Greece qualifies as a “fundamental change” within the meaning of the Vienna Convention.¹⁶⁶ And third, it is not clear that the *clausula rebus sic stantibus* even offers a remedy that is suitable to the problem at hand.¹⁶⁷

1. Applicability

While not all member states have ratified the Vienna Convention,¹⁶⁸ the *clausula rebus sic stantibus* is part of customary international law and therefore binds even those states that have not ratified the Vienna Convention.¹⁶⁹ Moreover, as far as international treaties between the European Union and third countries (i.e., countries outside the European Union) are concerned, the Court of Justice has made it clear that the European Union’s institutions are also bound by this doctrine.¹⁷⁰

It does not necessarily follow, however, that the *clausula rebus sic stantibus* can be applied to the Treaty on the Functioning of the European Union.¹⁷¹ This treaty, together with the Treaty on European Union, forms the foundation of EU law.¹⁷² As the Court of Justice has made clear with respect to their predecessor, the Treaty Establishing the European Economic Community, these treaties are fundamentally different from ordinary international treaties in that

165. *Id.* at 134.

166. *Id.* at 133.

167. *See infra* text accompanying notes 207–09.

168. *See* Vienna Convention, *supra* note 160.

169. ATHANASSIOS VAMVOUKOS, TERMINATION OF TREATIES IN INTERNATIONAL LAW 150–51 (1985); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 780 (2009); Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 90 n.91 (2007); Dammann, *Right to Leave*, *supra* note 31, at 133; Thomas Giegerich, *Article 62: Fundamental Change of Circumstances*, in VIENNA CONVENTION ON THE LAW OF TREATIES 1067, 1099–100 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) [hereinafter Giegerich, *Article 62*]; Emily K. Penney, Comment, *Is That Legal?: The United States’ Unilateral Withdrawal from the Anti-Ballistic Missile Treaty*, 51 CATH. U.L. REV. 1287, 1300 (2002); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2539 (2005).

170. *See* Case C-162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz, 1998 E.C.R. I-3655.

171. *See* Dammann, *Right to Leave*, *supra* note 31, at 133.

172. *See, e.g.*, Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 VA. J. INT’L L. 919, 921–22 n.3 (2010).

they create their own legal system.¹⁷³ This is no mere technicality. Rather, the Court of Justice has invoked this peculiar nature in order to justify deviating from the ordinary rules of international law. One example is the so-called primacy of EU law, that is, the principle that national courts have to abstain from applying national law to the extent that it conflicts with EU law.¹⁷⁴ Another example concerns the interpretation of EU law.¹⁷⁵ Rather than applying the principles on treaty interpretation laid down in the Vienna Convention, the Court has developed its own, very distinct approach to interpreting the EU treaties.¹⁷⁶ Accordingly, it is not clear why the *clausula rebus sic stantibus* should be applicable to the Treaty on the Functioning of the European Union when other aspects of the Vienna Convention are not.¹⁷⁷

Furthermore, even if the special nature of the Treaty on the Functioning of the European Union is insufficient to bar the application of the *clausula rebus sic stantibus*, the application of that doctrine may still run afoul of individual provisions of the Treaty.¹⁷⁸ The *clausula rebus sic stantibus* is not mandatory in nature.¹⁷⁹ Rather, the parties to a treaty are at liberty to deviate from this principle.¹⁸⁰ Accordingly, if one assumes that the Treaty on the Functioning of the European Union contains an unwritten expulsion remedy, then the parties to the Treaty have already addressed the question of whether and when a member state can be expelled, albeit in an implicit fashion. But even if one were to reject the existence of such an unwritten expulsion remedy, one would still be precluded from invoking the *clausula rebus sic stantibus*. After all, it must be kept in mind that Article 50 of the Treaty on European Union explicitly allows member states to leave the European Union, thereby creating a safety valve for those member states who believe that their

173. See Case 6/64, *Costa v. Ente Nazionale Energie Elettrica [ENEL]*, 1964 E.C.R. 593 (holding that “[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system.”).

174. *Id.* at 593–94.

175. See Dammann, *Right to Leave*, *supra* note 31, at 134.

176. Cf. Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 *FORDHAM INT’L L.J.* 656 (1997) (analyzing the interpretative approach of the Court of Justice).

177. Dammann, *Right to Leave*, *supra* note 31, at 134; cf. Thomas Giegerich, *Article 60*, *supra* note 2, at 1042 (arguing that member states cannot be expelled from the European Union because European law does not constitute international law within the meaning of Article 60 of the Vienna Convention).

178. See Dammann, *Right to Leave*, *supra* note 31, at 134.

179. *E.g.*, VILLIGER, *supra* note 169.

180. Dammann, *Right to Leave*, *supra* note 31, at 134; Giegerich, *Article 62*, *supra* note 169, at 1099–103.

duties under EU law have become too burdensome. Hence, there is no room to apply the *clausula rebus sic stantibus*.¹⁸¹

2. A Fundamental Change in Circumstances?

Even assuming, for the sake of the argument, that the doctrine of *rebus sic stantibus* is applicable to the question of Eurozone membership, the question remains whether an economic crisis like the one unfolding in Greece qualifies as a fundamental change in circumstances within the meaning of this doctrine.¹⁸²

As provided in Article 62 of the Vienna Convention, the threshold that such a change must exceed is rather high: circumstances existing at the time of the Treaty's conclusion must have changed in a fundamental way.¹⁸³ These circumstances must have formed an essential basis for the parties' agreement;¹⁸⁴ and the relevant change must have transformed the extent of the parties' remaining obligations under the Treaty in a radical fashion.¹⁸⁵ Moreover, these requirements have to be interpreted narrowly, as the doctrine of *rebus sic stantibus* only applies in rare cases.¹⁸⁶

Can one make the case that an economic crisis like the one holding Greece in its grip satisfies these requirements and therefore allows other member states to invoke the *clausula rebus sic stantibus*? This seems more than dubious. At most, one might try to argue that, for the other Eurozone countries, the Greek crisis brought the necessity to finance ever new rescue packages in order to prevent a Greek insolvency and that the parties failed to foresee this development. However, such a line of reasoning would be flawed for various reasons. To begin with, application of the *clausula rebus sic stantibus* requires that change in circumstances has made the parties' existing obligations incurred under the treaty more burdensome.¹⁸⁷ However, nothing in the Treaty on the Functioning of

181. See, e.g., Christian Calliess, *EUV Art. 50*, in *EUV/AEUV* 468 (Christian Calliess & Matthias Ruffert eds., 4th ed. 2011); Juliane Kokott & Matthias Pechstein, *Art. 53 EUV*, in *EUV/AEUV* 324, 325 (Rudolf Streinz ed., 2d ed. 2012); Dammann, *Right to Leave*, *supra* note 31, at 134.

182. Dammann, *Right to Leave*, *supra* note 31, at 134–35.

183. Vienna Convention, *supra* note 160, art. 62.

184. *Id.*

185. *Id.*

186. See, e.g., Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 104 (Sept. 25); David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L. L. 552, 585 n.133 (1993); Harlan Grant Cohen, "Undead" Wartime Cases: *Stare Decisis* and the Lessons of History, 84 TUL. L. REV. 957, 1003 n.263 (2010); Dammann, *Right to Leave*, *supra* note 31, at 135; Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 66 (2004); Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 822 (1994).

187. See Dammann, *Right to Leave*, *supra* note 31, at 135.

the European Union forces member states to participate in the bailout.¹⁸⁸ In fact, the Treaty is particularly clear on this issue. It even contains an explicit anti-bailout clause in Article 125, which provides that “[a] member state shall not be liable for or assume the commitments of . . . another member state.”¹⁸⁹ While this provision does not stand in the way of voluntary bailouts,¹⁹⁰ it makes it very clear that no member state is under any obligation to participate in such bailouts.¹⁹¹

And indeed, not all member states have participated to the same extent in bailouts. For example, Finland participated in the 2012 bailout, but only after receiving collateral from Greece.¹⁹² The United Kingdom went even further and declined to participate in the first or second Greek bailout on the grounds that it was not part of the Eurozone,¹⁹³ though the United Kingdom still ended up having to support Greece indirectly, since the United Kingdom is a member of the IMF.¹⁹⁴

Any attempt to cast an economic crisis as a fundamental change in circumstances also faces a second obstacle. By general consensus, those changes that the parties anticipated do not justify the application of the doctrine of *rebus sic stantibus*.¹⁹⁵ According to some scholars, the application of that doctrine is barred even in those cases, where the parties *ought to have* anticipated the relevant change.¹⁹⁶ This hurdle proves crucial because it seems farfetched to argue that the member states did not foresee—let alone that they could not have foreseen—the occurrence of a profound economic crisis. After all, why would the member states have included a provision ordering that member states do not have to bail out other member states if they had not correctly foreseen the possibility that some

188. *Id.*

189. TFEU, *supra* note 41, art. 125.

190. Behrens, *supra* note 161, at 121; Franz C. Mayer & Christian Heidfeld, *Verfassungs—und Europarechtliche Aspekte der Einführung von Eurobonds [The Introduction of Eurobonds: Constitutional and EU Law Considerations]*, 65 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 422, 424 (2012).

191. Dammann, *Right to Leave*, *supra* note 31, at 135.

192. Derek Scally & Suzanne Lynch, *Greek Drama 'A Parody, a Comedy and a Tragedy'*, IRISH TIMES (July 8, 2015), <http://www.irishtimes.com/news/world/europe/analysis-greek-drama-a-parody-a-comedy-and-a-tragedy-1.2276891> [https://perma.cc/QBC8-P5TS] (archived Mar. 6, 2016).

193. Adam Taylor, *U.K. Refuses to Take Part in the Next Greek Bailout*, BUSINESS INSIDER (June 20, 2011, 8:09 AM), <http://www.businessinsider.com/greece-uk-bail-out-2011-6> [https://perma.cc/966K-HF8S] (archived Feb. 17, 2016).

194. *Id.*

195. *See, e.g.*, VAMVOUKOS, *supra* note 169, at 189; VILLIGER, *supra* note 169, at 773, ¶ 15; Giegerich, *Article 62*, *supra* note 169, at 58.

196. Other authors insist that mere foreseeability does not prevent application of the doctrine. *See, e.g.*, VAMVOUKOS, *supra* note 169, at 189; Giegerich, *Article 62*, *supra* note 169, at 1087, ¶ 58.

member states would need to be bailed out? Furthermore, all or almost all developed economies at some point experience profound economic crises, and at the time that Greece was admitted to the Eurozone, it was hardly known as an economic powerhouse. Accordingly, an economic crisis like the one in Greece hardly constitutes a unforeseen fundamental change in circumstances as required by the *clausula rebus sic stantibus*.¹⁹⁷

3. Consequences of a Fundamental Change in Circumstances

Finally, it is not even clear that the *clausula rebus sic stantibus* offers an appropriate remedy. The parties invoking a fundamental change in circumstances may be able to terminate, withdraw from, or suspend the operation of the relevant treaty,¹⁹⁸ but it is widely thought that they cannot unilaterally change that treaty against the opposition of the other party or parties.¹⁹⁹ Therefore, it is unclear how the *clausula rebus sic stantibus* should justify a member state's expulsion from the Eurozone. After all, the provisions governing the admission of new member states into the Eurozone form part of the Treaty on the Functioning of the European Union,²⁰⁰ and no one wishes to terminate, withdraw from, or suspend the operation of that particular Treaty.

In sum, the *clausula rebus sic stantibus* simply does not offer a plausible option for expelling Greece from the Eurozone.

B. Suspension Clause

Another conceivable basis for an expulsion right with greater *prima facie* plausibility is the so-called suspension clause in Article 7 of the EU Treaty. Under said provision, the Council—which consists of the representatives of the member states—may suspend certain rights of a member state under the Treaties if that member state has committed a persistent and serious breach of the values listed in Article 2.²⁰¹ Because Article 7 allows only the temporary suspension, rather than the permanent elimination, of a member state's rights,²⁰² this provision could at most serve as a basis for a temporary exclusion from the Eurozone. However, for practical purposes, that would be sufficient; even in the case of Greece, those voices calling for an exit from the Eurozone typically demand a temporary rather than a

197. See Dammann, *Right to Leave*, *supra* note 31, at 135–36.

198. VILLIGER, *supra* note 169, at 778; Giegerich, *Article 62*, *supra* note 169, at 1100, ¶ 99.

199. See Giegerich, *Article 62*, *supra* note 169, at 1099–100.

200. TFEU, *supra* note 41, art. 140.

201. TEU, *supra* note 142, art. 7.

202. *Id.* art. 7(3).

permanent exit.²⁰³ Moreover, Article 7 does not impose any specific time limit on the suspension of rights.

Of course, the crucial question is whether Article 7 can be brought to bear on the problem at hand. Any attempt to do so faces two obstacles. First, the application of the suspension clause requires that a member state has violated one of the European Union's fundamental values²⁰⁴—a requirement that is rather difficult to meet. Second, it is unpersuasive to argue that a state's membership in the Eurozone constitutes a right within the meaning of Article 7.

1. A Violation of Fundamental Values

The application of the suspension clause requires a persistent and serious breach of the values listed in Article 2 of the Treaty on European Union.²⁰⁵ These values include respect for human dignity, freedom, democracy, equality, the rule of law, and human rights, including the rights of persons belonging to minority groups.²⁰⁶

Obviously, most of these values are in no way touched by the fact that a member state undergoes a severe economic crisis. However, the idea that a member state that constantly and persistently flouts the rules governing the Eurozone shows insufficient respect for the rule of law is not a priori implausible. Of course, various factors suggest that the rule-of-law criterion in Article 7 has to be interpreted rather narrowly. The parties' decision to demand a breach of fundamental values in order for membership to be suspended would be completely circumvented if any persistent and grave violation of EU law were sufficient to justify a suspension of rights.²⁰⁷

Furthermore, the need for a very high threshold is underscored by the fact that the suspension clause is quite narrowly drawn with high procedural safeguards. First of all, the Council, which is composed of representatives of the member states at the ministerial level,²⁰⁸ has to determine with a four-fifths majority that there is a clear risk of a serious breach of the values listed in Article 2.²⁰⁹ Subsequently, the Council has to verify at regular intervals if the relevant breach persists.²¹⁰ If it does persist, the European Council—

203. See *supra* note 138.

204. TEU, *supra* note 142, art. 7(2).

205. *Id.* art. 7.

206. *Id.* art. 2.

207. Cf. Frank Schorkopf, *Art. 7 EUV: Verletzung Fundamentalener Grundsätze Durch Einen Mitgliedstaat*, in GRABITZ/HILF/NETTESHEIM: DAS RECHT DER EUROPÄISCHEN UNION ¶ 30 (Martin Nettesheim ed., 56th ed. 2015) (arguing that a breach can only be deemed serious within the meaning of Article 7 of the TEU if it is so grave as to call European integration in question).

208. TEU, *supra* note 142, art. 16(2).

209. *Id.* art. 7(1).

210. *Id.*

which is composed of the heads of state or government²¹¹—may determine the existence of a persistent and serious breach, but only after obtaining the consent of the European Parliament.²¹² Only if all these steps have been undertaken may the Council decide to suspend certain of the rights of the member state in question.²¹³ In making that decision, the Council has to take into account any adverse consequences that such a suspension might have for natural and legal persons.²¹⁴ In sum, the suspension procedure is extremely restrictive. If nothing else, this suggests that it represents a means of last resort, to be used very sparingly. Ordinary violations of EU law, even if they are grave and persistent, cannot therefore suffice to suspend a member state's rights.

Against this backdrop, it is very difficult to argue that the mere failure of a member state to adhere to the limits on budget deficits and government debt set by the Treaty on the Functioning of the European Union and the Stability and Growth Pact suffice to invoke Article 7 of the Treaty European Union. Even before the euro crisis, member states repeatedly and consciously violated the Stability and Growth Pact without being held accountable at all.²¹⁵ This has been true even for large member states such as France and Germany.²¹⁶ Surely, if these violations were not considered worthy of any sanctions, then the more extensive, but also more understandable, violations of the relevant provisions by a member state in the midst of a profound economic crisis cannot justify the suspension of that member state's rights either, given that the suspension clause is clearly intended as a last resort.

Of course, none of this implies that a member state's violation of the rules pertaining to the monetary union can never rise to the level of a persistent and serious violation of the rule of law. In fact, one can easily imagine scenarios where a member state's conduct represents a vital threat to the functioning of the Eurozone. For example, a member state might openly declare that it would permanently disregard any rules pertaining to the Eurozone, as well as any fines

211. *Id.* art. 15(2).

212. *Id.* art. 7(2).

213. *Id.* art. 7(3).

214. *Id.*

215. Michael J. Boskin, *Five Lessons for Deficit Busters*, WALL ST. J. (June 20, 2011), <http://www.wsj.com/articles/SB10001424052702303823104576391331356123692> [<https://perma.cc/F7NX-ZWMC>] (archived Mar. 6, 2016) (noting that, even before the recession, the Stability and Growth Pact was routinely violated).

216. Jonathan Blitzer, *Spain as Our Punching Bag*, N.Y. TIMES, Nov. 4, 2012, at SR3 (noting that Germany repeatedly violated the Stability and Growth Pact between 2001 and 2007); Martin Feldstein, *Europe Needs the Bond Vigilantes*, WALL ST. J. (Apr. 4, 2012), <http://www.nber.org/feldstein/wsj04042012.html> [<https://perma.cc/FU2X-6P9J>] (archived Mar. 6, 2016) (noting that both France and Germany violated the Stability and Growth Pact).

levied against it and any judgments by the Court of Justice. Depending on the circumstances, such open defiance, if left unpunished, might well threaten the survival of the Eurozone. The Article will return to this problem in more detail below.²¹⁷ However, it is worth noting that neither Greece nor any other member state has yet come close to this type of misconduct.

2. Expulsion as a Suspension of Rights?

Even if a state's conduct represented a persistent and serious breach of the rule of law, the question remains whether the temporary expulsion from the Eurozone constitutes a suspension of rights within the meaning of Article 7 of the TEU, or, to use the wording of the Treaty, whether it can be viewed as a suspension of "certain of the rights deriving from the application of the Treaties to the member state in question."²¹⁸

The problem, in this context, is that the Treaty clearly distinguishes between a member state's rights on the one hand and its duties on the other. As an example of a right that can be suspended, it lists "the voting rights of the representative of the government of that Member State in the Council."²¹⁹ At the same time, the Treaty specifies that "[t]he obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State."²²⁰ In other words, Article 7 can only be used to suspend rights and cannot form a basis for suspending duties. This matters in the context at hand because participation in the Eurozone is not just a right but also a duty: in the absence of an exemption, like the one negotiated by the United Kingdom,²²¹ the question of whether to join the Eurozone is not left to the member states' discretion. Rather, they are obligated to do so once they satisfy the relevant preconditions.²²² It follows that an expulsion from the Eurozone—even if it is only temporary—cannot be based on Article 7 of the TEU.

C. *The Case for an Unwritten Expulsion Remedy*

The question remains whether there exists an unwritten right to expel individual member states from the Eurozone. In the legal literature, the general answer to this question has been "no."²²³

217. See *infra* Part IV(2)(b).

218. TEU, *supra* note 142, art. 7(3).

219. *Id.*

220. *Id.*

221. See Protocol (No. 15), *supra* note 144.

222. Dammann, *Right to Leave*, *supra* note 31, at 138.

223. See *supra* note 2.

Typically, scholars simply point to the fact that the Treaty on the Functioning of the European Union does not mention any right to expel misbehaving member states.²²⁴

However, invoking the silence of the Treaty is unpersuasive. Unwritten legal principles are quite common in EU law. Indeed, the Court of Justice developed some of the most important legal doctrines with little or no textual basis in the Treaty. For example, the mandatory requirements doctrine, which allows member states to limit the fundamental freedoms for the sake of overriding requirements in the public interest,²²⁵ falls into this category,²²⁶ and so do the rules on the liability of member states for violating EU law.²²⁷ Indeed, even the primacy of EU law—the principle that national courts cannot apply national law that is incompatible with EU law²²⁸—had no basis in the text of the Treaty. This tendency of the Court of Justice to develop unwritten legal doctrines when necessary reflects the fact that purposive considerations play a crucial role in interpreting EU law.²²⁹ In particular, the Court of Justice has made it clear that it is ready to go beyond the wording of

224. *E.g.*, Häde, *Artikel 140*, *supra* note 2; Häde, *Europäischer Solidarität*, *supra* note 2, at 865; Herrmann, *supra* note 2, at 417.

225. *See, e.g.*, Case C-196/89, *Nespoli & Crippa*, 1990 E.C.R. I-3647, ¶ 14; Case 6/81, *BV Industrie Diensten Groep v. J.A. Beele Handelmaatschappij BV*, 1982 E.C.R. 707, ¶ 7; Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, ¶ 6; Jens C. Dammann, Note, *The Future of Codetermination After Centros: Will German Corporate Law Move Closer to the U.S. Model?*, 8 *FORDHAM J. CORP. & FIN. L.* 607, 647 (2003).

226. *E.g.*, Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law*, 14 *CHI. J. INT'L L.* 93, 98 (2013) (noting that the mandatory requirements doctrine allows member states to limit the free movement of goods based on “grounds of justification . . . that do not have a basis in the treaty text”).

227. *Cf.* ALINA KACZOROWSKA, *EUROPEAN UNION LAW* 311–36 (3d ed. 2013) (summarizing the relevant case law).

228. *See infra* text accompanying notes 313–19.

229. *See, e.g.*, Case C-173/06, *Agrover Srl v. Agenzia Dogane Circonscrizione Doganale di Genova*, 2007 E.C.R. I-8783 ¶¶ 21–22 (giving “the purpose and general scheme” of a provision more weight than its wording); Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order*, 37 *HARV. INT'L L.J.* 307, 334 (1996) (noting that the Court of Justice employs a “teleological or instrumental approach” when interpreting rights and freedoms granted by the Treaty); Dammann, *Right to Leave*, *supra* note 31, at 137 (noting the “paramount importance” of teleological considerations in interpreting EU law); Fennelly, *supra* note 176, at 664 (pointing out that a teleological approach to legal interpretation is “the characteristic element in the Court's interpretive method”); Constantinos N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 *PACE INT'L L. REV.* 267, 273 (1994) (noting that the Court “constantly uses teleological interpretation”); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 *COLUM. L. REV.* 628, 701 (1999) (noting that “the teleological method . . . has . . . dominated the reasoning of the European Court of Justice since the early 1960s.”).

the Treaty to secure the “full effectiveness” or “*effet utile*” of EU law.²³⁰

Thus, the question of whether there exists an unwritten right to expel member states from the Eurozone really boils down to two other questions. First, are there persuasive doctrinal or other reasons not to recognize such a right? And second, if there are not, are there important policy reasons to recognize a right to expel member states from the Eurozone?

1. Doctrinal Concerns

Given the literature’s unanimous rejection of an unwritten expulsion right, one would expect there to be compelling doctrinal arguments against the existence of such a right. However, while the number of arguments adduced against an expulsion right is substantial, none of them are particularly convincing.

a. Complexity

To begin with, opponents of an expulsion right point to the legal complexities that an expulsion from the Eurozone would entail.²³¹ However, it must be kept in mind that the Treaty on European Union even provides for a withdrawal from the European Union itself,²³² which would have much more far-reaching consequences and lead to much greater legal complexities than a mere exit from the Eurozone. Accordingly, it is not clear why the legal complexities caused by a member state’s expulsion from the Eurozone should be insurmountable. Moreover, an obvious answer to concerns about legal complexities and other undesirable consequences of expulsion is for the Court of Justice to introduce a balancing test. The use of such a test would allow an expulsion only if the damage done to the Eurozone by letting a country remain a member clearly outweighed

230. Thus, the Court of Justice has invoked the need to secure the practical effectiveness of EU law in order to justify the development of a number of important doctrines with little or no basis in the text of the foundational treaties. *See, e.g.*, Case C-109/09, *Deutsche Lufthansa AG v. Kumpan*, 2011 E.C.R. I-01309, ¶ 53 (holding that national courts are required to interpret national law in accordance with EU law, and justifying this principle by invoking the need “to ensure the full effectiveness of EU law”); *Joined Cases C-6 & C-9/90, Francovich & Bonifaci v. Italian Republic*, 1991 E.C.R. I-5357, ¶ 33 (justifying the doctrine of state liability for violations of EU law by the need to ensure the “full effectiveness of Community rules”); Case 148/78, *Pubblico Ministero v. Ratti*, 1979 E.C.R. 1629, ¶ 21 (holding, despite the clear wording of the Treaty to the contrary, that directives sometimes have direct vertical effect, and justifying this holding by stressing the need to preserve the “effectiveness” of directives).

231. Athanassiou, *supra* note 2, at 33 (arguing that “forcing a Member State out of the EU or EMU would inevitably give rise to tremendous legal complexities”).

232. TEU, *supra* note 142, art. 50.

concerns about the negative consequences of an expulsion. In any case, the legal complexities resulting from an expulsion are hardly likely to be overwhelming. Historically, partial or complete dissolutions of currency unions have been a fairly common phenomenon.²³³ And, ever since the beginning of the Greek crisis, much thinking has gone into the question of how to organize the exit of a member state in an optimal fashion.²³⁴ Indeed, the President of the European Commission, Claude Juncker, himself noted that the Commission had developed “detailed plans” to cope with a Greek exit from the Eurozone.²³⁵ In sum, there is no reason to consider the legal complexities inherent in an expulsion from the Eurozone to be unmanageable.

b. The Irrevocable Fixing of Exchange Rates

Those scholars who reject an expulsion remedy also invoke the wording of Article 140 of the Treaty on the Functioning of the European Union.²³⁶ This provision governs the procedure for admitting member states into the Eurozone. According to 140(3) of the TFEU, when a member state joins the Eurozone, the Council shall “irrevocably fix the rate at which the euro shall be substituted for the currency of the member state concerned”²³⁷ An almost identical choice of words can be found in two of the protocols annexed to the Treaty.²³⁸

Some scholars argue that the term “irrevocably” implies that a member state cannot ever leave the Eurozone.²³⁹ However, this

233. Cf. Volker Nitsch, *Have a Break, Have a . . . National Currency: When Do Monetary Unions Fall Apart?* 24–26 (CESifo, Working Paper No. 1113, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=496002 [<https://perma.cc/57JL-RGU5>] (archived Mar. 6, 2016) (listing 245 country pairs with a shared currency between 1948 through 1997, of which 128 currency pairs have been dissolved).

234. Cf. ROGER BOOTLE ET AL., *LEAVING THE EURO: A PRACTICAL GUIDE* (2011) (detailing how the consequences of an exit from the Eurozone could be handled).

235. Matthew Campbell & Bojan Pancevski, *When No Means Yes*, SUNDAY TIMES (July 11, 2015), http://www.thesundaytimes.co.uk/sto/news/focus/article1580333.ece?CMP=OTH-gnws-standard-2015_07_11 [<https://perma.cc/K5WA-XN8S>] (archived Mar. 6, 2016); Griff Witte & Michael Birnbaum, *Europe Gives Greece 5 Days to Avoid Bankruptcy*, WASH. POST (July 7, 2015), https://www.washingtonpost.com/world/with-greeces-fate-on-the-line-european-leaders-to-gather-for-critical-summit/2015/07/07/ca99ab8a-242d-11e5-b621-b55e495e9b78_story.html [<http://perma.cc/PQ5R-VVU6>] (archived Mar. 6, 2016).

236. See, e.g., Athanassiou, *supra* note 2, at 13–14.

237. TFEU, *supra* note 41, art. 140(3).

238. Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, 2010 O.J. (C 83) 230, art. 46(3), (“The General Council shall contribute to the necessary preparations for irrevocably fixing the exchange rates.”); *id.* art. 49 (“Following the irrevocable fixing of exchange rates . . .”).

239. See, e.g., Athanassiou, *supra* note 2, at 13–14; Hofmeister, *supra* note 153, at 121.

reasoning is not difficult to refute.²⁴⁰ Even a literal reading of the text suggests two possible interpretations of the term “irrevocably.”²⁴¹ First, one can read it to imply that exchange rates are to be fixed for all eternity, meaning that no state can ever leave, or be expelled from, the Eurozone.²⁴² Second, though, it can be read to imply that *while a state is a member of the Eurozone*, the exchange rate applied in introducing the euro cannot be modified.²⁴³ On that reading, the relevant passage contains no statement about whether or not a member state can leave, or be expelled from, the Eurozone.

Crucially, there are two compelling reasons to think that this second interpretation is the correct one.²⁴⁴ To begin, the claim that no state can ever leave the Eurozone is obviously false, since a withdrawal from the European Union under Article 50 of the TEU also entails an exit from the Eurozone.²⁴⁵ And second, Article 140(3) of the TFEU and the relevant provisions in Protocol 4 must be understood in light of the history of the monetary union.²⁴⁶ As previously described, the Eurozone was preceded by the so-called Exchange Rate Mechanism, which generally fixed exchange rates but allowed them to fluctuate within certain margins.²⁴⁷ One of the limitations of the Mechanism was that the prescribed exchange rates had to be modified (“realigned”) periodically.²⁴⁸ Article 140(3) and the pertinent parts of Protocol 5 simply make clear that the currency exchange rates underlying the introduction of the euro shall not be subject to any such realignment. This becomes evident if one considers the wording of the relevant passages. If the Treaties had intended to characterize the introduction of the euro as irrevocable, then they could have said so very easily. Focusing instead on the exchange rates only makes sense if the exchange rates underlying the introduction of the euro are what the Treaty is really concerned with.

c. The Irreversible Move to the Third State of the Monetary Union

Opponents of an expulsion right also invoke the so-called Protocol on the Transition to the Third Stage of the Economic and Monetary Union.²⁴⁹ That protocol emphasizes the “irreversible

240. This section draws heavily on Dammann, *Right to Leave*, *supra* note 31, at 140–41.

241. *Id.* at 140.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *See supra* text accompanying notes 31–32.

248. *See supra* text accompanying notes 31–32.

249. Protocol on the Transition to the Third Stage of the Economic and Monetary Union, 1992 O.J. 191/87 (C) [hereinafter Transition Protocol].

character of the Community's movement to the third stage of Economic and Monetary Union."²⁵⁰

As in the interpretations of Article 140 (3) of the TFEU mentioned above, some scholars have argued that the term "irreversible" here implies that a country's membership in the Eurozone cannot be terminated.²⁵¹ And this line of reasoning is again easily refuted.²⁵² One naturally wants once more to advert to the fact that Article 50 of the TEU explicitly allows member states to withdraw from the European Union and thereby from the Eurozone.²⁵³ Even more importantly, the quoted passage does not even deal with the question of whether a member state has to remain part of the Eurozone. Even a literal reading suggests that only the creation of the Eurozone is declared to be irreversible; the question of which member states will be part of that Eurozone is not even touched upon.²⁵⁴ Indeed, this interpretation is confirmed if one considers the next sentence of the Protocol,²⁵⁵ which reads:

Therefore all member states shall, whether they fulfill the necessary conditions for the adoption of a single currency or not, respect the will for the Community to enter swiftly into the third stage, and therefore no member state shall prevent the entering into the third stage.²⁵⁶

This passage is a frank declaration that the Eurozone shall come about, regardless of whether or not all states are able to join it. The intention behind this declaration is clear: the creation of the Eurozone shall not be held up by laggards.²⁵⁷ Politically, this point is of tremendous importance because it embraces, on a small scale, the creation of a two-speed Europe in which some member states are further along than others.²⁵⁸ Hence, this passage has nothing to do with the question of whether member states can leave the Eurozone. If anything, the relevant protocol supports the idea of an expulsion right because it reinforces the idea that the existence of the Eurozone cannot be abandoned simply because of the inability or unwillingness of individual countries to satisfy the convergence criteria.

250. *Id.*

251. *See, e.g.,* Hofmeister, *supra* note 153, at 121.

252. This section draws heavily on Dammann, *Right to Leave*, *supra* note 31, at 140–42.

253. *Id.* at 141–42.

254. *Id.*

255. *Id.*

256. Transition Protocol, *supra* note 249.

257. Dammann, *Right to Leave*, *supra* note 31, at 142–43.

258. *Id.* at 143.

d. Penalizing Citizens

It has also been suggested that the expulsion of a member state would penalize ordinary citizens.²⁵⁹ However, that argument is unpersuasive. Ignoring the burden inflicted on ordinary citizens may indeed seem problematic, but the expulsion remedy can easily be designed in such a way as to attach proper weight to the interests of ordinary citizens. In particular, nothing prevents the Court of Justice from making the unwritten right of expulsion contingent on a balancing test under which the benefits of an expulsion must clearly outweigh the harm it does, thereby allowing the Court to take into account the burden that an expulsion imposes on ordinary citizens.

In fact, this solution would be similar to the approach taken by the Treaty on European Union law itself, in the context of the suspension clause.²⁶⁰ It is not difficult to see that any suspension of a member state's rights under Article 7 may ultimately harm that state's citizens. For example, the Treaty on European Union explicitly contemplates the suspension of a member state's voting rights in the Council.²⁶¹ Obviously, the state's citizens ultimately suffer the consequences of such a suspension of voting rights because they lose their (indirect) voice in the Council. Yet the Treaty only requires that such adverse consequences be taken into account when deciding whether or not to suspend a member state's rights.²⁶²

There are furthermore other areas of EU law where a member state's misconduct leaves its citizens to bear the consequences. For example, if a member state enacts legislation violating the fundamental freedoms, that legislation cannot be applied to cases governed by the fundamental freedoms, but can still be applied in those cases where the fundamental freedoms do not apply, namely in so-called purely internal situations that lack a cross-border dimension.²⁶³ In practice, this has given rise to what scholars call "reverse discrimination" in European law:²⁶⁴ burdensome rules

259. See, e.g., Athanassiou, *supra* note 2, at 33.

260. TEU, *supra* note 142, art. 7.

261. *Id.* art. 7(3) (listing the suspension of voting rights in the Council as one example).

262. *Id.* art. 7(3) (noting that, in deciding whether or not to suspend a member state's rights, "the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.").

263. See Joined Cases C-64 & C-65/96, *Uecker & Jacquet v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-3171, ¶ 16; Case C-206/91, *Poirrez v Caisse d'Allocations Familiales [CAF]*, 1992 E.C.R. I-6685, ¶ 11; Piet Eeckhout, *The Growing Influence of European Union Law*, 33 *FORDHAM INT'L L.J.* 1490, 1495–96 (2010); Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, 33 *FORDHAM INT'L L.J.* 1338, 1349 (2010); Ruth Mason, *Flunking the ECJ's Tax Discrimination Test*, 46 *COLUM. J. TRANSNAT'L L.* 72, 129 (2007).

264. See, e.g., Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, 15 *COLUM. J.*

adopted by a member state may end up applying to a state's own citizens but not to the citizens of other states, because the latter are protected by the fundamental freedoms whereas the former are not. Hence, a member state's infringement of EU law ends up penalizing its own citizens by putting them at a competitive disadvantage vis-à-vis foreign citizens. Incidentally, it is not particularly surprising that EU law should impose a burden on the citizens of a state that violates EU law. After all, such burdens provide voters with a powerful incentive not to elect governments who will violate EU law in the first place. And for the same reason, the fact that a member state's expulsion from the Eurozone threatens to impose a burden on that state's citizens is not entirely undesirable. If nothing else, it may deter that state's voters from electing politicians who will get their member state expelled from the Eurozone.

In sum, the fact that a member state's expulsion from the Eurozone would end up imposing a burden on that member state's citizens is hardly a strong argument against an expulsion right.

e. The Existence of an Exhaustive Regime of Sanctions

Scholars have also argued that there can be no room for the expulsion of member states from the Eurozone since the Treaty's regime of sanctions is already exhaustive.²⁶⁵ Now, it is certainly correct that the Treaty on European Union and the Treaty on the Functioning of the European Union contain provisions that allow for sanctions against a member state that does not comply with the rules governing the Eurozone. To begin, if the violation rises to the level of a persistent and grave breach of the fundamental values listed in Article 2 of the TEU, the member state risks a suspension of its rights under Article 7 of the TEU.²⁶⁶ Furthermore, any member state breaching EU law may face an infringement proceeding under Articles 258, 259 of the TFEU.²⁶⁷ However, the mere existence of these sanctions does not imply that they are meant to be exhaustive; in fact, there are compelling reasons to believe that they are not.

To begin with, it is noteworthy that the Court of Justice developed the doctrine of state liability for breaches of EU law by pointing out that existing remedies are insufficient to protect individual rights.²⁶⁸ This line of reasoning—and indeed the very

EUR. L. 169, 212 (2009); Lenaerts, *supra* note 263, at 1341. *See generally* Miguel Poiars Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in *THE FUTURE OF REMEDIES IN EUROPE* 117–40 (Kilpatrick et al. eds., 2000).

265. *See, e.g.*, Athanassiou, *supra* note 2, at 33.

266. TEU, *supra* note 142, art. 7(3).

267. TFEU, *supra* note 41, arts. 258, 259.

268. *See* Francovich & Bonifaci v. Italian Republic, 1991 E.C.R. I-5357, ¶ 33 (pointing out that “[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were

creation of the doctrine of state liability—is incompatible with the assertion that states breaching EU law do not have to fear any adverse consequences besides those explicitly listed in the Treaties.

Most importantly, though, it is easy to see that the sanctions provided in the Treaties are simply not always sufficient to provide for the enforcement of EU law. Infringement proceedings and fines are useless if a country is already bent on ignoring any fines and any judgment by the Court of Justice: the European Commission, unlike the government of the United States,²⁶⁹ does not have the option to send in federal troops. And Article 7 of the TEU is so narrowly drawn that its efficacy as a deterrent is dubious at best. For example, Article 7 allows the suspension of voting rights,²⁷⁰ but that may not impress a country that has already lost its political influence in the Council. Accordingly, there is no reason to believe that the sanctions explicitly listed in the Treaties are meant to be exhaustive.

f. The Rules on Treaty Amendments

Finally, scholars have argued that the expulsion of a member state from the Eurozone would amount to an amendment of the Treaty on the Functioning of the European Union, and any amendment to the Treaty requires the consent of all member states, including the one to be expelled.²⁷¹ However, it remains unclear why the expulsion of a member state should be viewed as a treaty amendment in the first place. Of course, such an expulsion impacts the rights and duties of a member state under the Treaty on the Functioning of the European Union, but so does the withdrawal of a member state from the European Union, and the Treaty does not categorize such withdrawal as a treaty amendment either.

In sum, of the numerous doctrinal arguments that have been or could be advanced against an unwritten expulsion right, none is particularly convincing. Some of these arguments, such as one based on the Treaty's clear commitment to the irreversible creation of a Eurozone or on an analysis of other potential sanctions, can even be adduced as arguments in favor of an expulsion right rather than against it. It follows that doctrinal arguments do not provide a clear answer to the question of whether there exists a right to expel members from the Eurozone. As a result, the focus must be on legal

unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.”).

269. For example, in 1957, President Eisenhower famously sent federal troops to Little Rock to enforce a federal desegregation court order. Mary L. Dudziak, *Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1646 (1997); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 28 (1994).

270. TEU, *supra* note 142, art. 7(3).

271. See, e.g., Athanassiou, *supra* note 2, at 33.

policy considerations. In other words, the question is whether there are compelling policy reasons to assume an unwritten expulsion remedy. That is the question that this Article will turn to next.

2. Expulsion as a Matter of Legal Policy

While at least some legal scholars have addressed, however briefly, the question of whether, as a matter of black letter law, there exists a right to expel misbehaving member states from the Eurozone, the legal literature is strangely silent on whether such an expulsion remedy is desirable *as a matter of legal policy*.²⁷² The economic literature also fails to address the desirability of an expulsion remedy, though for a different reason. Unlike legal scholars, economists have not been shy to express views about the policy question of whether or not Greece ought to leave the Eurozone.²⁷³ However, they studiously avoid the second-order question of who should be in charge of making that decision, Greece or the remaining Eurozone countries.²⁷⁴

Of course, that has not stopped politicians from adopting definite positions on this question. As early as 2012, Angela Merkel voiced her opinion that member states who do not play by the Eurozone's rules ought to be subject to expulsion.²⁷⁵ Others, including the President of the European Commission, were quick to contradict her.²⁷⁶

In fact, there is a distinction to be drawn here. There are compelling reasons not to allow for the expulsion of a member state simply because that member state finds itself caught in an economic crisis and temporarily breaks the legal rules governing the Eurozone in response. However, one can also imagine much more drastic scenarios in which an expulsion from the Eurozone is in fact justified. Those may include the case where a member state has decided, without good cause, to permanently ignore the rules of the Eurozone and to disregard any judgments by the Court of Justice seeking to uphold EU law. Therefore, the remedy of expulsion should not be precluded in all cases.

a. The Standard Case

It is helpful to begin with the scenario in which a member state such as Greece finds itself in a deep economic crisis and therefore opts to disregard the economic strictures of the Eurozone. In this

272. *See supra* note 2.

273. *See supra* note 2.

274. *See supra* note 2.

275. McGroarty & Karnitschnig, *supra* note 4.

276. Barroso, *supra* note 1.

case, an expulsion remedy is neither necessary nor even suitable to protect any legitimate interests.

i. Protecting the Interests of the Expelled Member State

What interests might be at stake in such a scenario? One might first try to justify an expulsion on the ground that an exit from the Eurozone is in the best interest of the country to be expelled, even if the government of that country fails to understand that. In other words, one might try to justify an expulsion on paternalistic grounds, an approach that enjoys some popularity among European pundits.²⁷⁷ However, the weaknesses of this type of reasoning ought to be obvious. One can disagree about whether an exit from the Eurozone is in a country's best interest;²⁷⁸ but it is difficult to argue that other member states are in a better position to answer that question than the citizens of the member state whose participation in the Eurozone is at stake. The best interest of a country ultimately depends on that country's preferences and, on that score, that country's own government is best placed to decide.

The case of Greece perfectly illustrates this point. While its government has frequently been accused of disorganization and inexperience,²⁷⁹ there is little question that its preferences on both Eurozone membership and austerity policies are in line with the

277. See, e.g., Dorothea Siems, *Griechenland zu Tode Retten* [*Saving Greece to Death*], DIE WELT (Aug. 19, 2015), http://www.welt.de/print/welt_kompakt/debatte/article145363070/Griechenland-zu-Tode-retten.html [https://perma.cc/29VW-WF82] (archived Mar. 6, 2016) (criticizing the 2015 bailout and arguing, inter alia, that a Greek exit from the Eurozone combined with a sovereign default would benefit Greece); Joachim Jahn, *Kritiker Warnen vor Viertem und Fünftem Rettungspaket* [*Critics Warn against a Fourth and a Fifth Rescue Package*], FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Aug. 19, 2015 (reporting that German opponents of the 2015 bailout defended their position by claiming that a Greek exit from the Eurozone was not only in the best interest of the Eurozone, but also in Greece's best interest).

278. See *supra* note 11.

279. See, e.g., Roger Cohen, *Soften the Greek Deal*, N.Y. TIMES (July 7, 2015), <http://www.nytimes.com/2015/07/07/opinion/roger-cohen-soften-the-greek-deal.html> [https://perma.cc/X2F3-XN93] (archived Feb. 17, 2016); Suzanne Daley & Anemona Hartocollis, *In Athens, Greeks Wonder Whether Tsipras Folded or Restored Greek Dignity*, N.Y. TIMES (July 10, 2015), http://www.nytimes.com/2015/07/11/world/europe/in-athens-greeks-muse-on-tsipras-abrupt-reversal.html?_r=0 [https://perma.cc/M5AX-6KSP] (archived Mar. 6, 2016) (noting that opposition parties were criticizing the Greek prime minister as naïve); Nektaria Stamouli & Marcus Walker, *How Alexis Tsipras's Greek Referendum Call Came After Creditors Covered His Proposals in Red Ink*, WALL ST. J. (June 28, 2015, 7:26 PM), <http://www.wsj.com/articles/first-red-ink-then-tsipras-call-for-greek-referendum-1435524517> [https://perma.cc/WX6B-PSN6] (archived Mar. 6, 2016) (noting that insiders are calling the Greek premier "inexperienced"); Marcus Walker & Viktoria Dendrinou, *Greece and Creditors Struggle for Elusive Deal*, WALL ST. J. (May 22, 2015, 2:30 PM), <http://www.wsj.com/articles/greece-and-creditors-scramble-for-elusive-deal-1432319404> [https://perma.cc/QX9R-U4TT] (archived Mar. 6, 2016) (citing officials from both Greece and the EU as claiming the Greek government is "inexperienced" and "lacks enough technical experts").

preferences of Greece's citizens. Polls show that an overwhelming majority of Greeks want Greece to stay part of the Eurozone,²⁸⁰ and the 2015 referendum has also made it clear that Greek voters are fed up with austerity policies.²⁸¹ By contrast, other member states' governments are likely to decide based on their own citizens' interests, and there is no reason to believe that those will coincide with the interests of Greece's citizens.

In other words, the fact that an exit from the Eurozone may be desirable only implies the need for a withdrawal right. By contrast, it cannot be adduced as an argument for the expulsion remedy.

ii. Protecting the Interests of the European Union or of Other Member States

A question remains concerning whether an expulsion remedy might still be legally desirable because of its necessity for protecting the legitimate interests of other member states or of the European Union as a whole. But what interests might those be?

(a). *Future Bailouts*

Many commentators have expressed concern that Greece's continued membership in the Eurozone will create the need for repeated bailouts in the future, thereby transforming the Eurozone into a "transfer union" where economically stronger states are forced to support weaker ones.²⁸²

However, this argument proves exceedingly tenuous. If an economically troubled member state such as Greece fails to obey by the legal strictures of the Eurozone, there are two possible outcomes. To begin, the member state's economy may recover to a point where the member state no longer requires help, in which case no further bailouts are necessary. Alternatively, the member state may continue

280. See Anton Troianovski, *Germany's Angela Merkel Takes Firm Stance on Greek Bailout*, WALL ST. J. (June 29, 2015, 12:33 PM), <http://www.wsj.com/articles/SB11064341213388534269604581077610729539224> [<https://perma.cc/P5L2-GKC3>] (archived Mar. 6, 2016) (noting that "opinion polls show Greeks overwhelmingly want to stay in the Eurozone.").

281. See Kitsantonis & Kanter, *supra* note 114 (noting that the no vote amounted to a "resounding rejection of proposed austerity measures").

282. See, e.g., Jan Dams, *Die Transferunion ist Längst Realität [The Transfer Union Has Already Become Reality]*, DIE WELT (Aug. 15, 2015), <http://www.welt.de/wirtschaft/article145231112/Die-Transferunion-ist-Realitaet.html> [<https://perma.cc/ULZ5-DQXP>] (archived Mar. 6, 2016) (arguing that the 2015 bailout has turned the Eurozone into a transfer union, which Germans never wanted); Jürgen Jeske, *Wer Ist ein Gutter Europäer [Who Is a Good European?]*, FRANKFURTER ALLGEMEINE ZEITUNG (Aug. 12, 2015), <http://www.faz.net/aktuell/wirtschaft/eurokrise/griechenland/griechenland-krise-wer-ist-ein-guter-europaeer-13745287.html> [<https://perma.cc/PK98-XF6K>] (archived Mar. 6, 2016) (warning of a transfer union and calling Greece a bottomless barrel); Siems, *supra* note 277, at 3 (warning that the 2015 bailout will turn the Eurozone into a transfer union and that this development will ultimately threaten the solvency of the entire Eurozone).

to find itself in dire economic straits, thereby raising the issue of additional bailouts. But in this second case, the European Union's institutions, as well as the other member states, always have the option of refusing further help. Under EU law, economically troubled member states have no legal right to be bailed out.²⁸³ Of course, one may fear that countries such as Germany and France will find it politically difficult to refuse calls for further bailouts. However, that does not justify calls for an expulsion remedy. First, it hardly seems justified to impose the potentially devastating effects of an expulsion on the population of an economically troubled member state simply because other EU member states find it awkward to refuse further help. Even more importantly, if the other member states cannot muster the political will to refuse a bailout, how would one expect them to exercise an expulsion right?

At this point, a caveat is in order. One may of course argue that EU institutions and other Eurozone member states feel compelled to undertake further bailouts for fear that the troubled member state's economic or financial crisis will spread to other countries. But the decisive question is whether the risk of such chain effects—and hence the need for bailouts to prevent them—really depends on whether the economically troubled member state is still part of the Eurozone. The Article will turn to this question next.

(b). *Economic Chain Reactions*

Political commentators frequently express concerns that, if Greece remains in the Eurozone, its descent into financial chaos and insolvency will eventually drag other member states down too.²⁸⁴ And, in fact, there is no question that a financial or economic crisis in one member state may spread to other countries. However, the crucial question is whether the expulsion of a member state can prevent such a chain reaction. There is little reason to think that it can.²⁸⁵

283. See TFEU, *supra* note 41, art. 125.

284. See, e.g., Daniel Eckert, *Euro Schüttelt Griechen—Trauma ab [Euro Shrugs Off Greek Trauma]*, DIE WELT (Feb. 18, 2015), http://www.welt.de/print/die_welt/finanzen/article137566856/Euro-schuetzelt-Griechen-Trauma-ab.html [<https://perma.cc/V7XT-M6XX>] (archived Mar. 6, 2016) (citing observers who believe that the Eurozone would be more stable without Greece); Horn, *supra* note 2, at 1403 (stressing the danger that more and more states will require bailouts and that the entire system may collapse as a result); Volker Mester, *Die Euro-Krise; Was Passiert, wenn Griechenland Pleitegeht? [The Euro Crisis: What Happens When Greece Becomes Insolvent?]*, HAMBURGER ABENDBLATZ (Sept. 13, 2011), <http://www.abendblatt.de/wirtschaft/article108105579/Was-passiert-wenn-Griechenland-pleitegeht.html> [<https://perma.cc/5VCP-XGJR>] (archived Mar. 6, 2016) (citing a German economist claiming that the Eurozone could achieve greater stability in the long term without Greece).

285. It is worth noting that economists tend to worry about the opposite scenario; they fear that the (voluntary or involuntary) exit of a member state from the Eurozone might spook the markets and set off a chain reaction leading to the financial

A scenario in which the insolvency of one Eurozone country draws other member states into the abyss might arise for two main reasons. First, the markets, having previously assumed that the European Union would not allow Eurozone countries to become insolvent, might come to view other member states as at risk once this expectation has been proven wrong.²⁸⁶ For example, let us assume that the European Union allows Greece to become insolvent. In that case, investors who previously believed that the European Union would protect Eurozone countries from defaulting on their sovereign debt might suddenly realize that their assumption was mistaken and might therefore start to fear that the same fate might befall other member states such as Spain or Italy. As a result, Spain and Italy might suddenly find themselves at risk of financial collapse as investors frantically try to sell off Spanish and Italian bonds. Against that background, one might try to argue that Eurozone countries that do not play by the rules should be expelled long before they are actually in danger of becoming insolvent. That way, one can reduce the risk that a Eurozone country goes insolvent and thereby prevent the chain reaction described above.

However, upon closer examination, this line of reasoning is rather tenuous. If markets ever assumed that Eurozone countries could not become insolvent,²⁸⁷ that expectation has long since evaporated. Tellingly, when Greece's citizens voted "no" in their 2015 referendum and Greece became the first developed country to miss interest payments to the IMF, the markets remained entirely calm.²⁸⁸ This suggests that many investors already expected Greece to become insolvent, notwithstanding its membership in the Eurozone.

Moreover, even assuming that markets still believe that Eurozone membership reduces the risk of insolvency by making

collapse of other member states as well. *See, e.g.*, Gillian Tett, *US Fears a European Sequel to Lehman Brothers*, *FIN. TIMES* (Apr. 23, 2015), <http://www.ft.com/intl/cms/s/0/4b2001ca-e999-11e4-a687-00144feab7de.html#axzz3jfr4kOG3> [<https://perma.cc/2SQT-T5T5>] (archived Mar. 21, 2016).

286. This type of contagion has an analogue in the context of private firms which is sometimes referred to as "informational contagion." *See, e.g.*, Adam J. Levitin, *In Defense of Bailouts*, 99 *GEO L.J.* 435, 458 (2011) (noting that "[i]nformational contagion occurs when the failure of one firm results in market confidence eroding in similar firms, which then fail when they are no longer able to obtain financing or conduct transactions on viable terms."); David A. Skeel, Jr., *States of Bankruptcy*, 79 *U. CHI. L. REV.* 677, 718 (2012) (defining "informational contagion" as "a negative shock that stems from information that one entity's troubles convey about other similar entities").

287. It has been speculated that at least in the past, markets assumed that economically troubled Eurozone countries would be bailed out and thereby protected from insolvency. *See, e.g.*, Eric A. Posner & Alan O. Sykes, *International Law and the Limits of Macroeconomic Cooperation*, 86 *S. CAL. L. REV.* 1025, 1061 (2013) (considering such an assumption "possible").

288. Sinn, *supra* note 10 (noting the markets' calm reaction to the no vote in the referendum).

bailouts more likely, subjecting economically troubled states to an expulsion remedy would likely prove counterproductive. If economically troubled member states become subject to expulsion, then rational investors will understand that being in the Eurozone no longer offers meaningful protection against insolvency.

A second mode of transmission for a financial crisis lies in cross-border financial contagion, particularly in the financial sector.²⁸⁹ If, for example, Spanish banks are heavily invested in Greek government debt, then Greece's inability to repay its government may also put the solvency of Spanish banks at risk.²⁹⁰ Moreover, as the financial crisis in the United States demonstrated, mere uncertainty about the extent of exposure may be a big part of the problem.²⁹¹ For example, if Spanish banks actually hold a very limited stake in Greek government debt, but investors don't know this because the investments held by Spanish banks are not transparent, then investors may start withdrawing funds from Spanish banks.²⁹² To stick with this Article's example, mere uncertainty about Spanish banks' exposure to Greece's financial crisis may be enough to undercut the solvency of Spanish banks.

However, it is important to realize that neither the actual extent of cross-border financial ties nor uncertainty about the extent of these ties is likely to depend substantially on membership in the Eurozone. Expelling a country from the Eurozone does not *per se* change the extent to which firms from other member states are invested in that country's sovereign bonds or private corporations. The ability to invest in another member state is based on provisions on the free movement of capital, which apply independently of Eurozone membership.²⁹³ Tellingly, at the moment of the Greek referendum, when the threat of expulsion was arguably greatest, UK banks held

289. See Platon Monokroussos et al., *Grexit and Why It Will Not Happen: Catastrophic for Greece and Destabilizing for the Euro* 36 (June 10, 2015) (unpublished manuscript) (on file with Soc. Sci. Research Network), <http://ssrn.com/abstract=2616278> [<https://perma.cc/MR78-75XG>] (archived Mar. 6, 2016) (stressing the crucial role of the financial sector with respect to the problem of financial contagion).

290. This type of financial contagion, especially if the debt is issued by a private party, is also referred to as counterparty contagion. See, e.g., Levitin, *supra* note 286, at 455 (defining "counterparty contagion" as "the domino effect [which] occurs when the failure of one firm leads directly to the failure of other firms that are its counterparties because the counterparties relied on payment or future business from the initial failed firm").

291. For that reason, much thinking has gone into the question of whether one can reduce such uncertainty by reducing complexity. See, e.g., Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657, 658 (2012) (noting the increasing complexity of capital markets and thinking about possible solutions).

292. This phenomenon, too, is sometimes referred to as information contagion. E.g., Mark J. Roe, *Clearinghouse Overconfidence*, 101 CALIF. L. REV. 1641, 1653 (2013).

293. See TFEU, *supra* note 41, art. 56 (guaranteeing the free movement of capital between member states as well as between member states and third countries).

more Greek debt than banks from any other member state except Germany,²⁹⁴ even though the United Kingdom has never been part of the Eurozone. It follows that even if a country were expelled from the Eurozone, this would probably not reduce the risk of financial contagion to a meaningful extent.²⁹⁵

(c). *Deterrence*

Could one at least argue that the deterrent effect of a possible expulsion from the Eurozone would be strong enough to prevent member states from getting into trouble in the first place?²⁹⁶ Again, the answer is probably not. That is because even if economically troubled member states could be expelled from the Eurozone, the ex ante likelihood of a member state being expelled because of a Greece-type crisis—let alone before an economic crisis sets in—is exceedingly low. Other member states would inevitably fear that they could be next and would therefore be reluctant to vote in favor of expulsion. Tellingly, the suspension clause of Article 7 of the TEU has never been invoked against any member state.²⁹⁷ Moreover, despite the fact that various member states have repeatedly violated the strictures of the Stability and Growth Pact, no country has ever been fined for doing so.²⁹⁸ But if the European Union cannot even muster the will to enforce potentially modest sanctions under the Stability and Growth Pact, it is far-fetched to believe that the mere violation of that pact, with or without an economic crisis, would lead countries to make use

294. See *The Greek Debt Crisis Story in Numbers*, BBC (July 10, 2015), <http://www.bbc.com/news/world-europe-33407742> [<https://perma.cc/98JV-CEZH>] (archived Mar. 6, 2016).

295. At most, one could try to invoke an indirect effect: if markets believe that Eurozone countries are less likely to be allowed to become insolvent, then Greece's membership in the Eurozone will make financial institutions in other countries more likely to buy Greek government debt. Thus, allowing Greece to stay in the Eurozone seems to increase the potential for financial contagion. However, this line of reasoning is questionable for two reasons. First, as previously noted, markets no longer appear to harbor the assumption that a country's Eurozone membership offers substantial protection against that country becoming insolvent. And second, even if markets still held such an assumption, the introduction of an expansive expulsion remedy would quickly put an end to it. Accordingly, there is no reason to believe that allowing the Eurozone to expel financially troubled member states would reduce the risk of cross-border financial contagion.

296. Alexander Sturm, *Wirtschaftsexperte Walk: "Ein Notfallpaket für die Märkte Läuft Schon"* [*Economic Expert Walk: "A Rescue Package for the Markets Is Already Underway"*], EURO AM SONNTAG (July 7, 2015), <http://www.finanzen.net/nachricht/aktien/Interview-exklusiv-Wirtschaftsexperte-Walk-34-Ein-Notfallpaket-fuer-die-Maerkte-laeuft-schon-34-4415655> [<https://perma.cc/QY9S-8XBU>] (archived Mar. 6, 2016) (citing expectations that a Greek exit from the Eurozone would deter other member states from disregarding the Eurozone's rules).

297. Austria was once subjected to sanctions, but these were not based on Article 7 of the TEU. Schorkopf, *supra* note 207, ¶ 62.

298. Boskin, *supra* note 215.

of the much more drastic sanction of expelling a member state from the Eurozone.

In sum, it is simply not clear what legitimate interests an expulsion right against economically troubled countries might serve. Such an expulsion remedy is not necessary to prevent future bailouts, it does not promise to reduce the risk of cross-border financial contagion, and it is bound to be ineffective as a deterrent.

b. The Extreme Case

Whereas the right to expel member states in a Greece-type scenario would offer few benefits, one can easily conceive of more extreme scenarios where such a right would yield obvious advantages.

The European Union's Achilles heel is its dependence on member states' voluntary compliance. Admittedly, when member states violate EU law, they are subject to no shortage of sanctions. To begin with, if the violation rises to the level of a persistent and grave breach of the fundamental values listed in Article 2 of the TEU, the member state risks a suspension of its rights under Article 7 of the TEU.²⁹⁹ Furthermore, any member state breaching EU law may face an infringement proceeding under Articles 258, 259 of the TFEU,³⁰⁰ and, if the breaching member state does not comply with the resulting judgment, it may face a lump sum or penalty payment.³⁰¹ Moreover, states violating the Stability and Growth Pact face fines of up to 0.5 percent of their GDP.³⁰²

However, if a state is determined not to pay any fines or penalties and to ignore any judgments, then the European Union has limited options. Unlike the federal government in the United States, the European Commission does not have the option of sending federal troops to enforce federal law against renitent states as, for example, President Eisenhower did to ensure the enforcement of a federal desegregation court order at Little Rock.³⁰³ At most, the European Commission may commence a proceeding under Article 7 to suspend the state's rights, such as its voting rights in the Council.³⁰⁴ However, a renitent government may not find this prospect overly threatening.

Against this backdrop, it becomes clear that a member state's open revolt against the European Union's legal system may come to

299. TEU, *supra* note 142, art. 7(3).

300. TFEU, *supra* note 41, arts. 258, 259.

301. *Id.* art. 260(3).

302. Council Regulation 1467/97, *supra* note 49, art. 12 (authorizing the imposition of fines of up to 0.5 percent of GDP).

303. *See supra* note 269.

304. TEU, *supra* note 142, art. 7.

present a vital threat to that legal system. Such a revolt risks setting in motion a chain reaction that ultimately destroys the European Union's legal order. To be clear, member states already have the right to leave the European Union. However, the concern is not that states might leave the European Union. Rather, the concern is that member states might remain within the European Union but refuse to obey by its rules, thereby prompting the gradual collapse of the European Union's legal system.

It should then be clear why the expulsion remedy ought not to be taken off the table entirely. If a member state were to dare an open revolt against the legal system of the monetary union, and if that revolt were to represent a threat to the survival or functioning of the Eurozone or even the European Union, then an expulsion remedy would be of obvious use. To call such a scenario unrealistic would be naïve. Admittedly, no such scenario has arisen so far, but the European Union—which was started in 1957 as the European Economic Community³⁰⁵—has existed for less than sixty years, and the Eurozone is barely more than fifteen years old. Europe's history is filled with breakups of supranational empires, and only the most radical Panglossian could deny that the Eurozone and even the European Union may eventually face that threat. Tellingly, in the context of the Greek crisis, Claude Juncker, President of the European Commission, has expressed precisely the fear that the Eurozone may break up.³⁰⁶ The difficult question, then, is not whether the expulsion remedy should be available as an ultima ratio. It should. Rather, the challenge is to define the preconditions of the expulsion remedy in such a way as to prevent its abuse.

c. When Should the Expulsion Remedy be Available?

Based on the above, one can state that the expulsion remedy should be available when a member state's conduct presents a threat to the existence and functioning of the Eurozone or even the European Union. Furthermore, the expulsion remedy has to remain a means of last resort.

Admittedly, both requirements are somewhat vague. However, given that it is impossible to predict the challenges that may face the European Union in the future, it is not possible or even desirable to define a precise rule that determines in which cases the expulsion remedy is available. Instead, it is preferable to rely on a standard

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

306. Georgi Gotev, *Juncker: If Greece Leaves, Anglo-Saxons Will Try to Break up Eurozone*, EURACTIV (May 5, 2015), <http://www.euractiv.com/sections/eu-priorities-2020/juncker-if-greece-leaves-anglo-saxons-will-try-break-eurozone-314308> [https://perma.cc/7K KQ-K3KU] (archived Mar. 6, 2016).

that leaves the Court of Justice with sufficient leeway to react to unforeseen developments.³⁰⁷

Moreover, while one cannot exhaustively define which types of misconduct are sufficiently grave to prompt the expulsion remedy, the history of the European Union at least makes it possible to provide some guidelines on what cannot suffice to justify a member state's expulsion from the Eurozone.

i. Conscious and Repeated Violations of EU Law

As a general rule, the mere failure to obey by EU law, even if it occurs knowingly and repeatedly, cannot per se justify such an expulsion. The obvious reason is that such failures are fairly common. For example, member states have repeatedly and consciously violated the Stability and Growth Pact without being held accountable.³⁰⁸ This has been true even for large member states such as France and Germany.³⁰⁹ Even moving beyond the realm of monetary and economic policy, conscious violations of EU law are frequent. Member states routinely fail to transpose EU directives into national law in a timely fashion.³¹⁰ They also often take their time to react to decisions by the Court of Justice,³¹¹ which is precisely why the Treaty on the Functioning of the European Union now provides for lump sum and penalty payments in case of noncompliance with the Court's judgments.³¹² None of these violations of EU law has ever presented a serious threat to the survival or functioning of the Eurozone or the European Union.

ii. Open Defiance

Nor does open defiance by itself suffice to justify the expulsion remedy. Episodes in which member states demonstratively refused to comply with EU law can readily be found in the European Union's

307. Regarding the distinction between rules, whose content is defined ex ante, and standards, whose content is defined ex post, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 557 (1992).

308. See Boskin, *supra* note 215 (noting that, even before the recession, the Stability and Growth Pact was routinely violated).

309. See Blitzer, *supra* note 216 (noting that Germany repeatedly violated the Stability and Growth Pact between 2001 and 2007); Feldstein, *supra* note 216 (noting that both France and Germany violated the Stability and Growth Pact).

310. See *Annual Report on Monitoring the Application of EU Law* (2014), COM (2015) 329 final, at 17 (July 9, 2015) (noting that "late transposition of directives by Member States remains a persistent problem.").

311. See *id.* at 16 (noting sixty-one cases in which infringement proceedings remained open because member states had not yet complied with Court of Justice's judgments).

312. See TFEU, *supra* note 41, art. 260(3) (allowing for the imposition of penalties if member states fail to comply with judgments of the European Court of Justice).

history; they have come and gone without putting an end to the European project.

Perhaps the most brazen case of open defiance to date was the so-called “empty chair crisis” from 1965 to 1966. Irked by the other member states’ interest in the development of a supranational dimension of the then so-called European Economic Community, France boycotted the meetings of the Council of Ministers, thereby forcing the Council’s work to come to a stop, until the so-called Luxembourg compromise resolved the conflict largely in France’s favor.³¹³

An equally famous and arguably more dangerous case of open insubordination, this time from a member state’s judiciary, is the German Constitutional Court’s *Solange I* decision from 1974.³¹⁴ The case concerned the relationship between European Community law and member state law.³¹⁵ At the time, the Court of Justice had already held that the law of the European Economic Community, as the European Union was then called, enjoyed primacy over the law of the member states.³¹⁶ This meant that member state law could not be applied to the extent that it conflicted with European law.³¹⁷ However, in *Solange I*, the German Constitutional Court took a different view. It enumerated various shortcomings of the European legal system such as the lack of a directly elected parliament and the absence of a codified catalogue of fundamental rights comparable to that offered by the German Constitution.³¹⁸ In the eyes of the German Constitutional Court, these deficiencies meant that European law was insufficient to guarantee an adequate level of protection for fundamental rights.³¹⁹ Therefore, the German Constitutional Court held that European law was subject to the jurisdiction of the German Constitutional Court and was “inapplicable because and to the extent that it violates one of the fundamental rights guaranteed by the German Constitution.”³²⁰ Only about ten years later, in the equally famous *Solange II* decision, did the German Constitutional Court come to the conclusion the

313. For a brief summary of relevant events, see, e.g., Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 FORDHAM INT’L L.J. 1118, 1129 (2008); Rafael Leal-Arcas, *Is EC Trade Policy up to Par?: A Legal Analysis over Time—Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty*, 13 COLUM. J. EUR. L. 305, 367 (2007).

314. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 2 C.M.L.R. 540 (Ger.) [*Solange I*].

315. *Id.*

316. Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, ¶ 3.

317. *Costa v. Ente Nazionale Energie Elettrica [ENEL]*, 1964 E.C.R., at 585.

318. See *Solange I*, *supra* note 313, at 62.

319. *Id.*

320. *Id.* (translation by author).

protection of fundamental rights under European law was now sufficiently strong and therefore decided, for the time being, to no longer exercise jurisdiction over EU law.³²¹ Yet even the *Solange II* decision does not amount to a complete recognition of the primacy of EU law,³²² since the German Constitutional Court explicitly reserved the right to reassert its own jurisdiction should EU law ever cease to meet the standards set forth in *Solange I*.³²³

Neither the policy of the empty chair nor *Solange I* ended up dooming European integration. Quite the contrary, some scholars now praise the German Constitutional Court's *Solange I* decision for pressuring the European Court of Justice into taking fundamental rights more seriously.³²⁴ This suggests that open defiance should not per se suffice to make the expulsion remedy available.

d. Procedural Safeguards

It is also useful to think about which procedural safeguards should apply to the expulsion remedy. To ensure that the substantive requirements for such an expulsion are actually satisfied, the decision to expel a member state from the Eurozone should be fully subject to judicial review by the Court of Justice. In other words, it should ultimately be the Court of Justice's responsibility to determine whether a state's conduct truly represents a threat to the functioning or existence of the Eurozone or the European Union and whether this threat cannot be averted by less drastic means. In analogy to Article 7 of the TEU, the Court ought to take into account the interests of the member state's citizens in making that determination.

The question remains how many of the other member states should have to call for an expulsion from the Eurozone. One obvious solution is to once more draw an analogy to Article 7 of the TEU and demand that at least a four-fifths majority of the other member states have approved the expulsion. Beyond that, it does not necessarily

321. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, 3 C.M.L.R. 225 (Ger.) [*Solange II*].

322. See Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 111 (2009); Michelle Iodice, Note, *Solange in Athens*, 32 B.U. INT'L L.J. 539, 543 (2014) (noting that *Solange II* did not amount to a surrender of the German Constitutional Court's jurisdiction over fundamental rights).

323. See Iodice, *supra* note 322, at 543; Davor Jančić, *Caveats from Karlsruhe and Berlin: Whither Democracy After Lisbon?*, 16 COLUM. J. EUR. L. 337, 343 (2010); Milanovic, *supra* note 322, at 111.

324. See, e.g., Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS. L. REV. 87 (2006); Ward Ferdinandusse, *Out of the Black-Box? The International Obligation of State Organs*, 29 BROOK. J. INT'L L. 45, 138–39 (2003). *But see* Manfred Zuleeg, *A Community of Law: Legal Cohesion in the European Union*, 20 FORDHAM INT'L L.J. 623, 627 (1997) (calling it “a myth that *Solange I* encouraged the ECJ to incorporate fundamental rights into Community law.”).

seem wise to insist on the remaining safeguards listed in Article 7 of the TEU. The various steps that Article 7 provides for are so cumbersome as to make the procedure unwieldy. Given that the expulsion remedy is only admissible in those situations in which there exists an actual threat to the existence of functioning of the Eurozone or European Union, imposing a slow and cumbersome procedure seems problematic. As the sovereign debt crisis has shown, threats to the functioning of the financial system may require swift action, and the same is likely to be true for the expulsion remedy.

e. What about Greece?

How do these principles apply to the Greek crisis? Based on the foregoing, one can only conclude that Greece is far from satisfying the necessary elements for an expulsion from the Eurozone. The failure to comply with the economic strictures of the Eurozone during an economic downturn is not per se enough to represent a threat to the functioning of the Eurozone. Indeed, Greece's sins seem rather minor when compared to the threats posed by France's conduct during the empty chair crisis or the German Constitutional Court's refusal to accept the primacy of EU law in its *Solange I* decision.

Accordingly, those who believe that Greece's expulsion from the Eurozone would violate EU law are completely right. The important point, though, is that they are right because Greece's conduct does not satisfy the preconditions of the expulsion remedy. By contrast, one should not make the mistake of denying the existence of an expulsion remedy entirely.

V. CONCLUSION

Can the European Union expel a member state from the Eurozone? Legal scholars generally agree that the answer is "no." They typically justify that answer by pointing to the fact that the Treaty on the Functioning of the European Union does not mention any such expulsion right.

However, this Article has shown that this and other doctrinal arguments are ultimately unpersuasive. Many of the most important doctrines in European law have no explicit basis in the text of the Treaties. What ultimately matters, therefore, is whether there are important policy reasons for recognizing an expulsion remedy, and that question has to be answered in the affirmative. In principle, therefore, a right to expel member states from the Eurozone must be recognized both *de lege ferenda* and *de lege lata*.

Crucially, though, such an expulsion remedy must be handled very restrictively. Properly understood, the expulsion of a member state from the Eurozone requires a threat to the existence or

functioning of the Eurozone or the European Union. Furthermore, the expulsion of a member state has to remain the ultima ratio. Where these preconditions are met, there is no reason to take the expulsion remedy off the table. Quite on the contrary, the ability to expel member states from the Eurozone may yet prove crucial to the future of the Eurozone and perhaps even the European Union.