

The Jurisprudence of Global Money

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The decades before and after the turn of the twentieth century, like those surrounding the turn of the twenty-first, are often understood as periods of globalization. The two periods share key features that characterize the global as a motif, including high mobility of goods, services, people, ideas and, perhaps most centrally, capital. An important distinguishing feature between the periods is the monetary regime: the gold standard for the turn of the twentieth century; managed flexibility (ranging from currency pegs to floating exchange rates) for the turn of the twenty-first. This paper examines the legal infrastructure of these two monetary regimes in order to illuminate two distinct yet related issues. The first is the connection between the form of rulemaking (e.g., legislation versus technocratic regulation) and the means of isolating monetary policy decisions from political influence. The second is the role of the monetary regime in mediating value. Both the gold standard and the managed flexibility regime aim to shield money from partisan intervention, but they do so in different ways; attention to the legal framework sheds light on how these differing regimes pursue the goal of insulating money from politics.

INTRODUCTION

Globalization discourse has taken an historical turn. Over the past decade, discussions of our current wave of globalization increasingly have begun to draw historical comparisons, concentrating particularly on the period between the final decades of the nineteenth century and the beginning of

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World War I.¹ Like our current period of globalization, the years 1880-1914 were characterized by high mobility of goods, services, people, ideas and, perhaps most centrally, capital. An argument has even begun to rage over which period is most globalized. I am unconcerned with the question of which period exhibits "more" or "less" globalization. I do, however, believe that a comparison of these two periods sheds light on both. In particular, an analysis of one of the glaring differences between the two periods, their respective monetary regimes, highlights fundamental changes in the political economy of money. Put even more crudely, the comparison of monetary regimes teaches us a lesson about changed politics.

Comparisons of historical periods, even when setting out to compare something quite focused like a monetary regime, may take many forms. Mine will be particularly narrow, at least at first glance, because I will concentrate primarily on the legal infrastructure that forms the background to monetary integration. Along the way I will advance the argument that the attention to law is not based on an idiosyncratic disciplinary attachment, but rather that the law is central to understanding the monetary regime, its politics, and its economics.²

The analysis develops as follows: Part I sets the stage for a comparison of monetary regimes by describing what an international monetary regime is and the functions it performs. While this exercise in description may seem trivial at first glance, it turns out in fact to be quite significant, because monetary regimes may be described from divergent perspectives with differing results. I attempt to account for these divergent perspectives by looking at the monetary regime as a background to balance of payments adjustment; as an important condition in public finance and sovereign debt management; and as a factor in determining domestic economic activity. I then bring these perspectives together by considering the role of money (and its international regime) in mediating value. Part II compares the legal infrastructures of globalized money for the two periods in question, concentrating on the form of legal norms and the actors who create and apply

1 GLOBALIZATION IN HISTORICAL PERSPECTIVE (Michael D. Bordo, Alan M. Taylor & Geoffrey G. Williamson eds., 2003); JEFFRY A. FRIEDEN, GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY (2006); KEVIN H. O'ROURKE & JEFFREY G. WILLIAMSON, GLOBALIZATION AND HISTORY (1999); MARC FLANDREAU & FREDERIC ZUMER, THE MAKING OF GLOBAL FINANCE 1880-1913 (2004).

2 For a more thorough account of the centrality of law to the monetary regime, see Christine Desan, *The Market as a Matter of Money: Denaturalizing Economic Currency in American Constitutional History*, 30 LAW & SOC. INQUIRY 1 (2005); GEORG FRIEDRICH KNAPP, THE STATE THEORY OF MONEY (1924).

them. Part III returns, legal comparison in hand, to the question of mediating value, and shows the centrality of legal norms for the understanding of value through money. A Conclusion speculates on the differences between the regimes for the politics of money.

Much of what follows turns on a somewhat slippery concept of mediating value, and on a further claim that different modes of mediating value engender different politics. The discussion of mediating value is necessarily abstract, so a somewhat reductive but concrete account of what I mean by mediating value may be helpful at this introductory stage.³

The issue of mediating value is essentially a question of *how* we attach value to particular things, and what role money plays in that process. Imagine for a moment two different ways we might conceive of the relationship between money and value. The first form of mediation rests on the assumption that somewhere there exists something that is (uncontroversially) valuable — the valuable thing anchors the entire conception of value. This thing may be intrinsically valuable, or it may be the object of a universal convention, but the *question* of its value is bracketed. For example, this valuable thing might be gold or labor. Money, which is neither simply gold nor labor (indeed, in and of itself it is never *simply* the intrinsically valuable thing),⁴ then mediates value by allowing for translation: so much money is *worth* so much gold, or so much labor.

A second form of mediation rests on what seems to be the opposite idea, which is the complete absence of intrinsic value. According to this idea, value is nothing in and of itself, but is rather the effect of endlessly repeated interactions of exchange wherein people express their *valuations* by trading one item for a particular quantity of another. Value is constituted by the exchanges themselves, and takes on an objective quality by the regularity of its repetition, or what is commonly understood as the market price.⁵ Money,

3 For an elaborate account of mediating value that captures the sense in which I use the term (and more), see MARY POOVEY, *GENRES OF THE CREDIT ECONOMY* 57-85 (2008).

4 Even in a regime of so-called "pure" commodity money, gold bullion is not money, and coin (which is money) is not traded by weight, as gold, but rather by tale, that is, as money.

5 For an early modern expression of this idea, see THOMAS HOBBS, *LEVIATHAN* 151-52 (C.B. Macpherson ed., Penguin Classics 1985) (1651) ("The *Value*, or *WORTH* of a man, as is of all other things, his *Price*; that is to say, so much as would be given for the use of his power: and therefore is not absolute; but a thing dependant on the need and judgment of another.") For discussion of this passage, see DEBORAH VALENZE, *THE SOCIAL LIFE OF MONEY IN THE ENGLISH PAST* 12-13 (2006).

on this account, is the language of market prices; it is the medium in which the endless series of valuations (in exchange) are regularized and expressed.

Both forms of mediation imply a rationalization of value. According to the first form of mediation, money allows us to compare all things to the anchor of value; according to the second form, money enables the comparison of all things to all others, by generalizing the equations of exchange.⁶ But the differences between these forms of mediation may be more important than their similarities.

Valuation is the process by which we understand status, importance, social roles; it is necessarily part of the structure of politics. Money, in turn, is one means of valuation, and often the central form of valuation enjoying the widest circulation. If it is true that the process of mediating value varies with historical conditions, then attention to those changes is paramount to understanding shifting politics over time. In what follows, I will not make a simple argument that a particular mode of mediating value necessarily engenders a particular politics; I will, however, attempt to draw the linkages among historical conditions of globalization, modes of mediating value, and politics, or more particularly, the politics of depoliticization.

I. INTERNATIONAL MONETARY REGIMES

Because money touches nearly everything, an international monetary regime may be described from a host of perspectives. This results in an inevitable complexity, a complexity problematic precisely because the focus of description will often determine much about the evaluation of a regime (i.e., it is difficult to distinguish the descriptive from the prescriptive in this setting). My account cannot avoid these difficulties, but my hope is that the parameters chosen for description (balance of payments adjustment; public finance management; determining domestic economic activity) will be sufficiently general to be genuinely informative about both periods of globalization under discussion. This Part attempts to explain what an international monetary regime does, or what it might do, when functioning properly.

⁶ It might be impossible to compare directly the nutrition or gastronomical pleasure I attach to a hamburger with the aesthetic pleasure or warmth provided by a new coat; the fact that one is priced at \$6.99 and the other at \$69.99 makes the comparison trivial.

A. Balance of Payments Adjustment

Perhaps the first function of an international monetary regime is to supply the conditions for adjustment of the international balance of payments. The necessity for an adjustment mechanism arises from the fact that there is no guarantee that each country involved in trade will import and export goods of a precisely equal value (indeed, that would be a strange coincidence). The simplest model of adjustment posits that in a country that imports more than it exports, money will become scarce (more money has been expended on imports than earned on exports). Money's scarcity forces down wages and prices, which in turn makes domestically produced products more attractive (both domestically and internationally) while making foreign products more expensive, thus reducing imports, stimulating exports and prodding a return to trade balance equilibrium. According to this abstracted model, adjustment is automatic, or in effect purely a response to a law as natural as that of water finding its own level.⁷ A host of complicating factors needs to be accounted for in order to transform the initial model into something approximating the real world, whether that of the late nineteenth century or today's. Some of the additional factors include changes in spending, movement of interest rates, and changes in capital flows. Studies of actual adjustment processes suggest (one may even venture, prove) that nothing like the automatic adjustment of the price-specie-flow mechanism ever exists among complex economies.⁸

Nonetheless, the basic insight that adjustment takes place, one way or another, is unavoidable. Additionally, it is difficult to avoid the conclusion that at one point or another, adjustment will be costly, and that the costs will not be borne symmetrically. The costs of adjustment may be separated into two categories, continuing and transitional costs.⁹ Countries with a balance

7 This is a simplified abstract of Hume's price-specie-flow mechanism, and the metaphor is his. DAVID HUME, *POLITICAL ESSAYS* 138-40 (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1748).

8 For an extremely useful collection of many of the most important sources, see *THE GOLD STANDARD IN THEORY AND HISTORY* (Barry Eichengreen & Marc Flandreau eds., 2d ed. 1997); *see also* GIULIO M. GALLAROTTI, *THE ANATOMY OF AN INTERNATIONAL MONETARY REGIME: THE CLASSICAL GOLD STANDARD 1880-1914* (1995); MARCELLO DE CECCO, *THE INTERNATIONAL GOLD STANDARD: MONEY AND EMPIRE* (1984); BARRY EICHENGREEN, *GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919-1939* (1992); ARTHUR I. BLOOMFIELD, *MONETARY POLICY UNDER THE INTERNATIONAL GOLD STANDARD: 1880-1914* (1959); R.G. HAWTREY, *THE GOLD STANDARD IN THEORY AND PRACTICE* (5th ed. 1947); GUSTAV CASSELL, *THE DOWNFALL OF THE GOLD STANDARD* (1936).

9 Continuing costs of an unfavorable adjustment are actually a drop in the standard of living, because the adjusting country has to lower wages and consumption.

of payments deficit have an interest in delaying an unfavorable continuing adjustment, and all countries have an interest in deflecting transitional costs to the extent possible to other countries.¹⁰ The ability to pursue the goals of delaying and deflecting the costs of adjustment is a direct expression of international monetary power, but the extent to which countries will be successful in achieving either of these two aims depends in great measure on the technical features of an international monetary regime.

B. Public Finance and Sovereign Debt Management

An international monetary regime bears a direct link to the public finance question, which is how should government finance fluctuating expenditures, and in particular, how can a government overcome problems of time inconsistency in financing.¹¹ The time inconsistency problem arises because governments are often faced with reasons (temptations) to deviate from previously adopted policies. The primary example in the literature usually relates to taxes: a government may adopt (and declare that it will stick with) a tax plan that gives firms or individuals an incentive to invest in capital goods, say factories; but once factories have been built, the government may be tempted to generate revenue by taxing them. However, firms and individuals know in advance that the government has the discretion to alter its original plans, and therefore take into account the uncertainty regarding its future behavior, discounting the government's declaration that it will abide

Transitional costs refer to the particular dislocations created by an adjustment, for instance the need to switch employment, and the costs associated with such a need (including temporary unemployment, search costs, possible relocation, etc.).

10 BENJAMIN J. COHEN, ADJUSTMENT COSTS AND THE DISTRIBUTION OF NEW RESERVES (1966); Benjamin J. Cohen, *The Macroeconomic Foundations of Monetary Power*, in INTERNATIONAL MONETARY POWER 31 (David M. Andrews ed., 2006); David M. Andrews, *Monetary Power and Monetary Statecraft*, in INTERNATIONAL MONETARY POWER, *supra*, at 7.

11 Michael D. Bordo & Finn E. Kydland, *The Gold Standard as a Rule*, in THE GOLD STANDARD IN THEORY AND HISTORY, *supra* note 8, at 99; Michael D. Bordo & Finn E. Kydland, *The Gold Standard as a Commitment Mechanism*, in MODERN PERSPECTIVES ON THE GOLD STANDARD 55 (Tamim Bayoumi, Barry Eichengreen & Marc Taylor eds., 1996).

by its plan. Thus, the initial goal of promoting investment by granting the tax incentive may be diluted, if not completely undermined.¹²

The same inconsistency problem pertains to other areas that require credible policy commitments over time, monetary policy being a central example. And government debt is thought to be particularly prone to the time inconsistency problem.¹³ For most time inconsistency problems, the key to a solution rests in finding a mechanism that will make an initial plan credible, and credibility is generally bought by sacrificing discretion.¹⁴ An international monetary regime, depending on how it is structured, may contribute to supplying such credibility. There are a variety of ways that such a discretion-limiting (or credibility-enhancing) effect might be achieved, and some of them (for instance, central bank independence or the more far-reaching expedient of currency boards) could be analyzed on the purely domestic front. However, all of the mechanisms interact intensely with international arrangements, making it worthwhile (and perhaps necessary) to analyze the domestic and international considerations together.¹⁵

An additional word on the interaction between an international regime and the limitation of discretion is in order: one of the central features of globalization is capital mobility, because capital mobility is understood to be a precondition for financial integration.¹⁶ But capital mobility in itself operates as a check on discretion in the sense that it limits the options

12 The Royal Swedish Acad. of Scis., Finn Kydland and Edward Prescott's Contribution to Dynamic Macroeconomics: The Time Inconsistency of Economic Policy and the Driving Forces Behind Business Cycles (2004), http://nobelprize.org/nobel_prizes/economics/laureates/2004/ecoadv.pdf.

13 *But see* Stefania Albanesi, Lawrence J. Christiano & V.V. Chari, *How Severe Is the Time Inconsistency Problem in Monetary Policy?*, 27 FED. RES. BANK MINNEAPOLIS Q. REV. 17 (2003).

14 The classic source on the general argument is Robert J. Barro & David B. Gordon, *Rules, Discretion, and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 12 (1983). For an additional application, see Michael D. Bordo & Hugh Rockoff, *The Gold Standard as a "Good Housekeeping Seal of Approval,"* in MICHAEL D. BORDO, *THE GOLD STANDARD AND RELATED REGIMES* 318 (1999).

15 J. Lawrence Broz & Jeffrey A. Frieden, *The Political Economy of International Monetary Relations*, 4 ANN. REV. POL. SCI. 317 (2001).

16 The lack of barriers ensures the possibility of mobility, but not necessarily actual integration. Actual integration can be measured by the correlation between domestic saving and investment. A low correlation means investment is not limited to domestic resources, and thus that capital is in fact flowing across borders. See Michael D. Bordo & Marc Flandreau, *Core, Periphery, Exchange Rate Regimes, and Globalization*, in *GLOBALIZATION IN HISTORICAL PERSPECTIVE*, *supra* note 1, at 417, 420-26; FLANDREAU & ZUMER, *supra* note 1, at 17.

open to a policymaker, or contracts the policymaking toolbox. If we were to consider only the domestic perspective, a government would have to choose no more than two out of the three following goals: exchange rate stability, openness to capital mobility (financial integration), and policy independence or flexibility. To see why, imagine a policymaker who decides that she wants to intervene in the domestic economy by lowering interest rates. If capital is mobile (i.e., there are no capital controls), then investors will respond by investing abroad, thus lowering demand for the policymaker's own currency and changing the exchange rate. Manipulating interest rates without affecting the exchange rate is possible, but only by preventing investors from moving their money abroad, i.e., by imposing capital controls. The same dynamic, forcing a choice of no more than two out of the three goals (exchange rate stability, policy flexibility, and capital mobility), exists whatever the starting point of the analysis.¹⁷ However, if the international situation makes avoiding capital mobility impossible (i.e., too costly), a government is left with only two choices: accept the benefits of exchange rate stability by ceding autonomy over national policy, or hold onto autonomy while eschewing the benefits of stable exchange rates. This choice, in turn, will have a direct effect on the rates at which a government can borrow (domestically or internationally), thus bringing us full circle, back to the financing issue.

C. Domestic Economic Activity

An international monetary regime always holds the potential to impact on the domestic economy. The impact is perhaps most obvious regarding the production of tradable goods, where both the terms of trade and the terms of financing of such trade are in part determined by the monetary regime and its influence on exchange rates. But the impact runs deeper still, and in ways only partly alluded to in the above discussions of adjustment and public finance. Adjustment and public finance issues undoubtedly affect domestic production and consumption, but it is sometimes difficult to trace the effects directly. The more visible link in the chain between an international monetary regime and domestic economic activity is the banking system. The importance of banks in the domestic economy is straightforward, as banking systems are typically responsible for supplying liquidity and credit

¹⁷ See Jeffrey A. Frieden, *The Dynamics of International Monetary Systems: International and Domestic Factors in the Rise, Reign and Demise of the Classical Gold Standard*, in *THE GOLD STANDARD IN THEORY AND HISTORY*, *supra* note 8, at 207. This is the famous Mundell-Flemming trilemma or impossible trinity; for a straightforward account, see Broz & Frieden, *supra* note 15.

for productive economic activity, as well as being instrumental in supplying credit to dealers in securities markets, which form the alternative supply of credit for production (at least in developed economies).

Whether or not their customers are directly implicated in international trade, banks themselves are highly sensitive to the international monetary regime. The basic reason for this sensitivity is that banks are in a sense in the business of creating money, but they do so under limitations imposed by some form of banking regulation. In many cases, such regulation mandates particular ratios of reserves to deposits, as well as defining the types of assets that can be used as reserves. Because any country, whether through a central bank or directly through its treasury, will have an interest in managing its money supply and will always have at least one eye on international ramifications, the banking system will inevitably be entangled in international considerations. This may not visibly impact on individual decision-making opportunities for a specific banker, but the banking system as a whole will generally have its money-creating powers circumscribed by the international monetary regime. And where the banking system is so affected, all domestic economic activity, whether or not geared toward tradable goods, will be implicated as well.

D. Assessing International Monetary Regimes — Beyond Economic Functionalism

The description of a monetary regime outlined above rests on economic functions, and those functions point to the possible benefits of coordination. The benefits of an international monetary regime are basically understood here as different ways of reducing transactions costs (including, perhaps predominantly, the cost of uncertainty), and they are benefits that partake of a network effect. The more countries participate in an international regime, the more any particular country stands to gain by joining the regime.¹⁸ But even if we assume that the aggregate effects of a particular regime are positive, there is no *a priori* reason to assume that the benefits will be equally distributed on either of two planes: neither among participating states, nor among various economic sectors or interests within states. Therefore, even though analysis of an international monetary regime should try to account for an aggregate global perspective, it must at the same time account for

¹⁸ This may also mean that a state might have more to gain not only from joining, but also from a one-time defection from the regime. For a relatively optimistic take on the network effects, see Frieden, *supra* note 17, at 209.

the effects on particular states, and on sectors within states. Only such an account can offer some indication as to why states decide to adhere to the prescriptions embedded within the regime.

At this point however, we are faced with a puzzle. The positive network effects of an international regime are a global public good,¹⁹ but participation in the regime comes at a price. Membership (however loosely defined) in a monetary regime implies that policymakers are willing, at least some of the time, to tie their own hands regarding management of their internal economies, whether such management amounts to smoothing adjustment or to countercyclical intervention. This is one reason why international monetary cooperation is often understood as a limitation on sovereignty. Two different types of questions arise from this puzzle: why, and how? A significant portion of international relations literature concentrates on the question of why states would agree to limit discretion over their economies, including the question of why policymakers would want to limit the political influence of their major domestic constituencies. My focus is on the second question: *how* does an international regime work to insulate policymaking from domestic politics, and possibly even from certain variations of international politics?

However, before engaging in this examination of how international monetary arrangements are shielded from politics, a complicating caveat is necessary. If it were clear that a particular set of policy prescriptions was justified from the perspective of, say, efficiency, the questions regarding why and how states accept those arrangements would be of limited importance, especially in terms of legitimacy. The entire problem could then be framed as one of overcoming narrow self-interest, or as an issue of enlightened policymaking grappling against rent-seeking impulses. In fact, however, economic theory is indeterminate with regard to most of the monetary policy choices confronting the structuring of an international regime and the types of participation in it by individual states. As Jonathan Kirshner has argued, "Macroeconomic policies are often veiled by a cloak of economic legitimacy. But on closer examination, it is clear that behind the assertion of efficiency, the aggregate economic benefits of various policy decisions are ambiguous, modest, and dwarfed by their political and differential effects."²⁰

¹⁹ *Id.*

²⁰ Jonathan Kirshner, *The Inescapable Politics of Money*, in *MONETARY ORDERS* 3, 4 (Jonathan Kirshner ed., 2003); see also Jonathan Kirshner, *Money in Politics*, 10 *REV. INT'L POL. ECON.* 645 (2003); Jonathan Kirshner, *Explaining Choices About Money: Disentangling Power, Ideas and Conflict*, in *MONETARY ORDERS, supra*, at 260; Ilene Gabel, *Ideology, Power and the Rise of Independent Monetary Institutions in Emerging Economies*, in *MONETARY ORDERS, supra*, at 25; Benjamin

This dynamic should draw our attention to a crucial issue, which is the way that economic terminology seeks to depoliticize monetary policy. But we should always bear in mind that *there is no maneuver more political than isolating a particular field of action from politics*. The reason is that somebody — the doctor, lawyer, or financial expert — acquires a monopoly over the discourse and the reasoning that leads to decision-making. Somebody in essence carves out a field and sets up his own language to define the terms and the stakes. One has to be an extreme believer in concepts of neutrality to understand this maneuver as apolitical. While there may be an interesting argument to be made whether certain scientific discourses can actually be neutral, most of us should, at least on reflection, reject the idea that money can be so. Therefore, everything I say about isolating money from politics is founded in an understanding of that isolation as a political gesture in itself.

Thus, we should be attuned not only to the known economic effects of policy choices, but more generally to the framework of understanding within which policy is discussed, or what Susan Strange has aptly called "the structural power of beliefs and ideas in political economy."²¹ The general point on beliefs and ideas is applicable across a host of issues, but has a more pointed focus when we consider the monetary regime. Money, tell us the fathers of sociology, mediates value: "If the economic value of objects is constituted by their mutual relationship of exchangeability, then money is the autonomous expression of this relationship. Money is the representative of abstract value . . . [M]oney as abstract value expresses nothing but the relativity of things that constitute value."²² Crucially, money does not mediate value in precisely the same way under varying historical circumstances, or that, at least, will be my working hypothesis. So the particulars of an international monetary regime should be analyzed not only according to their economic functions, but also in light of how the regime interacts with understanding, mediating, or constituting value. Simply put, then, the following account attempts to

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- J. Cohen, *A Brief History of International Monetary Relations*, in INTERNATIONAL POLITICAL ECONOMY 209 (Jeffrey A. Frieden & David A. Lake eds., 3d ed. 1995).
- 21 SUSAN STRANGE, AUTHORITY AND MARKETS 107 (Roger Tooze & Christopher May eds., 2002).
- 22 GEORG SIMMEL, PHILOSOPHY OF MONEY 120-21 (David Frisby ed., Tom Bottomore & David Frisby trans., 2d ed. 1990) (1907). Distinct yet similar accounts of the role of money as mediator of value can be found in 1 KARL MARX, CAPITAL 247-57 (Ben Fowkes trans., Penguin Classics ed. 1990) (1867); and 1 MAX WEBER, ECONOMY AND SOCIETY 80-100, 107-09 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1922).

integrate two issues into one question: how do the mechanics of insulating the monetary regime from politics interact with the mediation of value?

II. COMPARING REGIMES (I): THE JURISPRUDENCE OF GLOBAL MONEY

This Part of the Article compares the legal foundations of two international monetary regimes: the gold standard dominant in the period from 1880 to 1914, and the managed flexibility of the period from 1980 to the present. The literature on regimes distinguishes between rules and procedures, on the one hand, and other norms and principles, on the other.²³ To some extent, I follow that distinction by concentrating mostly on rules and procedures here, and on norms and principles in the next Part, but the distinction is far from watertight. I begin by presenting the legal structure of the gold standard, with some attention to each of the economic functions detailed above; I then move on to the regime of managed flexibility.

A. The Gold Standard

The 1870s and 1880s saw a steady increase in the number of countries adhering to the gold standard, and the period between 1880 and 1914 is generally considered as one governed by "the classical gold standard."²⁴ Being "on" the gold standard meant, first of all, defining the unit of currency

²³ Oran R. Young, *International Regimes: Toward a New Theory of Institutions*, 39 *WORLD POL.* 104 (1986); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1 (Stephen d. Krasner ed., 1983):

Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.

Id. at 2.

²⁴ See GALLAROTTI, *supra* note 8, at 3, 18-21; BARRY EICHENGREEN, *GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM* 15-20 (1998); Barry Eichengreen & Marc Flandreau, *Geography of the Gold Standard*, in *CURRENCY CONVERTIBILITY: THE GOLD STANDARD AND BEYOND* 87 (Jorge Braga de Macedo, Barry Eichengreen & Jaime Reis eds., 1996); Marc Flandreau, Jacques Le Cacheux & Frederic Zumer, *Stability Without a Pact? Lessons from the European*

in terms of a fixed weight of gold and providing for convertibility between domestic money and gold. In addition, many accounts of the gold standard point to a number of supplementary conditions, including the absence of restrictions on the private use of gold in domestic and, crucially, foreign transactions (freedom to import or export gold);²⁵ and a mechanism for tying the money supply to the country's gold stock.²⁶ In theory, the gold standard emerges diffusely, as each country carries out independent measures to place itself on gold, simply by declaring the gold value of its currency and standing ready to convert that currency into gold (or vice versa) on demand. In fact, this is a highly idealized image of the international gold standard, since numerous countries were on some version of a limping standard (meaning convertibility might be tied to silver and not exclusively to gold), while others (particularly peripheral countries, often influenced by imperial considerations) offered convertibility not to gold, but to other currencies, especially the British pound sterling.²⁷

Determining the currency standard in terms of gold and deciding on the particular value of the money unit in gold were salient political decisions, often subject to significant public controversy. Such decisions were generally

Gold Standard 1880-1914, at 8-13 (Feb. 1998) (unpublished manuscript), *available at* <http://www.ofce.sciences-po.fr/pdf/dtravail/wp98-01.pdf>.

25 This freedom also amounts to a lack of capital controls. For one of many accounts, see GALLAROTTI, *supra* note 8, at 22-26 ("Norms calling for domestic convertibility which were operationalized through a domestic monetary anchor (i.e., credit creation was consistently controlled according to metallist norms) eventually translated into international convertibility because the metallist norm of free-capital flows held." *Id.* at 25).

26 LAWRENCE H. OFFICER, BETWEEN THE DOLLAR-STERLING GOLD POINTS: EXCHANGE RATES, PARITY AND MARKET BEHAVIOR 8-10 (1996); Michael D. Bordo & Anna J. Schwartz, *The Operation of the Specie Standard — Evidence for Core and Peripheral Countries*, in CURRENCY CONVERTIBILITY: THE GOLD STANDARD AND BEYOND, *supra* note 24, at 11. Here is one succinct statement:

Under a gold standard the money supply is determined by . . . the monetary gold stock Under a gold standard the monetary authority defines the weight of gold coins or, alternatively, fixes the price of gold in terms of national currency. By being willing to buy and sell gold freely at the mint price, the authority maintains the fixed price. There are no restrictions to the ownership or use of gold.

MICHAEL D. BORDO, THE GOLD STANDARD AND RELATED REGIMES 6 (1999); *see also id.* at 27, 150.

27 Eichengreen & Flandreau, *supra* note 24, at 114-27; Marcello de Cecco, *Short-Term Capital Movements Under the Gold Standard*, in CURRENCY CONVERTIBILITY: THE GOLD STANDARD AND BEYOND, *supra* note 24, at 46-61; BLOOMFIELD, *supra* note 8, at 14-15.

preceded by the establishment of commissions of experts on banking and currency, and almost invariably implemented through primary legislation. A few examples should suffice to supply an indication of how nineteenth century actors perceived the establishment or change of their monetary standards.

England is always considered the lynchpin of the gold standard, but even there the adoption of the standard was an occasion for controversy. Histories of the gold standard often note that while most countries joined in the last three decades of the nineteenth century, Britain had essentially maintained commodity money that mirrored (in practical, rather than formal terms) the gold standard since early in the eighteenth century. However, formal bimetallism persisted throughout the eighteenth century. Britain formally adopted a gold standard in The Coinage Act of 1816, but this only established the notional standard underlying the currency; convertibility had been suspended because of the effects of the Napoleonic wars in 1797 and was only restored in 1821. The legislation prescribing a resumption of convertibility was passed in 1819, and went further towards making the gold standard a reality by eliminating restrictions on exporting (or melting) coin. All of this took place in the context of what became known as *the bullionist controversy*, in which the leading lights of British economic and political thought from Ricardo to Malthus to Bosanquet held what amounted to a decade-long public seminar on monetary policy.²⁸ Controversy resurfaced in the late 1830s,²⁹ and in 1844 The Bank Act (or Bank Charter Act) revised the charter of the Bank of England, separating the Bank into two departments, one responsible for note issue and the other for general banking operations. The Bank Act was significant in two particulars: first, it established the gold price of sterling at £3 17s. 9d. per ounce (which remained constant until England abandoned the gold standard in 1931); and second, it set up a £14 million reserve of securities against which notes could be issued.³⁰ Thus, even where

28 For a readable account of the bullionist controversy, see JACOB VINER, *STUDIES IN THE THEORY OF INTERNATIONAL TRADE* 119-217 (Harper and Brothers 1965) (1937).

29 This time the feuding camps were the banking school and the currency school.

30 In fact, notes could be issued as against the reserve, plus as against coin and bullion held by the Issue Department. For my purposes here, the important feature is that a fixed reserve ratio was imposed on the Bank, with the intention of maintaining a strict link between its gold holdings and the amount of its notes outstanding. See Bank Charter Act, 1844, 7 & 8 Vict., c. 32, § 2 (establishing reserve ratio); § 4 (establishing gold price of the pound). For discussions of the act and some of the surrounding controversy, see VINER, *supra* note 28, ch. 5; CHARLES A. CONANT, *A HISTORY OF MODERN BANKS OF ISSUE* 119-22 (4th ed. 1909).

the gold standard had essentially held sway for more than a century before the law's formalization of the status of gold, the legislation was the occasion for popular controversy, and commentators were convinced there was a direct link between the law and the performance of the Bank and of the English economy more generally.³¹

In Germany the adoption of the gold standard was intimately tied up with the process of unification. Through the middle of the nineteenth century, the various German states used different monetary standards; many coined their own currencies based primarily (but far from exclusively) on silver; and almost all issued their own paper currency as well. Commercial interests pressed for the unification of currencies as one step in the move toward easing trade among the German states, culminating in a commercial convention of 119 German cities in 1868, which recommended monetary unity on the basis of gold. Pressure from liberal constituencies in parliament at first led to the extraction of limited concessions from Bismarck,³² who personally favored bimetallism. Germany's defeat of France in the Franco-Prussian war and the resulting war indemnity (to be paid in gold) gave a gold-based monetary system practical support. In 1873 a provisional coinage law was passed declaring Imperial gold coinage as an objective, but only the consolidation of the Royal Bank of Prussia into the Bank of the Empire (which would later become the Reichsbank) allowed for a full unification of German currency based on the gold mark. Legislation on the gold value of the mark and on the reserve requirements of the Reichsbank was passed in March of 1875, essentially going into effect in the beginning of 1876.³³

For the United States, which had perhaps the most contentious experience, joining the gold standard was actually a two stage process: first, establishing convertibility; and second, establishing gold as the sole standard for defining the dollar. From early in the Civil War, the banks and the Treasury had suspended convertibility of all bank or Treasury note obligations.³⁴ The

31 The fact that provisions of the Bank Charter Act of 1844 had to be suspended three times in just over two decades after the act's passage perhaps helped to keep the issue alive.

32 An 1871 law provided for minting gold coins, but did not move Germany to the gold standard.

33 For accounts of the German experience of going on gold, see Alan S. Milward, *The Origins of the Gold Standard*, in CURRENCY CONVERTIBILITY: THE GOLD STANDARD AND BEYOND, *supra* note 24, at 87, 96-98; CONANT, *supra* note 30, at 196-207.

34 WESLEY CLAIR MITCHELL, A HISTORY OF THE GREENBACKS WITH SPECIAL REFERENCE TO THE ECONOMIC CONSEQUENCES OF THEIR ISSUE, 1862-1865, at 38-43 (1903); DAVIS RICH DEWEY, FINANCIAL HISTORY OF THE UNITED STATES 282-83 (1902).

Banking Acts of 1863 and 1864, along with a tax on the issue of notes by private banks, had effectively instilled uniformity of the money supply, which was essentially composed of National Bank notes, U.S. Notes (greenbacks) printed by the Treasury, and minor amounts of coin reserved primarily for international trade and for the payment of customs duties. The gold dollar was the standard for international exchange, but greenbacks were legal tender for all debts except customs, so the country was effectively on a dual standard: one for internal and the other for external transactions.³⁵ The legislation mandating resumption of specie payments was passed in 1875 and called for resumption in 1879. For practical purposes, U.S. formal bimetallism was *de facto* a gold standard. But in-between the passage of the Resumption Act and the date for resumption, silver interests managed to garner over a million votes for the Greenback Party and to pass the Bland-Allison Act, which reinstated silver as a standard and authorized treasury purchases of large quantities of silver, thus holding out the hope that a silver standard would not be abandoned completely. Gold politics were quieter in the 1880s, but in the 1890s American electoral politics were dominated by the question of the metallic standard of the currency. The 1890 Sherman Silver Purchase Act mandated higher levels of silver purchases at a time when the market price of silver was sinking, and the 1896 presidential election was considered a referendum on the gold standard. Having won the 1896 election, proponents of the gold standard cemented their victory with the 1900 Gold Standard Act, which was the finale of a decade-long spectacle in which most commentators were unsure whether the gold standard would survive.³⁶

35 The two standards coexisted because the rate of exchange was not fixed, and the value of the paper dollar drew even with the gold dollar only when resumption of specie payments loomed on the horizon. For a detailed explanation of why greenbacks could coexist with gold, see MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES, 1867-1960*, at 27 n.16 (1963). For an account of greenback depreciation in terms of gold, see MITCHELL, *supra* note 34, ch. 3.

36 Bland Allison Act, 20 Stat. 25 (1878); Resumption Act, 18 Stat. 3 (1875); Sherman Silver Purchase Act, 26 Stat. 289 (1890); Gold Standard Act, 31 Stat. 45 (1900). For a discussion, see RICHARD F. BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALISM, 1877-1900*, at 355-456 (noting that the gold standard would have fallen if it had had to stand alone, rather than becoming allied as it did with tariff protection, and arguing that "[t]he only factor that prevented the United States from switching from gold to silver or paper currency as the monetary standard was the unflinching position of the executive branch." *Id.* at 371); ARTHUR NUSSBAUM, *A HISTORY OF THE DOLLAR* 127-73 (1957). Advocates of a silver standard hoped to increase the money supply and ease credit in the face of the deflation of the 1890s, while their opponents wanted to maintain exchange rate and price stability.

These three distinct national settings in which the gold standard was adopted share a number of common features, features that repeated themselves in other countries as well. First and foremost, joining the gold standard entailed primary legislation with high political salience: political interests and political parties took up the question regarding the standard of currency as a key electoral issue for mobilization, and at times parties were even created to deal specifically with the issue of monetary definition. High salience translates into high visibility, which is in fact crucial to the workings of the gold standard. Since the international regime was based on the diffuse action of individual states acting in the absence of coordination,³⁷ high-visibility legislation was crucial in setting up a country's commitment to gold. While legislation is a sovereign act and thus may be reversed by the same sovereign, it presents itself as significantly more durable than simple executive action that can be modified or repealed at the will of the executive.³⁸ Thus, primary legislation is particularly suitable for the purpose of international credibility.

Second, proponents of the gold standard believed it would have salutary effects across the range of functions outlined above in relation to international monetary regimes: balance of payment adjustment; public finance; and domestic economic management. Regarding adjustment, between the world wars the view was popularized that the gold standard and its establishment of fixed exchange rates facilitated an adjustment mechanism that was almost automatic in its operation: deficits would entail an outflow of gold, which in turn would mean reduced prices domestically and reduced demand for imports, leading to an increase in foreign purchases and eventually a return to balance. Central banks would reinforce this tendency by raising discount rates in response to gold outflows, or lowering them in response to inflows.³⁹ This view of automatic adjustment, however, suffers from two difficulties: first, subsequent research has proved that the adjustment system

37 A series of international conferences that aimed at achieving international monetary cooperation and an agreed upon standard met with repeated failures, and yielded almost nothing in the way of operative plans. *See generally* STEVEN P. RETI, *SILVER AND GOLD: THE POLITICAL ECONOMY OF INTERNATIONAL MONETARY CONFERENCES, 1867-1892* (1998).

38 On discretion of the authorities where the gold price of the currency was not fixed by law (especially Italy) see de Cecco, *supra* note 27, at 106-08.

39 For the interwar view that the gold standard formed an automatic adjustment mechanism, see Cuncliffe Committee (1919) and Macmillan Committee (1931) reports compiled for the British Parliament, excerpted in *THE GOLD STANDARD IN THEORY AND HISTORY*, *supra* note 8, at 170-82, 185-99; *see also* EICHENGREEN, *supra* note 8, at 29-42.

was neither simple nor automatic, but rather heavily managed;⁴⁰ second, the view of the adjustment mechanism as automatic apparently played (at best) a minor role in the late nineteenth-century understanding of the gold standard. But despite the fact that they did not believe adjustment would be automatic, policymakers of the era apparently did believe that the gold standard would smooth adjustment with the greatest ease because it would facilitate both trade and movements of short-term capital.⁴¹

The implications for sovereign debt management seem, at least at first glance, clearer. Gold convertibility is often considered to have had an important credibility effect by signaling a country's financial responsibility, or its "commitment to sound budgets and balanced external payments with sustainable volumes of foreign borrowing."⁴² Making such a commitment by pinning the currency to gold was understood by some as a mode of ceding sovereignty, and by others as a bulwark against political interference with the economy understood as a distinct sphere of activity.⁴³

The impact of a true gold standard on the domestic economy via the banking channel is also relatively straightforward, if indirect. The idea is that so long as banks are subject to the requirement of convertibility, market discipline will require them to hold sufficient reserves to make good on their obligations. Thus, whether they create money by issuing notes or attracting

40 Actual adjustment included changes in the terms of trade, changes in holdings of securities or shifts in long-term and short-term credit, credit manipulation by the banking system, and the work of central banks led by the Bank of England. For analysis, see BLOOMFIELD, *supra* note 8; DE CECCO, *supra* note 8 (the role of India in allowing Britain to maintain convertibility and monetary leadership generally); EICHENGREEN, *supra* note 8, at 42-54; GALLAROTTI, *supra* note 8, at 185-206.

41 Milward, *supra* note 33, at 88-91, 100-01; GALLAROTTI, *supra* note 8, at 204-06.

42 Eichengreen & Flandreau, *supra* note 24, at 123. At least one of the authors may have changed his mind since 1996. Marc Flandreau has since presented evidence that the gold standard may not have been considered an important indicator of credit-worthiness, which instead was primarily evaluated by contemporaries on the basis of a country's debt burden, taking into account the rate of interest at which the debt was issued. See FLANDREAU & ZUMER, *supra* note 1, at 30-35; Bordo & Flandreau, *supra* note 16 (arguing that the gold standard was not very important in achieving integration of capital markets or opening up access to foreign credit). However, even if the gold standard in itself was not crucial as an independent factor in public finance, it was one aspect of generating wide enough confidence in the quality of sovereign debt for the credit market to flower. See GALLAROTTI, *supra* note 8, at 49-54.

43 See generally GRETCHEN RITTER, GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA, 1865-1896 (1997).

deposits, the obligation to redeem notes or repay deposits in specie is enough to ensure that they will neither overheat the economy nor undersupply it with liquidity. This was the seemingly extreme position of the banking school in England in the period leading up to the Bank Act, but also substantially the position of most free banking advocates throughout the nineteenth century. This impact of the gold standard in disciplining banks is indirect, in the sense that there is no national or international intervention in banking business excepting the enforcement of a background norm of redemption in gold.

The exposure to the redeemability requirement was thought to act in and of itself as a disciplining force, and one that could ensure an adequate (but never excessive) money supply. Thus, it was typical of the period that central banks were themselves regulated in some manner, but that they had little regulatory authority over the banking system generally. The final link is crucial, because the stability of domestic banking systems holds the fundamentals of the international system intact: bank failures in an individual country can lead to chain reactions, eventually bringing down the international house (no need to belabor this point today), but supposedly under a rule of pure convertibility banks have (in aggregate) good incentives to avoid bringing about such a result.⁴⁴

To sum up, the legal infrastructure of the gold standard had several notable features.⁴⁵ First, it was based largely on highly visible primary legislation.

44 This raises the issue of crisis, and crisis management. In its positing of a background rule and nothing more, the gold standard regime relied, implicitly, on *ad hoc* cooperation to manage crises. EICHENGREEN, *supra* note 8, makes cooperation central to his account of the workings of the gold standard; GALLROTTI, *supra* note 8, makes it a peripheral issue; but underlying this seeming disagreement is mostly a question of emphasis and of tone: both Eichengreen and Gallarotti assert that cooperation in times of crisis existed, that it was not rule-based and not guaranteed, and that it broke down significantly with the approach of WWI. For additional details on crisis management, see Charles Goodhart & P.J.R. Delargy, *Financial Crises: Plus ça Change, plus c'est la Même Chose*, 1 INT'L FIN. 261 (1998); Barry Eichengreen & Michael Bordo, *What Lessons from the Last Era of Financial Globalization* 24-29 (Nat'l Bureau of Econ. Research, Working Paper No. 8716, 2002), available at <http://www.nber.org/papers/w8716.pdf>; Michael D. Bordo, Barry Eichengreen & Douglas A. Irwin, *Is Globalization Today Really Different than Globalization a Hundred Years Ago?* 47-56 (May 1999) (unpublished manuscript), available at <http://www.econ.berkeley.edu/~eichengr/research/brooking.pdf>.

45 An important feature omitted (for the time being) is the differential impact of the standard at the core and on the periphery of the international system. The upshot of analyses of the impact is that the core benefits from the regime, while the periphery struggles to adapt. That issue replays itself to some extent regarding floating exchange rates. While of crucial importance, the issue is beyond the scope of this paper.

Such legislation was completely domestic and a sovereign act, but perceived as an international commitment and even a limitation on sovereignty. Second, it was pursued in the absence of coordination among states. The lack of coordination did not result in a lack of cooperation, but that cooperation was *ad hoc* and never guaranteed or codified. Third, the legal infrastructure included some delegation to discretionary institutions, namely central banks, but only (or primarily) for their contributions to the adjustment mechanism (not as regulators of banking or as actors in directing the economy). Fourth, it relegated banking stability to the indirect effects of its background rules, instead of attempting to regulate banking performance directly.

B. The Regime of Managed Flexibility

The managed flexibility that characterizes the current international monetary regime is like a camera obscura image of the gold standard: upside-down and backwards. Nearly every feature of the legal infrastructure of the gold standard has a direct and opposite instantiation in the legal infrastructure of the current regime. And yet the system is hauntingly similar, particularly regarding globalization in the form of free movement of capital across national borders. In particular, the system requires little if any primary legislation at the state level, and at the international level it relies on the entire range of formal and informal norms; it entails, if not formal coordination, at least a high level of structured cooperation; it accommodates a significant number of discretionary institutions on fundamental issues of macroeconomic management; and finally, it is geared toward direct regulation of the behavior of money-creating actors, primarily banks.

A comprehensive account of the legal infrastructure of the monetary regime, or what has been termed the international financial architecture, is beyond the scope of this paper. I hope, however, that the account of the major regulatory mechanisms that follows gives enough of a flavor of the whole so as not to appear arbitrary. I will concentrate on the way four international bodies⁴⁶ perform the work of cooperating to generate an international system in the absence of a monetary anchor of the type available under the gold standard. The international bodies are the G7, the OECD, the Basel Committee on Banking Supervision, and the IMF. In addition to their internal workings and their relationships with one another, their various

⁴⁶ The term "international bodies" reflects their ambivalent status from an international law perspective; some are international organizations proper (IMF), while others are not formally organized or rule-bound in their internal operation.

relationships with central banks are also important to understanding how they create the legal infrastructure of the monetary system.

The Group of Seven (G7 — the United States, UK, Germany, France, Italy, Japan and Canada) finance ministers and central bankers have been meeting several times a year for over thirty years. It is the least structured body in the infrastructure of the monetary regime, but also possibly "the preeminent forum for the formulation of international monetary policy and . . . the most important locus of authority in global financial governance."⁴⁷ The fact that it comprises such high-level officials places the G7 closer to political awareness; its unstructured and somewhat secretive procedures dim the spotlight that might otherwise be turned on its activities. Furthermore, while politics is never absent for G7 participants, either toward their constituencies or vis-à-vis one another, the ethos of their meetings is overwhelmingly professionalized:

One of the key characteristics of the G7 process is the degree of shared technical expertise amongst finance ministries and central banks. Officials tend to advance their position and make key points at G7 meetings in technical terms. It is commonly accepted and understood that the language of debate at G7 meetings is as much the language of economics and finance as it is of politics. Political points are occasionally made but this is usually done within the terms of economic language.⁴⁸

Activities of the G7 (or in earlier formats, G5) were initially geared toward developing coordination of fiscal and monetary policy in the wake of the breakdown of the Bretton Woods system in the early 1970s. The meetings of G7 finance ministers and central banks have no authority to promulgate binding legal rules, and this raises the question whether they ought to be considered part of the legal infrastructure of global money at all. But there is good reason to include them in the analysis nonetheless, because of their position in constituting what Eyal Benvenisti has called "coalitions of the willing."⁴⁹ And these particular coalitions should be distinguished sharply from the type of cooperation prevalent in the late nineteenth century. The G7 meetings yield agreement on such matters as interest rate targets and exchange rate goals — in other words, *ex ante* agreement on policy. Late

⁴⁷ ANDREW BAKER, *THE GROUP OF SEVEN: FINANCE MINISTRIES, CENTRAL BANKS, AND GLOBAL FINANCIAL GOVERNANCE* 1 (2006).

⁴⁸ *Id.* at 105.

⁴⁹ Eyal Benvenisti, "Coalitions of the Willing" and the Evolution of Informal International Law, in *COALITIONS OF THE WILLING — AVANTGARDE OR THREAT?* 1 (Christian Calliess, Georg Nolte & Tobias Stoll eds., 2007).

nineteenth-century cooperation was much narrower, focusing almost entirely on *ex post* resolution of crisis, or the mitigation of crises in the offing (for example, by arranging for transfers of gold or a reserve currency).

The G7 finance ministers and central bankers can work in (at least) two directions: first, their negotiations over policy directions can yield credible commitments from their members even in the absence of a procedure for binding rulemaking;⁵⁰ second, consensus at the G7 level is relatively easy to translate into direct action through the IMF because of weighted voting in that institution.⁵¹ Similarly, G7 agreement on issues such as liberalization of capital accounts or transparency carries a great deal of weight with additional international institutions, ranging from the Basel Committee to the International Organization of Securities Commissions (IOSCO), the Bank for International Settlements (BIS) and the International Association of Insurance Supervisors. Thus, G7 finance ministries and central bankers exert influence both on domestic policy decisions in their home countries, and on third parties who deal with the IMF and other formal institutions.⁵²

The Organization for Economic Cooperation and Development (OECD) is another major player in the international financial architecture, at least insofar as the liberalization of capital movements is understood to be the centerpiece of the structure. Among its various standard-setting agendas (the most prominent of which deals with corporate governance), the OECD requires of its members adherence to its Code of Liberalisation of Capital Movements as well as its Code of Liberalisation of Current Invisible Operations.⁵³ The codes are unanimous decisions of the OECD Council, and they are binding on members, despite the fact that the OECD has no mechanism for sanctioning violations (aside from the implicit threat of expulsion). The OECD has leaned toward more formalized action than the G7, and its impact on financial globalization is more specific: by enforcing its codes in the richest nations (where 90 per cent of the world's foreign direct

50 Such commitments were particularly important in reaching adjustment goals through the realignment of leading currencies in the 1970s and 1980s. See BARRY EICHENGREEN, *GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM* 139-52 (1998); BAKER, *supra* note 47, at 18-37.

51 BAKER, *supra* note 47, at 50.

52 See Susanne Soederberg, *The New International Financial Architecture (NIFA): An Emerging Multi-level Structure of Neo-liberal Discipline*, in *GOVERNING FINANCIAL GLOBALIZATION* 189 (Andrew Baker, David Hudson & Richard Woodward eds., 2005).

53 See OECD, *OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations*, http://www.oecd.org/document/63/0,3343,en_2649_34887_1826559_1_1_1_1,00.html (last visited July 19, 2009).

investment originates, and where 70 per cent of it flows), the OECD has been one of the driving forces in globalizing money.⁵⁴

The Basel Committee on Banking Supervision was founded in 1974 in the wake of a number of international bank failures, with the goal of providing a forum for discussing cooperative approaches to the supervision of multinational banks. The Bank for International Settlements (BIS) supplied the forum and a secretariat. The founders were the central bankers of the twelve countries (Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States) which, along with Spain, added in 2001, still comprise the entire membership of the committee.⁵⁵ For a long time the Basel Committee was a quiet and almost secretive organization, but promulgation of the Basel Accord (Basel I) in 1988 brought the committee some notoriety. The initial accord on capital adequacy for banks and its revision in 2004 (Basel II) are at once responses to a globalized monetary regime and significant markers of the legal infrastructure of that regime. On the one hand, the regime was born of the dilemma facing national regulators: worried that risky international lending and investment could be destabilizing for their own banking systems, regulators wanted to ensure safety by *regulating*, that is, limiting the risk exposure of their country's banks; on the other hand, each regulator was faced with the threat that while such regulation might enhance safety, it would do so at the price of international competitiveness. Regulators in the leading economies understood this as a classic collective action problem (all would be better off if all were regulated, but each had the competitive incentive not to regulate itself), although they were far from unanimous about how best to achieve the right collective result.⁵⁶

Two issues are central for understanding the importance of the Basel Committee to my larger argument here. First, the issue of capital adequacy

54 For an analysis of the OECD role in financial liberalization and globalization more generally, see RAWI ABDELAL, *CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE* 86-122 (2007).

55 Where central banks are not responsible for banking supervision (for instance in the UK, the Financial Services Authority was established in 1997 to take over the regulation of banks from the Bank of England), the regulatory authority is invited as well. See Basel Comm. on Banking Supervision & Bank for Int'l Settlements, *History of the Basel Committee and Its Membership* (Jan. 2007), <http://www.bis.org/bcbs/history.pdf>.

56 For a thorough analysis, including a discussion of the divergence between the U.S.-UK position and that of Japan, see DAVID ANDREW SINGER, *REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM* 36-66 (2007).

is critical to the international monetary regime, because it is a direct mechanism for limiting the creation of credit. Simply put, adherence to the capital adequacy requirements restricts the ability of banks to create money.⁵⁷ Second, the Basel Accord is perhaps the most vivid example of the relationship between the form of rulemaking and the insulation from politics. On the one hand, the committee does not aspire to formal rulemaking authority.⁵⁸ However, a range of factors including the World Bank and the IMF conditioning loans on compliance have made implementation nearly mandatory for many states (or at least made the cost of non-implementation nearly prohibitive). Over 100 states have implemented some version of the accord.⁵⁹ And while there have been significant gestures toward opening up avenues for participation by circulating drafts and inviting comments, the actual deliberations of the committee are closed and perceived as matters of technical proficiency where consensus, rather than politics, rules.⁶⁰

57 For example, "according to some accounts, Japanese banks were forced to withdraw so much money from circulation [in applying the original Basel Accord] that the Japanese recession of the nineties was triggered." GLOBAL ADMINISTRATIVE LAW: CASES AND MATERIALS 68 (Sabino Cassese et al. eds., 2d ed. 2008); *see also* Heather Montgomery, *The Effect of the Basel Accord on Bank Portfolios in Japan*, 19 J. JAPANESE & INT'L ECON. 24 (2005).

58 The committee's own website is quite adamant on this point:

The Committee does not possess any formal supranational supervisory authority, and its conclusions do not, and were never intended to, have legal force. Rather, it formulates broad supervisory standards and guidelines and recommends statements of best practice in the expectation that individual authorities will take steps to implement them through detailed arrangements — statutory or otherwise — which are best suited to their own national systems.

Basel Comm. on Banking Supervision & Bank for Int'l Settlements, *supra* note 55.

59 Regarding implementation, a General Manager at BIS had this to say:

The experience of the Basel Committee on Banking Supervision is instructive in this context. The Basel Committee is composed of senior supervisors from the most advanced countries, who have issued supervisory guidance on a wide range of topics. Basel Committee recommendations have no legal force. But since they have been adopted by consensus, they have been applied in all countries represented on the Committee. Interestingly, they have also been almost universally applied in non-member countries.

Andrew Crockett, General Manager of the Bank for Int'l Settlements and Chairman of the Fin. Stability Forum, *International Standard Setting in Financial Supervision* (Feb. 5, 2003) (lecture at the Cass Business School, City University, London), available at <http://www.bis.org/speeches/sp030205.htm>, quoted in David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 U. CHI. J. INT'L L. 547, 558 (2005).

60 Many commentators have noted that the Basel Committee as well as other fora of international financial experts (e.g., the Financial Stability Forum, also operating

An additional piece in the puzzle of the international monetary regime is the International Monetary Fund (IMF).⁶¹ The IMF has undergone significant changes since its founding at the end of World War II, developing from an institution concerned primarily with maintaining the exchange-rate regime to one concerned with the structural features of its members' economies.⁶² For my purposes, it is important to emphasize that the IMF is vital not only as a lending institution, but also as a lawmaking institution. The IMF pursues this lawmaking role in two related ways: first, through conditionality in lending;⁶³ and second, by developing standards and promoting their implementation.⁶⁴ Conditionality has been called "the most dramatic way that the IMF has affected sovereign decision-making across the globe."⁶⁵ When making loans, the IMF requires of the debtor a letter of intent regarding compliance with specific conditions. Some of these are embodied in IMF guidelines promulgated in 1979, but many more refer to standards developed by the IMF and other bodies, relating to various structural features in a state's banking and financial system.⁶⁶ Since borrowers from the IMF generally do not have real (i.e., feasibly priced) alternatives for raising capital, the conditions imposed by the IMF are in effect mandatory. But the standard-setting feature of IMF lawmaking need not rely on conditionality in isolation. By promoting particular codes of conduct (whether authored by the IMF itself or by other

under the aegis of the Bank for International Settlements) are more likely than most international bodies to reach cooperative agreement because their members form "transnational epistemic communities." See ERIC HELLEINER, *STATES AND THE REEMERGENCE OF GLOBAL FINANCE* 199-205 (1994).

61 There are, of course, additional pieces in this puzzle, including the Financial Stability Forum, the International Bank for Reconstruction and Development (the World Bank), national central banks, regional organizations like the Asian Development Bank, and others.

62 Robert Hockett, *From Macro to Micro to "Mission Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability*, 41 COLUM. J. TRANSNAT'L L. 153 (2002).

63 On the mechanism of conditionality as implemented by the IMF, see JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 241-44 (2006).

64 Sometimes the IMF develops standards on its own; more often it promotes the implementation of standards generated elsewhere, for example the Basel Committee or the International Organization of Securities Commissions. See Robert P. Delonis, *International Financial Standards and Codes: Mandatory Regulation Without Representation*, 36 INT'L L. & POL. 563, 580-95 (2004).

65 ALVAREZ, *supra* note 63, at 241.

66 The IMF's own standards include the General Data Dissemination System and the Special Data Dissemination Standard, developed by the Fund's International Monetary and Financial Committee, IMFC. Delonis, *supra* note 64, at 584.

international bodies), the IMF signals which practices enjoy favored status. Thus, not only those countries already pursuing loans from the IMF, but all those states that believe they may have reason to do so in the future, are encouraged, if not pressured, to accept and visibly implement the standards.

In sum, the regime of managed flexibility is something of a mirror-image to the gold standard regime of a century ago. The new regime rests on structured cooperation in formal or semiformal international frameworks. Negotiation in these frameworks is ongoing, and often yields norms that are nonbinding in theory, but binding in practice. Lawmaking relies intensively on high-level expertise, and is geared toward having a direct impact on money-creating agents (banks) in the various states toward which it is directed. The regulation is of low visibility but high impact, and is mediated by central bankers more often than politicians. These differences notwithstanding, the resulting norm of capital mobility and the usual reliance on market mechanisms to smooth adjustment processes are similar to the results under the gold standard.

III. COMPARING REGIMES (II): MEDIATING VALUE

Both the gold standard and the regime of managed flexibility succeed in insulating money and monetary policy from politics, but they do so in different ways. The differences are visible in the process of lawmaking that establishes each regime, but also, if more subtly, in the character of each regime and the particular way that money is set up as the denominator of value. Understanding the character of the regime requires a somewhat speculative exercise of describing their functioning beyond the concrete details alluded to in the account of lawmaking presented above, including an image of each system as a whole. To the extent that the determination of value by money becomes more attenuated in late twentieth-century globalization, its politics become even more submerged. This part of the paper is an attempt to account for these differences between the monetary regimes. I begin by recounting the political valence of lawmaking that structures each monetary regime. I then go on to sketch the characteristics of the two regimes by asking how each links money with value. Finally, I conclude by trying to draw together the various pieces in this puzzle of the politics of money.

According to the preceding account, a prominent difference between the gold standard and the current regime of managed flexibility lies in the mode of lawmaking by which the two regimes emerge and are sustained. The day-to-day operation of the gold standard, once in place, was experienced as insulated from popular politics. Maintaining sufficient gold reserves

in order to ensure that the gold standard would be upheld was the job of professional central bankers (or their equivalents)⁶⁷ and was carried out through a set of seemingly technical operations ranging from managing the discount rate to limiting (formally or informally) redemption of gold and, less frequently, carrying out open market interventions. Financiers of various stripes were united in their call to ensure expertise and administrative capacity in these roles, and the emerging (but then still quite new) dogma of central bank independence was one of the results.⁶⁸ However, the legal process by which countries entered the gold standard was tightly wound up in popular politics. Joining the gold standard was experienced as high politics, replete with interests, passions, and personalities. That process marked the fact that the financial structure was not taken for granted, the choice of financial structure was not (yet) a forgotten moment, but one at which different ways of valuing human endeavor were still in play.⁶⁹

The regime of managed flexibility, on the other hand, delivers a politics doubly attenuated. As under the gold standard, except with a significantly higher bar for technical proficiency, day-to-day management is a matter for the very highest echelon of expertise. The independence of central banks from political interference, once an important goal but a debatable proposition, has become a nearly impregnable fortress. Indeed, discussion of central bank independence often seems to send a message that the alternative to an independent bank is not a bank answerable to a state's interests in managing its economy, but rather an even more independent institution like a currency board that is constitutionally beyond the reach of the

⁶⁷ In the United States in the period under discussion, there was no central bank, and maintenance of the gold standard was primarily the responsibility of the Treasury.

⁶⁸ On the emergence of central bank independence and its eventual inculcation as dogma in the final decade of the nineteenth century, see Marc Flandreau, *Crises and Punishment: Moral Hazard and the Pre-1914 International Financial Architecture* 22-24 (Ctr. for Econ. Policy Research, Discussion Paper No. 3742, 2003), available at www.cepr.org/pubs/dps/DP3742.asp.

⁶⁹ The United States is a prime example. Greenbackers and Populists rejected the gold standard primarily because they advocated a way of life they claimed was valuable (we may call this producerist ideology); they did not deny the idea that another way of life would generate more monetary value, but rather claimed that their conception of the good life was more important than what could be disclosed by a monetary comparison. See RITTER, *supra* note 43, at 104-09.

government.⁷⁰ Lawmaking devolves into a process of international standard-setting absent overt authority and relying on ostensibly voluntary compliance. Even the entry into this system evinces an almost paradoxical detachment from politics: the establishment of a system of floating currencies was coordinated among the core states, but in a way that implied an exit from politics. Floating currencies and the lifting of capital controls that characterized the beginnings of current globalization were understood as a retreat from the political control that had both engendered and destroyed the Bretton Woods system. With as little fanfare as possible, the G7 countries replaced a system of political coordination with a system of expert technocratic coordination that relied much more heavily on a reemerging global market.⁷¹

But these differences, important as they may be, speak only to the most visible features and mechanisms of the international monetary regime. Perhaps just as important, however, is the image of the regime as a system. The image of the regime is the reference point for the mediation of value. It is through that image that contemporaries understand their own actions and evaluate their options. On this plane, the gold standard might be characterized as an anchored or disciplined utopia, while the regime of managed flexibility is a system of security, or of continual risk assessment.⁷² A brief description of each precedes my concluding speculations.

The gold standard regime, as Karl Polanyi famously described it, was based on a utopian vision of the global. Resting on a vision of free commerce, free labor, and a free market in gold itself, the integrated whole supplied an image of a thoroughly integrated world economy.⁷³ The utopian aspect of the regime lay in its dualism: on the one hand, a commodity anchor implied a

70 An entire (very informative) issue of *International Organization* is devoted to precisely this topic. The introduction sets the stage: William Bernhard, J. Lawrence Broz & William Roberts Clark, *The Political Economy of Monetary Institutions*, 56 INT'L ORG. 693 (2002). For a critical take on some of this literature, see Gabel, *supra* note 20; Kirshner, *supra* note 20; Hector E. Schamis, *The Political Economy of Currency Boards: Argentina in Historical and Comparative Perspective*, in MONETARY ORDERS, *supra* note 20, at 125. Perhaps some of the "consensus" may have fallen apart with the current credit crisis, but that remains to be seen.

71 For an account of some of the same dynamics regarding the trade regime, see Robert Howse, *From Politics to Technocracy — and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002).

72 On the distinction between discipline and security, see MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION 44-49 (Michel Senellart ed., Graham Burchell trans., 2004).

73 The utopian springs of the dogma of laissez-faire are but incompletely understood as long as they are viewed separately. The three tenets — competitive labor market, automatic gold standard, and international free trade — formed one

baseline for valuation grounded in concrete reality, i.e., the intrinsic worth of gold; on the other hand, the natural or automatic functioning of the standard was supposed to obviate the problem of valuation or valorization itself. By automatic functioning, Polanyi did not have in mind a system that actually runs on its own without the acts of individuals. Instead, the idea was that the gold standard itself imposed a law-like discipline on all actors, regardless of their individual goals.

By anchoring value in a particular commodity, two related threats are mitigated if not eliminated. The first is the threat of undisciplined activity by states, even when they accept the baseline for valuation implied by an integrated market. In other words, states adhering to the standard will not be able to tacitly default on debts by inflating the value of their currency, nor will they be able to pursue expansive taxing or spending which would drive capital out of the country.⁷⁴ But just as important is the second threat, which is that states will unilaterally opt out of a unified system of valuation.

The gold standard implied that policymakers could not decide independently to value (and thus encourage) say, farming, beyond its strictly economic contribution as measured in money. Valuing farming for its importance in ensuring moral fiber, or for connecting communities to the soil, or whatever else, was an activity that might be appropriate for poets, but not for policymakers. And this entire international structure could be enforced simply, without an international agent: discipline required only dividing the globe into sovereign states, whose only relinquishment of sovereignty was an individual commitment on the part of each to a single system of valuation. Once in place, the system itself mandated certain simple acts (payment of gold upon demand when presented with currency), but left those acts in the hands of those agents best situated to handle their mechanics (local banks, disciplined in turn by central banks, which in turn were answerable only to the international market for gold). London was the heart of the system in practice, but in theory, only gold itself was the anchor. Actual crises mark the distance of the system in practice from the utopia, as does its double breakdown, first in 1914 and then again in reconstructed form in 1933; but the image of the system is crucial for understanding its politics of money.

whole. The sacrifices involved in achieving any one of them were useless, if not worse, unless the other two were equally secured. It was everything or nothing. KARL POLANYI, *THE GREAT TRANSFORMATION* 144 (1944).

⁷⁴ Recall that the gold standard itself already includes both exchange-rate stability and capital mobility, and thus, according to the Mundell-Flemming trilemma discussed above, entails foregoing domestic policy flexibility.

The regime of managed flexibility, on the other hand, is cast as a system of security, of managing known and as yet unknown risks that can never be eliminated, but must be weighed against one another in order to optimize the outcome. The system is always confronted by imperfections that it accepts as givens. The first of these is the basic condition of lending, which is imperfect (and asymmetrically so) information. But there are others as well, ranging from the fact that political considerations will, despite precautions, always exert pressure to influence decision-makers; to the fact that opening the channels for investment will also open them to money-laundering and other criminal activities;⁷⁵ to the fact that openness to investment opportunities will always potentially be the openness to economic and social dislocations that may accompany fast-moving (and multidirectional) capital; to the fact that rapid expansion or contraction of economic activity accompanying such capital movements will mobilize new and unpredictable social and political resistance. There is no way to arrive at a point of perfection, since these risks are inherent in the very advantages of the system. It is only a matter of "maximizing the positive elements" and providing them with the best means of circulation, while "minimizing what is risky and inconvenient . . . and since [these risks] can never be nullified, one works on probabilities."⁷⁶

Value itself, under this regime, has no anchor, but is the constantly reconstituted result of exchange and expectations of further exchange. Value has become an effect of the system. In some sense, this is the logical endpoint of the idea of money as developed by Simmel. Under the current regime, money is only the marker of the relative value of all things, or the medium of ultimate relativity.⁷⁷ But what does this mean for a politics of money? On a practical level, it remains clear (today, painfully clear) that even the most abstracted financial transactions can come home to roost in the "real" economy and thus in people's everyday lives (i.e., not only in the stock portfolio of someone in the headlines, but also in whether the person

75 On this issue, note the "new wing" of the financial architecture, which is the Financial Action Task Force (FATF), an "inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing." The Financial Action Task Force, http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html (last visited July 19, 2009). For discussion, see Benvenisti, *supra* note 49, at 5.

76 FOUCAULT, *supra* note 72, at 19.

77 For one version of such a normative program, including a review of many other proposals, see BARRY EICHENGREEN, TOWARD A NEW INTERNATIONAL FINANCIAL ARCHITECTURE: A PRACTICAL POST-ASIA AGENDA (1999).

reading the newspaper is on her way to work, or reading a very slim column of employment classifieds). The response to the ever-presence of risks, on the level of policymaking, is precisely to construct a financial architecture fit for the endless task of balancing the risks and rewards of each of its features. But such an architecture necessarily treats value only as the effect of exchanges, denying, as it were, the politics of determining value. Thus, the image of the new financial architecture distances us from the stakes of an international monetary regime, making it increasingly difficult to appreciate money's role in shaping societies.

CONCLUSION

Is there a lesson to be drawn from this comparison of globalizing international monetary regimes? If so, I believe it is a lesson about the distancing of money and monetary policy from politics. Today's conventional wisdom holds that the gold standard was able to function smoothly because political pressure from the groups who stood to lose from its operation was weak. When suffrage was extended and labor parties began to acquire more power, they were able politically to pressure governments into policies that made the gold standard impossible to uphold.⁷⁸ The understated implication is that political accountability increases linearly with the expansion of democratic political structures, making political intervention into monetary policy more salient today than during the globalization of a century ago.

The analysis here suggests that in some ways, the opposite may be true. Moreover, the resilience of the monetary regime in the face of politics may be directly related to the tendency of money toward abstraction and wholly relativized value. In other words, there may be a link between

⁷⁸ Barry Eichengreen has been central to the development of this thesis:

Domestic politics was largely responsible for the credibility of this system. In the core of European countries that the international system pivoted around, no significant political opposition to gold-based currencies existed. Management of the monetary standard was not within the sphere of everyday politics. Unemployed workers who might have objected to the effects of credit stringency were in no position to make their opposition known.

EICHENGREEN, *supra* note 8, at 30; *see also id.* at 6; EICHENGREEN, *supra* note 24, at 31 ("The pressure twentieth-century governments experienced to subordinate currency stability to other objectives was not a feature of the nineteenth-century world. The credibility of the government's commitment to convertibility was enhanced by the fact that the workers who suffered most from hard times were ill positioned to make their objections felt."); GALLAROTTI, *supra* note 8, at 12-13.

a particular style of democratization, one in which what is important is that one's preferences have been counted, and money as an abstract representative of relative value. The current monetary regime comprises a host of coordinating institutions, without presenting a clear hierarchy or sense of priority. Decisions seem decentralized, diffused, and yet based on an elusive but unifying brand of expertise, one ranging from the credit agency to the central banker, but not much farther.

There is something about the diffusion and complexity of the whole that makes it difficult to appreciate it as a collective endeavor. The difficulty is heightened in periods of crisis, when it seems that if genuinely collective action could be pursued, much of the crisis would dissipate. The fact that this does not happen reinforces the feeling that the system is nothing more than an endless series of individual (read: non-political) choices.

Perhaps, then, today's monetary regime has been even more successful than the gold standard in isolating money from politics. Perhaps it is precisely the lack of a commodity anchor that makes it so clear that money is only valuable relatively, precipitating the illusion that money can act as a common denominator for all relativity, or in other words, as the sole mediator of value. Recovering a politics of money for today would require accepting money's relativity while reinstating its partiality in denominating value.