

Cambridge University Press
978-1-108-49229-4 — Constitutions in Times of Financial Crisis
Edited by Tom Ginsburg , Mark D. Rosen , Georg Vanberg
Frontmatter
[More Information](#)

CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS

Many constitutions include provisions intended to limit the discretion of governments in economic policy. In times of financial crises, such provisions often come under pressure as a result of calls for exceptional responses to crisis situations. This volume assesses the ability of constitutional orders all over the world to cope with financial crises, and the demands for emergency powers that typically accompany them. Bringing together a variety of perspectives from legal scholars, economists, and political scientists, this volume traces the long-run implications of financial crises for constitutional order. In exploring the theoretical and practical problems raised by the constitutionalization of economic policy during times of severe crisis, this volume showcases an array of constitutional design options and the ways they channel governmental responses to emergency.

Tom Ginsburg is Leo Spitz Professor of International Law and Professor of Political Science at the University of Chicago Law School.

Mark D. Rosen is University Distinguished Professor at Chicago-Kent College of Law, Illinois Institute of Technology.

Georg Vanberg is Professor of Political Science and Law, and current Chair of the Department of Political Science at Duke University.

Cambridge University Press
978-1-108-49229-4 — Constitutions in Times of Financial Crisis
Edited by Tom Ginsburg , Mark D. Rosen , Georg Vanberg
Frontmatter
[More Information](#)

Cambridge University Press
978-1-108-49229-4 — Constitutions in Times of Financial Crisis
Edited by Tom Ginsburg , Mark D. Rosen , Georg Vanberg
Frontmatter
[More Information](#)

Constitutions in Times of Financial Crisis

Edited by

TOM GINSBURG

University of Chicago

MARK D. ROSEN

Chicago-Kent College of Law, Illinois Institute of Technology

GEORG VANBERG

Duke University



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-49229-4 — Constitutions in Times of Financial Crisis
Edited by Tom Ginsburg, Mark D. Rosen, Georg Vanberg
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108492294
DOI: 10.1017/9781108679404

© Cambridge University Press 2019

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Ginsburg, Tom, editor. | Rosen, Mark D., editor. | Vanberg, Georg, 1971– editor.
TITLE: Constitutions in times of financial crisis / edited Tom Ginsburg, University of Chicago; Mark D. Rosen, Illinois Institute of Technology; Georg Vanberg, Duke University, North Carolina.

DESCRIPTION: New York : Cambridge University Press, 2019. | Series: Comparative constitutional law and policy | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2019003484 | ISBN 9781108492294 (hardback)

SUBJECTS: LCSH: War and emergency legislation. | Financial crises – Government policy. | Global Financial Crisis, 2008–2009. | BISAC: LAW / Constitutional.

CLASSIFICATION: LCC K4700 .C665 2019 | DDC 342.009/0511–dc23

LC record available at <https://lccn.loc.gov/2019003484>

ISBN 978-1-108-49229-4 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

<i>List of Contributors</i>	<i>page vii</i>
<i>Foreword</i>	
Gonçalo Saraiva Matias	ix
I. THE ROLE OF CONSTITUTIONS IN DEALING WITH CRISES	1
1. Introduction: Liberal Constitutions During Financial Crises Tom Ginsburg, Mark D. Rosen, and Georg Vanberg	3
2. Financial Emergencies John Ferejohn	18
3. Rule-of-Law Objections to the Lender of Last Resort Eric A. Posner	39
4. Balanced Budget Provisions in Constitutions Tom Ginsburg	58
5. Legislatures and Constitutions in Times of Severe Financial Crisis Mark D. Rosen	71
II. COURTS AND CRISES	93
6. The Place of Economic Crisis in American Constitutional Law: The Great Depression as a Case Study Barry Cushman	95
7. Financial Crises and Constitutional Compromise Georg Vanberg and Mitu Gulati	117

8.	Commitment for Cowards: Why the Judicialization of Austerity Is Bad Policy and Even Worse Politics	146
	R. Daniel Kelemen	
9.	Protecting Fundamental Rights During Financial Crisis: Supranational Adjudication in the Council of Europe	163
	Eva Brems	
	III. SUPRANATIONAL GOVERNANCE AND CRISIS	185
10.	Constitutionalism as Limitation and License: Crisis Governance in the European Union	187
	Turkuler Isiksel	
11.	The Institutional Origins of Europe's Constitutional Crises: Grexit, Brexit and the EU Form of Government	204
	Federico Fabbrini	
	IV. IMPLEMENTING AUSTERITY	227
12.	The Constitutional Performance of Austerity in Portugal	229
	Teresa Violante and Patrícia André	
13.	Constitutional Resilience and Constitutional Failure in the Face of Crisis: The Greek Case	261
	Xenophon Contiades and Alkmene Fotiadou	
	V. THE EFFECT OF CRISES ON CONSTITUTIONS	283
14.	Economic Crises, Political Fragmentation, and Constitutional Choice: The Agenda-Setting Power of Presidents in Latin America	285
	Gabriel L. Negretto	
15.	Constitutions, Crisis, and Regime Change: Perspectives on East and Southeast Asia	305
	Björn Dressel	
	<i>Index</i>	327

Contributors

Patrícia André is a researcher at CEDIS–NOVA Law School and DINAMIA’CET–IUL.

Eva Brems is Professor of Law, Ghent University.

Xenophon Contiades is Professor of Public Law, Panteion University of Social and Political Sciences; Managing Director, Centre for European Constitutional Law.

Barry Cushman is the John P. Murphy Foundation Professor of Law, and Concurrent Professor of Political Science and History, University of Notre Dame.

Björn Dressel is Associate Professor, Crawford School of Public Policy, Australian National University.

Federico Fabbrini is Full Professor of EU Law, School of Law & Government, Dublin City University and Director of the DCU Brexit Institute.

John Ferejohn is Samuel Tilden Professor of Law, New York University.

Alkmene Fotiadou is Dr.iur. and a research associate, Centre for European Constitutional Law.

Tom Ginsburg is the Leo Spitz Professor of International Law and Ludwig and Hilda Wolf Research Scholar, University of Chicago Law School, and Research Professor at the American Bar Foundation.

Mitu Gulati is Professor of Law, Duke University.

Turkuler Isiksel is the James P. Shenton Associate Professor of the Core Curriculum, Columbia University.

R. Daniel Kelemen is Professor of Political Science and Law, Rutgers University.

Gonçalo Saraiva Matias is a member of the Board and Director of Research at the Francisco Manuel dos Santos Foundation, Lisbon.

Cambridge University Press
978-1-108-49229-4 — Constitutions in Times of Financial Crisis
Edited by Tom Ginsburg , Mark D. Rosen , Georg Vanberg
Frontmatter
[More Information](#)

viii

List of Contributors

Gabriel L. Negretto is Associate Professor, Division of Political Studies, CIDE.

Eric A. Posner is Kirkland and Ellis Distinguished Service Professor, University of Chicago Law School.

Mark D. Rosen is University Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology.

Georg Vanberg is Professor of Political Science, Duke University.

Teresa Violante is a research fellow at the Goethe-University Frankfurt a.M. and visiting research fellow at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg).

Foreword

It is well known that the world financial crisis of 2007 and 2008 posed several challenges to the constitutions of the affected countries. These challenges were faced not only by countries which were directly affected and had to implement austerity measures, but also by countries whose economies were compelled to rescue others from the economic turmoil. This was particularly evident in Europe. Europe became, in this sense, a constitutional laboratory, given the effects of the financial crisis on economies, especially on the sovereign debt markets, on public finance, and ultimately, on the ability of governments to sustain the welfare state.

Constitutions might be prepared to respond to emergencies, but often the relevant provisions were drafted to deal with major catastrophes, or acts of war, and focus on the suspension of rights. In the context of the financial crisis, governments and courts felt reluctant to use concepts that were designed for very different purposes.

Furthermore, the global nature of the crisis undermined the traditional local constitutional responses. Protectionism and legal parochialism could not isolate states from the impact and spillover effects of a crisis that originated transnationally. One of the first reactions was for countries to distance themselves from those contaminated: ‘We are not Greece, we are not Ireland, we are not Portugal’ were expressions often used until they became useless. It was clear that the crisis had a potential to affect us all, even those not directly harmed by it. Again, in the context of the European Union – and because of the eurozone, the impact on the euro, and the absence of a common European debt sovereign market – those spillover effects were much more evident.

Not only were governments not prepared for the necessity – or perhaps inevitability – of this cross-national dialogue, but courts were even less prepared for it. This does not mean that courts did not incorporate international or comparative elements in their decisions, but they were probably unable to fully consider the cross-border effects of adjudication in their decisions.

An example of that impact was the jurisprudence of the Portuguese Constitutional Court on the reduction of pensions and salaries, at the same time that the German Constitutional Court was adjudicating decisions on the Outright

Monetary Transactions (OMT) program announced by the European Central Bank. At least psychologically, the OMT program would enhance the likelihood that Portugal could return to the markets and eventually pay the pensions and salaries that the government was cutting, as it later happened. Deeply intertwined decisions, with direct impact on one another, were taken as if they were totally independent. In that sense, the German Constitutional Court was wise enough to defer the case to the Court of Justice of the European Union, thus at least acknowledging the due relevance of the application of European law. In any event, it seems clear that little or no inter-court dialogue was undertaken at the time.

Awareness of constitutional constraints was also limited. This is not to say that the drafters of the austerity programs, especially those negotiated with the European Union and the IMF, ignored the constitutional risks of such programs. But these risks became more evident as the programs were implemented and sometimes amended. It is possible that the designers were not aware of the risks to the extent of acknowledging that they could jeopardize the programs as a whole, and thus the stability of the neighboring countries.

Again, this was the case with Portugal, where several regular evaluations nearly failed due to legislative measures rejected by the Constitutional Court. Only *in extremis* decisions by the government and parliament enabled the country to comply with international demands.

Fundamental constitutional concepts such as sovereignty, fiscal autonomy, human rights, and the welfare state were disputed during the crisis. Of course, to discuss these concepts in the first place, a country must have sound finances and financial independence. The discussion alternated between those who claimed that a country could only be independent with financial stability, and those who argued that sovereignty was lost from the moment a state asked for international rescue, and accepted the implementation of an austerity program. Perhaps there was a need for a middle ground between these positions, simply recognizing the inevitable impact of sovereign decisions from one state to another, and thus the need for supranational regulation and harmonization.

Portugal was deeply affected by the financial crisis, having undergone a very harsh adjustment program, from which it has now been able to recover completely, having returned to the sovereign debt markets in an autonomous fashion. In that way, it can be pointed to as an example of success. But the Portuguese people suffered greatly along the way, so we must all learn from the past, not only from the achievements, but also from the difficulties.

The mission of the Francisco Manuel dos Santos Foundation is to promote and improve knowledge about Portuguese reality, thereby contributing to the development of society, the consolidation of citizens' rights and the improvement of public institutions. By supporting the publication of this book, the Foundation advances

one of its goals. Not only does the book dedicate a chapter to the constitutional performance of austerity in Portugal, but it also allows for a contextualization of the constitutional reaction to the crisis in a broader sense, analyzing several aspects of its impact, through very thorough research and extremely interesting taxonomies.

I hope the book will become a reference work of the field for many years to come, so that it will help us all to better prepare for the constitutional impact of future crises. If nothing else, it will contribute to open, free and informed debate, which is so much needed in an age of toxic and fake news. Promoting such a debate is, after all, precisely the mission of the Francisco Manuel dos Santos Foundation, and we are pleased to present this volume.

Gonçalo Saraiva Matias

Cambridge University Press
978-1-108-49229-4 — Constitutions in Times of Financial Crisis
Edited by Tom Ginsburg , Mark D. Rosen , Georg Vanberg
Frontmatter
[More Information](#)
