

3-26-2013

## The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism

Federico Fabbrini

*Tilburg University*, [f.fabbrini@tilburguniversity.edu](mailto:f.fabbrini@tilburguniversity.edu)

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/iclr>



Part of the [Comparative and Foreign Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Federico Fabbrini, *The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism*, 36 B.C. Int'l & Comp. L. Rev. 1 (2013), <https://lawdigitalcommons.bc.edu/iclr/vol36/iss1/1>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [abraham.bauer@bc.edu](mailto:abraham.bauer@bc.edu).

# THE FISCAL COMPACT, THE “GOLDEN RULE,” AND THE PARADOX OF EUROPEAN FEDERALISM

FEDERICO FABBRINI\*

**Abstract:** This Article analyzes the central provision of the recently enacted Fiscal Compact, which directs member states of the European Union (EU) to incorporate into their constitutions a “golden rule”—that is, a requirement that yearly budgets be balanced. The purpose of the Article is to examine—by surveying the introduction of these pervasive budgetary constraints in four selected EU member states (Germany, France, Italy and Spain)—the institutional implications that the “golden rule” has on the role of the political and judicial branches, both in the states and in the EU as a whole. The Article argues that, while the domestic effects of the “golden rule” are likely to vary from one state to another, the Fiscal Compact systematically enhances the powers of the EU institutions to direct and police the budgetary policies of EU member states, thus increasing centralization in the EU architecture of economic governance. The Article then contrasts this development with the federal experience of the United States. A comparative perspective sheds light on the fact that, while most U.S. states are also endowed with constitutional “golden rules,” the federal government never played a role in their adoption and is barred from interfering with the budgetary processes of the states. In conclusion, the Article suggests that an unexpected paradox emerges in the new constitutional architecture of the EU: Although in crafting the institutional response to the Euro-zone crisis state governments have repeatedly discarded a U.S.-like federal model as being too centralized and

---

\* Assistant Professor of European & Comparative Constitutional Law, Law School, Tilburg University. Earlier versions of this Article were presented in seminars at the Department of Public Law—Tilburg Law School (Sept. 27, 2012), at the University of Illinois College of Law (Nov. 6, 2012), and at the University of Melbourne—Center for Comparative Constitutional Studies (Dec. 6, 2012) as well as the Conference “The Euro-Crisis and the State of European Democracy” held at the European University Institute (Nov. 23, 2012). The author is grateful to numerous friends and colleagues, including Maurice Adams, Ernst Hirsch Ballin, Sabino Cassese, Michael Crommelin, Bruno de Witte, Daniel Hamilton, Charlotte Ku, Gert-Jan Leenknecht, Ulrike Liebert, Miguel Maduro, Jason Mazzone, Anne Meuwese, Phillip Paement, Richard Rose, Daniel Rubinfeld, Wojciech Sadurski, Jo Shaw, Miranda Stewart, Adrienne Stone, David Super, Elena Simina Tanasescu, and Daniel Thym for helpful comments and suggestions. All errors remain my own. Further comments are welcome at [F.Fabbrini@tilburguniversity.edu](mailto:F.Fabbrini@tilburguniversity.edu).

centripetal for the EU, they have ended up establishing a regime that is much less respectful of state sovereignty than the U.S. federal system.

## INTRODUCTION

On March 2, 2012, twenty-five out of twenty-seven member states of the European Union (EU) agreed to sign in Brussels the Treaty on the Stability, Coordination, and Governance in the Economic and Monetary Union (TSCG).<sup>1</sup> This treaty, generally referred to as the Fiscal Compact, was adopted under the pressures of financial markets, which, since 2008, have been threatening several countries of the Economic and Monetary Union (EMU) with the spectre of sovereign default.<sup>2</sup> In this context, the treaty represents the latest, and allegedly conclusive, attempt to provide a satisfactory answer to the Euro-zone crisis.<sup>3</sup> The Fiscal Compact raises a number of new issues in the fields of international law, EU law, and comparative constitutional law.<sup>4</sup> Technically drafted as an international treaty, but functionally connected to the EU legal order, the Fiscal Compact pursues the goal of strengthening budgetary discipline in the member states of the Euro-zone.<sup>5</sup> The enactment of the Fiscal Compact reflects the understanding that the existence of a common supranational currency (the Euro), coupled with a no-bail-out clause in Article 125 of the Treaty on the Functioning of the EU (TFEU), requires tighter fiscal constraints in the Euro-zone member states.<sup>6</sup> In particular, this Article focuses on the obligation the

---

<sup>1</sup> See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union pmbl., art. 16, Mar. 2, 2012, <http://european-council.europa.eu/eurozone-governance/treaty-on-stability> [hereinafter TSCG].

<sup>2</sup> See Loïc Azoulay et al., *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty* 1–3, 20 (Eur. Univ. Inst. Dep't of Law, Working Paper No. 2012/9, 2012), available at [http://cadmus.eui.eu/bitstream/handle/1814/21496/LAW\\_2012\\_09\\_Kocharov\\_ed.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/21496/LAW_2012_09_Kocharov_ed.pdf?sequence=1).

<sup>3</sup> See *id.* at 20, 24–31. See generally Matthias Ruffert, *The European Debt Crisis and European Union Law*, 48 COMMON MKT. L. REV. 1777 (2011) (analyzing prior normative responses to the Euro crisis).

<sup>4</sup> See generally Azoulay, *supra* note 2 (assessing interplay between EU law and the Fiscal Compact).

<sup>5</sup> TSCG, *supra* note 1, pmbl. The Fiscal Compact has been signed by all seventeen member states of the Euro-zone. EUROPEAN UNION COMMITTEE, THE EURO AREA CRISIS, 2012, H.L. 260, ¶ 75 [hereinafter THE EURO AREA CRISIS]. Another eight EU member states that do not currently use the Euro have also joined the Fiscal Compact. *Id.* The United Kingdom (UK) and the Czech Republic have refused to join the Compact. See *id.*

<sup>6</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 125, Mar. 30, 2010, 2010 O.J. (C 83) 47, 99 [hereinafter TFEU]; see Azoulay, *supra* note 2, at 15–17. Note that in the Article I will use the expressions EMU and Euro-zone interchangeably. According to Article 119 TFEU, the member states agree to coordinate their economic policies

Fiscal Compact imposes on signatory states to enact the so-called “golden rule”—a requirement that annual government budgets be balanced—in state constitutions.<sup>7</sup> This requirement, which is unprecedented in the history of European integration, significantly increases the involvement of supranational institutions in the fiscal sovereignty of the states and is likely to affect the vertical balance of powers between the states and the EU.<sup>8</sup>

This Article examines the “golden rule” articulated in the Fiscal Compact by tracing its origin in German constitutional law and assessing the institutional challenges that its adoption raises in four selected EU member states (Germany, France, Italy, and Spain) and at the EU level. The developments taking place in the EMU are then compared to the experience of the United States in the field of fiscal federalism. The EMU and the United States appear to share several common structural features. The United States also established a single federal currency among its federated states through a long and difficult process.<sup>9</sup> Moreover, the U.S. federal government is barred from bailing out defaulting states, and most U.S. states have budgetary constraints in their constitutions prohibiting governments from running their budget at a deficit.<sup>10</sup> Yet, in the United States, the enactment of “golden rules” at

---

and create a single monetary union (the EMU) whose currency is the Euro (hence the expression “Euro-zone”). TFEU art. 119. Participation in the EMU is an obligation for all EU member states. *See id.* arts. 119–121. However, at the moment, two states have obtained a specific opt-out from the single currency, while eight states do not yet fulfill the technical criteria to become part of the single currency. *Who can Join and When?*, EUR. COMMISSION, [http://ec.europa.eu/economy\\_finance/euro/adoption/who\\_can\\_join/index\\_en.htm](http://ec.europa.eu/economy_finance/euro/adoption/who_can_join/index_en.htm) (last updated July 17, 2012). *See generally* Pier Carlo Padoan, *EMU as an Evolutionary Process*, in *GOVERNING THE WORLD’S MONEY* 105 (David M. Andrews et al. eds., 2002) (describing the process of integration of the EMU and the resultant benefits).

<sup>7</sup> Azoulay, *supra* note 2, at 4–5. Arguably, this provision represents one of the only true legal novelties introduced by the Fiscal Compact. *See id.* A few months before the adoption of the Fiscal Compact, in fact, EU institutions adopted the so-called “six pack,” namely a package of five regulations and one directive aimed at strengthening the surveillance of state budgetary policies. *See infra* note 17. It appears that, with the exception of the “golden rule” and a few other clauses, the Fiscal Compact provisions simply duplicate EU secondary legislation in the form of an international treaty. *See* Editorial Comments, *Some Thoughts Concerning the Draft Treaty on a Reinforced Economic Union*, 49 *COMMON MKT. L. REV.* 1, 5 n.12 (2012).

<sup>8</sup> *See* Editorial Comments, *supra* note 7, at 9–11. *See generally* Robert P. Inman & Daniel L. Rubinfeld, *The EMU and Fiscal Policy in the New European Community: An Issue for Economic Federalism*, 14 *INT’L REV. L. & ECON.* 147 (1994) (assessing the EMU’s impact on member states’ autonomy in fiscal policy).

<sup>9</sup> Kathleen R. McNamara, *State Building, the Territorialisation of Money, and the Creation of the American Single Currency*, in *GOVERNING THE WORLD’S MONEY*, *supra* note 6, at 128, 138–39.

<sup>10</sup> JAMES D. SAVAGE, *BALANCED BUDGETS AND AMERICAN POLITICS* 79–80, 117–18 (1988).

the state constitutional level was never required by federal law, but rather emerged as an autonomous decision of the states to ensure their access to the financial market.<sup>11</sup> In light of the comparison with the United States, the Article will therefore argue that an unexpected paradox emerges in the new constitutional architecture of the Euro-zone: Although, in reforming the EMU, state governments have consistently discarded the federal model as being too centralized and centripetal for Europe, they have ended up establishing a regime that is much less respectful of state sovereignty than the U.S. federal one.

The Article will be structured as follows. In Part I, I examine the Fiscal Compact and detail its core requirement that states adopt a balanced-budget amendment in their constitutions. In Part II, I analyze the “golden rule” at the state level in Europe. Here, on the one hand, I explain how the provisions of the Fiscal Compact draw from German constitutional law and, on the other hand, I assess whether the constitutional reforms that have recently been concluded in Spain and Italy, and started in France, satisfy the requirement of the Fiscal Compact. Part III considers the institutional implications of the introduction of the “golden rule,” both for state political and judicial branches, and for the EU bodies charged with enforcing them. Part IV then expands the analysis to the experience of the United States, surveying the U.S. model of fiscal federalism and explaining how, in the United States, the federal government exercises limited powers over the budgetary policies of the states. Part V finally contrasts the U.S. experience with the current European one and develops the argument that the EU is becoming more centralized than the United States in terms of fiscal rules. As it will be maintained, the paradox of European constitutionalism may be that, while the governments of the EU member states systematically discard a federal arrangement for the EMU as disrespectful of state sovereignty, the very sovereignty of the states would be better off under a federal system like that of the United States, rather than under the regime the Fiscal Compact is currently creating.

### I. THE “GOLDEN RULE” IN THE FISCAL COMPACT

The overall objective of the Fiscal Compact, as stated in the preamble, is to re-affirm “the need for governments to maintain sound and sustainable public finances and to prevent a general government deficit [from] becoming excessive . . . [in order] to safeguard the stability of

---

<sup>11</sup> Erik Wibbels, *Bailouts, Budget Constraints and Leviathans: Comparative Federalism and Lessons from the Early United States*, 36 COMP. POL. STUD. 475, 498 (2003).

the euro area as a whole.”<sup>12</sup> The objective of ensuring the sustainability of state budgets was already enshrined in the Stability and Growth Pact (SGP) originally enacted in two Council regulations in 1997,<sup>13</sup> and currently attached as Protocol 12 to the TFEU,<sup>14</sup> which requires the member states of the EMU to maintain their public deficit below the yearly ratio of 3% of the GDP and the total public debt below 60% of the GDP.<sup>15</sup> The weaknesses of the enforcement mechanisms of the SGP, however, ensured widespread non-compliance by EMU countries with the SGP debt and deficit criteria.<sup>16</sup> Failure to abide by the SGP budgetary criteria was allegedly one of the reasons for the outburst of the financial crisis that has afflicted the Euro-zone throughout the last four years.<sup>17</sup> As a response to this state of affairs, the Fiscal Compact moves one step further than the SGP and “requires,” in order to ensure fiscal sustainability, “the introduction [at the state level] of specific rules, including a ‘balanced budget rule’ and an automatic mechanism to take corrective action.”<sup>18</sup>

---

<sup>12</sup> TSCG, *supra* note 1, pmb. (third recital).

<sup>13</sup> See 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, pmb., 1997 O.J. (L 209) 1, 1 (second recital); Council Regulation 1467/97 of 7 July 1997 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, pmb., 1997 O.J. (L 209) 6, 6 (third recital).

<sup>14</sup> See Protocol No. 12 on the Excessive Debt Procedure pmb., May 9, 2008, 2008 O.J. (C 115) 279 [hereinafter Protocol No. 12].

<sup>15</sup> See TFEU art 126(2); Protocol No. 12, *supra* note 14, art. 1.

<sup>16</sup> See Stefan Collignon, *The End of the Stability and Growth Pact?*, 1 INT’L ECON. & ECON. POL’Y 15, 16 (2004).

<sup>17</sup> The enforcement mechanisms of the SGP were strengthened by the enactment of the so-called “six pack,” a package of five regulations and one directive, in November 2011. See Regulation 1173/2011, of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L 306) 1, 1; Regulation 1174/2011, of the European Parliament and of the Council of 16 November 2011 on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. (L 306) 8, 8; Regulation 1175/2011, of the European Parliament and of the Council of 16 November 2011 Amending Council Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 2011 O.J. (L 306) 12, 12; Regulation 1176/2011, of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25, 25; Council Regulation 1177/2011, of 8 November 2011 amending Regulation (EC) No 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 2011 O.J. (L 306) 33, 33; Council Directive 2011/85/EU of 8 November 2011 on Requirements for Budgetary Frameworks of the Member States, 2011 O.J. (L 306) 41, 41; see also LB & JHR, Editorial, *The Fiscal Compact and the European Constitutions: “Europe Speaking German,”* 8 EUR. CONST. L. REV. 1, 1 (2012).

<sup>18</sup> TSCG, *supra* note 1, pmb. (third recital).

The core provision of the Fiscal Compact, Article 3 introduces an obligation for the Contracting Parties to respect the “golden rule” of a balanced budget in every fiscal year.<sup>19</sup> Article 3(1)(a) codifies the general rule by stating that “the budgetary position of the general government of a Contracting Party shall be balanced or in surplus.”<sup>20</sup> This rule is further specified by Article 3(1)(b), which states that the rule shall be deemed to be respected if the “annual structural balance of the general government” (to be intended as “the annual cyclically-adjusted balance net of one-off and temporary measures”<sup>21</sup>) is “with a lower limit of a structural deficit of 0.5% of [GDP] at market prices.”<sup>22</sup> The European Commission is empowered to indicate country-specific objectives to ensure a sustainable convergence path toward this standard.<sup>23</sup> Article 3(1)(c) then introduces an exception to the “golden rule,” stating that “the Contracting Parties may temporarily deviate from [the rule] only in exceptional circumstances,” defined in Article 3(3)(b) as “an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn.”<sup>24</sup> Finally, Article 3(1)(e) sets up corrective mechanisms to be automatically triggered “in the event of significant observed deviations from the medium-term objective or the adjustment path towards it.”<sup>25</sup>

The Article 3 “golden rule” will be, upon ratification, binding for the 25 signatory parties as an obligation deriving from international law.<sup>26</sup> Nevertheless, the Fiscal Compact goes further than traditional international law and, with a rather unconventional step, requires the Contracting Parties to incorporate the “golden rule” in the domestic legal system with a specific source of law: constitutional law or its equivalent.<sup>27</sup> According to Article 3(2), in fact:

---

<sup>19</sup> See *id.* art. 3; Azoulai, *supra* note 2, at 4–5, 24.

<sup>20</sup> TSCG, *supra* note 1, art. 3(1)(a).

<sup>21</sup> *Id.* art. 3(3)(a).

<sup>22</sup> *Id.* art. 3(1)(b).

<sup>23</sup> See *id.*

<sup>24</sup> *Id.* art. 3(1)(c), (3)(b).

<sup>25</sup> *Id.* art. 3(1)(e).

<sup>26</sup> See Azoulai, *supra* note 2, at 12. Although functionally connected to EU law, the Fiscal Compact does not seem to enjoy the supremacy and direct effect of EU law. See generally Bruno de Witte, *Direct Effect, Supremacy and the Nature of the Legal Order*, in *THE EVOLUTION OF EU LAW* 177 (Paul Craig & Gráinne de Búrca eds., 1999) (explaining the legal status of EU law).

<sup>27</sup> See Azoulai, *supra* note 2, at 12–13.

The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of common principles to be proposed by the European Commission . . . .<sup>28</sup>

The Fiscal Compact, hence, requires states to enact the “golden rule” in the state constitutions or—where this would be substantially impossible due to difficulties in amending a constitution—in special domestic sources of law that are hierarchically superior to ordinary acts of parliament and that can work as benchmarks for the constitutional review of budgetary laws.<sup>29</sup>

To ensure that the Contracting Parties comply with the obligation to adopt the “golden rule” at the constitutional—or quasi-constitutional—level in their domestic legal systems, the Fiscal Compact sets up a mechanism of judicial enforcement centered on the EU Court of Justice (ECJ).<sup>30</sup> According to Article 8:

The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3(2), the matter will be brought to the [ECJ] by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission’s re-

---

<sup>28</sup> See TSCG, *supra* note 1, art. 3(2).

<sup>29</sup> See LB & JHR, *supra* note 17, at 3 (explaining how constitutional amendments may be adopted only through difficult and time-consuming processes in the Netherlands, Belgium and Denmark).

<sup>30</sup> TSCG, *supra* note 1, art. 8. The possibility of employing the ECJ, an EU institution, in the context of the Fiscal Compact, which is technically an international treaty adopted by 25 EU member states outside the framework of the EU, is supported by Article 273 TFEU, which allows the ECJ to “have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.” TFEU art. 273; see TSCG, *supra* note 1, art. 8(3); Editorial Comments, *supra* note 7, at 8.



port, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter to the [ECJ]. In both cases, the judgment of the [ECJ] shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the [ECJ].<sup>31</sup>

If a party does not comply with the first decision of the ECJ, then a second case can be brought before the ECJ which may impose on the disobedient state “a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0.1% of its [GDP].”<sup>32</sup> Moreover, as clarified in the preamble of the Fiscal Compact, the possibility for EMU countries to receive financial assistance under the new European Stability Mechanism (ESM) will be conditional “as soon as the transposition period referred to in Article 3(2) of [the Fiscal Compact] has expired, on compliance with the requirements of that Article.”<sup>33</sup>

The Fiscal Compact, in conclusion, establishes a pervasive legal regime to tighten the budgetary policies of the Contracting Parties, with the goal of ensuring fiscal discipline in the member states as a precondition for financial stability in the entire Euro-zone.<sup>34</sup> First, the Fiscal Compact provides a very detailed and technical “golden rule,” which defines in strict mathematical terms the yearly structural deficit permitted in every member state and specifies conditions for disrespecting the rule, as well as automatic mechanisms to ensure compliance.<sup>35</sup> Second, the Fiscal Compact—breaking with the tradition of ordinary international law, which leaves member states free to choose the domestic means to give effect to the commitments undertaken at the international level—obliges the Contracting Parties to incorporate the “golden rule” in state constitutions or in other quasi-constitutional sources of law which ought to bind the ordinary budgetary process.<sup>36</sup> Third, the Fiscal Compact sets up an intrusive enforcement mechanism, which authorizes Contracting Parties to bring cases against non-compliant states before the ECJ, and empowers the ECJ to sanction disobedient states with substantial financial penalties.<sup>37</sup> Respect of the “golden rule,” in addition, is made a condition to obtain financial assis-

---

<sup>31</sup>TSCG, *supra* note 1, art. 8(1).

<sup>32</sup>*Id.* art. 8(2).

<sup>33</sup>*Id.* pmbl. (twenty-seventh recital).

<sup>34</sup>See Editorial Comments, *supra* note 7, at 1–3.

<sup>35</sup>See TSCG, *supra* note 1, art. 3(1).

<sup>36</sup>*Id.* art. 3(2).

<sup>37</sup>*Id.* art. 8.

tance under the ESM.<sup>38</sup> Given the sweeping nature of these provisions, it is worth exploring the legal source that has been taken as a model for the “golden rule” of the Fiscal Compact and examine the challenges that its incorporation will raise in some of the EU member states.

## II. THE “GOLDEN RULE” IN STATE CONSTITUTIONS

In light of the analysis of the Fiscal Compact’s provisions, this Part will consider the budgetary constraints which currently exist, or are under discussion, in four selected countries of the Euro-zone. The first section will examine Germany and underline how the “golden rule” introduced in German law with the 2009 constitutional reform has served as the model for the drafting of the “golden rule” in the Fiscal Compact. The following three sections will then assess the introduction of balanced-budget rules into the constitutions of Spain, Italy, and France. Selection of these countries as case studies is based on both pragmatic and methodological reasons. On one hand, Germany, France, Italy, and Spain are the largest countries of the Euro-zone and alone account for more than seventy-five percent of the entire EMU’s GDP.<sup>39</sup> Assessing how fiscal constraints are designed in these states is therefore important in any discussion about the future financial stability of the Euro-zone. On the other hand, these countries are also endowed with very different institutional settings, with regard to both the framework of government and the system of constitutional review.<sup>40</sup> Italy and Spain, like Germany, have parliamentary systems (although Italy has a very fragmented party-system whereas the latter two are consolidated bipolar democracies) while France is a semi-presidential regime.<sup>41</sup> Moreover, although in all selected countries constitutional review of legislation is centralized in specialized Constitutional Courts, there are important differences in the judicial procedure in force in the four countries. For example, in France, legislation can be reviewed *a priori*, while in Italy, review is only conducted *ex post* and upon referral

---

<sup>38</sup> *Id.* p.mbl. (twenty-seventh recital).

<sup>39</sup> *Gross Domestic Product at Market Prices*, EUROSTAT, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tec00001> (last visited Jan. 20, 2013). In 2011, the aggregate GDP of Germany, France, Italy, and Spain amounted to 76.61% of the Euro-zone’s GDP. *Id.* I am grateful to Claudia Foroni for helping me with the search of the data and calculations.

<sup>40</sup> See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 40–41, 44–46 (2000).

<sup>41</sup> See *id.* at 40–41.

of a judge.<sup>42</sup> Alternatively, Spain and Germany allow for direct individual recourse to the Constitutional Court.<sup>43</sup> This variety of institutional settings can, therefore, offer valuable insights to differentiate the implications that the Fiscal Compact's implementation at the state level may have for political branches and courts.<sup>44</sup>

#### A. Germany

Given the prominent role Germany has played in managing the Euro-zone crisis and requiring that EMU states enact tighter budgetary constraints in exchange for greater financial solidarity, it will be no surprise that Article 3 of the Fiscal Compact largely draws from the “golden rule” that Germany enacted in its Basic Law—the German Constitution (GC)—in July 2009.<sup>45</sup> In the context of a broader reform of the German federal system, in fact, the so-called *Föderalismusreform II* (Federalism Reform II) introduced a number of relevant amendments to the *Finanzwesen*, the chapter of the GC dedicated to the fiscal relationship between the *Bund* (Federation) and the *Länder* (Regions).<sup>46</sup> In particular, the new Article 109 GC, besides reaffirming the budgetary autonomy of the Federation and the *Länder*, and noting their joint responsibility in the maintenance of the budgetary discipline set at the EU level in the SGP, states the general rule that:

The budgets of the Federation and the *Länder* shall in principle be balanced without revenue from credits. The Federation and *Länder* may introduce rules intended to take into account, symmetrically in times of upswing and downswing, the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and

---

<sup>42</sup> See Federico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, 9 GER. L.J. 1297, 1302–03 (2008); Tania Groppi, *The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?*, 3 J. COMP. L. 100, 102–03 (2008).

<sup>43</sup> See generally Victor Ferreres Comella, *The Spanish Constitutional Court: Time for Reforms*, 3 J. COMP. L. 22 (2008); Donald P. Kommers & Russell A. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, 3 J. COMP. L. 194 (2008).

<sup>44</sup> See *infra* Part III.

<sup>45</sup> See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG] [BASIC LAW], May 23, 1949, BGBl. I, arts. 109, 115 (Ger.), translation available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

<sup>46</sup> See Lars P. Feld & Thushyanthan Baskaran, *Federalism, Budget Deficits and Public Debt: On the Reform of Germany's Fiscal Constitution*, 6 REV. L. & ECON. 365, 384–85 (2010).

substantially harmful to the state's financial capacity. For such exceptional regimes, a corresponding amortisation plan must be adopted.<sup>47</sup>

The content of the "golden rule" is further specified, as far as the German federal government is concerned, in Article 115(2) GC, which states that "[r]evenues and expenditures shall in principle be balanced without revenue from credits," and clarifies that "[t]his principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed 0.35 percent in relation to the nominal [GDP]."<sup>48</sup> This provision thus sets a more restrictive deficit brake than the 0.5% allowed by Article 3(1)(b) of the Fiscal Compact.<sup>49</sup> The strict "golden rule" is mitigated, however, by the possibility of taking into account symmetrical periods of upswing and downswing "when economic developments deviate from normal conditions," and allowing for minor deviations on the basis of the economic cycle.<sup>50</sup> In addition, the balanced-budget requirement is accompanied by an exception clause which largely anticipated the one later enshrined in Article 3(3)(b) of the Fiscal Compact.<sup>51</sup> Thus, "[i]n cases of natural catastrophes or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity, these credit limits may be exceeded . . . by a majority" decision of the members of the *Bundestag*, the Lower House of the Federal Parliament.<sup>52</sup> "The decision has to be combined with an amortisation plan."<sup>53</sup> The 1949 GC, as amended in 2009, therefore, is endowed with a very comprehensive and technically detailed balanced-budget requirement that Germany decided autonomously to enact to ensure compliance with its EMU obligations, and to safeguard the sustainability of public finance for future generations.<sup>54</sup>

---

<sup>47</sup> GRUNDGESETZ, *supra* note 45, art. 109.

<sup>48</sup> *Id.* art. 115(2).

<sup>49</sup> *See id.*; TSCG, *supra* note 1, art. 3.

<sup>50</sup> GRUNDGESETZ, *supra* note 45, art. 115(2).

<sup>51</sup> *See id.*; TSCG, *supra* note 1, art. 3(3)(b).

<sup>52</sup> GRUNDGESETZ, *supra* note 45, art. 115(2).

<sup>53</sup> *Id.*

<sup>54</sup> *See* Azoulai, *supra* note 2, at 12. In light of the analysis of the "golden rule" in the GC, and of the direct influence that this provision has played in the drafting of the Fiscal Compact, it is ironic that the German government decided to ratify the Fiscal Compact with a two-thirds parliamentary majority, as if the Fiscal Compact was introducing a new amendment to the GC. *See Testing the Limits: Even Germany Has Constitutional Worries About More European Integration*, *ECONOMIST*, Mar. 24, 2012, at 31, available at <http://www.economist.com/node/21551102>. As has been suggested, the decision to opt for qualified majority voting may be driven by the desire to "impress" the increasingly Euro-skeptical German Constitutional Court, which was ultimately empowered to decide whether the

### B. Spain

Even before serving as a model for the Fiscal Compact, the GC was used as a source of inspiration for constitutional reform in Spain.<sup>55</sup> As the interest rates of Spanish sovereign bonds were beginning to skyrocket late in the summer of 2011, the incumbent Spanish government rushed a constitutional amendment aimed at establishing a balanced-budget requirement and allegedly reassuring the financial markets through Parliament.<sup>56</sup> The new Article 135 of the Spanish Constitution (SC)—which was approved with bipartisan support in both chambers of the legislature in less than two weeks and entered into force on September 27, 2011—now affirms in its first two paragraphs that “[a]ll public administrations will conform their actions to the principle of budgetary stability. The State and the Autonomous Communities shall not incur a structural deficit that exceeds the standard established by the EU.”<sup>57</sup> A numerical indication of the maximum structural deficit in relation to the GDP for both the State and the Autonomous Communities is not directly provided by the SC, but will be specified in a *ley orgánica* (organic law), a special source of law (with infra-constitutional but supra-legislative status) which the Chamber of Deputies approves by an absolute majority.<sup>58</sup> Together with the deficit brake, the SC constitutionalizes the limits of the SGP on public debt.<sup>59</sup> According to Article 135(3), “the total volume of debt of the public administrations with

---

Fiscal Compact was compatible with the GC or required a constitutional revision to be ratified. In its decision of September 12, 2012, the German Constitutional Court eventually validated the constitutionality of the Fiscal Compact, and simultaneously upheld the ESM Treaty’s compatibility with the GC. See Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Sept. 12, 2012, No. 2 BvR 1390/12, [http://www.bverfg.de/en/decisions/rs20120912\\_2bvr139012en.html](http://www.bverfg.de/en/decisions/rs20120912_2bvr139012en.html).

<sup>55</sup> See Victor Mallet, *Spanish MPs Approve Debt Limit*, FIN. TIMES (Sept. 2, 2011, 3:16 PM), <http://www.ft.com/cms/s/0/074c8362-d55f-11e0-bd7e-00144feab49a.html#axzz2HPjtXIZq>.

<sup>56</sup> See generally *La Reforma de l’Artículo 135 CE*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, Sept.–Dec. 2011, at 159 (analyzing the reforms to Article 135 and its impact on the Spanish Constitution).

<sup>57</sup> CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, art. 135, Dec. 29, 1978 (revised Sept. 27, 2011) (author’s translation) (“Todas las Administraciones Públicas adecuarán sus actuaciones al principio de estabilidad presupuestaria. El Estado y las Comunidades Autónomas no podrán incurrir en un déficit estructural que supere los márgenes establecidos, en su caso, por la Unión Europea . . .”).

<sup>58</sup> See *id.* arts. 31, 135(2).

<sup>59</sup> See *id.* art. 135.

reference to the GDP shall not exceed the reference value established in the TFEU.”<sup>60</sup>

Also in Spain, the “golden rule” of a balanced budget is subject to an exception clause.<sup>61</sup> Article 135(4) states that:

[t]he limits of the structural deficit and of the volume of public debt can only be exceeded in cases of natural catastrophes, economic recession or situations of extraordinary emergency beyond the control of the State which considerably endanger the financial situation or the economic and social sustainability of the State, to be assessed by the absolute majority of the members of the Chamber of Deputies.<sup>62</sup>

While the implementation of the Spanish constitutional reform still requires the adoption of an organic law to develop the principles established in new Article 135 SC, it can be argued that the 2011 amendment largely anticipates the obligations of the Fiscal Compact and may thus be regarded as compatible with the “golden rule” which is therein established.<sup>63</sup> With wise drafting, Article 135 SC dynamically refers to the deficit and debt limits set up at the EU level, and can thus easily be adapted to the new, stricter requirements imposed by the Fiscal Compact.<sup>64</sup> Moreover, through the enactment of an organic law, the balanced-budget rule of the SC can be further specified with technical criteria.<sup>65</sup> Accordingly, it would seem that no additional implementing measures would be needed at the constitutional level for Spain to comply with the Fiscal Compact.<sup>66</sup>

---

<sup>60</sup> *Id.* art. 135(3) (author’s translation) (“El volumen de deuda pública del conjunto de las Administraciones Públicas en relación con el producto interior bruto del Estado no podrá superar el valor de referencia establecido en el TFUE.”).

<sup>61</sup> *See id.*

<sup>62</sup> *Id.* art. 135(4) (author’s translation) (“Los límites de déficit estructural y de volumen de deuda pública sólo podrán superarse en caso de catástrofes naturales, recesión económica o situaciones de emergencia extraordinaria que escapen al control del Estado y perjudiquen considerablemente la situación financiera o la sostenibilidad económica o social del Estado, apreciadas por la mayoría absoluta de los miembros del Congreso de los Diputados.”).

<sup>63</sup> *See id.* art. 135; TSCG, *supra* note 1, art. 3.

<sup>64</sup> *See* C.E., B.O.E. n. 311, art. 135(4), Dec. 29, 1978 (Spain) (revised Sept. 27, 2011).

<sup>65</sup> *See id.* art. 135(2).

<sup>66</sup> *See* TSCG, *supra* note 1, art. 3. An entirely different matter is whether the Spanish government will be effectively able to comply with the rules it has enshrined in its own Constitution under the pressure of the EU institutions. It is well known that *hours* after signing the Fiscal Compact, the Spanish Prime Minister Mariano Rajoy communicated in a press release that Spain would not be able to respect the deficit-reduction criteria provided by the Fiscal Compact. *See* Joshua Chaffin & Victor Mallet, *Spain Defies EU over Deficit Rules*,

## C. France

The constitutional situation of Spain contrasts sharply with that of France.<sup>67</sup> At the moment, France has not yet amended its 1958 Constitution (FC) to establish a balanced-budget requirement.<sup>68</sup> A constitutional reform bill was introduced in Parliament by the government on March 16, 2011 and approved in the same wording, after several readings, by the National Assembly and the Senate on July 13, 2011.<sup>69</sup> To enter into force, however, the constitutional amendment requires either a vote of approval by the two chambers of Parliament sitting jointly in Congress, or by the electorate in a referendum.<sup>70</sup> The changes in the government after the election of May 2012 have for all purposes ensured the end of any prospect of constitutional reform.<sup>71</sup> Nevertheless, it is doubtful whether the proposed constitutional reform would have been fully consistent with the strict requirements of the Fiscal Compact.<sup>72</sup> Arguably, the proposed amendment to the FC would have only introduced a “golden rule lite.”<sup>73</sup> According to the proposed new Arti-

---

FIN. TIMES (Mar. 2, 2012, 6:50 PM), <http://www.ft.com/intl/cms/s/0/eabdded8-6462-11e1-b50e-00144feabdc0.html>.

<sup>67</sup> See Pierre Garello & Vesselina Spassova, *French 2011 Fiscal Reforms in Retrospect*, INST. FOR RES. ECON. & FISCAL ISSUES (May 28, 2012), <http://www.irefeurope.org/en/content/french-2011-fiscal-reforms-retrospect>.

<sup>68</sup> *Id.*

<sup>69</sup> Helene Fouquet, *French Lawmakers Endorse Constitutional Rule on Balanced Budgets*, BLOOMBERG (July 13, 2011, 5:55 AM), <http://www.bloomberg.com/news/2011-07-13/french-lawmakers-endorse-constitutional-rule-on-balanced-budgets.html>.

<sup>70</sup> See 1958 CONST. art. 89 (Fr.). See generally *L'introduction de la "Règle d'Or" Budgetaire Dans la Constitution*, in CONSTITUTIONS 23 (2011) (reporting the opinion of academics and parliamentarians on the constitutional reform bill).

<sup>71</sup> The new French President, Francois Hollande of the Socialist Party, expressed during the spring 2012 Presidential campaign his intention to renegotiate the Fiscal Compact if elected. See Steven Erlanger & Nicholas Kulish, *French Front-Runner Says He'd Seek to Renegotiate Fiscal Treaty if Elected*, N.Y. TIMES, Apr. 26, 2012, at A8. Incidentally it may also be noticed that the Fiscal Compact—breaking also on this account with the established tradition in the EU—requires the approval of only 12 states for its entry into force, rather than unanimity. See TSCG, *supra* note 1, art. 14(2). The reason for introducing this rule was to avoid the veto of those member states where the ratification or implementation of the Fiscal Compact might have been more troublesome. France, which rejected key European treaties in 1954 and 2005, is certainly one of the countries where the risk of a “no-vote” on the Fiscal Compact could be significant. See Carlos Closa Montero, *Moving Away from Unanimity: Ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union 1*, 11 (Reconstituting Democracy in Eur., Working Paper No. 2011/38, 2011), available at [http://www.reconproject.eu/main.php/RECON\\_wp\\_1138.pdf?fileitem=5456490](http://www.reconproject.eu/main.php/RECON_wp_1138.pdf?fileitem=5456490).

<sup>72</sup> See TSCG, *supra* note 1, art. 3(2); *France: Stability Programme 2011–2014*, at 32 (Apr. 2011), available at [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/pdf/20\\_scps/2011/01\\_programme/fr\\_2011-05-03\\_sp\\_en.pdf](http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/20_scps/2011/01_programme/fr_2011-05-03_sp_en.pdf).

<sup>73</sup> See *France: Stability Programme 2011–2014*, *supra* note 72, at 32.

cle 34(20) FC, the objective of strengthening budgetary constraints was ensured through the enactment of a new source of law—called *lois-cadres d'équilibre des finances publiques*, or framework laws on the equilibrium of public finance—which determined “the multi-annual orientations, the norms of evolution and the management rules of the public finances, with the goal to assure the equilibrium of the budget of the public administrations” for at least three years.<sup>74</sup>

The framework laws on the equilibrium of public finance ought to dictate the fiscal standards to be followed in enacting the yearly budgetary law, and—as clarified by the proposed new Article 47(1) FC—no budget could be approved in the absence of a framework law applicable to the concerned fiscal year.<sup>75</sup> Furthermore, according to the prospective Article 61(2) FC, the French Constitutional Council would have had to review budgetary laws every year “before their entry into force”<sup>76</sup> for their compatibility with the *loi-cadres d'équilibre des finances publiques*.<sup>77</sup>

As this summary reveals, significant differences existed between the provisions of the proposed amendment to the FC and the rules of the Fiscal Compact.<sup>78</sup> The French reform did not codify a clear rule to prevent government deficit or impose a yearly balanced budget.<sup>79</sup> By devising a new legal instrument—the framework laws—the existing constitutional reform bill would only establish a flexible duty for the government to ensure fiscal equilibrium over a three-year span.<sup>80</sup> The indeterminacy of this obligation explains the absence of exception clauses analogous to those in the Fiscal Compact, the GC, and the SC.<sup>81</sup> Moreover, according to draft Article 46-1 FC, the conditions for approval of the framework law had to be set in a *loi organique* (an organic

---

<sup>74</sup> Projet de loi constitutionnelle du 13 juillet 2011 relatif à l'équilibre des finances publiques [Draft Constitutional Law of July 13, 2011 Relating to the Balance of Public Finances], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], July 13, 2011, art. 1, <http://www.assemblee-nationale.fr/13/ta/ta0722.asp> [hereinafter Draft Constitutional Law of July 13, 2011] (author's translation) (draft amendment of art. 34(20) FC). The original version in French reads: “pour au moins trois années, les orientations pluriannuelles, les normes d'évolution et les règles de gestion des finances publiques, en vue d'assurer l'équilibre des comptes des administrations publiques.” *Id.*

<sup>75</sup> *Id.* art. 5(1) (draft amendment of art. 47(1) FC).

<sup>76</sup> *Id.* art. 10(2) (author's translation) (draft amendment of art. 61(2) FC). The original version in French reads: “avant leur promulgation.” *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *supra* text accompanying notes 19–25, 72–77.

<sup>79</sup> See *France: Stability Programme 2011–2014*, *supra* note 72, at 32.

<sup>80</sup> See Draft Constitutional Law of July 13, 2011, *supra* note 74, art. 1 (draft amendment of art. 34(20) FC).

<sup>81</sup> *Id.*



law to be approved by absolute majority of the National Assembly),<sup>82</sup> thus granting the governing majority wide room to modulate the effects of the budgetary constraints on the basis of other political incentives.<sup>83</sup> All in all, it would seem that the French project of constitutional reform was not in line with the developments which have subsequently occurred in the EU through the enactment of the Fiscal Compact.<sup>84</sup> The new French government, however, has recently abandoned the prospect of a constitutional reform to incorporate the Fiscal Compact in domestic law, and opted instead for the enactment of a *loi organique*, as permitted by the Fiscal Compact itself.<sup>85</sup>

#### D. Italy

Contrary to the high level of politicization that has characterized the proposal to amend the FC to introduce tighter budgetary rules in France, the reform of the 1948 Italian Constitution (IC) to enshrine the “golden rule” has been notable for the high level of political consensus among parties—an unusual phenomenon in a country which is otherwise characterized by extremely polarized and litigious political elites.<sup>86</sup> The peculiar conditions that led to the creation of the Monti government in November 2011, at the height of the speculative attack against the Italian sovereign bonds, may explain the widespread support that the proposal to introduce the “golden rule” in the IC has received from political parties in both chambers of Parliament.<sup>87</sup> The constitutional revision bill to amend the budgetary provisions of the IC was originally sponsored by the previous government.<sup>88</sup> Yet, the Monti

<sup>82</sup> See 1958 CONST. art. 46 (Fr.).

<sup>83</sup> See Draft Constitutional Law of July 13, 2011, *supra* note 74, art. 4 (draft amendment of art. 46-1 FC).

<sup>84</sup> See TSCG, *supra* note 1, art. 3(2).

<sup>85</sup> The President of the French Republic submitted to the Constitutional Council a request pursuant to Article 54 FC, to ask prospectively whether the ratification of the Fiscal Compact required a constitutional revision of the FC. Conseil constitutionnel [CC][Constitutional Court] decision No. 2012-653DC, Aug. 9, 2012, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-115501.pdf>. In its decision of August 9, 2012, the Constitutional Court replied that the ratification of the Treaty did not require a constitutional change and that the obligation to incorporate the “golden rule” in French law could be undertaken via the enactment of a *loi organique*. *Id.*

<sup>86</sup> See Shoaib-ur-Rehman Siddiqui, *Italy Approves Balanced-Budget Amendment to Constitution*; BUS. RECORDER (Apr. 18, 2012, 12:26 AM), <http://www.brecorder.com/top-news/109-world-top-news/53572-italy-approves-balanced-budget-amendment-to-constitution.html>.

<sup>87</sup> See Michael Schuman, *The Most Important Man in Europe*, TIME, Feb. 20, 2012, at 28, 30 (describing the economic conditions that led to the creation of the Monti government).

<sup>88</sup> Siddiqui, *supra* note 86.

government explicitly endorsed the proposal while in office, identifying the amendment as an important commitment Italy had to undertake vis-à-vis its EU partners.<sup>89</sup> This ensured speedy approval both in the Chamber of Deputies and in the Senate, which are required to vote twice on the same text at a distance of three months between the first and the second reading,<sup>90</sup> and the Constitutional Revision Act was signed into law on April 20, 2012.<sup>91</sup>

The new Article 81 IC provides that:

The State ensures the balance between revenue and expenditures in its budget, considering the upswings and the downswings of the economic cycle. The State can resort to the emission of debt only with the purpose to consider the effects of the economic cycle and, upon authorization of the two chambers of Parliament adopted at the absolute majority of its members, in cases of exceptional events.<sup>92</sup>

Article 81 IC then introduces a new source of law in the Italian legal system, modelled on the Spanish *ley organica* and the French *loi organique*, empowering Parliament to adopt, at the absolute majority of its members, a special budgetary statute.<sup>93</sup> The statute is designed to establish “[t]he content of the budgetary laws, the fundamental norms and the criteria to ensure the balance between the revenues and the expenditures of the budget and the sustainability of the debt of all public administrations.”<sup>94</sup> The obligation of a balanced budget is then extended, by the new Article 119, to the Regions, which are required to “ensure respect of the economic and financial constraints deriving from the

---

<sup>89</sup> *See id.*

<sup>90</sup> *See* Art. 138 Costituzione [Cost.] (It.).

<sup>91</sup> *See* Legge Costituzionale 20 aprile 2012, n. 1, in G. U. del 23 Aprile 2012, n. 95 (It.). *See generally* Daniele Cabras, *L'introduzione del principio del c.d. pareggio di bilancio: una regola importante per la stabilizzazione della finanza pubblica*, 2012 QUADERNI COSTITUZIONALI 111 (discussing the constitutional reforms in Italy).

<sup>92</sup> Art. 81 Cost. (author's translation) (“Lo Stato assicura l'equilibrio tra le entrate e le spese del proprio bilancio, tenendo conto delle fasi avverse e delle fasi favorevoli del ciclo economico. Il ricorso all'indebitamento è consentito solo al fine di considerare gli effetti del ciclo economico e, previa autorizzazione delle Camere adottata a maggioranza assoluta dei rispettivi componenti, al verificarsi di eventi eccezionali.”).

<sup>93</sup> *See id.*

<sup>94</sup> *Id.* (author's translation) (“Il contenuto della legge di bilancio, le norme fondamentali e i criteri volti ad assicurare l'equilibrio tra le entrate e le spese dei bilanci e la sostenibilità del debito del complesso delle pubbliche amministrazioni . . .”).

EU.”<sup>95</sup> Overall, the constitutional amendment of the IC strengthens Italy’s commitment toward budgetary discipline.<sup>96</sup> Nevertheless, it could be argued that, because of their rather generic formulation, the new constitutional provisions do not entirely incorporate the “golden rule” of the Fiscal Compact.<sup>97</sup> Despite these discrepancies, it is possible that in enacting the special statute required by Article 81 IC, Parliament will fulfil the Fiscal Compact requirements.<sup>98</sup> Yet, at the moment, it remains uncertain whether this new special statute will be regarded as part of the bloc of constitutionality used by the Italian Constitutional Court in the review of legislation, as is specifically required by Article 3(2) of the Fiscal Compact.<sup>99</sup> Most likely, this issue will have to be decided by the Italian Constitutional Court.

### III. THE INSTITUTIONAL IMPLICATIONS OF THE “GOLDEN RULE”

As the previous Part has explained, the introduction of the “golden rule” in the Fiscal Compact was anticipated by the enactment of tight budgetary constraints in the GC and the SC.<sup>100</sup> Similarly, the prospect of the enactment of the Fiscal Compact has worked as a powerful incentive for completing constitutional revision in Italy.<sup>101</sup> Leaving aside the question whether all state constitutional provisions are fully consistent with the detailed obligations of the Fiscal Compact, an overview of the four major economies of the Euro-zone, demonstrates that only France is currently without any constitutional limitation on government spending.<sup>102</sup> In light of this consistent trend toward the constitutionalization of rules on budgetary discipline, this Part discusses the plausible institutional implications of the adoption of the “golden rule” for the political branches and courts of both the member states and the EU. The first section will focus on the role of executives and legislatures by analyzing how budgetary constraints affect the relationship between parliaments and cabinets, and by suggesting that the impact of the “golden rule” is likely to change in light of each state’s form of government. The second

---

<sup>95</sup> Art. 119 Cost.; L.C. n. 1/2012, art. 4 (It.) (amending Art. 119 Costituzione) (author’s translation). (“assicurare l’osservanza dei vincoli economici e finanziari derivanti dall’ordinamento dell’Unione europea.”).

<sup>96</sup> See Siddiqui, *supra* note 86.

<sup>97</sup> See Art. 81 Cost.; TSCG, *supra* note 1, art. 3(2).

<sup>98</sup> See Art. 81 Cost.; TSCG, *supra* note 1, art. 3(2).

<sup>99</sup> See Groppi, *supra* note 42, at 102–04 (describing the limited types of actions to activate constitutional review in Italy).

<sup>100</sup> See *supra* Part II.A–B.

<sup>101</sup> See *supra* Part II.D.

<sup>102</sup> See *supra* Part II.C.

section will focus on the role of state courts, emphasizing how the constitutionalization of fiscal rules will strengthen the role of Constitutional Courts throughout Europe, but hinting that this development is bound to raise significant procedural challenges in several EU member states. As will be explained in the third section, however, the introduction of the “golden rule” in state constitutional law is likely to have profound implications on the role of the EU political and judicial institutions, both of which will find themselves in a stronger position to guide and oversee the fiscal policies of the member states.

#### A. *The Role of State Executives and Legislatures*

The existence of a balanced-budget requirement in state constitutions places an obligation on the political branches to devise budgetary laws that comply with the fiscal constraints of the state constitution.<sup>103</sup> As such, executives are expected to propose, and parliaments ultimately to approve, annual budget laws which are either at a surplus or on balance (or at worst have a deficit not exceeding that permitted by the Fiscal Compact).<sup>104</sup> Generally speaking, these new legal constraints are likely to have an impact on the budgetary policies of various EU member states, notably in countries like Italy or Spain where political elites have traditionally been less concerned with the sustainability of public finances, and have repeatedly subsidized government spending by raising public debts.<sup>105</sup> Yet, besides the relevant cultural factors, it is likely that the impact of the “golden rule” on the role of the political branches of state governments will vary on the basis of the institutional features of the system of government of each member state.<sup>106</sup> In particular, the adoption of the “golden rule” will affect executives and legislatures and their relationship in different ways depending on the nature of the budgetary process in place in any given state.

In this regard, a crucial factor in explaining the implications of the “golden rule” is the role parliament currently exercises in the budgetary

---

<sup>103</sup> See Azoulai, *supra* note 2, at 5.

<sup>104</sup> See *id.* at 14.

<sup>105</sup> See Mark Hallerberg, *Fiscal Federalism Reforms in the European Union and the Greek Crisis*, 12 EURO. UNION POL. 127, 135, 138–39 (2012).

<sup>106</sup> See generally MAURICE DUVERGER, *LES GRANDS SYSTÈMES POLITIQUES* (1970) (comparing forms of government in different institutional regimes); GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES, AND OUTCOMES* (2d ed. 1997) (comparing institutional roles in different democratic systems).

process.<sup>107</sup> In comparative terms, parliaments can function either as decision-makers—with a sizeable role in designing the substance of the yearly budget—or as oversight bodies—with limited capacity to influence the drafting of the budget, but greater powers in overseeing its implementation.<sup>108</sup> Parliaments generally exercise a more prominent decision-making function in parliamentary systems in which executives do not enjoy political majorities and where the budget is the result of political bargaining between the cabinet and parliamentary leaders.<sup>109</sup> On the contrary, in semi-presidential systems and parliamentary systems in which executives have strong and obedient parliamentary majorities, parliaments largely exercise an *ex post* function in the budgetary process, which focuses on the oversight (mostly by the opposition in parliament) of the execution of the budget by the cabinet.<sup>110</sup> In light of this distinction, it is plausible to maintain that, in the first institutional model, the introduction of a “golden rule” will likely strengthen the position of the executive branch vis-à-vis parliament.<sup>111</sup> In the second institutional context, however, the effects of the “golden rule” are less visible and more difficult to predict.<sup>112</sup> While the existence of balanced-budget constraints is not likely to affect the role of the executives, it may provide instruments for parliamentary opposition to make its voice heard.

The states considered in this Article offer a broad spectrum of institutional settings which help empirically explain the institutional dynamics that the “golden rule” may trigger between executives and legislatures.<sup>113</sup> For instance, in Italy, where the executive enjoys limited constitutional instruments to force Parliament to approve its budget,<sup>114</sup> the new Article 81 IC may give the government a new means to close the debate on its budget proposal and force Parliament to vote its

---

<sup>107</sup> See generally Ian Lienert, *Who Controls the Budget: The Legislature or the Executive?* (Int'l Monetary Fund, Working Paper No. 05/115, 2005) (explaining the various roles legislative and executive bodies play in budget-making).

<sup>108</sup> See *id.* at 7–8.

<sup>109</sup> *Id.* at 9.

<sup>110</sup> See *id.* at 7–8, 11.

<sup>111</sup> See *id.* at 11. It goes without saying, at the same time, that the “golden rule” will reduce also the room for maneuvering by the executive (especially by limiting the capacity to spend to obtain political consensus). *Id.* at 13.

<sup>112</sup> See *id.* at 11–14.

<sup>113</sup> See *supra* Part II.

<sup>114</sup> See Massimo Rubechi, *La Sessione di Bilancio in Parlamento: Governi in Fuga*, in LA PRASSI DEGLI ORGANI COSTITUZIONALI 269, 276–77, 282 (Augusto Barbera & Tommaso F. Giupponi eds., 2008).

bill.<sup>115</sup> In the semi-presidential system created by the 1958 FC, by contrast, the government—which, save during the so-called cohabitation, is under the full control of the directly elected President—already enjoys almost total control of the budgetary process.<sup>116</sup> Indeed, according to Article 49(3) FC, the government may commit its political responsibility and consider a bill approved by Parliament without even submitting it to a vote.<sup>117</sup> In this context, the “golden rule” is unlikely to strengthen the position of the executive. Yet, it could perhaps give a new opportunity for the opposition in Parliament to control the activity of the executive by challenging a bill before the Constitutional Council.<sup>118</sup> The cases of Germany and Spain, finally, lay somewhere in between the Italian and French extremes. Both countries are parliamentary democracies in which the executives enjoy significant leeway in the budgetary process.<sup>119</sup> Yet, in both systems the government may be dependent on the political support of junior parties, increasing the difficulties it may face in imposing its budget on Parliament.<sup>120</sup> As a consequence, it seems likely that the “golden rule” will have either empowering or constraining effects on these countries’ executive branches, depending on specific political conditions.

### B. *The Role of State Courts*

The “golden rule” constitutionalizes an obligation on executives to propose and legislatures to approve balanced-budget laws yearly.<sup>121</sup> Because in the majority of EU countries the existence of a constitutional provision makes it justiciable, the constitutionalization of the “golden

---

<sup>115</sup> See Art. 81 Cost. (It.); see also Nicola Lupo, *Le procedure di bilancio dopo l'ingresso nell'Unione economica e monetaria*, 1999 QUADERNI COSTITUZIONALI 523, 550–51 (explaining how the creation of the EMU has strengthened the role of the executive branch vis-à-vis Parliament in Italy).

<sup>116</sup> See Roger Chinaud, *Loi de Finances: Quelle Marge de Manoeuvre pour le Parlement?*, 64 POUVOIRS 99, 99 (1993).

<sup>117</sup> 1958 CONST. art. 46 (explaining that the legislature may only defy the executive’s decision with a no-confidence vote).

<sup>118</sup> See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 120 (1992). In fact, however, as mentioned in this Article, the draft new Article 61 FC would have made the review of budgetary laws by the French Constitutional Council mandatory before the law’s entry into force. See *supra* text accompanying notes 76–77.

<sup>119</sup> See Ruíz Almendral, *Estabilidad Presupuestaria y Reforma Constitucional*, 41 REVISTA ESPAÑOLA DE DERECHO EUROPEO 33, 82 (2012); Joachim Wehner, *Reconciling Accountability and Fiscal Prudence: A Case Study of the Budgetary Role and Impact of the German Parliament*, 7 J. LEGIS. STUD. 57, 59–61 (2001).

<sup>120</sup> See Lienert, *supra* note 107, at 14.

<sup>121</sup> See Azoulai, *supra* note 2, at 4–5, 14.

rule” inevitably strengthens the role of courts as guardians of fiscal discipline and comptrollers of the budgetary policies of the political branches.<sup>122</sup> The increasing empowerment of state courts as a result of developments in EU law is in itself nothing new.<sup>123</sup> Many scholars have emphasized how EU law has consistently enhanced the institutional position of courts vis-à-vis the political branches of EU member states.<sup>124</sup> Nevertheless, whereas EU law has traditionally favored the position of ordinary judges, the introduction of the “golden rule” in the state constitutions benefits the role of Constitutional Courts.<sup>125</sup> In most EU member states, including all four case studies considered in this Article, the task of reviewing the constitutionality of legislation is centralized in *ad hoc*, specialized Constitutional Courts.<sup>126</sup> It is therefore plausible that Constitutional Courts in Germany, Spain, Italy, and (in case) France, will through the adoption of the “golden rule” acquire new and pervasive competences in the fiscal field, including the ability to scrutinize—and strike down—the budgets approved by Parliaments, to ensure compliance with the constitutional budgetary constraints.

This development is in itself quite remarkable since, until now, the role of the judiciary in this area of the law has been negligible in almost all the countries here considered.<sup>127</sup> The empowerment of state Constitutional Courts in reviewing governmental budgetary policies raises, however, serious questions as to judges’ capacity to master the technically complex economic variables condensed within the “golden rule,” and makes it difficult to predict the degree of deference that Constitutional Courts may be willing to grant to the political branches.<sup>128</sup> Significant concerns are also raised by the possibility that a Constitutional Court may be asked to rule on the constitutionality of a budgetary law long after the law’s enactment.<sup>129</sup> It is hard to imagine the effect of a Constitutional Court ruling which retroactively strikes down a budget

---

<sup>122</sup> See Giacomo Delledonne, *Financial Constitutions in the E.U.: From the Legal to the Political Constitution* 8 (Mar. 23, 2012) (unpublished manuscript) (on file with author).

<sup>123</sup> See J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2420–22 (1991).

<sup>124</sup> See MONICA CLAES, *THE NATIONAL COURTS MANDATE IN THE EUROPEAN CONSTITUTION* 221–22 (2006); Weiler, *supra* note 123, at 2420–22.

<sup>125</sup> See STONE SWEET, *supra* note 40, at 33–35.

<sup>126</sup> See DOMINIQUE ROUSSEAU, *LA JUSTICE CONSTITUTIONNELLE EN EUROPE* 20–24 (3d ed. 1998); STONE SWEET, *supra* note 40, at 34.

<sup>127</sup> See Delledonne, *supra* note 122, at 6–8.

<sup>128</sup> I am grateful to Elena Simina Tanasescu for making this point clear to me.

<sup>129</sup> See, e.g., Giovanni Bognetti, *Il Pareggio di Bilancio Nella Carta Costituzionale*, *RIVISTA TELEMATICA GIURIDICA DELL’ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI*, Nov. 15, 2011, at 1, 6, available at [http://www.rivistaaic.it/sites/default/files/rivista/articoli/allegati/Bognetti\\_0.pdf](http://www.rivistaaic.it/sites/default/files/rivista/articoli/allegati/Bognetti_0.pdf).

many years after its enactment. Having said so, it nevertheless seems plausible to suggest that the role played by the Constitutional Courts in the budgetary field will greatly depend upon the underlying features of the state system of constitutional review. In particular, procedural factors such as the mechanisms by which a Court can be activated and the timing within which a Court has to decide a case will be of central importance.<sup>130</sup> Therefore, the “golden rule” will most likely be relevant for Constitutional Courts in systems endowed with broad mechanisms of constitutional review, while it will be more restricted (and potentially dangerous) in those systems in which Constitutional Courts can only be involved well after the conclusion of the budgetary process.

The four countries considered in this Article offer examples of how the effects of the “golden rule” will likely combine with alternative procedural mechanisms of constitutional review. Hence, for instance, the constitutionalization of budgetary constraints works well in a state like Germany, characterized by a powerful Constitutional Court which can review acts of Parliament in essentially any form.<sup>131</sup> Under the procedural mechanisms of the GC, in fact, the Constitutional Court could be requested to review the constitutionality of a budget at an early stage, thus ensuring quick oversight on the activity of Parliament.<sup>132</sup> The same considerations seem to apply also for the Spanish Constitutional Court, whose powers are largely based on the German model.<sup>133</sup> In France, the Constitutional Council has been traditionally entrusted to review legislation before its enactment.<sup>134</sup> Hence, the possibility of scrutinizing a budget bill (which, according to the proposed new Article 61 FC, would have been a duty)<sup>135</sup> would not have significantly altered the current function of the Constitutional Council.<sup>136</sup> In Italy, on the contrary, the Constitutional Court can only review acts of Parlia-

---

<sup>130</sup> See STONE SWEET, *supra* note 40, at 50–52.

<sup>131</sup> See Kommers & Miller, *supra* note 43, at 194 (describing the Constitutional Court’s authority to review acts of Parliament before or after their enactment, upon referral from members of Parliament or ordinary courts, or even on the basis of a direct individual petition).

<sup>132</sup> See, e.g., Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] July 9, 2007, No. 2 BvF 1/04, paras. 96, 119 (reviewing the federal budget through a constitutional challenge raised by the opposition). In this case, which was decided before the constitutional revision of 2009, the Court rejected the challenge but clarified that the GC had to be modified to strengthen the control against unwarranted spending.

<sup>133</sup> See P. Acosta, *National Legal Tradition—Spain*, in JUDICIAL REVIEW: A COMPARATIVE ANALYSIS INSIDE THE EUROPEAN LEGAL SYSTEM 113, 126 (S. Galera ed., 2010).

<sup>134</sup> See Fabbrini, *supra* note 42, at 1302–03.

<sup>135</sup> See *supra* text accompanying notes 76–77.

<sup>136</sup> See Fabbrini, *supra* note 42, at 1302.



ment *a posteriori*, either upon referral of a judge who doubts the constitutionality of a statute she must apply to a pending case or upon a challenge by a Region.<sup>137</sup> Since the recent Italian constitutional reform has not introduced any change in the procedural mechanisms to activate the Constitutional Court, it is unclear how effectively a case against a budget bill could be brought before the Constitutional Court.<sup>138</sup>

### C. *The Role of Supranational Institutions*

As the preceding analysis has clarified, the enactment of the “golden rule” in state constitutions is bound to have institutional implications on both the relationships between the political branches and the role of Constitutional Courts in the member states.<sup>139</sup> The nature of such institutional changes is likely to be asymmetric, varying from state to state on the basis of pre-existing factors like the function of parliaments in budgetary procedures, and the procedural mechanisms utilized by Constitutional Courts to review legislation.<sup>140</sup> What seems instead to be symmetrically occurring in all member states as a result of the introduction of the “golden rule” is a power shift in favor of supranational institutions.<sup>141</sup> The Fiscal Compact imposes strict budgetary rules on the member states and provides for new enforcement mechanisms, which are likely to empower both the ECJ and the European Commission vis-à-vis the states.<sup>142</sup> Regarding the role of the suprana-

---

<sup>137</sup> Groppi, *supra* note 42, at 102–03.

<sup>138</sup> During the debate leading toward the revision of the IC, a proposal was made to empower the Court of Auditors to bring a case before the Italian Constitutional Court to challenge budgetary laws that failed to comply with the new Article 81 IC. *See* Bognetti, *supra* note 129, at 5–6. The proposal was eventually rejected, however, leaving uncertain how the Italian Constitutional Court may review a budgetary law without dangerous delays. *See id.*

<sup>139</sup> *See supra* Part III.A–B.

<sup>140</sup> *See supra* Part III.A–B.

<sup>141</sup> *See, e.g.*, Mark Dawson & Floris De Witte, Constitutional Balance in the EU After the Euro-Crisis (Nov. 22, 2012) (unpublished manuscript) (on file with author). In this Article, I will focus only on the role for the EU institutions in the new architecture of the Eurozone, and I will not consider the role that EU institutions have played in response to the Eurozone crisis. As a matter of fact, it appears that the European Council (the body representing the heads of state and government of the member states) has become the central institutional arena in which major political decisions on the future of the EMU are made. *See generally* Sergio Fabbrini, Intergovernmentalism and Its Outcomes: The Implications of the Euro Crisis on the European Union, (Feb. 16, 2012) (unpublished manuscript), *available at* <http://eucenter.berkeley.edu/files/Fabbrini.17Feb2012.pdf> (discussing the growth in the decision-making role of the European Council and its implications for the future of the EMU).

<sup>142</sup> *See supra* Part I.

tional judiciary, it has already been mentioned that the obligation of the states to incorporate the “golden rule” in domestic law is policed by the ECJ.<sup>143</sup> Because it is entrusted to decide whether a state has fulfilled its obligations under Article 3(2) of the Fiscal Compact, the ECJ is vested with the authority to oversee the national constitutional revision processes and sanction states whose constitutional amendments are inconsistent with the Fiscal Compact.<sup>144</sup> Although EU precedent shows that the ECJ has never hesitated to declare the unlawfulness of state constitutional provisions that were incompatible with EU law,<sup>145</sup> the additional power of judicial review that the ECJ now enjoys on the basis of the “golden rule” appears more sweeping, as it directly impacts the *exercise* of the constituent power of a state to amend its constitution.<sup>146</sup>

In addition, although Article 8 of the Fiscal Compact technically only empowers the ECJ to enforce the obligation to *enact* the “golden rule” at the state level, it cannot be overlooked that the ECJ may over time acquire a role in enforcing the obligation of states to *respect* the “golden rule” in the budgetary procedures.<sup>147</sup> As explained in the previous section, state Constitutional Courts will be primarily vested with the duty to review state political branches’ compliance with the “golden rule.”<sup>148</sup> Yet, budgetary policy and fiscal standards are increasingly regulated by EU law; besides the Fiscal Compact, one must consider the provisions of the EU treaties along with the new comprehensive legislative framework established by the so-called “six-pack” regulations,<sup>149</sup> which provide detailed indications on how state budgets should look.<sup>150</sup> Taking into account the obligation of state courts to refer preliminary questions to the ECJ on matters of interpretation of EU law,<sup>151</sup> it is conceivable that the ECJ may be asked to rule on the compatibility of a state budget with provisions of EU law.<sup>152</sup> Needless to say, this hypothesis is advanced here in merely speculative terms; it seems likely at the same time, that relevant national variations may shape the state courts’

---

<sup>143</sup> See *supra* text accompanying notes 30–33.

<sup>144</sup> See Azoulai, *supra* note 2, at 5.

<sup>145</sup> See, e.g., Case C-285/98, Kreil v. Germany, 2000 E.C.R. I-69, para. 32 (holding that the GC’s clause prohibiting women from serving in the military was incompatible with the principle of equal access to work recognized in secondary EU legislation).

<sup>146</sup> See Azoulai, *supra* note 2, at 12.

<sup>147</sup> See, e.g., *id.* at 13 (suggesting that the ECJ could be required to enforce budget-reporting requirements as well as constitutionalization of the “golden rule”).

<sup>148</sup> See *supra* Part III.B.

<sup>149</sup> See *supra* note 17.

<sup>150</sup> See Azoulai, *supra* note 2, at 22–23.

<sup>151</sup> See TFEU art. 263.

<sup>152</sup> I am grateful to Sabino Cassese for making this point clear to me.

willingness to refer questions concerning state budgetary law to the ECJ.<sup>153</sup> Nevertheless, the prospect of something of this sort happening elucidates the potentially unprecedented transformations that the “golden rule” may generate in the role of the ECJ.<sup>154</sup>

The power shift toward the EU that the Fiscal Compact produces, however, is not exclusively to the advantage of the judiciary.<sup>155</sup> Political institutions like the European Commission will also gain influence from the existence of strict rules binding national authorities in the exercise of their budgetary competences.<sup>156</sup> In this regard, one has to bear in mind that the Fiscal Compact builds upon a set of EU constitutional and legislative measures which have recently accorded to the Commission a pervasive role in the guidance and oversight of the national budgetary procedures.<sup>157</sup> In particular, the so-called “European semester” was set up in 2010,<sup>158</sup> and requires states to submit every spring to the Commission a draft of their budget laws that takes into account the parameters of the economic situation of the country previously prepared by the Commission.<sup>159</sup> The Commission can request changes when it believes that the draft national budget would run afoul of EU economic and fiscal objectives.<sup>160</sup> Budgets are then presented domestically in parliaments each fall, after having received the Commission’s approval.<sup>161</sup> Moreover, pursuant to the excessive deficit procedure of Article 126 TFEU, the Commission is empowered to propose to the Council of Ministers (the EU body representing the executives of the

---

<sup>153</sup> See generally Marlene Wind et al., *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*, 10 EUR. UNION POL. 63 (2009) (assessing state-to-state variations in referring disputes to the ECJ).

<sup>154</sup> I am grateful to Wojciech Sadurski for making this point clear to me.

<sup>155</sup> See TB & WTE, Editorial, *The Euro Crisis: Storm, Meet Structure*, 7 EUR. CONST. L. REV. 349, 353 (2011).

<sup>156</sup> See *id.*; Giulio Napolitano, *L'incerto futuro della nuova governance economica europea*, 2012 QUADERNI COSTITUZIONALI 141, 144.

<sup>157</sup> See Jason B. Gott, Comment, *Addressing the Debt Crisis in the European Union: The Validity of Mandatory Collective Action Clauses and Extended Maturities*, 12 CHI. J. INT’L L. 201, 205–06 (2011); Giuseppe Martinico, *The Euro-Area Crisis: A First Legal Analysis*, 3 PERSP. ON FEDERALISM, no. 3, 2011 at 9–10.

<sup>158</sup> See Council Conclusions EUCO 13/10 of 17 June 2010, at 5 [hereinafter Conclusions], available at [http://ec.europa.eu/eu2020/pdf/council\\_conclusion\\_17\\_june\\_en.pdf](http://ec.europa.eu/eu2020/pdf/council_conclusion_17_june_en.pdf). A more solid legal framework for the so-called “European Semester” has since been provided by EU legislation. See Regulation No 1175/2011, of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, 2011 O.J. (L 306) 12, 12; Azoulai, *supra* note 2, at 22–23.

<sup>159</sup> See Azoulai, *supra* note 2, at 22–23.

<sup>160</sup> See *id.*

<sup>161</sup> See Conclusions, *supra* note 158, at 5.

member states) the adoption of measures, including fines, against states that do not comply with the deficit limits of the SGP.<sup>162</sup> For the states that signed the Fiscal Compact, Article 7 enhances the Commission's power in this procedure by committing the states to accept the Commission's proposal unless a qualified majority in the Council of Ministers opposes the decision.<sup>163</sup>

In this context, the "golden rule" in the Fiscal Compact provides another instrument of control for the Commission over the states' budgetary procedures, contributing further to the centralization at the EU level of core policymaking functions in the fiscal domain. By relying on the strict and detailed balanced-budget rules mandated by the Fiscal Compact, the Commission will be able to exercise a more pervasive *ex ante* scrutiny on the sustainability and appropriateness of the draft budget bills which the governments submit for approval during the European Semester.<sup>164</sup> At the same time, the Commission will gain more effective powers of *ex post* oversight on the budgetary performances of the states, with the possibility—besides naming the states which have not incorporated the "golden rule," and thus opening the way for a case before the ECJ<sup>165</sup>—of adopting semi-automatic sanctions against states with excessive deficits.<sup>166</sup> From this point of view, in the end, it emerges that the Fiscal Compact, with its balanced-budget requirement, adds another stone to the path of increasing centralization in the EU constitutional framework, enhancing the role of the EU judicial and political institutions.<sup>167</sup> Nevertheless, it must be critically emphasized that this development does not involve the European Parliament, which is instead left entirely out of the new architecture of the Euro-zone, weakening the legitimacy of the transfer of growing slices of political authority at the EU level.<sup>168</sup> In light the implications of the Fiscal Compact on the existing federal balance between the states and the EU, it is now worth comparing how the challenges of ensuring state

---

<sup>162</sup> See TFEU art. 126(11).

<sup>163</sup> TSCG, *supra* note 1, art. 7.

<sup>164</sup> See TSCG, *supra* note 1, art. 3.

<sup>165</sup> See *id.* art. 8.

<sup>166</sup> See *id.* art. 7.

<sup>167</sup> See Giovanni Pitruzzella, *Chi governa la finanza pubblica in Europa?*, 2012 QUADERNI COSTITUZIONALI 9, 16; Roland Bieber, *Observer–Policeman–Pilot: On Lacunae of Legitimacy and the Contradictions of Financial Crisis Management in the European Union* 3 (Eur. Univ. Inst. Dep't of Law, Working Paper No. 2011/16, 2011), available at [http://cadmus.eui.eu/bitstream/handle/1814/19696/LAW\\_2011\\_16\\_Bieber.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/19696/LAW_2011_16_Bieber.pdf?sequence=1).

<sup>168</sup> See Cristina Fasone, *The Weakening of the European Parliament in the Framework of the New European Economic Governance* 10–11 (Mar. 23, 2012) (unpublished manuscript) (on file with author).

fiscal discipline in an economic and monetary union have been historically addressed in the U.S. federal system.

#### IV. FISCAL FEDERALISM IN THE UNITED STATES: A COMPARATIVE PERSPECTIVE

As Randall Henning and Martin Kessler have recently emphasized, the experience of the United States in the field of fiscal federalism offers a number of valuable points of comparison to analyze “the dilemmas that Europe faces.”<sup>169</sup> From a historical perspective, the United States, like the EU, has had to address the challenges of creating a common currency and managing a union in which states have diverging economic interests and performances.<sup>170</sup> It is therefore helpful to explore the extent to which the institutional responses developed by the United States to address these challenges are similar to, or different from, those currently under discussion in the EU.<sup>171</sup> A comparative analysis reveals the existence of some *similarities*.<sup>172</sup> Since the mid-nineteenth century, the U.S. fiscal architecture has been characterized by two basic structural tenets.<sup>173</sup> First, the federal government has consistently applied a policy of refusing to bail out defaulting states, making the states fully responsible for the service of their debt.<sup>174</sup> Second, the states have incorporated budget constraints in their constitutions to prevent excessive government spending and debt accumulation.<sup>175</sup> These features—which are reflected in the EU context in the bailout prohibition of Article 125 TFEU and in the “golden rule” mandated by the Fiscal Compact—emerged simultaneously in antebellum America.<sup>176</sup> Shortly after the foundations of the United States, the federal government, under the leadership of Secretary of the Treasury Alexander Hamilton, agreed on the federal assumption of the debt in-

---

<sup>169</sup> C. Randall Henning & Martin Kessler, *Fiscal Federalism: US History for Architects of Europe's Fiscal Union* 2, 5–6 (Peterson Inst. for Int'l Econ., Working Paper No. 2012-1, 2012).

<sup>170</sup> McNamara, *supra* note 9, at 128–29, 132–33.

<sup>171</sup> See Robert P. Inman & Daniel L. Rubinfeld, *Fiscal Federalism in Europe: Lessons from the United States Experience*, 36 EUR. ECON. REV. 654, 659–60 (1992); Jerome W. Sheridan, *The Déjà Vu of EMU: Considerations for Europe from Nineteenth Century America*, 30 J. ECON. ISSUES 1143, 1143–44 (1996).

<sup>172</sup> See Sheridan, *supra* note 171, at 1143.

<sup>173</sup> See JONATHAN A. RODDEN, HAMILTON'S PARADOX: THE PROMISE AND PERIL OF FISCAL DISCIPLINE 71–72 (2006).

<sup>174</sup> See *id.* at 7.

<sup>175</sup> *Id.* at 63.

<sup>176</sup> See *id.* at 63–64.

curred by the states during the Revolutionary War.<sup>177</sup> Nevertheless, during the 1840s, when a number of states faced financial collapse due to an accumulation of speculative investments in infrastructures and public utilities, the federal government refused to bail out the defaulting states, setting an enduring precedent and creating a strong incentive for each state to ensure sustainable budgetary policies.<sup>178</sup>

Hence, beginning with New York in 1846, states have introduced constitutional provisions limiting public debt and requiring that state budgets be balanced.<sup>179</sup> The trend toward the constitutionalization of budgetary constraints remained steady after the Civil War, and by the end of the nineteenth century most states had adopted statutory “golden rules.”<sup>180</sup> A contemporary survey reveals that thirty-five states currently have constitutional balanced-budget requirements, and fourteen more have statutory or *de facto* obligations to ensure balanced budget—Vermont being the only state with no such constraints whatsoever.<sup>181</sup> The “golden rules” adopted by the states vary significantly in their technical formulation and procedural effects.<sup>182</sup> While some state constitutions include a clear requirement that the legislature approves (and the governor signs) a budget law which is on balance,<sup>183</sup> other states more flexibly require that the governor submits (and the legislature approves) a budget in which expenditures do not exceed the estimated revenues.<sup>184</sup> In the first case, the “golden rule” works as a strict condition for the approval of legislation, binding the hands of the po-

<sup>177</sup> RON CHERNOW, ALEXANDER HAMILTON 298–99 (2004).

<sup>178</sup> Wibbels, *supra* note 11, at 490–91, 498.

<sup>179</sup> Arthur Grinath, III et al., *Debt, Default and Revenue Structure: The American State Debt Crisis in the Early 1840s* 34–35 (Nat’l Bureau of Econ. Research, Historical Working Paper No. 97, 1997).

<sup>180</sup> See Henning & Kessler, *supra* note 169, at 16–17.

<sup>181</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, BALANCED BUDGET REQUIREMENTS: STATE EXPERIENCES AND IMPLICATIONS FOR THE FEDERAL GOVERNMENT 3 (1993), available at <http://www.gao.gov/products/AFMD-93-58BR>; NAT’L CONFERENCE OF STATE LEGISLATURES, FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 1–13 (2010), available at <http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf>.

<sup>182</sup> See Henning & Kessler, *supra* note 169, at 21.

<sup>183</sup> See, e.g., CAL. CONST. art. IV, § 12(g) (West, Westlaw through 2012 ballot propositions) (“[T]he Legislature may not send to the Governor for consideration, nor may the Governor sign into law, a budget bill that would appropriate from the General Fund, for that fiscal year, a total amount that . . . exceeds General Fund revenues for that fiscal year . . .”).

<sup>184</sup> See, e.g., ILL. CONST. art. VIII, § 2(a) (West, Westlaw through Sept. 2012 amendments) (“The Governor shall prepare and submit to the General Assembly . . . a State budget for the ensuing fiscal year . . . Proposed expenditures shall not exceed funds estimated to be available for the fiscal year as shown in the budget.”).

litical branches, while in the second case the rigidity of the “golden rule” can be bypassed by over-optimistically predicting the amount of financial resources that will be available in the fiscal year and increasing the spending accordingly.<sup>185</sup> At the same time, the enforcement of the “golden rule” also varies significantly among the states.<sup>186</sup> While courts in few states—notably New Jersey, Ohio, and Texas—have played a rather active role in reviewing budget laws to ensure that, despite balanced-budget requirements, proper financing is guaranteed to public education as required by the state constitution,<sup>187</sup> attempts in many other states at legal enforcement of balanced-budget constraints have been barred under the “political question doctrine.”<sup>188</sup>

Beyond these analogies, a comparative assessment also highlights the existence of relevant *differences* between the U.S. federal system and the economic architecture of the Euro-zone.<sup>189</sup> First, while almost all U.S. states have enacted balanced-budget requirements in their constitutions, “[i]t is worth emphasizing that this outcome was not the result of a strong central government.”<sup>190</sup> Each state opted for the “golden rule” through political debates that were largely autonomous, albeit driven by a common “Jacksonian distrust” for transient majorities and their lack of concern for the future.<sup>191</sup> As it has been argued “[t]he federal government was passive during the adoption of these provisions by the states. The federal government certainly did not mandate the adoption of these provisions and it does not appear that it was promoting them either.”<sup>192</sup> Here lays a first major difference from the dynamics currently at play in the EU, where the adoption of balanced-budget amendments in state constitutions is instead dictated and policed at the supranational level.<sup>193</sup> The process that led to the constitutionalization of balanced-budget rules in the U.S. states reflected the notion that states were—and ought to be regarded as—fully sovereign fiscal entities.<sup>194</sup> This view, premised on the theory of “dual federalism,” arguably

---

<sup>185</sup> I am grateful to Daniel Rubinfeld for making this point clear to me.

<sup>186</sup> Henning & Kessler, *supra* note 169, at 21–22.

<sup>187</sup> I am grateful to David Super for making this point clear to me.

<sup>188</sup> Under this doctrine, courts refuse to hear disputes which are best left to the political branches of government. See LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 110–16 (1988).

<sup>189</sup> See Sheridan, *supra* note 171, at 1143.

<sup>190</sup> Wibbels, *supra* note 11, at 498.

<sup>191</sup> See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2606 (2005).

<sup>192</sup> Henning & Kessler, *supra* note 169, at 17.

<sup>193</sup> See *id.*

<sup>194</sup> See RODDEN, *supra* note 173, at 140–41, 145.

no longer appropriately describes the fiscal relationships between the states and the central government in the United States, which is now characterized by an overlap of competences.<sup>195</sup> Nevertheless, the budgetary processes of the states continue even today to remain independent, and the federal government has no authority to mandate state compliance with federal budgetary standards.<sup>196</sup>

Second, in the United States, the fiscal powers of the states have been complemented by the rising role of the federal government.<sup>197</sup> Beginning markedly with the New Deal, the federal government has become a prominent actor in the governance of macroeconomic policy and plays a key role in financially supporting the states through grants and monetary transfers for the management of specific programs.<sup>198</sup> As David Super has explained, the federal government's fiscal relationships with state governments today reflect a cooperative model, based on compensation, capacity, and leadership.<sup>199</sup> In addition, because state balanced-budget rules essentially force state governments to adopt pro-cyclical policies, the Keynesian task to support the economy in times of downswing is entirely exercised at the federal level.<sup>200</sup> Ultimately, "[t]he New Deal amended [the United States'] implicit fiscal constitution by recognizing a new federal responsibility to provide countercyclical assistance."<sup>201</sup> Here lays a second major difference between the United States and the EMU: While the U.S. government has powerful instruments to govern the economy—notably the monetary

---

<sup>195</sup> See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (discussing the progressive change in the nature of the relationship between the states and the federal government in the United States, from a time in which sovereignty was presumptively strictly divided between the states and the federation—each empowered to act in mutually exclusive fields of competence—to a time in which the action of the states and the federal government are understood as overlapping and intertwining).

<sup>196</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 176–77 (1992) (holding that the federal government cannot commandeer a state legislature to regulate according to a scheme set at the federal level). The fact that the federal government cannot directly interfere with the budgetary processes of the states, however, leaves intact the possibility for the federal government to transfer to the states the task of providing several services, thus effectively mandating them to spend their resources on ad hoc programs. See John M. Quigley & Daniel L. Rubinfeld, *Federalism as a Device for Reducing the Budget of the Central Government*, in *FISCAL POLICY: LESSONS FROM ECONOMIC RESEARCH* 7, 21 (Alan J. Auerbach ed., 1997) (discussing the expansion of federal mandates and their implications for economic federalism in the United States).

<sup>197</sup> Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790–1987*, 75 CALIF. L. REV. 415, 426–28 (1987).

<sup>198</sup> See *id.* at 432–34.

<sup>199</sup> See Super, *supra* note 191, at 2571.

<sup>200</sup> See *id.* at 2592–93.

<sup>201</sup> *Id.* at 2575 (footnote omitted).



policies of the Federal Reserve<sup>202</sup> and the limitless ability to finance economic investments through federal bonds<sup>203</sup>—supranational institutions in the EU lack comparable powers.<sup>204</sup> As a consequence, during the last eighty years, while the U.S. states have managed their autonomous fiscal policies within the limits of their balanced-budget constraints, the federal government has simultaneously acquired broad control over the general economic and monetary policy of the United States and developed means to soften the implications of a recession.<sup>205</sup>

## V. THE PARADOX OF EUROPEAN FEDERALISM

As the previous Part explained, both the EU and the United States have central governments committed to, or bound by, no-bail-out policies regarding defaulting states.<sup>206</sup> Moreover, states are endowed with strict budgetary requirements in their constitutions.<sup>207</sup> Nevertheless, in the United States, the federal government plays a macroeconomic role in the economy which finds no equivalent in the role currently played by the EU institutions.<sup>208</sup> At the same time, the fiscal sovereignty that the U.S. states enjoy vis-à-vis the federal government contrasts with the direct interference that EU institutions have on the budgetary policy of the member states.<sup>209</sup> This Part builds on the comparison with the U.S. experience to reconsider the main innovations introduced by the Fiscal Compact and to illuminate a paradox in the new constitutional architecture of the EMU. The paradox is that, while EU member states have willingly refused to embrace a U.S.-like federal model for the governance of the Euro-zone on the assumption that this was too restrictive of

---

<sup>202</sup> See J. LAWRENCE BROZ, *THE INTERNATIONAL ORIGINS OF THE FEDERAL RESERVE SYSTEM 1* (1997). See generally STEFANIA BARONCELLI, *LA BANCA CENTRALE EUROPEA: PROFILE GIURIDICI E ISTITUZIONALI: UN CONFRONTO CON IL MODELLO AMERICANO DELLA FEDERAL RESERVE* (2000) (comparing the European Central Bank and the Federal Reserve).

<sup>203</sup> See generally JAMES V. SATURNO & MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., *A BALANCED BUDGET CONSTITUTIONAL AMENDMENT: BACKGROUND AND CONGRESSIONAL OPTIONS* (2011), available at <http://www.fas.org/sgp/crs/misc/R41907.pdf> (discussing efforts to constrain federal expenditures).

<sup>204</sup> See generally BARONCELLI, *supra* note 202.

<sup>205</sup> See Scheiber, *supra* note 197, at 428–30, 433–34. But see Robert Ward Shaw, Comment, *The States, Balanced Budgets and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1213–14 (2004) (explaining how the revival of federalist ideas in the United States, with the shift of important tasks from the federation back to the states, creates new financial difficulties for the states given their balanced-budget constraints).

<sup>206</sup> See *supra* text accompanying notes 172–78.

<sup>207</sup> See *supra* text accompanying notes 179–88.

<sup>208</sup> See Henning & Kessler, *supra* note 169, at 23.

<sup>209</sup> See Bieber, *supra* note 167, at 3–5.

state sovereignty, they have established a regime which is much less respectful of state fiscal sovereignty than the U.S. one. In the United States, in fact, the emergence of the “golden rule” at the state level was not imposed by federal law, and the budgetary processes of the states and the federal government remain fully separated.<sup>210</sup> On the contrary, EMU member states are obliged to adopt “golden rules” by the Fiscal Compact and forced to submit their budgetary procedures to pervasive supranational constraints.<sup>211</sup> The Fiscal Compact’s adoption may therefore lead to the paradoxical situation of making fiscal policy management in the EU supranational system much more centralized than in the U.S. federal one. This is ironic considering that EU member states have systematically discarded a federalist arrangement for the governance of the Euro-zone as being incompatible with state sovereignty.

The emergence and spread of the financial crisis during the last three years in Europe pushed a number of opinion-makers to call for a constitutional change in the architecture of the EMU.<sup>212</sup> Many observers pointed specifically at the U.S. federal system as a model for the new EMU, arguing that the adoption of a federal arrangement in the EU context would improve the efficiency and legitimacy of the EU response to the crisis.<sup>213</sup> Yet, the governments of the EU member states have repeatedly discarded the option of moving the EU in the direction of a full-fledged federal system, seeing this step as incompatible with the preservation of state sovereignty.<sup>214</sup> This position has been forcefully defended, especially by France and Germany, who played a leading role in crafting the response to the Euro-crisis.<sup>215</sup> Hence, in a public speech in Toulon on December 1, 2011, French President Sarkozy affirmed that the new architecture of the Euro-zone would be designed

---

<sup>210</sup> See *supra* note 192 and accompanying text.

<sup>211</sup> See *supra* notes 19–29 and accompanying text.

<sup>212</sup> See, e.g., *1789 and All That*, *ECONOMIST* (Feb. 11, 2012), <http://www.economist.com/node/21547253> (calling for greater integration between EU member states).

<sup>213</sup> See, e.g., *id.* (emphasizing Hamiltonian federalism as key to U.S. monetary unity); Luigi Guiso & Helios Herrera, *Solo l’unione fiscale salverà l’euro*, *IL SOLE 24 ORE* (Feb. 23, 2012), <http://www.ilsole24ore.com/art/commenti-e-idee/2012-02-23/solo-unione-fiscale-salvera-064032.shtml?uuid=AavQaDwE>; see also Yves Bertoncini et al., *De l’Europe des Etats à l’Europe des citoyens*, *LE MONDE* (Mar. 8, 2012, 2:05 PM), [http://www.lemonde.fr/idees/article/2012/03/08/de-l-europe-des-etats-a-l-europe-des-citoyens\\_1654216\\_3232.html?xtmc=bertoncini&xtcr=3](http://www.lemonde.fr/idees/article/2012/03/08/de-l-europe-des-etats-a-l-europe-des-citoyens_1654216_3232.html?xtmc=bertoncini&xtcr=3) (identifying strengths of a federalist system for European governance).

<sup>214</sup> See generally MIGUEL POIARES MADURO, BRUNO DE WITTE & MATHIAS KUMM, EUR. UNIV. INST. GLOBAL GOVERNANCE PROGRAMME, *THE EURO-CRISIS AND THE DEMOCRATIC GOVERNANCE OF THE EURO: LEGAL AND POLITICAL ISSUES OF A FISCAL CRISIS* (2012), available at <http://globalgovernanceprogramme.eu.eu/wp-content/uploads/2012/06/Policy-Report10May20121.pdf> (discussing options for institutional reforms of EMU).

<sup>215</sup> See LB & JHR, *supra* note 17, at 3.

to safeguard the full sovereignty of the EU member states.<sup>216</sup> German Chancellor Merkel supported analogous arguments, perhaps under the noxious influence of the jurisprudence of the German Constitutional Court.<sup>217</sup> Even though the German government apparently did not completely set aside the possibility that the institutional responses to the Euro-crisis could encompass greater political integration in the EU,<sup>218</sup> the option of a federal arrangement for the EMU was discarded as an unacceptable form of “Transfer Union,” a system in which virtuous Germany would have to give up its sovereignty to take care of the financial follies of other EU member states.<sup>219</sup>

The position of the member states’ governments fits comfortably within a general trend against federalism and constitutionalism in the EU, which, at least since the failure of the EU Constitutional Treaty in 2005, seems to have gained the upper hand in European public discourse.<sup>220</sup> Whereas the U.S. federal model loomed large in the minds of EU political elites at the beginning of the twenty-first century—the most prominent example being the speech by German Foreign Minister Fischer at Humboldt University in 2000,<sup>221</sup> paving the way to the establishment of a Constitutional Convention on the Future of Europe<sup>222</sup>—a backlash seems to have occurred in the last few years.<sup>223</sup> As

---

<sup>216</sup> See Charles Jaigu, *Nicolas Sarkozy trace les pistes pour sortir de la crise*, LE FIGARO, Dec. 1, 2011, at 2.

<sup>217</sup> See, e.g., Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Sept. 7, 2011, No. 2 BvR 987/10 (recognizing the authority of the German Parliament to provide financial assistance to Greece in the context of the EMU, but stating that a constitutive pillar of the GC is the sovereign power of Parliament to make budgetary decisions); see also Sebastian Recker, *Casnote—Euro Rescue Package Case: The German Federal Constitutional Court Protects the Principle of Parliamentary Budget*, 12 GER. L.J. 2071, 2073–74 (noting interpretation of the rescue program as respecting German sovereign control over revenues).

<sup>218</sup> See Quentin Peel, *Germany and Europe: A Very Federal Formula*, FIN. TIMES, Feb. 10, 2012, at 9.

<sup>219</sup> See Tony Czuzcka, *Merkel Says Euro-Area Fiscal Union Won't Be 'Transfer Union'*, BLOOMBERGBUSINESSWEEK (Feb. 7, 2012), <http://www.businessweek.com/news/2012-02-07/merkel-says-euro-area-fiscal-union-won-t-be-transfer-union.html>.

<sup>220</sup> The federalist vision of Europe, despite becoming minoritarian, has nonetheless remained active. See Radoslaw Sikorski, *I Fear Germany's Power Less Than Her Inactivity*, FIN. TIMES (Nov. 28, 2011, 6:38 AM), <http://www.ft.com/cms/s/0/b753cb42-19b3-11e1-ba5d-00144feabdc0.html#axzz2Cb7seH4d>; Guy Verhofstadt, *Europe Must Pool Its Debts to Survive*, WALL ST. J. (Apr. 18, 2012, 10:50 AM), <http://online.wsj.com/article/SB10001424052702304299304577349524185171792.html>.

<sup>221</sup> See Joschka Fischer, Ger. Foreign Minister, Speech at Humboldt University: From Confederacy to Federation (May 12, 2000), *transcript available at* <http://centers.law.nyu.edu/jeanmonnet/archive/papers/00/symp.html>.

<sup>222</sup> See Michel Rosenfield, *The European Convention and Constitution Making in Philadelphia*, 1 INT'L J. CONST. L. 373, 375–78 (2003) (comparing the European Constitutional

Renaud Dehousse has argued, an “anti-federalist” vision has recently prevailed, leading to a system in which state rights and national identity are at the center of the EU integration project.<sup>224</sup> The Fiscal Compact, as the latest institutional response to the economic crisis by EU member states, partakes of this “sovereignist” narrative. As its sponsors underline, the Fiscal Compact does not create a powerful central government and leaves intact the fiscal sovereignty of the member states by introducing a mere coordination of their economic policies.<sup>225</sup> Nevertheless, if one scratches the surface of this self-congratulating public narrative, a striking paradox emerges. The Fiscal Compact is bringing about centralization in the governance of the Euro-zone that is significantly greater than that existing in the United States.

As previously explained, the Fiscal Compact has introduced a very detailed “golden rule” which member states are required to incorporate within their constitutions under the threat of judicial action before the ECJ. The “golden rule” significantly affects the relationship between executives, legislatures, and courts within the member states, and, if coupled with other recent normative developments in EU law, gives unprecedented powers to the European Commission to direct and police the budgetary policies of the EU countries.<sup>226</sup> Nothing similar has ever happened in the United States; despite the progressive rise of the federal government in the economic and fiscal realm, the states decided in total independence to adopt balanced-budget amendments in their constitutions and are fully autonomous in the management of their budgetary processes.<sup>227</sup> Indeed, in the United States, *because of the federal system of government*, it would arguably be impossible for the federal government to mandate to the states the incorporation of specific budgetary rules in the state constitutions and to require state legislatures and governors to submit draft budgets for prior approval in Washington, DC.<sup>228</sup> Yet, this is precisely what will happen in the EU as a re-

---

Convention to the U.S. Constitutional Convention); Jacques Ziller, *The Constitutionalization of the European Union: Comparative Perspectives*, 55 LOY. L. REV. 413, 413 (2009).

<sup>223</sup> See Bruno De Witte, *Saving the Constitution? The Escape Routes and their Legal Feasibility*, in GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION 919, 919–38 (Giuliano Amato et al. eds., 2007).

<sup>224</sup> Renaud Dehousse, *‘We the States’: Why the Anti-Federalists Won*, in WITH US OR AGAINST US? EUROPEAN TRENDS IN AMERICAN PERSPECTIVE 105, 112–14 (Nicolas Jabko & Craig Parsons eds., 2005).

<sup>225</sup> See *supra* text accompanying notes 215–19.

<sup>226</sup> See TB & WTE, *supra* note 155, at 353.

<sup>227</sup> See Wibbels, *supra* note 11, at 498.

<sup>228</sup> See Scheiber, *supra* note 197, at 438–39.

sult of the Fiscal Compact.<sup>229</sup> I do not intend to take a position here on whether this should be considered as a positive or negative development. Rather, my purpose is to emphasize how this development is paradoxical given the commitment of the member states to design a new EMU architecture which would leave the sovereignty of the states wholly intact. As the comparative analysis shows, the legal response to the economic crisis embodied in the Fiscal Compact is bound to tip the EU balance of powers in favor of the supranational institutions, significantly reducing the fiscal sovereignty and the budgetary autonomy of the member states. Therefore, while the federal model has repeatedly been considered inadequate for a “Europe of nation-states,”<sup>230</sup> paradoxically its embrace in the new architecture of the Euro-zone would have been not only more efficient to address the economic crisis, but also more protective of state autonomy and self-governance.

#### CONCLUSION

This Article has analyzed the recently adopted Fiscal Compact by focusing on the requirement that signatory states incorporate a “golden rule” in their constitutions. The Fiscal Compact represents the latest attempt by the EU member states to address the financial crisis afflicting the Euro-zone by strengthening the fiscal discipline of the EMU. Yet, the obligation for the states to adopt the “golden rule” of the Fiscal Compact is an unprecedented development in the history of European integration. First, the Fiscal Compact designs an extremely detailed balanced-budget rule. Second, states are expressly obliged to incorporate the rule in their domestic systems through the highest domestic source of law, constitutional law. Third, the incorporation of the “golden rule” by the states is policed by powerful judicial mechanisms, empowering the ECJ to sanction disobedient states with heavy

---

<sup>229</sup> The proposal recently advanced by the European Commission for two additional regulations on the surveillance of the budgetary policies of the states would increase this trend even further by empowering the Commission to assess the final budget of the states and request changes. See *Commission Proposal for a Regulation of the European Parliament and of the Council on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area*, at 6–7, COM (2011) 821 final (Nov. 23, 2011); *Commission Proposal for a Regulation of the European Parliament and of the Council on the Strengthening of Economic and Budgetary Surveillance of Member States Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability in the Euro Area*, at 3–6, COM (2011) 819 final (Nov. 23, 2011).

<sup>230</sup> See David P. Calleo, *De Gaulle's Visions for Europe*, in CHARLES DE GAULLE'S LEGACY OF IDEAS 1, 1–10 (Benjamin M. Rowland ed., 2011) (discussing the Gaullist origin of the idea of a “Europe of nation-states”).

financial penalties. Fourth, respect of the “golden rule” is made a condition to obtain financial assistance under the ESM. The Article has explained that the model of the Fiscal Compact can be traced in German constitutional law, and has assessed the constitutional reforms introducing budgetary constraints in Spain, Italy, and France. This selected survey has revealed several divergences between the “golden rules” enacted at the state level and in the Fiscal Compact, but has underlined how (with the exception of France) the largest EMU states consistently moved in the direction of tightening their budgetary commitments.

The purpose of the Article has been to examine the institutional implications of the enactment of the “golden rule,” both for state political and judicial branches, and for supranational institutions. While the effects of balanced-budget requirements on the relationships between executives and legislatures, and on the role of state Constitutional Courts, are likely to vary from one state to another on the basis of several pre-existing governmental institutional features (such as the role of parliaments in the budgetary procedures) or on the system of constitutional review (such as the mechanisms by which review by Constitutional Courts can be activated), the introduction of the “golden rule” systematically enhances the powers of the supranational institutions. On the one hand, the Fiscal Compact entrusts to the ECJ new tasks to scrutinize and enforce budgetary rules within the states. On the other hand, the Fiscal Compact, coupled with other recent innovations in EU law, endows the European Commission—but critically, not the European Parliament—with new pervasive instruments to direct and oversee the fiscal policies of the states. These developments reveal an increasing centralization in the EU architecture of economic governance that contrasts with the federal experience of the United States. Although almost three-fourths of the U.S. states are endowed with “golden rules” in their state constitutions, the federal government never played a role in the adoption of these balanced-budget amendments, and is barred from interfering with the budgetary processes of the states.

As the Article has argued, therefore, an unexpected paradox emerges. While EU member state governments have systematically discarded calls in favor of a federal arrangement for the EMU as being disrespectful of state sovereignty, they have established a regime for Eurozone governance that sacrifices state sovereignty much more than would have been permitted in a federal system. A comparison with the United States sheds light on how intentions and outcome diametrically differed in the political responses to the Euro-crisis and reveals how, in the end,

the more EU member states attempt to avoid creating a federal architecture for the EU, the more they end up fostering supranational centralization and reducing state autonomy. The name Fiscal Compact, by which the TSCG is usually referred, was suggested by European Central Bank President Mario Draghi in a speech before the European Parliament on December 1, 2011.<sup>231</sup> The concept drew inspiration from Hamilton's statement that "the origin of all civil government, justly established, must be a voluntary compact between the rulers and the ruled."<sup>232</sup> Hamilton was also one of the major architects of the U.S. system, supporting the adoption of a complete constitutional framework and the creation of an effective federal government for the United States. It is perhaps time for the architects of EMU to rediscover the ideals of federalism and constitutionalism that Hamilton advocated.

---

<sup>231</sup> See *Introductory Statement by Mario Draghi, President of the ECB, Brussels, 1 December 2011*, EUR. CENT. BANK, <http://www.ecb.int/press/key/date/2011/html/sp111201.en.html> (last visited Jan. 25, 2013).

<sup>232</sup> Alexander Hamilton, *The Farmer Refuted*, in 2 THE WORKS OF ALEXANDER HAMILTON 37, 44 (John C. Hamilton ed., 1850), available at <http://www.heritage.org/initiatives/first-principles/primary-sources/alexander-hamilton-the-farmer-refuted>.