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Constitutions Through The Lens Of The Global Financial Crisis: Considering The Experience Of The United States, Portugal, And Greece

Vincent L. Esposito

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"The Constitution is intended to meet and to fit the amazing physical, economic, and social requirements that confront us in this modern generation." – Franklin D. Roosevelt

Introduction

In 2008, the global financial crisis exploded onto the world stage highlighting the modern conditions of globalization, financial interconnectedness, and economic vulnerability. The speed and the intensity of the global financial crisis have resulted in sweeping legislation challenging existing legal constraints and setting continuous constitutional challenges. This interaction between economic crisis and constitutions, applied through the lens of the current global financial crisis, highlights the strengths and shortcomings of certain constitutional designs.

In this paper we will analyze two different constitutional frameworks; those granting general and specific rights. Generally, the United States Constitution is a charter of negative rights, which grants general rights rather than specific rights, and allows the Supreme Court to fill in the gaps.¹ Thus, individual fundamental rights are implied through the liberty provision of the Fourteenth Amendment's Due Process Clause.² Whereas the constitutions of Portugal and Greece have a positive charter, that provides for specific individual rights, especially socio-economic rights.³ Although the intensity of the crisis and the availability of resources of each country vary wildly, each has been dealing with the same basic issues and challenges within their respective legal constraints. In particular, each country is required to balance the good of the state or the collective public interest against the rights and hardship of individual citizens. This plays out in the call for budget reductions and the corresponding cuts to services and salaries. In

¹ Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 chap. L. Rev. 137 at 139, 151 (2003).

² Kende, *supra* note 1 at 139, see U.S. CONST. amend. XIV.

³ PORT. CONST. & GREEK CONST.

the U.S., because specific individual rights are absent, the balancing is left to the legislature⁴ and therefore the main constitutional challenges focus on the legal scope of the federal government's power. In contrast, the constitutional challenges in the Eurozone focus on the infringement of individual social and economic rights and the struggle to implement austerity policies and severe budget cuts. The resulting constitutional challenges led to a finding that U.S. courts played a near non-existent role whereas the Eurozone courts Europe, played a much greater role.

Part I of this paper will discuss the constitutional history of the United States concerning the court's role during the New Deal, where the Supreme Court was able to alter its interpretation of Due Process without the benefit of a formal constitutional amendment.⁵ This change of interpretation ushered in a new framework of judicial review that allowed greater deference to the legislature when regulating the economy.⁶ Furthermore, this paper will discuss and analyze the ability the U.S. government to manage the current global financial crisis within its existing constitutional framework, and in particular explore the lack of constitutional challenges to TARP and its implementation.

Part II will examine the case of Portugal, where the implementations of austerity policies have been hindered by the Portuguese Constitution.⁷ The Portuguese Constitutional Court, after first upholding austerity measures valid on the basis of emergency economic circumstances, has constantly invalidated austerity measures as repugnant to the individual rights embodied in the

⁴ Kende, *supra* note 1 at 152. ("The Supreme Court has made clear the legislative and executive branches should resolve socio-economic rights issues.")

⁵ Daniel J. Hulsebosch, *The New Deal Court: Emergence of a New Reason*, 90 Colum. L. Rev. 1973, 1973 (1990).

⁶ Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 Fordham L. Rev. 459, 464-46 (2001).

⁷ See Tribunal Constitucional [Port. Const. Ct.] Rul. no. 396/2011; *see also* Tribunal Constitucional [Port. Const. Ct.] Rul. no. 353/2012.

Portuguese Constitution.⁸ This judicial activism has threatened Portugal's access to credit markets and a fragile economy still recovering from the recession.

Part III will examine the case of Greece, which has suffered the harshest consequences of the global financial crisis. Due to the severity of the existing crisis the Greek courts have upheld austerity measures even though these measures infringe on individual rights guaranteed by the Greek Constitution.⁹ The lack of constitutional protection of specific rights and the disintegration of the standard of living has led to widespread violent protest throughout Greece.

Part IV will include a comparative analysis of the differences between general and specific constitutional framework; and additionally compare the opposite outcomes reached by the Portuguese and Greek courts concerning substantial similar issues of austerity. Furthermore we will examine the ability of the United States, through its legislature, to balance the need for deficit reductions and individual socio-economic rights. Finally we will conclude that in the specific case of economic crisis the United States constitutional framework, its experience, and the role of its legislature have allowed the U.S. to most successfully adapt and balance the pressing issues presented by the global financial crisis

I. THE UNITED STATES

"Our Constitution is a charter of negative rather than positive liberties ... The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them." – Judge Posner¹⁰

⁸ See *Id.* See also Tribunal Constitucional [Port. Const. Ct.] Rul. no. 399/2010.

⁹ See Panagiotis Sotiris, *Greece: The EU-ECB-IMF austerity package and the challenge for the Left*, Greek Left Rev., July 15, 2010 available at <http://greekleftreview.wordpress.com/2010/07/15/greece-the-eu-ecb-imf-austerity-package-and-the-challenge-for-the-left/>.

¹⁰ Kende *supra* note 1 at footnote 2. citing *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

The Great Depression and Great Recession are two episodes in the U.S. constitutional story that pushed the constitutional limit of the federal government's ability to intervene in the economy. During the Great Depression the Supreme Court was seen a substantial roadblock to recovery and the implementation of New Deal Legislation. In a series of landmark decisions between 1935 and 1936 the Supreme Court invalidated major federal and state regulatory legislation based on theories of "liberty of contract" and a limited federal government.¹¹ By 1937 the Supreme Court reversed itself and held federal and state regulatory legislation constitutional.¹² This change in judicial review altered the existing constitutional interpretation without the requirement of a constitutional amendment and allowed the government to directly manage the existing emergency crisis and the economy.¹³

The Great Depression and the New Deal

The Wall Street Crash of 1929 marked the beginning of the Great Depression which saw the disintegration of the national economy.¹⁴ When Franklin D. Roosevelt delivered his inaugural address in March 1933, the nation's unemployment rolls listed thirteen million idle workers or one quarter of the work force.¹⁵ From 1930-33, five thousand banks had failed, eliminating nine million savings accounts, and half of the nation's income.¹⁶ The average man's desire for food and shelter put enormous stress on the political system.¹⁷ The Roosevelt administration pledged a "New Deal" to combat the desperate economic condition by passing emergency legislation.¹⁸ By increasing the government's role in the economy, New Deal

¹¹ William G. Ross, *When did the "Switch in Time" Actually Occur?: Re-Discovering the Supreme Courts "Forgotten Decisions of 1936-1937*, 37 *Ariz. St. L.J.* 1153, 1153-54 (2005).

¹² Ross, *supra* note 11 at 1154.

¹³ Lash, *supra* note 6 at 459-60.

¹⁴ Ross *supra* note 11 at 1153-54.

¹⁵ Hulsebosch, *supra* note 5 at 1973.

¹⁶ *Id.*

¹⁷ *Id.* at 1977.

¹⁸ *Id.* at 1974.

legislation challenged the existing constitutional orthodoxy of limited government¹⁹ and conventional judicial notions of substantive economic due process.²⁰ In order to permit economic reform the court had to alter its current constitutional interpretation.²¹ To this effect, the Supreme Court was able in a very short period of time to make a doctrinal revision abandoning substantive economic due process and the liberty of contract principal.²² In the end, the Supreme Court redefined due process and established a new constitutional framework that expanded the federal government's ability to intervene in the economy during economic crisis.

i) Emergency Power Doctrine

Even prior to the New Deal legislation, states passed moratoriums on foreclosures in response to the emergency economic situation that provided relief to struggling debtors. The moratory statutes were challenged by bankers and lenders as a violation of the Contract Clause of the U.S. Constitution.²³ The Contract Clause states that “no state shall enter into any . . . Law impairing the Obligation of Contracts.”²⁴ Home Building Loan Association v. Blaisdell²⁵ was the first case where the Supreme Court upheld the use of the emergency power doctrine outside the context of war.²⁶

In 1933, threatened by foreclosures, farmers rioted in Minnesota and petitioned the state legislature for protection.²⁷ In response, Minnesota passed a moratory statute that delayed foreclosure sales and extended redemption periods beyond the dates of foreclosure specified in

¹⁹ G. Edward White, *Cabining the Constitutional History of the New Deal In Time The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*. By William E. Leuchtenburg. New York: Oxford University Press. 1995. 94 Mich. L. Rev. 1392, 1393 (1996).

²⁰ Hulsebosch, *supra* note 5 at 1987.

²¹ *Id.* at 1974.

²² *Id.*

²³ Home Building Loan Association v. Blaisdell, 290 U.S. 398, 399-400 (1934)

²⁴ U.S. CONST. art. I § 10, cl. 1.

²⁵ Blaisdell, 290 U.S. at 400.

²⁶ Hulsebosch, *supra* note 5 at 1988.

²⁷ *Id.*

the individual mortgage contracts.²⁸ The statute authorized Minnesota courts, upon application by the mortgagor, to extend the existing one-year period of redemption from fore-closure sales for such time as was deemed equitable and further the duration of the law was limited to either two years (March 1935), or if the emergency ended, whichever came first.²⁹

The Minnesota Supreme Court held that to the extent that the statute interfered with contractual obligations, there was justification based on the state's police power responding to the interest of a public economic emergency.³⁰ The U.S. Supreme Court agreed and upheld the statute despite the fact that it violated the Contract Clause of the Constitution based on the emergency power principal.³¹ The Court carved out conditions in which a valid exercise of emergency power existed; the legislation must be for the protection of a basic interest of society, the character of the relief was appropriate to the emergency, the conditions on which relief was granted were reasonable and the legislation was temporary being "limited to the exigency which called it forth."³²

Blaisdell has been described as representing the dawn of "living Constitution" jurisprudence.³³ Its majority opinion³⁴ embodied the notion that the Constitution should adapt to changing circumstances.³⁵ It also exemplified the ultimate sovereign right of self-preservation which could neither be defined nor circumscribed by a formal constitutional clause.³⁶ As Robert

²⁸ Blaisdell, at 416-418.

²⁹ Hulsebosch, *supra* note 5 at 1988.

³⁰ Blaisdell, at 419-20.

³¹ Id. at 437. (Court held that "the economic interest of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.")

³² Id. at 444-47.

³³ Lash, *supra* note 6 at footnote 100. See Laura Kalman, *Law, Politics, and the New Deal*, 108 Yale L.J. 2165, 2186-87 (2000).

³⁴ Written by Chief Justice Hughes.

³⁵ Lash, *supra* note 6 at 479.

³⁶ Hulsebosch, *supra* note 5 at 1999.

Jackson famously wrote, “The Constitution is not a suicide pact” douse the flames first; then repair the bad writing.³⁷

ii) Due Process

Congress enacted Roosevelt’s recovery plan, known as the first one hundred days of legislation, to lift the economy from its purgatory.³⁸ The extraordinary New Deal legislation challenged the constitutional orthodoxy of limited government and the traditional interpretation of due process, which embraced the liberty of contract.³⁹ During the half-century preceding the Depression, the Court has decided to equate the personal liberty promised by due process with unfettered enterprise and expanding the concept of property to a degree that limited government regulation.⁴⁰ Although the “liberty of contract” is not an express constitutional right, the Supreme Court embraced the freedom of contract as a liberty protected under the Due Process Clause of the Fourteenth Amendment⁴¹ in Lochner v. New York.⁴² Based on this interpretation of due process the Supreme Court had broadly rejected both federal and state attempts to regulate the economy and provide for the welfare of workers.⁴³ Between 1935 and 1936 the Supreme Court invalidated a number of key aspects of Roosevelt’s New Deal legislation, based on Lochner’s “liberty of contract,” economic substantive due process, and a limited interpretation of the Commerce Clause.⁴⁴

³⁷ Id. at 2000.

³⁸ Lash, *supra* note 6 at 476.

³⁹ Hulsebosch, *supra* note 5 at 1999.

⁴⁰ Id.

⁴¹ U.S. CONST. amend. XIV, § 1.

⁴² Lochner v. New York, 198 U.S. 45 (1905). (Lochner involved a New York state statute that limited the hours of any bakery employee to no more than sixty hours in one week. The Supreme Court invalidated the statute and held that the statute limiting hours of labor “interferes with the right of contract between the employer and employees . . . and the general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”) Id. at 53.

⁴³ Id. at 459-60.

⁴⁴ Id. at 476.

In early 1935, the Supreme Court declared unconstitutional the Railroad Retirement Act (RRA) in Railroad Retirement Board v. Alton Railway Co.⁴⁵ the National Industrial Recovery Act (NIRA) in A.L.A. Schechter Poultry Corp.⁴⁶ and the Frazier-Lemke Act.⁴⁷ In 1936 the Court struck down the Agricultural Adjustment Act, a new coal labor code in Carter v. Carter Coal Company,⁴⁸ and New York's minimum wage,⁴⁹ which upheld the court's previous ruling in Adkins v. Children's Hospital.⁵⁰

As the Supreme Court invalidated core provisions of Roosevelt's legislation, many believed that the Constitution, as interpreted by the Supreme Court, barred escape from the Depression.⁵¹ The popular conception at the time was that the government should participate in a regulatory capacity in the economy.⁵² Charles Beard, a Constitutional historian, wrote that the time had come for "the ruling ideas, appropriate to the age of tallow candle and ox cart," to be modernized to comprehend "economic interests ... [that] have been advancing with electric speed under the impacts of technology and organization."⁵³ Others viewed the Court's

⁴⁵ Railroad Retirement Board v. Alton Railway, 295 U.S. 330, 344-46 (1935). (The Railroad Retirement Act (RAA) established a federally administered compulsory retirement and pension system for all carriers. The law required present and future employees to make contributions to the retirement fund. The Court held that the RAA violated the Due Process Clause of the Fifth Amendment and stated that the "act denies due process of law by taking the property of one and bestowing it upon another. The Court further found that the RAA violated the Commerce Clause.)

⁴⁶ A.L.A. Schechter Poultry Corp v. U.S., 295 U.S. 495 (1935). (The Live Poultry Code was written and promulgated by the Roosevelt administration in 1934 under the NIRA. The code fixed the maximum number of hours a poultry employee could work, imposed a minimum wage, and banned certain methods of unfair competition. The Supreme Court invalidated the act because it was an unconstitutional grant of legislative power to allow the president to write new codes as long as they regulated "unfair competition," reasoning that "unfair competition" was too ambiguous to constitute a "intelligible principle." Secondly the Court found that the act violated the Commerce Clause because Schechter's activities where entirely intrastate.)

⁴⁷ Hulsebosch, *supra* note 5 at 2001. (The Frazier-Lemke Act, amended the Bankruptcy Act permitting debtors to effect composition of their debts by forcing creditors to relinquish security. The Law was applied retroactively and permitted extensions up to ten years.)

⁴⁸ Carter v. Carter Coal Co., 298 U.S. 238 (1936).

⁴⁹ See Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

⁵⁰ Adkins v. Children's Hosp., 261 U.S. 525 (1923).

⁵¹ Hulsebosch *supra* note 5 at 1976.

⁵² *Id.* at 2004.

⁵³ *Id.* quoting C. Beard & G. Smith, *The Future Comes* 169-70 (1933).

interpretation of due process clause, as “the last and most formidable entrenchment of privileged wealth.”⁵⁴ Additionally this sentiment was captured by the popular press, which wrote:

“What we need now is martial law: this is no time for civil law. The President should have dictatorial powers. The edicts of the Constitution do not interfere with a general when he is fighting a battle; and the Constitution should not interfere with the remedies which are essential to get us out of this appalling depression.”⁵⁵

Others, placed the blame on the Justices themselves, in a book before he joined the court Robert Jackson wrote that “the immediate difficulty was with the Justices, not the Court of the Constitution.”⁵⁶

In 1937, in an effort to clear constitutional hurdles, Roosevelt had submitted his court packing plan,⁵⁷ and Congress itself was considering a number of constitutional amendments.⁵⁸ Both proposed plans were rendered moot when the Supreme Court, and in particular Justice Robert, changed its interpretation of due process, which effectively abandoned Lochnerian doctrine and allowed the New Deal to proceed.⁵⁹ The switch is generally regarded as having occurred with the Supreme Court’s legitimating of Washington State’s minimum wage in West Coast Hotel v. Parrish,⁶⁰ which overruled Adkins and a fifteen year old precedent to the contrary.⁶¹ Parrish, ushered in an entire new method of judicial review that granted great

⁵⁴ Id. quoting I. Brant, *Storm Over the Constitution* 242 (1936).

⁵⁵ Id. at 1978 quoting Macfadden, “This is War,” *Says General Pershing*, *Liberty*, June 25, 1932, at 4, 4.

⁵⁶ Lash, *supra* note 6 at 475 quoting Robert H. Jackson, *The Struggle for Judicial Supremacy* 70 (1941).

⁵⁷ President Roosevelt proposed to increase the Court’s membership by adding one justice for every Supreme Court justice over the age of seventy to ensure favorable treatment of New Deal Legislation. Hulsebosch, *supra* note 5 at footnote 31.

⁵⁸ Lash, *supra* note 6 at 476-77. (Proposed Amendments fell along two main lines; those which sought to restructure the nature of judicial review, for example by providing for a congressional override of judicial opinions and those which sought to increase the regulatory power of government by permitting regulation of labor and the economy.)

⁵⁹ Id. at 460.

⁶⁰ West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

⁶¹ White, *supra* note 20 at 1415.

deference to legislatures when regulating the economy.⁶² The Court reconstituted due process in a manner that allowed the legislature to make policy and since the Court's decision in Parrish, not a single regulatory law has been struck down as beyond Congress' commerce power.⁶³

Due to the flexibility of the U.S. Constitution by granting general rights, the Supreme Court was able to alter the shape of judicial review and in doing so the interpretation of due process without the benefit of a formal constitutional amendment.⁶⁴ President Roosevelt's critique that "we have been relegated to the horse-and-buggy definition of interstate commerce" had been overturned,⁶⁵ and the shift can be considered a "rebirth" in which the American constitutional system adapted to modernity.⁶⁶ Thus, the U.S. government was armed with the tools to implement legislative solutions to economic problems confronted by a modern world.

Great Recession

"This is the financial equivalent of war and we are going to need wartime power." –
Hank Paulson Secretary of Treasury to President George W. Bush.

The global financial crisis came to a head in 2008 with the collapse of Lehman Brothers, but its roots stem back to the real-estate bubble and the collapse of the market for mortgage backed securities.⁶⁷ The U.S. real-estate bubble was created by inflated housing prices fueled by a rapid rise of subprime lending⁶⁸ and the packaging of mortgage back securities.⁶⁹ Subprime

⁶² Hulsebosch, *supra* note 5 at 2016.

⁶³ Lash, *supra* note 6 at 478.

⁶⁴ *Id.* at 464-46.

⁶⁵ Lash, *supra* note 6 at 479.

⁶⁶ White, *supra* note 20 at 1392.

⁶⁷ Martin Neil Bailly, Robert E. Litan, & Matthew S. Johnson, *The Origins of the Financial Crisis*, Fixing Finance Series-Paper 3, at 7 (2008).

⁶⁸ Subprime loans (or mortgages) are loans to unqualified buyers. Prior to 2000 subprime lending was non-existent, but the sustained rise in the housing market and the bundling of mortgages made subprime lending lucrative and attractive. This increase in lending led to more demand for new houses which in turn led to an oversupply of housing on the market growing the real estate bubble. Additionally, many of these loans included

mortgages were “securitized”⁷⁰ by being pooled together with prime mortgages into “packages.”⁷¹ These packages were sold to financial institutions that used these pooled mortgages to back other financial instruments,⁷² which were sold to investors all over the world.⁷³ As financial institutions made huge profits creating and selling these instruments, easy monetary policies and low interest rates created an incentive for financial institutions to borrow large sums of money to finance the purchase of more mortgage-backed securities.⁷⁴ The increased borrowing led to a high level of financial leverage on the financial books of investment banks, which multiplied profits but also exposed them to greater risk if real-estate prices were to fall.⁷⁵ When the housing bubble finally burst, the value of securities tied to the real estate markets plummeted inflicting severe instability on the entire financial system. Lehman Brothers, due to its massive property investments, saw its stock price free fall, and was forced to file bankruptcy.⁷⁶

i) TARP

The fallout from the collapse of Lehman Brothers threatened the stability of the entire banking system. As the breakdown in the banking system and credit market spread throughout the economy, the United States was inflicted with the worst economic crisis since the Great

forms of predatory lending. For example, borrowers had poor credit histories and banks used attractive mortgage incentives such as no down payments, teaser rates, or postponed interest payments to increase lending. Id.

⁶⁹ Id.

⁷⁰ Fannie Mae and Freddie Mac guaranteed these “mortgage-backed securities” to ensure their marketability. Id.

⁷¹ Id.

⁷² Also known as collateralized debt obligations (CDOs). These CDOs were then sliced into tranches by degree of exposure to default or risk and sold to investors depending on their appetite for risk. *The Origins of the Financial Crisis: Crash Course*, The Economist, Sep. 7, 2013.

⁷³ Id.

⁷⁴ Id.

⁷⁵ *Baily supra* note 73 at 7-8.

⁷⁶ Id.

Depression.⁷⁷ The symptoms were substantial; foreclosures were at an all-time high, real estate values plummeted, businesses scaled down, unemployment exploded, the DOW plummeted, and consumer spending and confidence were shaken.⁷⁸ In response, Congress enacted the Emergency Economic Stabilization Act of 2008 (EESA), which created the Troubled Asset Relief Program (TARP).⁷⁹ The purpose of TARP was “to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the national financial system.”⁸⁰ At its heart, TARP granted significant authority to the Secretary⁸¹ to spend \$700 billion to remove distressed assets from the financial banking system, which in essence allowed the government to infuse a large amount of capital into the economy for the purpose of stabilizing the market.⁸²

Courts have yet to address any constitutional challenges to TARP,⁸³ but many groups⁸⁴ have asserted its unconstitutionality. The principal constitutional issue rests on the claim that TARP is an unconstitutional delegation of legislative power and violates the non-delegation principle.⁸⁵ The crux of the argument rests on the fact that legislative power is constitutional vested in Congress⁸⁶ and Congress may not delegate away that power to another branch of

⁷⁷ Erik D. Klingenberg, *Summary and Analysis of the Troubled Asset Relief Program*, 62 Consumer Fin. L.Q. Rep. 26 (2008).

⁷⁸ *Id.*

⁷⁹ Stephen Smith, *Standing up to Nothing: Why TARP Has Not Become a Constitutional Case*, at 515 (2011).

⁸⁰ 12 U.S.C.A. § 5201(1).

⁸¹ TARP authorized the Secretary “to purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary.” 12 U.S.C.A. § 5211. The act further states that such authority must be exercised in a manner to protect the value of personal investments, minimize foreclosures, boost the economy, maximize the return on investment, and provide accountability to the public. 12 U.S.C.A. § 5213.

⁸² Smith, *supra* note 85 at 515-16.

⁸³ Cases that have challenged TARP’s constitutionality have been dismissed for lack of standing. See Texans Against Governmental Waste and Unconstitutional Governmental Conduct v. U.S. Dep. of Treas., 619 Supp. 2d 274, 275-276 (N.D. Tex. 2009).

⁸⁴ FreedomWorks Organization challenged TARP’s constitutionality.

⁸⁵ Touby v. United States, 500 U.S. 160, 165 (1991).

⁸⁶ Article I, Section 1 of the U.S. Constitution vests “all legislative powers herein granted” in Congress. U.S. CONST. art I §1. Further in Article I, Section 8 of the U.S. Constitution provides that Congress has the power to “regulate Commerce.” U.S. CONST. art. I §8 cl. 3.

government. However the non-delegation principle is not a ban on all Congressional delegations, and is satisfied when Congress “lays down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.”⁸⁷

Therefore TARP’s constitutionality rests on whether Congress has satisfied the “intelligible principle” requirement and provided a permissible scope of authority to the Secretary. The “intelligible principle” analysis depends on factors such as the scope of legislative authority granted, the power that is granted, and the constraints imposed on the exercise of that power.⁸⁸ Here, TARP grants the Secretary broad authority to purchase \$700 billion worth of “toxic assets.”⁸⁹ The act places some restraints on the Secretary by stating that the Secretary must exercise in a manner that “prevent unjust enrichment of financial institutions,”⁹⁰ “maximize overall returns to the taxpayers of the United States,”⁹¹ and additionally consider the following factors; the value of personal investments, minimize foreclosures, boost the economy, maximize the return on investments and provide accountability to the public.⁹²

An argument can be made that TARP grants extraordinary broad authority to the Secretary that impacts the entire national economy with only vague conditions on the exercise of that authority.⁹³ Since the Great Depression the Supreme Court has generally interpreted the “intelligible principle” test to allow broad delegations of powers, but due to the amount of money involved combined with the lack of sufficient oversight make the bailout different enough from

⁸⁷ *J.W. Hampton, Jr., & United States*, 276 U.S. 394, 409 (1928)

⁸⁸ *Whitman v. American Trucking Assns.*, 531 U.S. 457 (2001) (The degree of agency discretion that is acceptable varies according to the scope of the power congressionally confer.)

⁸⁹ 12 U.S.C. §5201(1).

⁹⁰ 12 U.S.C. §5211(e)

⁹¹ 12 U.S.C. §5201(1)

⁹² 12 U.S.C. §5213.

⁹³ FreedomWorks Foundation, *Constitutional Infirmities of the Emergency Economic Stabilization Act of 2008 (“ESSA”): A Legal Analysis from FreedomWorks Foundation*, No. 124 at 8 (2009).

previous delegations.⁹⁴ In an interview concerning the bailout, Harvard Law Prof. Laurence H. Tribe, stated “that any such challenge was unlikely to succeed because the doctrine of Congressional delegation was significantly weakened during the New Deal and never recovered.”⁹⁵ Prof. Tribe further said that the bailout [TARP] “certainly tests the outer limits of Congressional delegation authority,” and “if the delegation were genuinely alive and well, TARP might be among its potential victims.”⁹⁶

The Obama administration in July 2009, went a step further when it used TARP funds to assist automakers by purchasing their debts in a government-assisted bankruptcy restructuring.⁹⁷ This was done after Congress had effectively killed the Auto Industry Financing and Restructuring Act of 2008, which would have gave Congressional consent for the auto bailout.⁹⁸ The purpose of the auto-bailout was to save millions of jobs at a time of economic emergency, but it pushed the constitutional limits of federal power because TARP was limited to apply only to financial institutions.⁹⁹ Thus it is argued that the Secretary illegally expanded the definition of any financial institutions¹⁰⁰ to included car manufacturers.¹⁰¹ Although there has been no court ruling on the constitutionality of the bailouts, it is clear that the federal power exercised represents the outer limits of a constitutional exercise of federal power.

Today, an unconstitutional decision would have little practical effect as it is unlikely that the money spent could be recovered. However, the lack of an unconstitutional ruling

⁹⁴ John Armev, *Some Ask if the Bailout is Unconstitutional*, N.Y. Times, Jan. 16, 2009, at A16 available at <http://www.nytimes.com/2009/01/16/us/politics/16challenge.html>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Smith, *supra* note 85 at 515.

⁹⁸ *Id.* at 527.

⁹⁹ 12 U.S.C.A. § 5211(a)(1).

¹⁰⁰ Although not exhaustive the EESA definition for financial institutions applies to “any bank savings association, credit union, security broker or dealer, or insurance company.” 12 U.S.C.A. 5205(5).

¹⁰¹ Smith, *supra* note 85 at 526. (Note: that the money was actually paid to GM’s and Chryslers’ “financial” arm.)

demonstrates the government's continued ability to enact recovery legislation.¹⁰² This exercise of federal power to regulate the economy is rooted in the constitutional experience from the Great Depression.¹⁰³ The positive experience with the New Deal period of the active federal approach to the Depression in the form of industrial recovery programs and regulation are partly due to the idea and pragmatic reasons for not limiting the government's maneuvering room during economic crises.¹⁰⁴ This experience combined with the flexible characteristic of the U.S. Constitution has allowed for an existing constitutional framework to readily accommodated new responses¹⁰⁵ to modern problems exemplified in the responses to the financial crisis.

II. PORTUGAL

The global financial crisis, rooted in the U.S. subprime crisis, swiftly crossed the Atlantic and mutated into the European sovereign-debt crisis. The sovereign-debt crisis describes the disruption of credit markets where the weaker southern countries¹⁰⁶ of the Eurozone plagued by high debt-GDP ratios were unable to borrow credit at sustainable rates.¹⁰⁷ The inability to sustainably borrow credit forced these countries to seek bailout packages from the "Troika" which included the international lenders, International Monetary Fund, the European Central Bank, and the Europeans Commission.¹⁰⁸ Fearing an expansion of the crisis and a deeper recession, European leaders had no choice but to provide emergency funds to the debt stricken countries to safeguard the financial stability of the entire Eurozone.¹⁰⁹ However, the Troika

¹⁰² Xenophon Contiades, *Constitutions in the Global Financial Crisis A Comparative Analysis*, 300 (2013).

¹⁰³ For example the weak to non-existent constitutional constraints of the non-delegation doctrine are rooted in the Court's New Deal rulings. *Id.*

¹⁰⁴ Hulsebosch, *supra* note 5 at 1987.

¹⁰⁵ For example the authorization of bailouts that nearly socialize the banking and auto-industry.

¹⁰⁶ Commonly referred to as PIGIS; Portugal, Ireland, Greece, Italy, and Spain.

¹⁰⁷ Contiades, *supra* note 113 at 219-220.

¹⁰⁸ Aristidis Bitzenis, Ioannis Papadopoulos & Vasileios A. Vlachos, *Reflection on the Greek Sovereign Debt Crisis: The EU Institutional Framework, Economic Adjustment in an Extensive Shadow Economy*, Cambridge Scholars Publishing. (2013) at 3.

¹⁰⁹ *Id.*

conditioned these loans on the implementation of deficit reduction policies known as austerity.¹¹⁰ These austerity measures or belt tightening included reductions of salaries and pension benefits for public employees, cuts in public services and job cuts, retroactive taxes, and alterations in collective bargaining.¹¹¹ The implementation austerity policies have created constitutional issues in each country as they attempt to satisfy their obligations under the loan agreement or Memorandum.¹¹²

Portugal felt effects of the global financial crisis immediately in 2008.¹¹³ After chronic financial mismanagement, overspending, and a bloated public sector, the following two years accompanied by low economic growth, and an exacerbated sovereign credit market provoked by Greece's near financial meltdown.¹¹⁴ In 2010, Moody's Investor Service cut Portugal's bond rating down two notches as Portuguese debt exploded with a high debt-GDP ratio.¹¹⁵ In April 2011, in an attempt to stabilize its financial situation,¹¹⁶ Portugal requested a €78 billion bailout package from the Troika.¹¹⁷ On May 17, 2011 the bailout agreement or Memorandum¹¹⁸ was signed by the Portuguese Government.¹¹⁹ The Portuguese State agreed to the conditions set by the Memorandum, which required a strong restructuring of social, economic, and financial policy aimed at reducing public budget deficits.¹²⁰ The manifestation of the policy, imposed by

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Contiades, *supra* note 113 at 220.

¹¹³ *Id.* at 219.

¹¹⁴ Martinho Lucas Pires, *Private Versus Public or State Versus Europe? A Portuguese Constitutional Tale*, Mich J. Int'l L. Emerging Scholarship Project (2013) available at www.mjionline.org/wordpress/wp-content/uploads/2013/pires.pdf at 101.

¹¹⁵ Contiades, *supra* note 113 at 219.

¹¹⁶ After Greece's near meltdown, interest rates tied to Portuguese debt soared to more than 7%. The rescue package was necessary in order to keep the country's financing cost from escalating and to service its debts. Pires, *supra* note 126 at 101.

¹¹⁷ Contiades, *supra* note 113, at 219.

¹¹⁸ The Memorandum consisted of three separate documents. *Id.*

¹¹⁹ Pires, *supra* note 126 at 101.

¹²⁰ *Id.*

the Memorandum and passed by the Portuguese legislature, challenges some of the most fundamental principles embodied in the Portuguese Constitution.¹²¹

Portugal's Constitution was written in 1976 after the socialist "Carnation Revolution," which rid the country of dictatorship and led to its democratization.¹²² In an effort to turn away from its past dictatorship, the Portuguese Constitution of 1976 ("Constitution") is one of the strongest constitutions in Europe in regards to the protection of social rights.¹²³ The Constitution "ensures the primacy of ... a democratic state based on the rule of law and open up a path towards a socialist society."¹²⁴ Additionally obliges the state to promote employment, move toward free health and educational services and develop centers of rest and holiday for workers.¹²⁵ In reference to the legal force of those rights the Constitution states; "The law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and such restrictions must be limited to those needed to safeguard other constitutionally protected rights and interests."¹²⁶ The constitutional order guarantees social state, equality, labor and social security as its core rights and freedoms, and the crisis has presented a challenge to Portugal's core ideals and principals.

Court Decisions

Many of the first measures passed to manage the crisis were upheld based upon the extreme economic situation threatening the country. Since the beginning of the sovereign debt crisis, the Portuguese Constitutional Court ("Court") has been confronted with policies

¹²¹ Id.

¹²² Christina M Akrivopoulou, *Striking Down Austerity Measures: Crisis Jurisprudence in Europe*, Int'l J. Const. L. Blog, June 26, 2013, available at www.iconnectblog.com/2013/06/striking-down-austerity-measures-crisis-jurisprudence-in-Europe/.

¹²³ Id.

¹²⁴ PORT. CONST. Preamble

¹²⁵ Patricia Kowsmann, *New Hurdle in Battling Crisis: Constitutions*, W.S.J. Sep. 26, 2013 available at <http://online.wsj.com/news/articles/SB10001424127887323864604579069350790061202>.

¹²⁶ PORT. CONST. art. 18 (2).

conflicting with rights guaranteed by the Portuguese Constitution.¹²⁷ On the other hand the cuts are necessary in order to access credit from the bailout.¹²⁸ In 2010 the first measures were enacted to address the country's runaway deficits, when the Portuguese government implemented a retroactive tax.¹²⁹ The Portuguese Constitution explicitly forbids retroactive taxation.¹³⁰ Upon review the Portuguese Constitutional Court upheld the new tax on the grounds that it was merely retrospective and was necessary to accomplish compelling fiscal objectives.¹³¹

In the Constitutional Court's decision 396/2011, the Court was asked to consider the constitutionality of an extra tax¹³² and a reduction of salaries¹³³ aimed at public employees.¹³⁴ The Court found that the measures were discriminatory because they targeted public sector, which violates of the constitutional principle of equity.¹³⁵ However, the Court further found that the measures were justified in the framework of the economic crisis and due to the overriding interest of the public welfare in the state's ability to acquire new loans for the citizens' general welfare.¹³⁶ Furthermore, the Court warned that the measures were justified so long as the situation remained exceptional, time-constrained, within certain limits, and anything beyond would be unjustified and therefore unconstitutional.¹³⁷ Thus in the Court's first two decisions regarding austerity, the Court found that although the measures violated parts of the Portuguese

¹²⁷ Contiades, *supra* note 113 at 235.

¹²⁸ *Id.*

¹²⁹ *Id.* at 234.

¹³⁰ PORT. CONST. art. 103.3; PORT. CONST. art. 18.

¹³¹ Tribunal Constitucional [Port. Const. Ct.] 399/2010.

¹³² This tax was an extra tax at the rate of 2 per cent on all income earned in 2011. See Contiades, *supra* note 113 at 235.

¹³³ Salary reduction of the public sector was between 5 and 10 per cent. See *Id.*

¹³⁴ Contiades, *supra* note 113 at 235-36.

¹³⁵ *Id.* at 234; see PORT. CONST. art. 13.

¹³⁶ Akrivopoulou, *supra* note 134.

¹³⁷ Pires, *supra* note 126 at 104.

Constitution, the emergency economic situation justified their constitutionality, albeit with warning.

Since the Court's first two decisions, austerity measures that infringe on constitutionally protected rights have been almost routinely struck down. In July of 2012 the Court considered two provision, Article 21 and 25, of the 2012 Budget Law.¹³⁸ Article 21 consisted of a salary cut, based on the suspension of two subsidies in annual salaries in the form of a Christmas-month (13th month) and a holiday-month (14th month) for public workers.¹³⁹ Article 25 concerns the suspension of the same subsidies but for pensioners.¹⁴⁰ The suspension provision would only run for three years, 2012 to 2014, but would be a considerable; decreases in salary up to 25% and a minimum reduction of 14% of pension value.¹⁴¹ In response workers challenged the provisions alleging that the articles violated four principals¹⁴² of the Portuguese Constitution.¹⁴³ In the Constitutional Court Decision 353/2012,¹⁴⁴ nine of the twelve judges declared these provisions unconstitutional as violating Article 13 of the Constitution.¹⁴⁵ The Court first found a violation of the principle of equity¹⁴⁶ due to the targeting of the public sector, and then considered whether this discrimination was justified.¹⁴⁷ The Court noted the clear temporal limits of the provisions, but also considered the substantial financial impact on the lives of public workers pointing out that the cuts had a long and strong effect on the economic

¹³⁸ Pires, *supra* note 126 at 102-3.

¹³⁹ *Id.* at 103.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Petitioners alleged violations of (1) the principle of trust, a necessary element of the Rule of Law, established by article 2 of the Constitution; (2) Failed the necessary test in the assessment of proportionality further alleging that the Government could have achieved the same result through less burdensome means; (3) The principle of equality, established by Article 13 of the Constitution; (4) the principle of social security protected by article 63 of the Constitution because it frustrated the expectations of worker's contribution to the system. *Id.* at 103-4.

¹⁴³ *Id.*

¹⁴⁴ Tribunal Constitucional [Port. Const. Ct.] 353/2012.

¹⁴⁵ Pires, *supra* note 126 at 104.

¹⁴⁶ Port. Const. Art. 13(1)-(2).

¹⁴⁷ Pires, *supra* note 126 at 104.

“stability” of citizens. The Court reasoned that because the reduction in salary of public workers was so substantial and no similar reductions extended to the private sector, these provisions are distinguished from those upheld in Const. Ct. Rul. 396/2011.¹⁴⁸ Therefore the court held that the deliberate targeting of public sector workers with such an intense salary reduction violated the equity principle.¹⁴⁹ However, the Court also considered the severity of the financial situation and the need to satisfy the conditions of the Memorandum, and the Court permitted the enforcement of the measures for the current budget year of 2012, but suspended its effect for 2013 and 2014.¹⁵⁰

In the Constitutional Court decision 187/2013 handed down in April, 2013 the Court struck down four austerity measures¹⁵¹ introduced in the 2013 national budget law.¹⁵² The measures considered a tax on unemployment and sickness benefits, and cuts in wages and pensions.¹⁵³ The Court again recognized the seriousness of the current financial situation and the need to attain the public deficit goals included in the specific policy conditions laid down in the Memoranda, however the Court reasoned that these measures went beyond the limits established by the prohibition on excess where proportional equality is concerned.¹⁵⁴

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 105.

¹⁵¹ Four provisions unconstitutional; (1) Suspension of the additional holiday month of salary, based upon the violation of the principle of equity that requires the just distribution of public costs, because no sacrifices imposed on earnings from other income; (2) Suspension of the holiday month of salary under teaching and research contracts as violations of the principle of equity; (3) Partial Suspension of the holiday month for pensioners, based on similar violations of the principle of equity; (4) Contribution payable on unemployment and sickness benefits, based on violations of the principle of proportionality. The Court reasoned that the Constitution says that workers have a right to material assistance for unemployment and for workers who are ill within the context of a social security system. The Court further states that although there is no right to a concrete amount of assistance, when reduction is so that makes the welfare function unviable violates the Constitution. *Id.* see Tribunal Constitucional [Port. Const. Ct.] Rul. no. 187/2013.

¹⁵² Pires, *supra* note 126 at 105.

¹⁵³ *Id.*

¹⁵⁴ Pires, *supra* note 126; see Tribunal Constitucional [Port. Const. Ct.] Rul. no. 187/2013.

Following this pattern the Court again struck down parts of Portugal's revised Labour Code,¹⁵⁵ in which the reforms were imposed by the terms of the Memorandum and officials from the troika.¹⁵⁶ The reforms¹⁵⁷ attempted to make it easier for companies to shed workers and to make the workplace more flexible by firing workers whose posts became redundant.¹⁵⁸ The Court held that these measures violated guarantees of secure employment,¹⁵⁹ which prohibits the firing of workers without just cause.¹⁶⁰ In particular the Court reasoned that the regulations in the reform were too vague, and if left it up to the discretion of companies to decide on whether layoffs are justified.¹⁶¹ The Court further reasoned that "the law does not provide the necessary regulation indications about the criteria that should be used by a company in deciding which jobs should be cut," and stated that this "opens the door for arbitrary and legally uncontrollable dismissals."¹⁶² The Court further states that the key aspects of the article that gave the labor code precedence over collective hiring agreements violate the constitutional right that protects unions and collective bargaining.¹⁶³

¹⁵⁵ The Labour Code 2012, Law No. 23/2012.

¹⁵⁶ Paul Mitchell, *Portugal Enforces Labour Reforms but more demanded*, W.S.W.S, August 6, 2012 available at <https://www.wsws.org/en/articles/2012/08/port-a06.html>. See Tribunal Constitucional [Port. Const. Ct.] Rul. No. 602/2013.

¹⁵⁷ They included a suspension of the employer's obligation to find the displaced workers alternative employment; and instituted a program where public employees would be placed into retraining programs and eventually lay off those who aren't placed in new jobs after 12 months. Additionally it is important to note that these reforms target the private sector. *Id.*

¹⁵⁸ EL Pais, *Portuguese Constitutional Court rules aspects of labor reform illegal*, Sep. 26, 2013 available at http://elpais.com/elpais/2013/09/26/inenglish/1380205619_415536.html.

¹⁵⁹ PORT. CONST. ch. III art 53 (Job Security); "Workers are guaranteed job security, and dismissal without fair cause for political or ideological reasons is prohibited."

¹⁶⁰ Dinamia Maria da Paz Campos Lima, *The Court Rules Some Austerity Measures to be Unconstitutional*, European Industrial relations observatory on-line, Nov. 12, 2013 available at <http://www.eurofound.europa.eu/eiro/2013/10/articles/pt1310019i.htm>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ PORT. CONST. ch. III art. 56 (Trade union rights and collective agreements.); states in pertinent part (1) "Trade unions have the competence to defend and promote the defense of the rights and interests of the workers they represent." . . . (2) Trade unions have the right (a) To take part in drawing up labor legislation; . . . (e) To take part in corporate restructuring processes, especially with regard to training actions or when working conditions are

The Portuguese Constitutional Court and the Portuguese Constitution have placed a substantial roadblock for legislatures attempting to reduce deficits and comply with the conditions imposed by the Memorandum. Precedent set by the Court has fueled current fears that important aspects of the 2014 Budget will also be invalidated.¹⁶⁴ In a recent statement by Troika officials have identified challenges by the Court as potentially the biggest threat to Portugal's effort to meet budget goals and to exit the bailout next year.¹⁶⁵ In 2014 the government needs to cut the deficit to 4 percent of GDP down from 5.5 percent this year.¹⁶⁶ If Portugal is unable to meet its budget goals it may hinder access to private credit markets and require the application for a second bailout.¹⁶⁷ Alternatively a negative ruling on the 2014 budget would force the government to find alternative means of cutting spending to replace the potential lost savings and achieve its budget goals.¹⁶⁸ The government's measures would likely include tax hikes that could undermine a fragile economy recovering from a recession.¹⁶⁹ Thus the problem imposed on policy makers is that deficit measures must comply with the Portuguese Constitution and if they are invalidated, the result would restrict access to credit market requiring a second bailout, or critical tax hikes to make up for the short fall in revenue, threatening

altered. . . (3) Trade Unions have the competence to exercise the right to enter into collective agreements, which right shall be guaranteed as laid down by law.

¹⁶⁴ Axel Bugge, *Portugal Budget vote to trigger challenges to austerity*, Reuters (UK), Nov. 25, 2013, available at <http://uk.reuters.com/article/2013/11/25/uk-portugal-bailout-idUKBRE9A00HU20131125>.

¹⁶⁵ *Id.*

¹⁶⁶ Bugge, *supra* note 176.

¹⁶⁷ *Constitutional Difficulties: A court ruling could force Portugal to seek a second bailout*, The Economist, Apr. 13, 2013 available at <http://www.economist.com/news/europe/21576144-court-ruling-could-force-portugal-seek-second-bail-out-constitutional-difficulties>.

¹⁶⁸ Bugge, *supra* note 176.

¹⁶⁹ *Id.*

recovery.¹⁷⁰ This precarious situation has moved the Prime Minister of Portugal, Mr. Passos Coelho, to call to revise the constitution to slim down the welfare state.¹⁷¹

III) GREECE

The global financial crisis hit the Greek economy like a sledgehammer, and the intensity of its effects are unmatched throughout the Eurozone, threatening bankruptcy and violent social unrest.¹⁷² The sovereign-debt crisis began in late 2009, when the Greek government announced that previous reports on its official deficit were misleading.¹⁷³ Cooking the books combined with severe public finance mismanagement¹⁷⁴ and tax evasion put the Greek economy into a death spiral.¹⁷⁵ In December 2009, the country's credit rating was downgraded from A- to BBB+ with a negative outlook.¹⁷⁶ The loss of Greece's market credibility caused investors to demand a higher yield on Greek bonds, which increased the borrowing costs.¹⁷⁷ As credit markets dried up, Greece was unable to borrow funds at a sustainable rate to service its debt obligations, and in April 2010 requested a bailout package from the Troika.¹⁷⁸ In May, 2010 Greece agreed to the terms of the bailout and signed the "Memorandum," which required the implementation of austerity measures to meet specific deficit reduction targets.¹⁷⁹ The bailout agreement with the

¹⁷⁰ *Id.*

¹⁷¹ *Constitutional Difficulties: A court ruling could force Portugal to seek a second bailout*, The Economist, Apr. 13, 2013 available at <http://www.economist.com/news/europe/21576144-court-ruling-could-force-portugal-seek-second-bail-out-constitutional-difficulties>. (The Socialists (PS) refuses to discuss any constitutional reforms on ideological grounds depriving the two thirds majority required. Also attack the austerity reforms as creating unemployment, deepening the recession, and bringing the country to the brink of social tragedy.)

¹⁷² Panagiotis Sotiris, *Greece: The EU-ECB-IMF austerity package and the challenge for the Left*, Greek Left Rev., July 15, 2010 available at <http://greekleftreview.wordpress.com/2010/07/15/greece-the-eu-ecb-imf-austerity-package-and-the-challenge-for-the-left/>.

¹⁷³ *Id.*

¹⁷⁴ Contriades *supra* note 113 at 195-96. (Corruption, clientelism and low competitiveness met the effects of the global financial crisis of 2008 with its negative impact on Greece's main industries pushed the country into recession.)

¹⁷⁵ *Id.*

¹⁷⁶ Contriades, *supra* note 113 at 196.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 196.

¹⁷⁹ *Id.*

Troika represented an aggressive restructuring plan to implement massive social and economic reform.¹⁸⁰ The adoption of austerity policies has coincided with violent protests, a deep recession, dramatic rise of unemployment, mass exodus of emigrants, rising suicide rate and extremism.¹⁸¹ Since 2008, the Greek economy has shrunk 23 percent and is expected to diminish another 4.2 percent for 2013.¹⁸² Even more distressing is Greece's unemployment, which has tripled since 2008 nearing 30 percent, which is even worse among Greek youth and has exploded to over 60 percent.¹⁸³

The main legislative piece of the first Greek bailout is Law 3845/2010, which incorporated the terms of the Memorandum into Greek Law accompanied by severe budget cuts. Law 3847/2010 created a reduction in the public wage bill by reducing the Easter, summer, and Christmas bonuses and allowances paid to civil servants.¹⁸⁴ In order to access the credit under the terms of the Memorandum the Greek government must meet certain deficit reduction targets by additional rounds of budget cuts.¹⁸⁵ Under the terms of the 2011 bailout, the government has until the end of 2013 to move 25,000 civil servants into a labor reserve at reduced pay and the likelihood of layoffs.¹⁸⁶ Furthermore it is the first time under the Greek Constitution that public sector workers will lose their jobs, with another 15,000 redundancies expected by the end of 2014.¹⁸⁷ Other constitutional provisions, such as the right to free university education will be hit

¹⁸⁰ *Id.*

¹⁸¹ Akrivopoulou, *supra* note 134.

¹⁸² *Greek Crisis: Mass Strikes Over Civil Servant Job Cuts*, B.B.C. News, Sep. 16, 2013 available at <http://www.bbc.co.uk/news/world-europe-24105379>.

¹⁸³ George Georgiopoulos & Renee Maltezou, *Greek Youth Unemployment Rises Above 60 Percent*, Huff.Post, May 9, 2013 available at http://www.huffingtonpost.com/2013/05/09/greek-youth-unemployment-n_3244437.html

¹⁸⁴ Contiades, *supra* note 113 at 205-7.

¹⁸⁵ *Id.* at 208.

¹⁸⁶ Patricia Kowsmann, *New Hurdle for Resolving Euro Crisis: Constitutions*, W.S.J., Sep. 26, 2013 at A13.

¹⁸⁷ *Id.*

hard by the layoffs.¹⁸⁸ By July, 2013 some 4,500 civil servants, mostly teaching staff, were already redeployed or laid off, as four out of forty universities are shut down and other operating half staffed.¹⁸⁹ With high levels of unemployment stiff resistance to the job cuts imposed by the bailout conditions has resulted in violent protests across Greece centered in Athens.¹⁹⁰ By June 2013, 64 percent of Greeks opposed the government's latest austerity measures, putting strong political pressure on the establishment as the ruling coalition struggles to avoid collapse.¹⁹¹

In addition to violent protests the austerity measures has prompted constitutional challenges to the introduction of taxes, enforcement of severe budget cuts, public sector layoffs, and the reductions in pensions and salaries in the public sector that violate social rights guaranteed by the Greek Constitution.¹⁹² On these challenges, the Greek Council of State has routinely upheld the legality of the austerity measures, due to the severity of the economic crisis.¹⁹³

Court Decisions

The Greek Council of State,¹⁹⁴ in case 668/2012, upheld the austerity measures prescribed in the first Memorandum, concerning budget cuts and reductions in salaries and pension of the public sector by taking into account the need to serve the goals of general public interest.¹⁹⁵ The Council reasoned that the principles of proportionality, equality, the fair distribution of public burdens and the right to property were not infringed since the need to service the country's external debt and the enhancement of its financial credibility were crucial

¹⁸⁸ *Petition: Geek University*, Greek Left Rev., Oct. 24, 2013 available at <http://greekleftreview.wordpress.com/2013/10/24/petition-greek-university/>

¹⁸⁹ *Id.*

¹⁹⁰ Kowsmann, *supra* note 198.

¹⁹¹ Terrance Heath, *Austerity Battle Heating Up In Greece*, Campaign for America's Future, July 17, 2013 available at <http://ourfuture.org/20130617/austerity-battle-heating-up-in-greece>.

¹⁹² Kowsmann, *supra* note 198.

¹⁹³ Akrivopoulou, *supra* note 134.

¹⁹⁴ Greece's highest administrative Court (do not have a Constitutional Court).

¹⁹⁵ Akrivopoulou, *supra* note 134.

to the public's interest.¹⁹⁶ The decision was largely based on the basis of Greece being in economic need.¹⁹⁷

In 2013, the Greek Council of State in judgment 1685/2013 upheld an increased financial contribution in taxes for annual incomes exceeding 60,000 euros.¹⁹⁸ It justified the measure due to the need of protect the public interest and held that Law 3758/2009, did not violate the constitutional restrictions,¹⁹⁹ permitting the retroactivity of laws that impose taxes only for the year prior to their adoption.²⁰⁰ Also in 2013, the Greek court justified additional cuts and layoff to the public sector in accordance with the Memorandum. The Court held that the measures did not to violate the principles of equity and the fair distribution of burdens and were justified by the emergency state of the Greek economy.

Despite the Greek Council consistent of upholding austerity measures some Greek courts have begun to control the policies implemented by the Memorandum.²⁰¹ In order to unlock the next round of aid the Greek government proposed another round of austerity measures in the 2013 budget plan.²⁰² The austerity package included pension reform²⁰³ and the elimination of annual bonuses for state employees.²⁰⁴ The austerity measures were challenged before the Greek Court of Auditors, which vets Greek laws before they are submitted to parliament.²⁰⁵ In

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ GREEK CONST. art. 78.

²⁰⁰ Akrivopoulou, *supra* note 134.

²⁰¹ *Id.*

²⁰² John Kolesidis, *Greek Court Challenges Pension Reform Plan*, Reuters, Nov. 1, 2012, available at <http://www.reuters.com/article/2012/11/01/us-greece-pensions-idUSBRE8A01E220121101>.

²⁰³ *Id.* (The reform included increasing the retirement age two years to 67 and cutting pension by 5-10% of over 1,000€. This was the 5th time since the 2010 bailout where pensions were slashed, amounting to more than a 25% cut in benefits.)

²⁰⁴ *Id.*

²⁰⁵ *Judges Ruled Upcoming Pension Cuts as "Violating Greek Constitution,"* Keep Talking Greece, Nov. 1, 2012, available at <http://www.keeptalkinggreece.com/2012/11/01/judges-ruled-upcoming-pension-cuts-as-violating-greek-constitution/>.

November of 2012, the Court of Auditors declared these austerity provisions unconstitutional as violating Articles 2,²⁰⁶ 4,²⁰⁷ 22,²⁰⁸ and 25²⁰⁹ of the Greek Constitution, conflicting with Constitutional obligation to respect and protect human dignity, principals of equality, proportionality, and the protection of labor.²¹⁰ Although the Court's decision is not legally binding on the Greek state, it opens the legal way to anyone who wants to challenge the proposed cuts.²¹¹ Additionally Giorgos Kasimatis, one of Greece's foremost constitutional scholars, has argued since the Court's first Memorandum ruling that the loan agreements violate the Greek Constitution.²¹² Kasimatis states that "the decisions by the [Council of State] violates basic tenets of justice" and further argues that "the court did not examine whether the agreements violate specific clauses of Greek law . . . instead the decisions were based solely on the basis of Greece being in economic need. This is a political decision and not a legal decision."²¹³ Furthermore, Christina M. Akrivopoulou concerned with the legitimacy of the Greek Constitution writes, "during the crisis the liberal, democratic Constitution of 1975 has lost much of its ability to adapt to changing political conditions and according to public opinion it has failed to provide Greek society with the necessary solutions to exit the crisis. For the majority of Greeks, the present Constitution has lost its ability to effectively guarantee the freedoms and rights of its citizens."²¹⁴

²⁰⁶ GREEK CONST, Part 1, Sec. 1, Art. 2. Principal obligation of the state

²⁰⁷ GREEK CONST, Part 2, Art. 4. Equality of Greeks.

²⁰⁸ GREEK CONST, Part 2, Art. 22. The right of work. Social Security.

²⁰⁹ GREEK CONST, Part 2, Art. 25. Protection and exercise of fundamental rights.

²¹⁰ *Judges Ruled Upcoming Pension Cuts as "Violating Greek Constitution,"* Keep Talking Greece, Nov. 1, 2012, available at <http://www.keeptalkinggreece.com/2012/11/01/judges-ruled-upcoming-pension-cuts-as-violating-greek-constitution/>

²¹¹ *Id.*

²¹² Michael Nevradakis, *Are Greece's Loan Agreements and Austerity Measures Illegal? Greek Constitutional Law Scholar Says 'Yes'*, Huff Post, Oct. 31, 2012 available at http://www.huffingtonpost.com/michael-nevradakis/are-greeces-loan-agreemen_b_2046978.html.

²¹³ *Id.*

²¹⁴ Akrivopoulou, *supra* note 134.

Thus in Greece, the Greek Counsel of State has remained consistently deferential toward the legislature's budget cuts, upholding the austerity measures based on the emergency economic situations.²¹⁵ Interestingly however, the "Memorandum regime" has been accompanied by a deterioration of the standard of living and the curtailment of constitutional rights which has resulted in violent protests around Greece.²¹⁶ This has created a dynamic situation where although the Greek courts are deferential to the legislature, as Akrivopoulou writes, its legitimacy is being undermined by not upholding the individual rights protected in the Constitution.²¹⁷

IV) COMPARATIVE ANALYSIS AND CONCLUSION.

The U.S. has shown an enormous ability to adapt to the challenges imposed by the global financial crisis. Considering the positive experience with the Great Depression, the federal government has been allowed to make an extraordinary federal intervention in the economy without significant challenges. Furthermore, because the U.S. Constitution confers general rights we have seen the ability of the legislature to balance the needs of individual welfare against budget cuts considerations.

The Supreme Court's decision in Blaisdell²¹⁸ granted relief to debtors from foreclosure under emergency circumstances. It allowed the government to alter the terms of an existing private contract to serve a broader public interest despite being repugnant to the Contract Clause. In the current crisis, foreclosures are rampant, and the Obama Administration granted foreclosure

²¹⁵ Kowsmann, *supra* note 198.

²¹⁶ *Greek Crisis: Mass Strikes Over Civil Servant Job Cuts*, B.B.C. News, Sep. 16, 2013 available at <http://www.bbc.co.uk/news/world-europe-24105379>.

²¹⁷ Akrivopoulou, *supra* note 134.

²¹⁸ Blaisdell, at 416-418.

relief²¹⁹ and mortgage modification but did not rise to the extraordinary relief granted in Blaisdell. Furthermore, it did not rely on the narrower emergency doctrine to pass constitutional muster, and allowed for the appropriate level of relief at the discretion of the legislature.

Additionally, unemployment benefits have been extended since 2008, and now are currently up for debate in Congress considering their extension.²²⁰ The lack of constitutional right of unemployment benefits allows Congress to debate the issue and balance other policy considerations. This example exemplifies the deference of granting economic relief to the legislature allowing them to decide how long and how much without significant constitutional challenge. Therefore the absence of judicial activism toward economic recovery legislation allows for flexibility through the legislature to determine the best policy.

Comparatively, in the Eurozone we see two similar constitutional frameworks, Portugal and Greece embodying specific individual rights, come to polar opposite conclusions on the constitutionality of austerity measures. The balancing under the emergency doctrine of public welfare, state interest, and economic emergency against specific individual rights and hardships has led to different outcomes. In Portugal its constitution has become a significant roadblock to austerity and reform and thus has threatened its access of credit, a second bailout, and increased taxes; whereas in Greece the courts have so far upheld the austerity measures based upon the emergency situation.

²¹⁹ Les Christie, *Obama administration expands foreclosure prevention program*, CNN, Jan. 27, 2012 available at http://money.cnn.com/2012/01/27/real_estate/hamp_program/ (The Home Affordable Modification Program [HAMP] prevented foreclosures of borrowers by offering principal reduction incentives to private lenders and banks rather than a heavier handed alteration of existing contracts through moratoriums.).

²²⁰ Manu Raju & Jake Sherman, *Unemployment benefits loom in budget talks*, Politico, Dec. 6, 2013 available at <http://www.politico.com/story/2013/12/budget-unemployment-benefits-paul-ryan-patty-murray-100790.html>

Thus because of the deference of Greek courts to its legislature it is an oversimplification to argue that because of the U.S. constitutional framework and a lack of judicial activism toward recovery legislation allows the U.S. to better manage an economic crisis. On the other hand, the experience in Greece exemplifies the dangers of the emergency doctrine being used to undercut guarantees of constitutional rights. In the U.S. a health legislative process has resulted in a powerful check against such abuses. For instance, I argue that the foreclosure relief and extension of unemployment benefits has reduced the sting of the recession and limited extremism and violent protest. Whereas in Greece absent any relief to the citizenry has resulted in violent protests.

A relevant Constitutional case has been played out in Detroit's recent bankruptcy proceedings. The city of Detroit has been devastated by the Great Recession and with billions of debt filed the largest bankruptcy proceeding in the United States history.²²¹ The relevant issue is Detroit's contractual obligations toward the payments of the city pensions.²²² Union leaders and pensioners claim that the city application for Chapter 9 is constitutional prohibited.²²³ The crux of their argument is that Michigan's Constitution prohibits the modification of pensions, and thus prohibits a Chapter 9 filing, which would all pension benefits to be altered through the restructuring of the city's debt.²²⁴ They further argue that because Michigan's Constitution actually provides that pension benefits "shall be a contractual obligation thereof which shall not be diminished or impaired" the state's Constitution invokes the federal Constitution's protection

²²¹ Bill Vlasic & Monica Davey, *Detroit is Ruled Eligible for Bankruptcy*, Dec. 3, 2013, <http://www.nytimes.com/2013/12/04/us/detroit-bankruptcy-ruling.html?hpw&rref=us&r=0>.

²²² *Id.*

²²³ Stephen J. Lubben, *Before Detroit's Bankruptcy Proceeds, a Question of Eligibility*, N.Y. Times, Aug. 20, 2013, available at <http://dealbook.nytimes.com/2013/08/20/before-detroit-bankruptcy-proceeds-a-question-of-eligibility/>.

²²⁴ *Id.*

under the Contract Clause that prohibits the states from passing any law impairing contracts.²²⁵ In contrast city officials contend that the Bankruptcy Code, a federal law, overrides conflicting state laws, through the Supremacy Clause.²²⁶ On Dec. 3, 2013 a U.S. federal Judge Steven Rhodes ruled that Detroit was eligible to reorganize under bankruptcy law despite Michigan's Constitutional provision.²²⁷ Judge Rhodes said that although the city could cut pensions as part of the restructuring, however warned that he will not rubber-stamp any pension cuts.²²⁸

It is clear that the pensioners would have benefitted under the Portuguese or Greek Constitutions, but a similar Portuguese Court ruling would have left the City of Detroit insolvent and without the protection of bankruptcy.²²⁹ However, similar to in Greece, the federal court ruling places a heavy burden on the citizenry especially the city's pensioners. Although in Detroit, cutting pensions valued at around \$19,000 would substantially limit the effects of the safety net for many city workers, in Greece the intensity of the pensions cuts are much heavier and has led to widespread poverty and hardship.²³⁰ The difficult part is to balance between these two results. Here, the federal government was able to provide Detroit with bankruptcy protection and the ability to modify contracts, and allow a limited check on pension cuts.

In conclusion when considering the implementation economic legislation in an economic crisis the U.S. government under its constitutional framework had the flexibility to best manage the crisis. In particular, the case of Portugal showed how strong constitutional socio-economic rights, can act as a substantial roadblock to recovery. On the other hand the case in Greece has

²²⁵ Lubban, *supra* note 235.

²²⁶ *Id.*

²²⁷ Rebecca Cook, *Detroit eligible for bankruptcy protection: U.S. judge*, Reuters, Dec. 3, 2013, available at <http://www.reuters.com/article/2013/12/03/us-usa-detroit-bankruptcy-judge-idUSBRE9B20PZ20131203>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Bill Vlasic et al, *supra* note 233.

shown the possible abuses of the emergency doctrine and the devastating effects from a lack of relief.