



FREEDOM AND DEMOCRACY IN A WORLD GOVERNED BY FINANCE: HABERMAS AND THE CRISIS IN EUROPE: A FREE LABOR RESPONSE

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Jürgen Habermas has recently warned that the sovereign debt crisis in Europe is transforming democratic governments into “economic governments”¹ threatening not only economic disaster, but also the end of the world’s first supranational project – the European Union. And, according to Habermas, Europeans seem not to understand their Europe, and instead

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¹ See JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE 50-52 (Ciaran Cronin trans., 2012); see also Jürgen Habermas, *Democracy is at Stake*, PRESSEUROPE (Oct. 27, 2011), www.presseurope.eu/en/content/article/1106741-juergen-habermas-democracy-stake. The term “economic government” refers to the 2011 agreement between German Chancellor Angela Merkel and French President Nicholas Sarkozy to bailout Greece which has led to a series of bank bailouts and austerity measures. See Robert Marquand, *Sarkozy, Merkel Reach Deal on Greece Bailout Cash*, CHRISTIAN SCIENCE MONITOR (Jul. 17, 2011, 12:19 PM), <http://www.csmonitor.com/World/Europe/2011/0617/Sarkozy-Merkel-reach-deal-on-Greece-bailout-cash>. Habermas views the agreement between these two European leaders as the basis for subsequent expansion of a new form of executive federalism implicit in the Lisbon Treaty into a form of intergovernmental rule by the European Council, which enables the European Union (EU) to “transfer the imperatives of the markets to the national budgets.” HABERMAS, CRISIS, *supra*, at 52.

have used economic austerity as an excuse for denying democratic and constitutional possibilities at summit meetings, bailouts, and in new anti-democratic economic agreements. Habermas encourages his readers to understand the lessons of the past while looking ahead to new cosmopolitan possibilities freed from the twentieth century experiences of world war and economic depression. And, yet, few seem to be listening or heeding Germany's most renowned political philosopher. European leaders focus on fiscal integration, Europe-wide banking supervision, and tighter economic policies, but little concern is given to citizen participation in governance. Without democratic integration, the European project risks creating economic, not democratic government. What are at stake are the basic social arrangements created in the post-World War era for sharing the wealth, the burdens and the responsibilities of workers and investors essential to a constitutional democracy. This Review Essay argues that Habermas's response to the European crisis is relevant to the debt crisis in America, but his democratic aspirations need to be grounded in work, worker organizations, and the reality of workplaces, and not some ideal space for democratic discourse or commutative action. Habermas's vision for a democracy at the transnational level is not a possibility as long as economic government recreates social conditions that look more like the ones created by the discredited nineteenth-century peonage system than by twenty-first century democracy.

I. INTRODUCTION

Jürgen Habermas, Germany's leading political philosopher and long-time advocate of a unified and constitutional European Union (EU), has offered a democratic response to the crisis of the European Union. In a recent book length essay, *The Crisis of the European Union: A Response*,² he passionately argues that a European unification is important as a "civilizing force" to meet the challenge of globalization now writ large by the power of global capital markets and global finance. He argues that the challenge is not to construct a different EU project, which European leaders seem to be doing, but rather to conserve its

² See HABERMAS, CRISIS, *supra* note 1, at 52.

democratic achievements that have included not only the formal guarantees of civil and human rights, but also the “levels of social welfare, education, and leisure that are the precondition of both an effective private autonomy and of democratic citizenship.”³ The European Union matters, according to Habermas, because a unified Europe is essential to preserve democracy at the supranational level to meet the challenges of globalization and global financial markets.⁴

Habermas’s *The Crisis of the European Union: A Response* is important for it offers insight for understanding how globalization and markets are eroding democratic values and giving rise to a new form of economic government not just in the EU, but in America as well. Economic government challenges the basic ideal of citizen participation by allowing a class of unaccountable financial elites to reconfigure the social contract by re-balancing the equality and opportunity of citizens. The right to make a living wage is thus placed in jeopardy to meet the needs of the international banking sector and creditor interests at the expense of debtor interests. The resulting redistribution of rights and interests creates disunity in the polity of society, making governance on the basis of representative interest impossible. There are lessons to be learned from what is happening in Europe that can be helpful for understanding similar problems of governance in America. Habermas’s *The Crisis of the European Union: A Response* offers his readers an important perspective for discovering these lessons.

This essay argues that the democratic government Habermas wishes to build up to the supranational level of the EU can be achieved, but it will come about only if people who are now experiencing the brunt of the economic crisis involve themselves in the forms of political collective action that labor organizations exercised at the turn of the last century. Ironically, it is from the experience and history of workers’ rights movements in both America and in Europe where one can discover the democratic

³ See Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5, 6 (2001).

⁴ See HABERMAS, *CRISIS*, *supra* note 1, at 55 (discussing how external costs “are being generated on an unprecedented scale and as a result a need for regulation which overtakes existing political capacities for concerted action”).

dilemma posed by the sovereign debt crisis. It will take a workers movement and the reaffirmation of the idea of free labor to bring to life the forms of political life that Habermas claims are necessary for the future of democratic government in globalized societies. In this essay, I offer the idea and history of free labor as one of the “building blocks” of democratic government for preserving democratic rights and the material means of a government “by the people” for ensuring the Constitution’s promise of “liberty and equality” that are crucial for the realization for the evolution of a supranational democratic government.

Many workers today lack the power to avoid working under conditions that are dictated by austerity measures and many employers today have no incentive to relieve or change those conditions. Globalization has meant that workers compete against themselves for an ever-shrinking pool of jobs. The right to quit, which is recognized as the defense to oppressive working conditions, is not available to many workers in a world economy that is depressed by austerity and sovereign debt. Sovereign debt and austerity policy in the euro zone, and budget cutting and public sector wage and employment reductions in America, are re-creating labor conditions that are resembling those that once existed in the era when peonage and labor servitudes restricted free labor and prevented laborers from participating in the decisions to determine wages or conditions for which one was to work. Laborers of this era were also denied the right to strike and otherwise engage in concerted activities for mutual aid and self-protection. This is happening in Greece, Italy, Spain, and Portugal, as well as in Ohio, Indiana, Wisconsin, and other states in America. Workers are asked to accept punishing austerity measures that require them, if they are fortunate to still have a job, to work more for less and without any real alternatives other than to starve.

It is in workplaces where solidarity is formed and collective action arises to countervail economic power; but it is also in the workplaces where the consequences of the sovereign debt crisis have had their most serious impact. The free labor theory, the history of debt servitude and the discredited peonage system in nineteenth century America offers insight for understanding what is and what will continue to happen so long as government turns its back on its citizens and fails to recognize the need to address social inequalities between the rich and the poor and

the rights necessary for human dignity. Habermas's message is that political integration based on social welfare is necessary if the *biotope* of the 'old Europe' is to survive the anti-democratic imperatives of global finance and the current sovereign debt crisis. The message of this essay is that one need only look to the history of involuntary servitude of the discredited peonage system to discover the importance of the civilizing power of democratic politics. Free labor and democratic rights of participation create the modern idea of human freedom necessary for the survival of democracy in ever-interconnected global societies linked together by finance and markets. The history of free labor in American Thirteenth Amendment jurisprudence offers insight for grounding Habermas's *The Crisis of the European Union: A Response*, in American soil.

This essay proceeds in three parts. Part I will analyze how sovereign debt has transformed elected governments and politics in the euro zone and in the local and municipal governments with particular emphasis given to the legal changes that have recently occurred in the structure of law and politics. Recent Supreme Court decisions of the Roberts' Court will be considered for purposes of illustrating how the Roberts' Court is allowing state governments to adopt and foster policies of austerity that resemble those now being championed by German Chancellor Angela Merkel. Part II will then explain why austerity measures provoked by the crisis are creating a political and moral, as well as economic, crisis. Debt of our governments binds human beings to the sovereignty of money such that debt and money itself is the essence of our sovereignty.⁵ Austerity policy contributes to the erosion of democratic freedoms, as it is used by politicians to chip away welfare-state policies in Europe, just as budget cutting chips away at collective bargaining rights and wage gains in the United States. The challenge is to

⁵ Primordial debt theorists claim that debt is historically associated with the "essence of society" and that ideas of debt are encoded in early religious texts, thus shaping our moral views of right and wrong. See DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* 56, 57, 58 (2011) ("Anyone, then, who lives a proper life is constantly paying back existential debts of one sort or another; but at the same time, as the notion of debt slides back into a simple sense of social obligation, it becomes something far less terrifying than the sense that one's very existence is a loan taken against Death."). See also Bruno Theret, *The Socio-Political Dimensions of the Currency: Implications for the Transition to the Euro*, 22 J. CONSUMER POL'Y 51, 60-61 (1999).

conserve the democratic achievements of nation-states in Europe and in America that have brought protections of civil rights, provided social welfare and education reforms, and have brought about a form of unity and solidarity between people who are otherwise strangers in workplaces. The political horizon of our democratic politics has shrunk as the imperatives of capital markets and bankers take priority over the needs of people and the values of democratic governance. What is developing is a new form of economic government, destructive to both political and labor solidarity necessary for a functioning democracy based on citizen participation.

Part III then develops ideas from ‘free labor’ scholarship and peonage case law of the United States Supreme Court for purposes of revealing how the modern understanding of involuntary labor servitude under the Thirteenth Amendment to the United States Constitution might help one understand what is at stake in Europe and in America. This Part claims that the history of involuntary servitude in America is a fertile ground for understanding what is happening in Europe and America. From this history, one can begin to better appreciate the concerns Habermas has about why the European Union is worth saving and why Americans should care. What happens in Europe will determine the fate of democracy at the supranational level and ultimately decide whether or not economic integration and the imperative of bank insolvency create an insurmountable obstacle to democratic government. The Conclusion will thus offer an explanation for why Habermas’s response to the European Crisis is important and relevant for America.

II. GLOBAL SOVEREIGN DEBT AND THE ECONOMIC GOVERNMENT

In the fifth year since the financial crisis of 2008, debt is crushing nations in Europe; it is also paralyzing federal, state, and local governments in the United States as deficits compel cuts in spending, social welfare, and unemployment assistance along with unemployment rates not seen since the Great Depression. The risk that Greece will exit from the European Union remains high even after the conservative, pro-austerity

government won the June 17, 2012 election.⁶ The announcements on July 5, 2012, by three central banks in Europe and China (European Central Bank, Bank of England, and Chinese Central Bank) to unilaterally cut the interest rates for borrowing in order to stimulate more borrowing and economic development is an important recognition that the economic slowdown is global.⁷ The fear is that contagion risk may in turn lead to the exits of Italy and Spain and that contagion risk would spread to America and China putting an end not just to the world's first supranational project,⁸ but also to world economic development. In the midst of what looks eerily like the nightmare that precipitated the Great Depression,⁹ politicians on the left and right blame workers and

⁶ Rachel Donadio, *Supporters of Bailout Claim Victory in Greek Election*, N.Y. TIMES (June 17, 2012), <http://www.nytimes.com/2012/06/18/world/europe/greek-elections.html?pagewanted=all>.

⁷ See, e.g., Binyamin Appelbaum, *Three Central Banks Act to Stimulate More Borrowing*, N.Y. TIMES (July 6, 2012), http://www.nytimes.com/2012/07/06/business/global/markets-look-to-europes-central-bank-for-action.html?_r=0. The unilateral decision to lower interest rates is evidence that financial decision makers are moving toward Keynesian policy and away from austerity policy that has heretofore been the dominant policy of banking authorities especially those at the European Central Bank. The policy shift toward lower interest rates also reveals a shift away from the fear of inflation to new concerns about deflation and demand recession.

⁸ Spain accepted emergency loans for its banks on June 9, 2012. It was the fourth country to receive a bailout in the euro zone (the other bailouts have involved Greece, Ireland, and Portugal). Raphael Minder, Nicholas Kulish & Paul Geitner, *Spain to Accept European Rescue For Ailing Banks*, N.Y. TIMES (June 10, 2012), <http://www.nytimes.com/2012/06/10/business/global/spain-moves-closer-to-bailout-of-banks.html?pagewanted=all>. See also *European Debt Crisis*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/e/european_sovereign_debt_crisis/index.html (last updated Oct. 17, 2012).

⁹ Richard A. Posner has noted that “[t]hat there is no longer an acceptable definition of a depression except ‘comparable to the Great Depression,’ the word having lost all by historical referents.” RICHARD A. POSNER, *THE CRISIS OF CAPITALIST DEMOCRACY* 218 (2010). Paul Krugman, a Nobel winner in economics and liberal editorialist of the New York Times, has concluded that the current economic slump is, “essentially the same kind of situation that John Maynard Keynes described in the 1930s: ‘a chronic condition of subnormal activity for a considerable period without any marked tendency either towards recovery or towards collapse.’” PAUL KRUGMAN, *END THIS DEPRESSION NOW!*, at x (2012). Joseph E. Stiglitz, also a Nobel winner in economics, characterizes the

greedy managers and former politicians for the crisis as the euro zone is placed in doubt and as state and local governments in the U.S. are failing. All the finger-pointing does, however, is make it more difficult to understand what is at stake.

The economic consequences are frightening. In Spain, now the epicenter of the European debt crisis, unemployment is over twenty-five percent of the adult population available for full time work, and nearly fifty percent among the young – percentages that are comparable to the unemployment percentages in the United States during the Great Depression.¹⁰ In Greece, people who once owned homes are starving¹¹ and increasing rates of “economic suicide” have been reported in the euro zone.¹² In the United States, the destruction of the economic recession is unevenly distributed. Some cities like Detroit resemble conditions in Athens and states like Florida resemble Spain; whereas major urban areas like New York City and Los Angeles remain vibrant with pockets of poverty hidden in neighborhoods segregated from the better off neighborhoods. While the global recession in the U.S. is not as severe as that in the EU, there is a growing recognition that nearly every State government is facing serious budget deficits, growing in amount and raising fears for the future of American society.

In the United States, sovereign debt has limited both federal

economic crisis as the “Great Recession” exhibiting an “increasingly dysfunctional form of capitalism” that is “the worst economic downturn since the Great Depression.” JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR SOCIETY* 82 (2012). The economic distinction between a “mild depression” and a “Great Recession” is not worth debate; whatever it is called, the economic crisis is without question ‘comparable to the Great Depression.’

¹⁰ Krugman argues that the best way to think about the world economy is to accept that we are in a mild depression. KRUGMAN, *supra* note 9, at x.

¹¹ See *Starving Greeks Queue for Food in Their Thousands as Debt-Wracked Country Finally Forms a Coalition Government ...but How Long Will it Last?*, DAILY MAIL REPORTER (June 20, 2012), <http://www.dailymail.co.uk/news/article-2161651/Starving-Greeks-food-thousands-politicians-finally-form-coalition-government--long-last.html>.

¹² See Ariana Eunjung Chag, *‘Economic Suicide’ Shakes Europe as Financial Crisis Takes Toll on Mental Health*, THE WASHINGTON POST (Aug. 14, 2012), http://articles.washingtonpost.com/2012-08-14/business/35491624_1_double-suicide-mental-health-financial-crisis.

and state governments and the effects have been especially severe at the state and local level. Budget deficits¹³ at the federal and state level have provoked fierce political debates about intergenerational equity, moral hazard and governance problems.¹⁴ The most basic change, however, is the assault on the New Deal and Great Society social programs, and especially collective bargaining rights of public sector workers. To appreciate the economic and political transformation now taking place, it is necessary to consider the transformation that has occurred in both the European Union and in America since 2008.

A. The Crisis of the European Union

The European debt crisis began in late 2009 with the revelation that Greece had been keeping secret the true extent of its government deficit shortfall caused by the financial crisis of 2008. It soon became apparent that Greece, along with Ireland and Portugal, needed bailouts from the European financial community. On May 8, 2009, the European Council created a bank bailout program based on refinancing credit, known as Target credit,¹⁵ from the core European states in the north to aid

¹³ Deficit spending is a way for government to put more money into the hands of politicians. In America, deficits have been run up by two unfunded wars, the Bush tax cuts, and unfunded domestic spending. ROBERT SKIDELSKY, KEYNES: THE RETURN OF THE MASTER 178 (2009). Robert Skidelsky claims that deficit spending is a “crude form of Keynesian policy” that has “done much to give Keynesian policy a bad name” because deficit spending has not been “the result of any coherent steady philosophy.” *Id.* The more telling point is that deficit spending is an extension of sovereign debt based on an implicit obligation of government owed to citizens. Deficit spending is a form of debt that government owes to those it governs. See GRAEBER, *supra* note 5, at 358.

¹⁴ See, e.g., Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 862 (2012). Professor Schragger has observed that these debates have been “surprisingly ahistorical” but typical of what we have seen before, especially during the state and municipal debt crises of the 19th century when “Public overinvestment in infrastructure (especially railroads) and a series of economic shocks precipitated state and local fiscal failure.” *Id.* at 862-63 (“Even the most sensible, honest, and scrupulous state or local government cannot avoid the business cycle, the reality of economic boom and bust.”).

¹⁵ The EU bailout program follows the example of America with its Troubled Asset Relief Program (TARP) that bailed out American banks in the months

the periphery nations in the south. European financial ministers have thus looked to the Troubled Asset Recovery Program (TARP) model, and have bailed out the banks of Ireland, Portugal, Greece, and now Spain with Target credit. It may be that the bailout approach is a “fool’s errand”¹⁶ because Europe lacks an integrated banking system capable of guarantying deposits and money-market funds throughout the euro zone similar to that of the Federal Deposit Insurance Corporation (FDIC) in America. Extending target credit to individual banks is now recognized to be ineffective given that the banks are not required to use the funds to invest in business but may instead reinvest in government bonds.

As a result of a recent secret summit meeting in Brussels between leaders of the EU on July 28, 2012, a plan was adopted to create a permanent bank bailout fund giving banks a line of low interest credit loans, but also giving Germany and the European Central Bank even more control over lenders.¹⁷ The latest plan, however, does not provide central oversight of the budgets and deficits of member nations and this poses a problem for EU leaders who are attempting to erect a banking union without a fiscal union. The recent bailout of banks in Cyprus along with the draconian tax on depositor accounts has created a political firestorm and the fear is that citizens throughout the euro zone will no longer have confidence in their banks.¹⁸ Each nation in the euro zone is thus subject to strict EU

after the 2008 financial crisis. Andrew Ross Sorkin, *Why The Bailout In Spain Won't Work*, N.Y. TIMES, Jun. 12, 2012, at B1, available at <http://dealbook.nytimes.com/2012/06/11/why-the-bailout-in-spain-wont-work>.

¹⁶ Sorkin, *supra* note 15.

¹⁷ The plan adopted the European Stability Mechanism as a permanent bank bailout fund with 500 billion Euros (633 billion U.S. dollars) to recapitalize banks directly. In exchange, Germany and its allies won more strict centralized control of lenders. See James Kanter, *Doubts Greet Plan for a New Euro Zone Bank Regulator*, N.Y. TIMES, Jul. 2, 2012, at B1, available at <http://www.nytimes.com/2012/07/02/business/global/doubts-greet-plan-for-euro-zone-bank-regulator.html?pagewanted=all>.

¹⁸ See Michael Kambas, *Cyprus Banks Remain Closed to Avert Run on Deposits*, REUTERS (Mar. 25, 2013), www.reuters.com/article/2013/03/25/us-cyprus-parliament-idUSBRE92G03I20130325.

banking restrictions in the event of a bailout. The problem is that investors will continue to worry about the solvency of their bank deposits, and uncertainty will lead to a run on the banks given that bailout loans only increase the amount of the nation's debt. More importantly, growing levels of debt from bank bailouts diminishes the political resolve to deal with the systematic problem of inequality and high unemployment.

Indeed, within just days after the Spanish bailout in June 2012, it was reported that Italy could be the next victim of the European sovereign debt crisis.¹⁹ The fear is that Italy will not be able to grow its way out of its recession fast enough to pay back its sovereign debt. This will only exacerbate Italy's unemployment problem and further popularize the workforce in that country. There is a permanent possibility of contagion risk in the euro zone as the bailout in Spain seemed to be failing as the ten-year Spanish bond increased by six and one-half percent, which is a reliable indicator that investors do not have confidence in the ability of the country to pay its debt.²⁰ Meanwhile, Italy's ratio of sovereign debt to GDP is at 120 percent and will only increase as the value of Italy's bonds drop as investors lose confidence in Italy's ability to meet its debt obligations.²¹ Italy and Spain are thus on the edge of what some economist call a "*doom loop*" in which the concern of investors about bank solvency causes banks to react by selling assets to appear solvent, which in turn makes investors even more uncertain about bank solvency.²² The doom loop is what explains the disaster unfolding in Greece.²³ The run on Greek

¹⁹ See Liz Alderman & Elisabetta Povoledo, *Worry For Italy Quickly Replaces Relief for Spain*, N.Y. TIMES, Jun. 12, 2012, at A1 available at <http://www.nytimes.com/2012/06/12/business/global/monti-struggles-to-keep-italy-from-being-the-next-domino-to-fall.html>. Italy has the third largest economy in the euro zone. *Id.* Italy's unemployment rate is above ten percent according to Eurostat, the European statistical agency. *Id.*

²⁰ Sorkin, *supra* note 15.

²¹ Alderman & Povoledo, *supra* note 19.

²² Paul Krugman, *Another Bank Bailout*, N.Y. TIMES, Jun. 11, 2012, at A19, available at <http://www.nytimes.com/2012/06/11/opinion/krugman-another-bank-bailout.html>.

²³ See Paul Krugman, *The Downgrade Doom Loop*, N.Y. TIMES (Aug. 8, 2011), <http://krugman.blogs.nytimes.com/2011/08/08/the-downgrade-doom-loop>.

banks and the likely exit of Greece from EU gives rise to contagion risk that may lead to the end of the EU. Meanwhile, from now on, whatever happens in Greece will be a matter that will be controlled and decided not by the Greeks, but by financial elites and American tax exiles who reside outside Greece or America. With each bailout, economic government in the EU is gaining control of nation-states and that control is creating new forms of risk for the populations of Europe and beyond.

The bailouts required the Greek government to adopt a series of austerity measures and cuts in spending. The Greeks suggested that the bailout proposal first be approved by the electorate, but the European financial officials rejected the

The 2012 bailout deal was based on a novel collective action clause that was the brainchild of Mitu Gulati, a law professor at Duke, and Lee C. Buchheit, a sovereign debt lawyer who works at the New York law firm Cleary, Gottlieb, Steen & Hamilton. Landon Thomas, Jr., *An Architect of a Deal Sees Greece as a Model*, N.Y. TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/07/business/global/mitu-gulati-an-architect-of-greeces-debt-deal-wants-more.html?pagewanted=all>. The clause, inserted in redrafted Greek bonds, required investors who reject a bailout deal to suffer the same loss as those who agreed to accept the deal. *Id.* Essentially, the collective action clause allowed Greece to compel all of its unhappy creditors to take losses on their bond holdings as a precondition for the debt restructuring needed to avoid default. For a discussion of collective action clauses, see Sergio J. Galvis & Angel L. Saad, *Collective Action Clauses: Recent Progress and Challenges Ahead*, 35 GEO. J. INT'L L. 713 (2004). There were, however, several bond creditors who held out who were later paid 436 million Euros, which was nearly 100 percent of their bond value. *See* Landon Thomas, Jr., *Rejecting Greek Debt Deal Results in a Hefty Payoff of the Holdouts*, N.Y. TIMES, May 16, 2012, at B3 available at <http://www.nytimes.com/2012/05/16/business/global/bet-on-greek-bonds-paid-off-for-vulture-fund.html>. About ninety percent of the holdout funds went to Dart Management, a secretive investment fund based in the Cayman Islands specializing in buying distressed bonds of nearly bankrupt countries (so-called 'vulture funds'). The payout gives Dart Management 100 cents on the dollar. *Id.* Dart Management has considerable leverage over the Greek government given that it could sue on its bond holdings and thus "[t]ie up the European bailout funds on which the country is counting on to stay in business." *Id.* Greece cannot force investors to take a write-down on their bonds, and holdouts will likely be using the same strategy used by Dart Management to get 100 percent on their Greek bonds. Kenneth Dart, heir to a billion-dollar foam cup business, a United States tax exile, lives in the Cayman Islands. *Id.* Dart, along with Elliot Associates, is suing Argentina in the United States, seeking two billion dollars, because Argentina defaulted on its bond debt in 2002. *Id.*

Greek government's effort arguably because the electorate might reject austerity.²⁴ The surrender to the dictates of the European Council is necessary because if Greece fails to comply with the demands of the European financial officials, then bailouts may not be forthcoming and credit ratings of the nation will be downgraded causing a run on the banks and eventual default. Hence, even if the electorate is given the opportunity to vote, as it did on June 17, 2012, there really are no choices given that the foreign banks remain in control of the capital that the country needs. Free flow of capital thus operates to constrain democracy, and to increase inequality and economic instability.

Nearly one third of Greece's bank deposits have left the country, setting the stage for a complete collapse of its banking system.²⁵ Prolonged austerity is making it difficult for Greece to become self-reliant, and instead it is becoming dependent upon European banks. The dependency relationship has meant that the government has had to give up its sovereignty over the economy to foreign banks. Austerity has also meant that consumers have less to spend, resulting in fewer revenues for the government as thousands of taxpaying businesses fail.²⁶ The loss of government control over the economy by the debtor nations in the euro zone thus threatens to break up the euro zone, thereby eroding the social contract between labor and government established in the Post-War Era.

²⁴ See *Dissent Hits Greek Coalition Before Austerity Vote*, THE WASHINGTON TIMES (Nov. 1, 2012), <http://www.washingtontimes.com/news/2012/nov/1/dissent-hits-greek-coalition-austerity-vote/>.

²⁵ See Landon Thomas, Jr. & Raphael Minder, *In Spain, Bank Transfers Reflect Broader Fears*, N.Y. TIMES, May 25, 2012, at A1, available at <http://www.nytimes.com/2012/05/25/business/global/in-spain-bank-transfers-reflect-broader-fears.html?pagewanted=all&gwh=7C02FEB45B72A6195E74D1D348421394>. If the newly elected coalition government in Greece fails to meet the conditions of its bailouts and decides to leave the European Union, or is forced out, the economic consequences would likely quickly spread, destabilizing banks and economies not just in the euro zone but throughout all global societies in the world economy.

²⁶ See Liz Alderman, *With Tax Proceeds Drying up, Greece Could Be Broke by July*, N.Y. TIMES, Jun. 6, 2012, at A1, available at <http://www.nytimes.com/2012/06/06/business/global/greece-warns-of-going-broke-as-taxes-dry-up.html>.

The story of Spain is similar to that of Greece. In 2007, Spain reported a surplus in its budget before its own real estate bubble burst.²⁷ However, like everywhere else, the mortgage market in Spain was overheated and banks in Germany were more than willing to provide high- interest mortgages to home buyers.²⁸ When the housing market crashed, Spain's surplus turned into a deficit as the economy went into a recession.²⁹ Government bonds came due at high interest rates, forcing Spain to accept bailouts from foreign banks that required severe austerity measures to be adopted.³⁰ As a result, unemployment in Spain is currently at approximately 26.8 percent, and over fifty percent for its youth.³¹ Spain is thus at the epicenter of the sovereign debt crisis in southern Europe.³²

In June 2012, Spain agreed to accept a bailout of its banks in a deal worked out by the European finance ministers, becoming the fourth EU member nation to receive a bailout.³³ This time collective action clauses were not part of the deal, and instead a low interest line of credit in the amount of 100 billion dollars

²⁷ See WILLIAM K. TABB, *THE RESTRUCTURING OF CAPITALISM IN OUR TIME* 212-13 (2012).

²⁸ *Id.* at 212.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Greece Unemployment Hits Highest Rate in the European Union*, BBC NEWS (Jan. 10, 2013), <http://www.bbc.co.uk/news/business-20968845>.

³² See Paul Krugman, Op Ed., *Europe's Economic Suicide*, N.Y. TIMES, Apr. 16, 2012, at A19, available at <http://www.nytimes.com/2012/04/16/opinion/krugman-europes-economic-suicide.htm> ("Never mind talk of recession; Spain is in full-on depression, with the overall unemployment rate at 23.6 percent, comparable to America at the debts of the Great Depression, and the youth unemployment rate over 50 percent.").

³³ See Rachael Minder, Nicholas Kulish & Paul Geitner, *Spain to Accept Rescue from Europe for its Ailing Banks*, N.Y. TIMES, Jun. 10, 2012, at A1, available at <http://www.nytimes.com/2012/06/10/business/global/spain-moves-closer-to-bailout-of-banks.html?pagewanted=all>. The other EU countries that have received a bailout are Ireland, Portugal and Greece. *Id.*

was extended to the Spanish emergency bank fund.³⁴ The deal was created as a reaction to the Greece crisis, but bond investors have not seen the bailout in Spain as a success because funds continue to be drawn from banks and bond interest rates on Spain's ten- year bonds have increased. Moreover, instead of funneling bailout funds into the Spanish economy, the banks have, as in Greece, become the primary buyers of their government's bonds.³⁵ The doom loop has thus continued in Spain. Contagion risk and infection of financial panic is now the greatest danger to the currency union and to the EU itself. The fear of breakup of the European Union is a powerful force justifying even greater transfer of political power to the economic governance of foreign European ministers and the European Central Bank.

The collapse of the housing bubble in Ireland led to taxpayer bank bailouts which have imposed burdens on the youth of nation forcing many to once again immigrate to Canada and Australia as they had during the great potato famine.³⁶ The electorate in Ireland has stolidly accepted austerity measures, even as the economy in Ireland has been pushed into a mild depression as housing values have dropped and as consumer demand has decreased and unemployment has increased.³⁷ Ireland's housing markets plunged when the housing bubble burst, and as a result of overleveraged debt, Ireland's banks became zombie banks (no reserves left for borrowing or investing).³⁸ In Portugal, depression levels of unemployment have forced it too into a debtor nation status and it became the second EU country to accept bank bailouts subject to strict

³⁴ Landon Thomas, Jr., *Worried Banks Resist Fiscal Union*, N.Y. TIMES, Jul. 18, 2012, at B1, available at <http://www.nytimes.com/2012/06/18/business/global/worried-banks-pose-threat-to-push-for-financial-union.html?pagewanted=all>.

³⁵ Thomas, Jr., *Worried Banks Resist Fiscal Union*, *supra* note 34 (reporting how bailout funds are being used by Greek and Spanish banks that have "perpetuated a nasty cycle in which the problems of the government become the problems of its banks, and vice versa").

³⁶ See TABB, *supra* note 27, at 214.

³⁷ *Id.*

³⁸ *Id.*

austerity conditions by the EU.³⁹ The problem for these countries is that sovereign debt, coupled with risk averse foreign investors, has compelled these governments to accept austerity measures demanded by the European Central Bank in order to get badly needed financial injections and low cost loans.

With each bailout, however, economic emergency in the EU is becoming the excuse for consolidation of political power with policy that harmonizes economic control of all fields relating to the economy of the member nations including economic, fiscal, and labor policies. As a result of a plan adopted in 2010 by the financial ministers in Brussels and now part of the “six-pack” agreement of 2011,⁴⁰ fiscal discipline and austerity is now required for every member of the euro zone under specific and strict budget targets. The six-pack agreement essentially gives the President of the European Council authority to enforce the agreement by imposing fines on non-compliant nation-states. The six-pack agreement gives the executive of the European Council authority to rule by dictate, establishing an executive federalism run by politicians behind closed doors who set the austerity targets for nation-states. These austerity targets have placed Ireland, Greece, Spain, and Portugal in danger given the depressed economies these countries already face. Spain had a 23.6 percent jobless rate in 2011, and Portugal’s economy is expected to shrink by three percent by the end of the year.⁴¹ And, in Greece, even after the last bailout, the ratio of debt to GDP will still be at a whopping 151 percent this year.⁴²

³⁹ *Id.* at 231.

⁴⁰ The “six-pack” agreement refers to six acts of legislation proposed on September 12, 2012 by the European Council designed to tighten economic governance in the European Union. The agreement was confirmed by the European Council on October 4, 2012. The agreement allows the European Council to regulate imbalances in budgets of debtor nations accepting bailouts. See Press Release, Council of the European Union, *Council Confirms Agreement on Economic Governance*, LUXEMBOURG PRESS (Oct. 4, 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/124882.pdf.

⁴¹ Christina D. Romer, *Hey, Not So Fast on European Austerity*, N.Y. TIMES, Apr. 25, 2012, at BU5, available at <http://www.nytimes.com/2012/04/29/business/austerity-is-no-quick-answer-for-europe-economic-view.html>.

⁴² *Id.*

Unemployment in the entire euro zone was 10.8 percent in February 2012⁴³ and had climbed to 11.9 percent by January 2013.⁴⁴

The move to centralize executive control of fiscal and debt matters in the European Union denies democratic participation of citizens in policy debates, and it also fragments solidarity in the EU by attempting to create a “one size fits all” economic policy for harmonizing competition in the EU community. Treaty agreements and bank bailouts are conducted behind closed doors without facing the argumentative exchange of opinions of citizens in the public sphere. Financial interest, and not citizen wishes, now dominates the governance of EU nations. Thus, when French voters cast their votes in the May 2012 election in favor of anti-austerity candidate Francois Hollande, the morning after he won he flew to Berlin to meet with the pro-austerity German Chancellor Angela Merkel, to re-negotiate the austerity policy imposed on France. Chancellor Merkel, however, was quick to announce that austerity policy was “non-negotiable”, underscoring the reality that the future of the economy in France and in the rest of the southern rim of the euro zone was very much under the control of the German government. The response of the German federal government has angered Habermas because he thinks the closing of the doors on citizen participation will destroy the democratic potential of the European Union, and because he believes that the economic integration of Europe, that Chancellor Merkel means when she calls for ‘more Europe,’ is a betrayal of the democratic potential of the European people. Economic harmonization becomes the template for dealing with the diverse economies of member states, creating conflict between the rich nations in the north and the poor nations in the south, pitting northern Europeans against southern Europeans and vice versa.

Jürgen Habermas predicts that “[a]s national populations become aware of the degree to which EU decisions exert an influence on their daily lives, and as this awareness is relayed by

⁴³ *Id.*

⁴⁴ David Jolly, *Euro Zone Reports Joblessness and Low Inflation*, NY TIMES (Mar. 1, 2013), <http://www.nytimes.com/2013/03/02/business/global/euro-zone-unemployment-rose-to-new-record-in-january-as-inflation-eased.html>.

the media, they will also become aware of their interest in exercising their democratic rights as citizens of the EU.”⁴⁵ Habermas argues that the idea of a “European people”, necessary for political union in the EU, is fading and cannot be resuscitated so long as sovereign debt and austerity are incapacitating citizen solidarity at the local and national level, thus preventing will-formation for politics at higher levels. There is, he says, a fundamental difference between having the “freedom of choice” and “legal freedom” of “a democratically generalizing form of lawmaking which guarantees all citizens equal liberties.”⁴⁶ The reality is that while elections are held in Europe and dissent is expressed, power and authority remains in the hands of the European financial community, and especially with German Chancellor Merkel, who remains an influential power in the European financial community. The “European People” vote and they even elect candidates who are opposed to the economic policies dictated by the European financial community, but their vote and the candidates they have elected remain, in theory, beholden to an elite policy group consisting of the European Commission, the European Central Bank, the International Monetary Fund (the so-called ‘*trioka*’), and the “Eurogroup” consisting of the financial ministers of the seventeen nations that have adopted the Euro as a common currency.⁴⁷

⁴⁵ HABERMAS, CRISIS, *supra* note 1, at 2.

⁴⁶ *Id.* at 18.

⁴⁷ There is also a potential obstacle arising in the German Courts. In Germany, the Left Party and a member of Chancellor Merkel’s center-right coalition in Parliament, Peter Gauwelier, brought a case to the German Federal Constitutional Court challenging Merkel’s governmental authority to bind the German nation, the German people, and the German government to debt treaty and austerity measures imposed by the European Commission. The measures might cut funding of social programs, and hence the Left Party seeks to block Merkel’s treatment agreement that would impose debt obligation and potential austerity measures. See Annika Breidhardt, *German Court Hears Case Against Euro Bailouts*, REUTERS (July 5, 2011), <http://uk.reuters.com/article/2011/07/05/uk-eurozone-germany-court-idUKTRE7635EZ20110705>. See Melissa Eddy, *German Finance Minister Asks Court Not to Block Euro Assistance*, N.Y. TIMES, Jul. 11, 2012, at B3, available at <http://www.nytimes.com/2012/07/11/business/global/german-finance-minister-asks-high-court-not-to-delay-euro-measures.html?pagewanted=all>. German jurisprudence is thus poised for a landmark decision by Germany’s

At the core of the debate in Europe are questions about how much money rich nations and rich people should give to support poor nations and the working poor and how much political sovereignty the EU nations and citizens should have to surrender to save the banking community. How much of taxpayer revenues should be used for welfare support of the unemployed, and how much of the electorate sovereignty should be surrendered to executive control over the economy? This is also, of course, a pressing political and economic issue in the United States, which has been the subject of a number of recent important popular books,⁴⁸ offering important insight for understanding the dangers of inequality for modern democratic societies. All agree about the importance of economic security to a republican government and constitutional democracy. Citizens cannot be expected to be good citizens if they do not have a job or if they are not paid a working wage. Without training and retraining, decent work, and decent pay, citizens today cannot be expected to remain active in a constitutional democracy, one that allows vast divides to exist between people based on income, jobs, and educational opportunities. Gross inequality brings with it plutocracy and oligarchy in government and in the economy, allowing money to rule instead of citizens. Material independence and economic security are essential to republican forms of government based on democratic principles of citizen's participation.⁴⁹

highest constitutional court on the future of European unification and debt treaties. While the Federal Constitutional Court in Germany is likely to give its approval to Chancellor Merkel and uphold the debt treaties, Germany's political class may not continue supporting the Merkel government and its policy of "more Europe".

⁴⁸ See, e.g., STIGLITZ, *supra* note 9; LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT* (2011); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER – AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); LARRY BARTEL, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GUILDED AGE* (2008); and NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2008).

⁴⁹ When workers lack jobs and solidarity is fragmented, democratic freedom can fall prey to what Hannah Arendt called the "lethargy and inattention" of a government that allows their citizens to only take an active part in the affairs of government on Election Day and leaves to their representatives the messy business of political debate and policy decision-making. HANNA ARENDT, ON

B. THE CRISIS OF STATE AND LOCAL GOVERNMENT IN THE UNITED STATES

To appreciate the relevance of Habermas's essay, it is also necessary to consider what has happened in America since 2008. State and local governments have been hurt the most by the financial crisis of 2008. When the housing bubble burst, home values plummeted and many homeowners lost their homes in bank foreclosure.⁵⁰ Foreclosed homes that could not be sold were abandoned resulting in erosion of home values in the neighborhood.⁵¹ The decreasing home values created lower property tax levels, thereby reducing the tax revenues. The resulting recession hit hardest in the Midwest that had already been weakened by the loss of manufacturing jobs as a result of outsourcing and plant closings that had been ongoing for a number of decades as result of globalization and technological developments. Managers of state employees' pension funds invested in bonds and derivatives created from overly optimistic leveraging of risk and questionable credit ratings.⁵² An overheated housing market contributed, and eventually collapsed tax revenues, as the construction industry crashed, forced state government to turn to the credit market as a source of needed revenue.⁵³

However, increasing reductions in tax revenues have created a one trillion dollar shortfall in state pension fund funding,

REVOLUTION 241 (1965). Arendt argued that in America's contemporary representative democracy, citizens come to accept that their representatives will decide what is best, such that democratic power has become vested in the state, resulting in citizen participation and democratic freedoms tragically fading in importance. *Id.* at 240 (noting how, in America, citizens exercise their democratic power and let their views be known is on one day only: Election Day).

⁵⁰ See TABB, *supra* note 27, at 132-34; RICHARD A. POSNER, A FAILURE OF CAPITALISM 13-4, 75-105 (2009).

⁵¹ See STIGLITZ, *supra* note 9, at 169-70.

⁵² Professor Richard C. Schragger explains how the short term interest of market makers have contributed to the risk taking and debit loads of cities and states already in debt. See Schragger, *supra* note 14, at 871-75.

⁵³ *Id.* at 871.

according the 2010 report of the Pew Center on state pensions.⁵⁴ State Pension funds present a serious challenge to state and local governments, as federal assistance programs to the states are eliminated in response to proposed federal budget reductions in 2013.⁵⁵ The Pew center findings reveal that seven states: Connecticut, Illinois, Kansas, Massachusetts, Oklahoma, Rhode Island, and West Virginia, had pension funds that were only two-thirds funded.⁵⁶ Two states, Illinois and Kansas, had less than sixty percent of the necessary pension funds on hand.⁵⁷ Since every dollar spent by the state to reduce its unfunded pension obligation is committed to reduce the state's unfunded retirement liability under law,⁵⁸ there is less funding available for teachers, fireman, and other state workers. Ultimately, state taxpayers will have to pay higher taxes or the state will have to cut government spending on essential public services.

What distinguishes state and municipal debt from European sovereign debt is America's federal fiscal and monetary authority and federal safety nets and welfare supports for state systems. In states like Florida and Nevada, which have been hard hit by the housing market crash, federal programs such as social security and unemployment insurance have moderated somewhat the economic devastation of the recession. On the other hand, state governments are also like the nation-states in the EU in that state and local governments do not have macroeconomic tools such as a central bank or general fiscal spending power. Moreover, state and local governments operate under state constitutional limitation on public debt increases and spending power restricting what state governors and legislators can do in using budgetary power as a fiscal tool in

⁵⁴ See *The Trillion Dollar Gap: Underfunded State Retirement Systems and the Road to Reform*, PEW CENTER ON THE STATES (Feb. 10, 2010), <http://www.pewstates.org/research/reports/the-trillion-dollar-gap-85899371867>.

⁵⁵ William Alden, *State Budgets Unlikely to Get Federal Assistance*, THE HUFFINGTON POST (Feb. 28, 2011), http://www.huffingtonpost.com/2011/02/28/state-budget-crisis_n_829035.html.

⁵⁶ *The Trillion Dollar Gap*, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ *Id.*

responding to the recession. State governors do not have many tools at their disposal to deal with economic problems other than cutting spending as a basic budgetary reduction measure. Austerity at the state and local level thus becomes the counterpart to austerity policy fashioned by EU leaders.

Constitutional constraints, at the state level, including balanced budget amendments and outright limitations of the ability of the state to acquire debt limit state and local fiscal flexibility.⁵⁹ Limiting state and local governments' ability to tax and spend has restricted the options available for dealing with the debt crisis by limiting the borrowing and spending power and by taking away needed revenue sources.⁶⁰ The problem is that fiscal reasonability at the state and local level is powerless to alter financial circumstances of capital markets that function beyond their jurisdiction. State and local budgets thus tighten in recessions, which is the opposite of what should be happening to counter the recessionary cycle. Scholars note that this "exacerbates downturns while cutting services to the most vulnerable."⁶¹ It also leads to unemployment and the polarization of labor markets as public sector employment is reduced to reduce budget deficits.

At the federal level, the U.S. Supreme Court is erecting constitutional barriers to the power of Congress to enact legislation to reduce inequality and need. Consider, for example, the Supreme Court's recent decision on affordable health care: *National Federation of Independent Business v.*

⁵⁹ Forty-one states have constitutional amendments requiring balanced budgets; forty-six have mandates that require public funds to be used only for public purposes; and three-quarters of the states limit the ability of state and local governments to acquire debt, and many have restrictions on authority to raise taxes (e.g., requirements of legislative supermajority votes or public referendum approval of tax increases.) See Richard C. Schragger, *supra* note 14, at 866.

⁶⁰ Much of the political debate about sovereign debt in America has assumed that government debt is a problem of overspending. Richard Schragger argues that balanced budget amendments and other fiscal state constitutional mechanisms that have been adopted have limited the ability of the states to respond to the economic downturn by eliminating badly needed financing. See *id.* at 863-64.

⁶¹ *Id.* at 873.

Sebelius.⁶² It was a stunning victory for President Obama's administration, but the rhetoric of the opinion gives conservative support for reviving the pre-New Deal policies of laissez-faire in the face of colossal market failure of the financial markets in 2008. Chief Justice Robert's opinion for the five to four majority recognized that Congress's commerce power is limited and does not allow Congress to use incentives to compel citizens to purchase insurance even when necessary to solve a free rider problem. He emphasized that the "[t]he Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for 200 years both our decisions and Congress's actions have reflected this understanding."⁶³ The majority thus refused to uphold the individual mandate under traditional notions of Congressional power through the Necessary and Proper Clause. Chief Justice Roberts was thus aligned with the dissenters on this question, who invoked the views of James Madison on Congressional spending powers. When the Roberts opinion is read alongside the dissent, one can discern a dark shadow forming over a half-century of constitutional law and policy upholding the centrality of federal government responsibility over the economy.

What was brushed aside was the modern history arising during the New Deal era and extending beyond ever since, during which the Supreme Court had affirmed the importance of the Federal government responsibility to promote the general welfare under the Necessary and Proper Clause in order to provide support for a healthy citizenry along with the promise of government to maintain fairness and opportunity.⁶⁴ Hence, while the majority upheld the Affordable Care Act under Congress's taxing power, the Court also recognized that Congress's power was limited and would not extend if a tax were

⁶² Nat'l Fed'n of Indep. Buss. v. *Sebelius*, 132 S. Ct. 2566, 2609 (2012).

⁶³ *Id.* at 2573.

⁶⁴ See William E. Forbath, *Workingman's Constitution*, N.Y. TIMES, Jul. 6, 2012, at A23, available at <http://campaignstops.blogs.nytimes.com/2012/07/05/workingmans-constitution> (arguing that "[g]overnment has not only the authority but also the duty to underwrite these promises").

to be regarded as a “penalty” for an unlawful act or omission.⁶⁵ The implication is that the Federal government does not have unlimited power to legislate in economic matters and that at least four justices of the Supreme Court (Justices Scalia, Thomas, Alito, and Kennedy) are apparently more than willing to pull back on the New Deal policies that have been previously accepted by the Court as necessary for bolstering the role and responsibility of the federal government in the economy. The point is not that American New Deal policies or European governments’ approaches are somehow superior to laissez-fair economic policy (though I think they are), but rather that in a global economy it does seem rather irrational to tie the hands of the federal government on spending power, especially in the midst of a demand-starved recession. Would the framers of the Constitution want to keep the nation in the eighteenth century even as economy and society becomes increasingly globalized?

Meanwhile, at the state and local level of government, budget cutting and overt political attacks on public sector unions and collective bargaining rights - made famous by Wisconsin’s Republican Governor Scott Walker’s ‘divide and conquer’ strategy that was recorded during a prank telephone call revealed how budget politics at the state level has waged a war against unions in the public sector.⁶⁶ Other Republican governors, in Indiana and Ohio, appear to have adopted the same strategy in terminating collective bargaining rights either by executive order (Indiana) or by legislative action (Ohio).⁶⁷ In response, the Ohio electorate, in a special election, was successful in repealing the Ohio anti-collective bargaining act. But, in Wisconsin a special recall election failed to unseat Governor Brown. While attacks on public sector collective

⁶⁵ While the Affordable Care Act described the payment as a “penalty” and not a “tax,” the majority reasoned that statutory characterization did not control whether the extraction of the so-called penalty was not within Congress’s constitutional power to tax. *Nat’l Fed. of Indep. Buss.*, 132 S. Ct. at 2608.

⁶⁶ See Alex Altman, *Scott Walker on Tape: Budget was ‘Divide and Conquer’*, TIME (May 11, 2012), <http://swampland.time.com/2012/05/11/scott-walker-on-tape-budget-bill-was-divide-and-conquer>.

⁶⁷ See David Schaper, *Collective Bargaining Curbs Spread Across the U.S.*, NPR.ORG (May 27, 2011), <http://www.npr.org/2011/05/24/136610879/collective-bargaining-curbs-spread-across-the-u-s>.

bargaining have energized workers and have led to a resurgence of interest in labor unions, there has also been considerable backlash against workers and unions that has been inflamed by political arguments that have held workers and unions responsible for state budget deficit spending. State politicians claim, rightly or wrongly, that union pension plans have been a major reason that state budgets have fallen into deep deficits. State deficits have consequently become a topic of political debate that has fragmented and eroded the possibility of political unity needed for political compromises regarding the sharing of burdens and responsibilities of the economic recession. This too has been aided by the United States Supreme Court.

The Roberts' Court held in *Knox v. Service Employees International Union*⁶⁸ that the Service Employees International Union in California could not collect and spend membership dues for political purposes without the approval of dissenters, without violating the free speech provision of the First Amendment.⁶⁹ Justice Alito's opinion for a 7-2 majority in *Knox* will make it more difficult for unions to participate in the political arena, participation that is necessary to counter the power of corporations and to present to the electorate the other side of the debate on state and local budgetary issues. Additionally, the Court ruled in *Chicago Teachers Union v. Hudson*⁷⁰ and *Abood v. Detroit Board of Education*⁷¹ that agency shop agreements in the public sector violate the First Amendment if the agreement forces an individual to contribute to political and ideological projects of the union without that person's consent. In *Hudson*, the Court adopted procedures that a union must follow when it intends to use the membership funds for political purposes.⁷² In *Knox*, the Court held that the *Hudson* procedures require that the union send to each union member and nonmember a notice allowing them to *opt in* to the

⁶⁸ *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012).

⁶⁹ *Id.* at 2295.

⁷⁰ *Chi. Teachers Union v. Hudson*, 475 U.S. 292 (1986).

⁷¹ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 242 (1977).

⁷² *See Hudson*, 475 U.S. at 310.

special fee rather than requiring them to *opt out*.⁷³ The possibility of non-unanimous support for the political expression of a union will cause union leaders to exercise restraint, and individual dissenters can now force the union leadership from collecting union dues to support political issues when no prior notice has been issued informing them of their right to *opt in*.

A nonunion member can now use the *Hudson* procedure to force a public sector union to defend its calculation of the special assessment for union fees in exercising the ‘*opt in*’ right. The midyear assessment required by *Knox* forces courts, arbitrators, and unions to face the difficult task of determining how much of a special assessment fee can be withheld, as Justice Breyer explained in his dissent.⁷⁴ The ‘*opt-in*’ requirement can also reduce union revenues since, under the default *opt-out* rule, individuals who do not have strong feelings about the political issue or expenditure are likely to be swayed in favor of inaction. Justice Breyer thus adopted the conclusion of Sunstein and Thaler in finding that default rules play an important role in influencing behavior of individuals who do not have “well defined preferences.”⁷⁵ He also noted that the Court’s decision in *Davenport v. Washington Education Association*⁷⁶ permits a state to enact an opt-in requirement but never made the *opt-in* requirement *mandatory*.⁷⁷

Corporations do not face the same restraints when it comes to making campaign expenditures to *super-pacs* advocating the election or defeat of political candidates. The Court’s decision in *Knox* thus reveals a serious lie at the core of the *Citizens United*⁷⁸ decision: namely, that unions have the same freedoms

⁷³ *Knox* 132 S. Ct. at 2295.

⁷⁴ *Knox*, 192 S. Ct. at 2307 (Breyer, J., dissenting).

⁷⁵ *Id.* at 2307 (citing Sunstein & Thaler, *Liberterian Paternalism is not an Oxymoron*, 70 U. CHI.

L. REV. 1159, 1161 (2003)).

⁷⁶ *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 192 (2007).

⁷⁷ *Knox* 192 S. Ct. at 2291.

⁷⁸ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

and rights as corporations (and wealthy individuals) to express their views by making expenditures in political campaigns. A small group of dissenting members of a union can now prevent the union from using union funds to advance the majority message in political campaigns, even after notice had been given about the proportion of union dues being used for such purposes. The Supreme Court is thus putting up barriers to union participation in elections, muffling voices of those who stand to lose the most from budgetary reductions and laws eliminating state worker rights of collective bargaining.

Meanwhile, conservative politicians at the state and local level are busy chopping away at the social welfare contract that has supported the middle class ever since the Great Depression, and public sector unions are demonized as “shadow bosses.”⁷⁹ Public debt at the state and local level in the U.S. is thus used as a justification by state governors and municipal executives to cut spending, terminate collective bargaining rights, and discharge the employment of teachers, policemen, and fireman, sometimes with the support of their legislature and sometimes unilaterally by executive order.⁸⁰

Federalism⁸¹ and sovereignty⁸² reinforce a state’s power to rule on economic matters within its domain without interference, thus creating the basis for state politicians to use fiscal policy as an “exit option” from national economic policy. State fiscal policy enables state politicians to express a “muscular voice” in the national political debate about deficits

⁷⁹ See FRANK MALLERY & ELIZABETH MALLERY, *SHADOWBOSSSES: GOVERNMENT UNIONS CONTROL AMERICA AND ROB TAXPAYERS BLIND* (2012).

⁸⁰ Michael Richard Fischl, “*Running the Government Like A Business*”: *Wisconsin and the Assault on the Workplace Democracy*, YALE L.J. ONLINE (Jun. 21, 2011), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/%E2%80%9Crunning-the-government-like-a-business%E2%80%9D:-wisconsin-and-the-assault-on-workplace-democracy>.

⁸¹ American federalism, or “our federalism” (see *Younger v. Harris*, 401 U.S. 37, 44 (1971)) involves two-levels of government – state and federal – which depend on the notion of minority rule and decentralized governance. See Heather K. Gerken, *Forward: Federalism All The Way Down*, 124 HARV. L. REV. 6, 11-12 (2010).

⁸² Gerken, *supra* note 81, at 12 (explaining how sovereignty is invoked as federalism’s definitional limit).

and the budget.⁸³ State governors thus become vocal in a national debate about government's role in the national economy. State governors are emboldened to use their policymaking power to "challenge, thwart, and even deny the national majority."⁸⁴ The 'opt out' or "exit option" is a widely required feature of state-federal relations on fiscal policy. Local majorities can influence and sometimes frustrate federal policy on fiscal issues by exercising this exit option.

Politics at the state and local level have become complicated by arguments of intergenerational equity and the problem of moral hazard. Any effort to engage in fiscal measures is met with the claim that deficit spending would severely limit future generations. The moral hazard argument that bailouts would encourage state and local politicians to engage in forms of profligacy is not likely to be as widespread as many may think. Richard C. Schragger discounts the validity of both of these arguments,⁸⁵ arguing that state and local fiscal crises are largely a matter of politics and not the fiscal constitution or the market. He does not attempt to reconcile the conflict between debt and democracy, because what is at stake is contested as are ideas about "what the public good requires."⁸⁶ What is beyond dispute is that less public investment made at the state level will mean

⁸³ For the idea of federalism as creating an "exit option", see Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS., 147, 149 (1992). For the idea of federalism as a "voice" of minorities or what some have called "process federalism", see Gerken, *supra* note 81, at 14-18.

⁸⁴ Gerken, *supra* note 81, at 9.

⁸⁵ Schragger argues that the moral hazard concerns are overstated because "subnational polities are much less responsive to incentives – whether those incentives encourage or discourage profligacy – than designers of institutions sometimes think." Schragger, *supra* note 14, at 864. He discounts the intergenerational argument on the ground that the "future should [not] be allowed to exercise a veto over present-day tax and spending decisions...." *Id.*

⁸⁶ *Id.* at 885. While the theory of markets has assumed that state and local spending decisions can "influence or manage economic growth and decline," Schragger notes that the consensus of opinion of economic development theorists is of the opinion that "economic development has more to do with the happenstance of initial settlement decisions and path dependency than with capital-favorable policies. *Id.* at 872 (citing HELEN F. LADD & JOHN YINGER, AMERICA'S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY 291 (1989)).

fewer jobs and less opportunity for the middle class. What is odd about these debates is that they are occurring in the midst of a debt crisis where austerity and debt traps are destroying the possibility of prosperity in this world and the next. Concerns about intergenerational justice and moral hazards seem odd when one looks to what is happening in Europe, where an entire generation is likely to be lost and where moral hazard is not even remotely relevant, a situation that has the very real potential for spilling over to the American economy.

III. AUSTERITY AND DEBT TRAPS

Habermas is highly critical of the austerity measures that the Europeans have relied upon in their response to the sovereign debt crisis. *Austerity*, the word of the year according to Merriam-Webster in 2010,⁸⁷ has come to describe what sovereign debt means in the lives of ordinary people. While the word involves economics, it is more broadly a political term referring to the government policy of deficit-cutting used by governments to demonstrate long-term fiscal solvency to creditors – banks and private government bond holders.⁸⁸ In the European Union, austerity policy has tightened economic governance in the European Union on fiscal issues, by employing targeted spending cuts for nation states in serious economic decline and in need of fiscal assistance. Designed to prevent future sovereign debt crises, the six-pack gives the Executive of the European Union new powers to impose fines on countries that fail to adopt austerity policies.⁸⁹ The EU executive is thus given the power to impose sanctions that can only be blocked by a majority of votes among euro zone states.⁹⁰ European leaders also recently agreed to allow a permanent bailout fund, the European Stability Mechanism, to recapitalize

⁸⁷ See *Word of the Year 2010*, MERRIAM-WEBSTER (Dec. 20, 2010), <http://www.merriam-webster.com/info/10words.htm>.

⁸⁸ See KRUGMAN, *supra* note 9, at 188-207 (discussing how the ‘believers’ in austerity policy have come to be known as the new “austerians” in political discourse).

⁸⁹ See *Council Confirms Agreement on Economic Governance*, *supra* note 40.

⁹⁰ *Id.*

banks in trouble directly, but in exchange the plan calls for more centralized authority.⁹¹

In the United States, austerity is a word that the financial analyst Rob Parenteau fashioned into a term – ‘Austerians’ – to “felicitously”⁹² describe politicians and economists who are strongly committed to budget deficit reduction measures. Austerians in the United States have advocated that state, local and federal governments slash budget deficits by reducing government spending and by eliminating public sector jobs. Austerity has since become associated with Republican Party proposals for deficit reduction. At the state and local level, austerity is associated with policies calling for balanced budgets and in state labor benefits, including the right of collective bargaining in the public sector. In Wisconsin, the state Governor, Scott Brown, ignited labor and citizen demonstrations at the capitol building. On the national level, austerity is what defines Senator and former Republican vice president candidate Paul Ryan’s budget proposal, which has been met with the approval of Republican presidential candidate Mitt Romney. In political terms, austerity calls for a continuation of neoliberal policies that have put future economic development ahead of current human needs, requiring governments to choose to cut government spending and to lay off public-sector workers rather than raise taxes on individuals and corporations that have prospered over the decades of the neoliberal Washington consensus even after the financial crisis.⁹³

Austerity is closely associated with the fear of collapse and default as has occurred in Greece, even though Greek debt is, as discussed above, *sui generis* even in Europe. The “Hellenization” of public debt in America, as Paul Krugman has called it,⁹⁴ uses Greece as an example of what can happen when

⁹¹ See EUROPEAN STABILIZATION MECHANISM, <http://www.esm.europa.eu> (last visited Mar. 25, 2013).

⁹² See KRUGMAN, *supra* note 9, at 189.

⁹³ TABB, *supra* note 27, at 262-72.

⁹⁴ KRUGMAN, *supra* note 9, at 177.

governments become fiscally irresponsible and too indebted.⁹⁵ Niall Ferguson, Carmen Reinhart, and Kenneth Rogoff emphasize that the problem of sovereign debt threatens deeper global economic crisis, and that historical records reveal that countries that adopted austerity policies were able to recover from economic periods of decline.⁹⁶ Critics, on the other hand, argue that those countries that did recover after adopting austerity measures were all small and had trading partners that were in a boom, which allowed for the opportunity of export trading to make up for reduced government spending. For example, a critic of austerity, Joseph E. Stiglitz, reminds his readers that Europe is America's most important trading partner, and if America was to reduce its imports due to budgetary cutting, it would only cause both Europe and the United States to suffer.⁹⁷

A. THE EXTERNAL SOCIAL COSTS OF AUSTERITY POLICY

The economic issues threatening the social fabric of Europe and America—persistent unemployment, rising government deficits, subnormal growth, and rising inequality—are overcoming democratic governance. First, it is important to note that these realities in the economy are neither typical nor inevitable but rather the kind of atypical problems that prevailed on the eve of the Great Depression when the stock market bubble popped.⁹⁸ Keynesian economists agree that the financial

⁹⁵ See, e.g., Rogoff, *Ferguson Say Global Crisis is Not Yet Over: Video*, BLOOMBERG, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOVBsFL6MxIU> (last visited April 29, 2013).

⁹⁶ See CARMEN M. REINHART & KENNETH ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2009).

⁹⁷ STIGLITZ, *supra* note 9, at 211.

⁹⁸ The Great Depression was the worst economic contraction in modern history. Between 1929 and 1932 the value of goods and services in the United States fell by nearly fifty percent; production decreased by one third, unemployment rose to twenty-five percent and capital investment ceased to be made. See SKIDELSKY, *supra* note 13, at 65-66. A new breed of economists, known as the New Keynesian economists, call the popping of investment and asset bubbles that were responsible for the Great Depression “the *Minsky Moment*” – the moment when rising debt and leverage of risk

crisis cannot be understood in light of the boom and bust nature of business cycles of normal times, but rather must be understood in light of the problems of investment bubbles, leveraging of risk, and rising inequality that were also problems in existence on the eve of the Great Depression.⁹⁹ Reinhart and Rogoff assert that the real danger today is created by sovereign debt that threatens future economic development and future generations.¹⁰⁰ What is beyond dispute is that the financial crisis of 2008 and the sovereign debt it generated throughout the world is accelerating profound changes in governance in Europe and America, and this is antithetical to the idea of constitutional democracy on both continents.

Keynesians argue that austerity is a policy for boom times, not when there is persistent unemployment and weak

results in the popping of exuberant and over leveraged investments. See HYMAN P. MINSKY, CAN 'IT' HAPPEN AGAIN? ESSAYS ON INSTABILITY AND FINANCE (1982); Hyman P. Minsky, *The Financial Instability Hypothesis* (Handbook of Radical Political Economy, Working Paper No. 74, 1992); SKIDELSKY, *supra* note 13, at 109-10. The *New Keynesians* distinguish themselves from the classical or "Chicago School" economists, who emphasize the point that markets do fail, and that it takes longer for an economy to adjust to 'shocks.' Robert Waldman, *Background on Freshwater and Saltwater Economics*, ANGRY BEAR BLOG (Jan. 27, 2009, 7:49 PM), <http://www.angrybearblog.com/2009/01/background-on-fresh-water-and-salt.html>. They regard persistent unemployment in the economy as a reason to explain why markets do not always clear, necessitating government intervention. *Id.* Robert Waldman, an economist at Rome University, described the difference between Classical and New Keynesians as the difference between "freshwater" and "saltwater" economists. *Id.* The "freshwater economists," trained or taught at the University of Chicago, accepted the neo-classical theory based on the general equilibrium model, which assumes that people are rational and that markets clear because symmetric information prevails. *Id.* The "saltwater economists," located mainly on the East coast of the United States, believe that markets fail, that information is asymmetrical and that economic performance can be improved through government regulations. *Id.*

⁹⁹ Thus, just as Hebert Hoover's austerity measures helped to create an investment bubble in the stock market in 1929, Alan Greenspan and the Federal Reserve adopted monetary policies that heated up a housing bubble that popped in 2008, the reverberations of which brought about a financial crisis and the sovereign debt crisis. See STIGLITZ, *supra* note 9, at 88, 231. FDR had initially also followed the same small government policies in the early 1930s and was, according to Stiglitz, "pilloried" for it. *Id.* at 88.

¹⁰⁰ See REINHART & ROGOFF, *supra* note 96.

demand.¹⁰¹ Paul Krugman, who writes editorials for the New York Times and identifies himself as a New Keynesian, argues that austerity during an economic slump depresses demand and makes the debt crisis worse by causing what economists call “debt deflation.”¹⁰² Joseph E. Stiglitz, also an admitted Keynesian economist who is an expert on problems of inequality, emphasizes the problem of inequality and the shrinking middle class as reasons for advocating Keynesian remedies for dealing with the economic slump. New Keynesians argue that austerity in an already depressed economy only increases the supply of unemployed workers, putting pressure on workers who have a job to accept less. Austerity undermines the ability of unions to maintain labor standards, forcing them to make wage concessions. Harvard economist Kenneth Rogoff takes a centrist position in arguing that sovereign debt reduction is necessary for dealing with long run problems. There is wide disagreement about the fundamental assumption about the possibility of market failure and asymmetrical information problems that prevent markets from clearing. The neoclassical economists assume that markets do clear in the long run and the New Keynesians argue that the long run is too long, emphasizing what Keynes is famously known for stating that “in the long run we are all dead.” In the face of such disagreement, voters are left without a clear policy prescription that they can choose, even if they are given the choice in an election.

The idea of external social costs helps to explain what is normatively wrong with government austerity policy. In private markets, social costs are the external cost of production. In the case of austerity policy, external social costs are the costs inflicted on workers who lose their jobs as a result of cut backs in spending compelled by austerity measures. The true social costs of austerity are not fully taken into account by government officials. First, austerity policy permits exploitation and

¹⁰¹ SKIDELSKY, *supra* note 13, at 31-32, 109-10.

¹⁰² Paul Krugman, Op-Ed., *Reagan was a Keynesian*, N.Y. TIMES (June 8, 2012), <http://www.nytimes.com/2012/06/08/opinion/krugman-reagan-was-a-keynesian.html> (“America is currently suffering from a classic case of debt deflation; all across the economy people are trying to pay down debt by slashing spending, but, in so doing, they are causing a depression that makes their debt problems even worse.”).

oppression of the most vulnerable populations in our societies. Those who lack resources and who need their jobs to survive are now locked in a struggle with those who are better off economically and who already have considerable power. Inequality, made even worse by austerity, compels the most vulnerable populations into accepting conditions that resemble labor servitudes. The choice of whether to work or not to work may seem voluntary, but the reality is that there is no choice. Citizens cannot be free if they are not equal, and if they are not equal they cannot exercise the same rights of participation in the political or economic arenas.

Second, worker power is weakened by austerity policy because austerity works on the individual level with a particular employer, and it eliminates the bonds of solidarity by fragmenting the unity between workers. Austerity is like bad weather that affects us all but that is felt and understood on an individual level. We are all affected by it, but at the same time it is a very personal experience. As soon as austerity causes a job loss for an individual, that individual either moves on to another job or remains unemployed, making it difficult for the individual to benefit from whatever “power below” he or she might exercise with others. Moreover, because austerity promises to bring about better times in the future, servitude does not seem to be that awful since the individual can continue to hold on to the promise of the ability to change employers at some later time to avoid oppressive hours, pay, working conditions, or treatment in the present when things get better.

Third, unemployment brought about by austerity policy increases the polarization of the labor force already in existence. This polarization is a result of globalization and technology that have been sources of income inequality and the shrinking of the middle class. Joseph Stiglitz notes how the history of austerity causes recession by lowering demand as a result of government cuts in spending.¹⁰³ While those in finance emphasize the importance of confidence necessary for taking risks, there is little reason for believing that confidence can be restored by policies that increase unemployment and lower demand through cutbacks in government spending. Austerity socializes the cost of the financial class by placing the burden on the most

¹⁰³ STIGLITZ, *supra* note 9, at 230.

vulnerable populations of society. What does seem apparent is that government cutbacks in spending required by austerity measures will in the short run increase both unemployment and inequality.

Finally, the debate about austerity has been dominated by economists who make technical arguments based on long and short run predictions that fail to measure and take account of the true social costs of the policy. Those who stress the importance of protecting financial markets primarily stress the importance of confidence of investors and forget the suffering of the working poor and the unemployed. Clearly, the economic solution to the crisis is not easily determined by merely choosing between competing camps of economists. On the other hand, there are observable facts that illustrate the human suffering now inflicted by EU policy. In Greece, mothers are now surrendering their children to adoption centers because they can no longer afford to care for them.¹⁰⁴ The breakup of families and the unprecedented rise in the suicide rate in the euro zone are cruel consequences of the current crisis that are the unmentionables of austerity policy.

In Michigan, the state legislature enacted an Emergency Management law that allows the Governor of the state to dissolve the elected government of a town or municipality whenever economic conditions suggest that the government is on the verge of bankruptcy.¹⁰⁵ The state's Republican Governor Rick Snyder appointed an emergency manager to manage the City of Detroit.¹⁰⁶ The emergency manager, a Washington bankruptcy lawyer, is granted the power to terminate union contracts and impose austerity measures.¹⁰⁷ Detroit is ruled

¹⁰⁴ See Chloe Hadjimatheou, *The Greek Parents Too Poor to Care for their Children*, BBC NEWS MAGAZINE (Jan. 9, 2012), <http://www.bbc.co.uk/news/magazine-16472310>.

¹⁰⁵ See *Fact Sheet: Michigan Emergency Manager Act*, http://www.michigan.gov/documents/snyder/EMF_Fact_Sheet2_347889_7.pdf (last visited Mar. 25, 2013).

¹⁰⁶ See Bill Vlasic, *Lawyer Outlines Challenges in New Job Fixing Detroit*, NY TIMES (Mar. 25, 2013), <http://www.nytimes.com/2013/03/26/us/detroits-emergency-outlines-challenges.html>.

¹⁰⁷ *Id.*

today not by an elected public official but by the edict of a private bankruptcy lawyer acting as an emergency manager.

Public debt at the state and local levels of government in the United States has resulted in the ceding of political authority to an unelected class of political agents and officers who can subordinate the welfare of citizens and workers to the interests of creditors. In this way, newly elected governors have attempted to follow economic policies that resemble those advocated by the German Chancellor Merkel and Prime Minister Cameron of the United Kingdom who have plunged the economies of Europe into an austerity induced demand recession.

The punishing consequences of sovereign debt motivate politicians on both the right and the left to ignore democratic values and to revert to authoritarian positions that no democratic legislator could justify or accept. Receiverships, emergency management declarations and bankruptcy are replacing democratically based forms of government at state and local levels.¹⁰⁸ In this sense, state and local governments are following the pattern now developing in the European Union, which has allowed the executive of the European council to dictate economic policy for member nation-states. It has been reported that more than three hundred municipalities nationwide are in danger of default on their debt, and as of 2011, four local governments have filed for bankruptcy.¹⁰⁹ Proposals have been made to adapt federal bankruptcy law and the law of the European Union to deal with the problem of sovereign bankruptcy.¹¹⁰ These proposals have been thwarted because it is recognized that the problem of public debt, like the words “bailout” and “cram down,” are “fighting words” in the world of public debt. As Anna Gelpern puts it, “[t]alking about state debt

¹⁰⁸ See Michael Cooper & Mary Williams Walsh, *Distressed Cities Weigh Bold Tactics in a New Fiscal Era*, N.Y. TIMES (March 31, 2012), <http://www.nytimes.com/2012/04/01/us/cities-swap-bold-strategies-for-a-new-fiscal-era.html>.

¹⁰⁹ See Schragger, *supra* note 14, at 862. The four that had filed are Jefferson County, Alabama; Harrisburg, Pennsylvania; Central Falls, Rhode Island; Boise Country, Idaho. Harrisburg has since withdrawn its filing.

¹¹⁰ Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888, 890 (2012) (proposals are discussed here).

as ‘state bankruptcy’ sets the stage for replaying entrenched arguments from a different field, and threatens to derail a useful exchange for the wrong reasons.”¹¹¹

Restructuring municipal debt in bankruptcy appears to do nothing to solve the political legitimacy problems of sovereign debt. Bankruptcy law, according to Anna Gelpern, “has no capacity to effect economic policy reform or revenue collection, or to structure broad-based political decision making about economic policy.”¹¹² The underlying problem of public debt at the state and local levels of government is that capital markets may “dictate the internal politics of cities and states and limit their present range of policy choices.”¹¹³ Bankruptcy procedure cannot fix that problem, but what it can do is take decisions of how to share responsibilities of debt away from elected officials who are responsible to the voters and give it to an unelected receiver who can then use the bankruptcy law to unilaterally decide budgetary cuts. Federal bankruptcy procedure also allows federal judges to impose austerity measures to make good on debt on state governments, thereby redrawing the lines between federal and state power by ceding the need to pay back debt at the expense of citizens’ welfare to creditors, and eroding the sovereignty of people.¹¹⁴

Budget deficits at the state level have since become the excuse for politicians to terminate collective bargaining rights of public sector unions (as in Wisconsin) and/or to enact so-called “Right to Work” laws (as in Indiana) which allow a state to forbid union security agreements that require employees to pay union dues as a condition of continued employment. These measures have weakened the union movement and as a result have further eroded the income of middle-class workers.¹¹⁵ Wage concessions and the restructuring of pension benefits have been said to be necessary to “make the math” work so that the

¹¹¹ *Id.* at 891.

¹¹² *Id.* at 941.

¹¹³ Schragger, *supra* note 14, at 865.

¹¹⁴ See Gelpern, *supra* note 110 (discussing the unique nature of bankruptcy of sovereign states).

¹¹⁵ See Fischl, “Running the Government Like A Business,” *supra* note 80, at 9.

state can balance its budget. This is happening even as the cost of government borrowing in the United States is at all-time low to allow for increased spending. Governments at the state and federal level, however, remain paralyzed by political disputes about taxes, intergenerational equity, and fears of moral hazards created by rising state and federal debt. Economists Carmen M. Reinhart and Kenneth Rogoff conducted statistical research studies and have claimed that there is a historical connection between financial crisis in the past and high levels of sovereign debt and inflation.¹¹⁶ Reinhart and Rogoff give support to those who fear that if government fails to reduce its debt there will be a deeper recession and long-term inflation.

However, there are too many unemployed people in the short run. An entire generation is now at risk of either becoming permanently unemployed, or of falling behind if and when they do become employed. Moreover, where there are jobs, the skills and educational requirements necessary for those jobs disqualify the vast majority of the population, so that the vast majority of workers are left to compete for the few moderate skill-level jobs that once sustained the middle class.¹¹⁷ In America, polarization of the labor force that existed before the financial crisis has been intensified by state and local government cuts in spending and budget reductions.¹¹⁸ In America and Europe, the polarization of the labor force is widening the divide between the rich and the working poor, defeating the possibility of political unity and consensus.

There may be elections, but the real policy alternatives shaping what the voters care most about—jobs and the economy—are being shaped by economic conditions that are

¹¹⁶ See REINHART & ROGOFF, *supra* note 96.

¹¹⁷ One should be dubious about the efficacy of labor strategies that embrace the “primacy of market ordering or the inevitability of boundarylessness [sic]” employment. Richard Michael Fischl, *Labor Law, The Left, and the Lure of the Market*, 94 MARQ. L. REV. 947, 956-57 (2011) (arguing that such strategies are based on a “devil’s bargain . . . only without any hint of a quid pro quo.”).

¹¹⁸ The polarization of the labor force has been a problem since the mid-nineteen eighties as manufacturing began outsourcing jobs and as the decline of long-term employment and unionism in the American labor force destroyed good middle class jobs. See KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 127-56 (2004) (describing the “new psychological contract” of “boundary less workplaces”).

affected by banks and financial elites. Austerity policy in Europe and deficit reduction measures at state and local levels in the United States re-create an economic system of government that denies the possibility of free labor, transforming the baseline in the struggle between labor and capital. Elections held under the pressure of economic crisis create outcomes shaped by agendas of bondholders and creditors. In Europe, intergovernmental agreements and treaties between the European Council and member states of the EU have created a political force united with the European Central Bank, the International Monetary Union and the European banking community that has created imbalances in the political arenas of nation states. EU influence on referendum outcomes insulates executive power from national electoral politics, illustrated by the example of a EU official who flew across Ireland in a campaign plane displaying “Vote Yes for Europe Logos” during an election to determine if Ireland should join the EU. Another example would be the newly elected French President Francois Hollande, who campaigned on an anti-austerity policy, but who, on the day after he won the election, flew to Berlin to meet with Chancellor Merkel, who proceeded to publically admonish President Hollande by declaring that austerity was “non-negotiable.”

Stephen Tierney’s study of referendum voting on treaties in the EU, suggests that the EU as an institution can exercise a measure of influence on national populations by using its financial power and by providing voter information supporting the EU agenda.¹¹⁹ Campaign rhetoric that warns the electorate of the probable disaster that might be caused by a “no” vote on austerity in Greece would probably be difficult for most Greek voters to ignore. The European Council also remains influential in its ability to make decisions about policy through its informal policy decisions. Habermas thus argues that proposals for the direct election of the president of the European Union “would be nothing more than a fig leaf for the technocratic self-empowerment of a core European Council whose informal decisions would circumvent the treaties.”¹²⁰

¹¹⁹ See STEPHEN TIERNEY, CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION 161-65 (Oxford University Press, 2012).

¹²⁰ HABERMAS, CRISIS, *supra* note 1, at 6.

In the United States, state and local politicians exercise power to block economic and social policy of the federal government. Newly elected Tea Party Governors have manipulated their electorate by demonizing public sector unions and have engaged in openly hostile forms of political actions to destroy democratic practices in state workplaces. Meanwhile, economic conditions and budget cutting have further eroded the ability of unions to exist at the very same time that the United States Supreme Court has erected barriers to the ability of unions to participate as equals in the political process. Federalism in both Europe and in America has contributed to the erosion of the democratic potential of unions by providing the rationale for the legal basis for austerity in Europe and the legal rationale for state resistance to federal fiscal policy in America. Representative democracies in both Europe and America are fragmented by tensions and conflict in politics expressed at the state and federal levels of government. Meanwhile, the electorate is limited in their ability to express and debate the issues, as the pressing needs of material necessity overcome the attention of the vast majority of people who are unemployed or are working, but are deeply in debt.

B. DEBT TRAPS AND SOCIAL DISINTEGRATION

Debt is at the source of some of our most basic ethical and religious beliefs about self-sacrifice, obligation, horror, revenge and sin. As Margaret Atwood reminds us in her 2008 Massey lectures (and her book: *Payback: Debt and the Shadow Side of Wealth*¹²¹), debts are not just about money, debts resonate with literary and moral narratives that link the moral and political life of the individual to the worldwide economic system. David Graeber, an anthropologist, recounts how debt in the last five thousand years has played a significant role in our basic

¹²¹ MARGARET ATWOOD, *PAYBACK: DEBT AND THE SHADOW OF WEALTH* (2009). Perhaps, we believe that austerity is something that we must accept as a matter of faith. “We owe God a Death,” said Feeble in Shakespeare’s *Henry IV*. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE FOURTH* act. 3, sc. 2. People in fact are dying by “economic suicide” as suggested by the recent the uptick of suicide rates in the Euro zone. See Paul Krugman, Op-Ed., *Europe’s Economic Suicide*, N.Y. TIMES (Apr. 15, 2012), <http://www.nytimes.com/2012/04/16/opinion/krugman-europes-economic-suicide.html>.

vocabulary of right and wrong.¹²² Money thus becomes the basis for defining human values and it is at the essence of governance and sovereignty. If “freedom” is the basic value that global law is empowered to secure, then freedom to choose between working under substandard conditions and benefits or to go without a job is not a very satisfactory notion of what free labor should mean. Freedom in a democracy means the freedom necessary for the realization of one’s potential.¹²³ This is the positive conception of freedom.

The negative concept of freedom is the view that freedom exists only if the external or internal barriers to achievement are eliminated. The negative concept of freedom is based on the notion that individuals must be free from restraints and restrictions of their government, other individuals, or environmental conditions.¹²⁴ The assumption is that if the individual can be free from external or internal barriers then the individual may attain their life’s achievements. However, if resources are not available, then negative freedom is a cruel form of freedom. It is cruel for society to ignore inequalities in income that disadvantage the poor and it is equally cruel for sovereign debt to be used by government as an excuse for requiring the most vulnerable populations in our societies to sacrifice their limited resources and money to support the interests of a class of financiers who have benefited despite the financial crisis.

Debt traps are especially a problem for students in the United States who have assumed increasing debt loads supported by the federal government to pay for college and professional school tuition, as well as books and living costs during their college and post-graduate studies. The federally supported debt loans have allowed students to charge up debt loads greater than the debt attributed to credit cards and other consumer loans in America. The youth of society are thus forced into debt that will likely involve lifetime obligations at a time when job opportunities are evaporating during the prolonged

¹²² GRAEBER, *supra* note 5.

¹²³ See Note, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1307 (1969).

¹²⁴ See Isaiah Berlin, *Two Concepts of Liberty*, Lecture at Oxford Univ. (1958).

economic recession. Two-thirds of college seniors graduated in 2010 with an average of more than twenty-five thousand dollars of debt.¹²⁵ Students also faced an unemployment rate of 9.1 percent for college graduates.¹²⁶

Debt traps force a generation of workers to work for years to pay back their debt, trapping them in a form of servitude that compels work to pay back a debt incurred for skills necessary for work. Hence, while politicians argue that cutbacks in government spending programs, including the federal student loan program, are necessary to protect future generations from sovereign debt, it is sovereign debt that is currently disadvantaging an entire generation that will now be compelled to pay back student debt over their lifetime. Intergenerational injustice is a real concern; but concerns about future unborn people should not justify public policy that disadvantages the current generation of workers. If the current generation is disadvantaged, then their children will, in turn, be denied educational and other opportunities; this will negatively impact future generations.

Debt thus becomes a trap for future generations, contributing to the inequality and polarization of the next generation of workers. The foundation of the European and American system of social justice is jeopardized as rising inequality and unemployment disintegrates the social contract necessary for creating a political bond between groups and individual members of society. Democracy cannot take hold in the consciousness of citizens if economic conditions deny them the necessary freedoms they need to exercise the liberties and rights of democratic citizenship. The tidal shifts in our politics caused by the emergency of the financial and debt crisis have unfortunately changed the parameters of the public discourse as imperatives of economics become more important than democratic governance.

¹²⁵ STIGLITZ, *supra* note 9, at 95.

¹²⁶ See *Student Debt and the Class of 2011*, PROJECT ON STUDENT DEBT 3 (Oct. 2012), www.projectonstudentdebt.org/files/pub/classof2011.pdf (last visited Jan. 14, 2013). The 2005 Bankruptcy law makes it near impossible for students to discharge student loans. For a discussion of the economic problems caused by student loan debt see STIGLITZ, *supra* note 9, at 195-97.

IV. SOVEREIGN DEBT, PEONAGE AND SERVITUDE

Money and debt define the relation of the individual to the government and to the market. Currency and coins stamped with the symbols of political authority and used to buy commodities and services in a market are subtle reminders of the political significance of money and debt in human society.¹²⁷ “The images stamped on Greek coins (Miletus’ lion, Athens’ owl) were typically the emblems of the city’s god, but they were also a kind of collective promise, by which citizens assured one another that not only would the coin be acceptable in payment of public debt, but in a larger sense, that everyone would accept them, for any debts, and thus, that they could be used to acquire anything anyone wanted.”¹²⁸ Sovereign debt is an obligation that the sovereign can enforce to collect from citizens as a form of collective or “public” obligation based on money. The public square thus doubles as a marketplace¹²⁹ and honor and trust is measured in terms of money payments.¹³⁰ Sovereign debt feeds on a “peculiar habit of defining ourselves simultaneously as master and slave, reduplicating the most brutal aspects of the ancient household in our very concept of ourselves, as masters of our freedom, or owners of our very selves.”¹³¹

Like in the peonage system, or as it used to be called in nineteenth century England, the “truck system,”¹³² workers who fall into debt traps are unable to escape. Like the “*peon*,” the laborer can only seek the mercy of his master. Migration offers an opportunity for avoiding the harshness of the austerity master, but because debt has been globalized, even migration becomes just another trap. In America, payday lenders who charge four-hundred percent interest become the lenders of last

¹²⁷ STIGLITZ, *supra* note 9, at 75.

¹²⁸ GRAEBER, *supra* note 5, at 246-47.

¹²⁹ Hence with Greek coinage “[b]y the fifth century, in Greek cities, the *agora*, the place of public debate and communal assembly, also doubled as a marketplace.” *Id.* at 186-87.

¹³⁰ *Id.* at 165-210.

¹³¹ *Id.* at 209.

¹³² *Id.* at 349.

resort for a growing population of unemployed workers and new migrants. As state governments shrink welfare and unemployment support, the unemployed are compelled to accept the severe obligations of a debt trap. Under present-day capitalism, if workers and the middle class hope to avoid involuntary servitude, it will be through collective action; either directly through labor organizations and collective activity or indirectly through democratic participation in government. The law that best expresses these ideas is found in the preamble to the National Labor Relations Act, enacted by Congress in 1935 to give working people the chance to participate in the economic conditions that shape their lives.¹³³ Austerity policy blocks the policy mechanism created to protect workers from harsh and unwholesome working conditions and, as a result, austerity is working to return workers to a condition of involuntary servitude. The danger is that we risk forgetting the lessons that were the reason for protective worker legislation.

A. LESSONS FROM PEONAGE CASES IN AMERICAN CONSTITUTIONAL LAW

The story of indebtedness has always been an integral subtext of the story of human liberation.¹³⁴ In America and in Europe, compulsory labor based on indebtedness of the peon to the master was a major obstacle to free labor and democratic values for much of modern history. To recall the story of the Irish potato peasants or the serfs of Ireland, or slaves and poor whites in the antebellum South in America, one begins to see how an overarching story of how debt has enslaved us by establishing legal and moral justification for conditions of human slavery.

Historians of the institution of slavery in the United States, for example, are reminding Americans of a long forgotten history when the evil institution of slavery and forced labor existed and continued well after Lincoln's Emancipation Proclamation and the Thirteenth Amendment to the United States Constitution. Slavery and involuntary servitude did not end in 1868, the year the Thirteenth Amendment became law.

¹³³ 29 U.S.C. § 151 (2012).

¹³⁴ See generally GRAEBER, *supra* note 5.

As the historian Douglas A. Blackmon has explained in his widely acclaimed book, *Slavery by Another Name* (recently the subject of a PBS documentary),¹³⁵ former slaves in the South were arrested on trumped up charges of vagrancy and loitering, convicted, and required to pay penalties and court costs of hundreds of dollars.¹³⁶ And, if they could not pay the fines after conviction, which was always the case, they were sold to private companies and forced to work off their debt as convicted laborers under a system of convict leasing.¹³⁷ Alternatively, poor whites along with indentured blacks were forced to work on the former Southern plantations under peonage contracts establishing a continuing system of domination and subjugation based on a contract to repay a debt.

The story of convict leasing and peonage contracts is a sober lesson, not just about race, but also about the exploitation of labor and the clash between human freedom and the market. Involuntary servitude came about because poor blacks and whites lacked the “power below” to protect themselves from labor exploitation, and because the market lacked “incentives above” to end the system of domination and subjugation created by the institution of slavery. Eventually, politics and the law came to understand the evils of convict leasing and the peonage system. The theory of free labor did not develop until the Supreme Court finally came to see how debt servitude, even when voluntarily created, can give rise to a prohibited form of involuntary servitude. It is the Thirteenth Amendment that gave Congress the power to forbid involuntary servitudes and to later enact labor and civil rights legislation.¹³⁸ Because slavery and indentured servitude were economic systems based on voluntary contract it became apparent that freedom to contract could be used to deprive slaves and indentured servants of their

¹³⁵ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2007). The PBS documentary based on Blackmon’s book premiered on Feb. 13, 2012 in the United States.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ U.S. CONST. amend. XIII.

economic liberty in order to satisfy their material needs for survival.¹³⁹

In a series of peonage cases, culminating in an opinion written by Justice Jackson in *Pollack v. Williams*, the United States Supreme Court came to accept a principle of “free labor” essential to the understanding of a modern democracy.¹⁴⁰ In *Pollack*, the Court struck down a Florida peonage statute that relied upon state criminal law to enforce and penalize the payment of a wage debt.¹⁴¹ In doing so, Justice Jackson announced what James Gray Pope has rightly called “[the Court’s] most extensive justification for protecting the inalienable right to quit work under the Thirteenth Amendment.”¹⁴² Justice Jackson expressed the right to quit in constitutional terms: to be free, laborers must have the right to change employers in order to avoid exploitation by the master.¹⁴³ However, “[w]hen the master can compel and the laborer cannot escape the obligations to go on, there is no power below to redress, and no incentive above to relieve, a harsh overlordship or unwholesome conditions of work.”¹⁴⁴

The evils of peonage or involuntary servitude can be understood in light of two constitutional principles that have since shaped modern free labor theory. First, “no indebtedness warrants a suspension of the right to be free from compulsory

¹³⁹ Randy E. Barnett has recognized this recently in his defense of economic liberty, but he never does see the full implications of free labor theory as a constitutional restraint on the free contract ideology that supported the now discredited decision in *Lochner v. New York*. See Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 8-9 (2012) (arguing that the Thirteenth Amendment is the source of economic liberty that justified the *Lochner* decision).

¹⁴⁰ See *Pollack v. Williams*, 322 U.S. 4 (1944).

¹⁴¹ *Id.* at 5-6, 25.

¹⁴² James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude”*, 119 YALE L.J. 1474, 1478 (2010). See also James Gray Pope, *What’s Different About the Thirteenth Amendment, and Why Does it Matter?*, 71 MD. L. REV. 189, 193 (2011).

¹⁴³ See *Pollack v. Williams*, 322 U.S. 4 (1944).

¹⁴⁴ *Id.* at 18.

service.”¹⁴⁵ Second, that freedom from compulsory service requires that workers have the “power below” and their employers have the “incentive above” to prevent “a harsh overlordship or unwholesome conditions of work.”¹⁴⁶ Sovereign debt and austerity policy in the euro zone and in state and local governments in America can be seen as violating these two principals of free labor. Global financial power is eroding freedom and democracy in both the EU and in America by creating a *quasi*-form of debt servitude, through government policies that place workers in a condition that restricts free labor and thereby prevents workers as citizens from engaging in the forms of solidarity necessary for political unity. The result is a denial of “power below” and an “absence of incentives” above for free labor.

The right to quit is the main protection against involuntary servitude because it provides the “power below” and “incentive above” to prevent a harsh overlordship or unwholesome working conditions. This is the central point of Justice Jackson’s decision in *Pollack*.¹⁴⁷ Traditional debt bondage directly violates the right to quit by barring the individual from quitting until the debt is paid off.¹⁴⁸ The employment relation under present-day capitalism resembles debt bondage even though the individual is not prevented from quitting, because the right to quit does not, in fact, provide the necessary power below and incentive above to protect workers, many of whom no longer have the protections of a labor union or at least not one that has any power, from employer power abuses.¹⁴⁹ This is why workers were granted the right to engage in collective activities for mutual aid and self-protection in America. It was recognized when labor legislation was enacted during the New Deal era that workers needed a bill of rights to allow them to protect themselves from the overwhelming power of large corporation

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See *Bailey v. Alabama*, 219 U.S. 219 (1911); *Pollack*, 322 U.S. 4.

¹⁴⁹ See Pope, *Contract*, *supra* note 142, at 1527-57.

and business combinations.¹⁵⁰ A single employee exercising the “right to quit” is something that most employers regard as having no bearing whatsoever on the employer’s power to control what workers do. What does and can countervail employer power is the right of workers to collectively refuse to work by engaging in a strike or other collective activities for mutual aid and self-protection. Austerity and budget cutting and laws restricting collective bargaining rights in the public sector are further weakening workers by diluting the collective power of unions and individual workers. If workers are going to avoid involuntary servitude, they must do so collectively, by either participating in a strong labor union or by participating in the democratic process of government.

Scholars of the Thirteenth Amendment argue that the peonage cases from twentieth-century America set up the constitutional basis for distinguishing between free and unfree labor. Free labor necessitates the right to quit which requires a society that gives labor the power below to redress labor exploitation and at the same time creates “incentives above” to recognize labor freedom to quit. What this has meant in American labor law is that workers must be allowed to join unions, to strike, and to picket for better working conditions. It has also established the legal rationale for minimum wage and worker safety legislation. The point is that servitude and unfree working conditions are not just things that happen to individuals; they are systems of an economy premised on the importance of controlling labor. Slavery and servitude continued after Lincoln’s famous emancipation proclamation and after the adoption of the Thirteenth Amendment prohibiting slavery and involuntary servitude *because the life world* of society continued to be subordinated to the imperatives of the market economy. Labor remained unfree because workers were denied the right to collectively engage in activities for mutual aid and self-protection and because economic necessity compelled many workers to accept unwholesome working conditions.

The most astonishing fact from legal history that preceded the enactment of the Thirteenth Amendment was that judges,

¹⁵⁰ I would like to thank James Gray Pope for reminding me of this important point.

lawyers and legal scholars defended debt slavery on the ground of the individual's freedom to contract. The argument that was accepted at this time was that peonage contracts of employment were fair and just because they recognized the individual's right to freely and voluntary contract. The defenders of free contract appealed to a curious idea of free labor: the freedom to surrender one's freedom to another to payback a debt. Even today, one can discover a similar line of rhetoric in Randy E. Barnett's defense of the discredited decision in *Lochner v. New York*.¹⁵¹ According to Barnett, "[any] unwarranted restrictions on liberty –whether personal or economic –are simply partial 'incidents' of slavery."¹⁵² Freedom to contract thus becomes once again the basis for requiring workers to submit to unwholesome conditions of work. Barnett argues that this is part of the constitutional ideal of liberty that cannot be taken out of "our constitution."¹⁵³

Of course, the Constitution Barnett wants to defend was the one that enforced involuntary servitude on the ground that it was the result of free contract. Freedom to submit to debt slavery became the legal and political justification for continuing the incidence of slavery by other means in the South, resulting in the re-enslavement of black and poor white Americans from the Civil War to World War II. It was also the rationale that supported the substantive due process theory in *Lochner*. Freedom to contract became an iron cage for people forced to work by economic conditions and simple survival. It was not until Justice Jackson's opinion in *Pollack v. Williams* that the legal system began to recognize the evils of debt peonage.

It is from the history of *de facto* slavery in the South after emancipation that one can begin to understand how the conditions of sovereign debt and austerity are re-creating a peonage system in our time.¹⁵⁴ We should understand sovereign

¹⁵¹ Barnett, *supra* note 139, at 11-12. See *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁵² Barnett, *supra* note 139, at 9.

¹⁵³ *Id.*

¹⁵⁴ See generally PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH (1972); JACQUELINE JONES, THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT (1992); BLACKMON, *supra* note 135. The story of debt slavery, convict leasing and peonage

debt for what it truly is—a system of indebtedness that will enslave us if we do not take action to protect ourselves from the demands of creditors and speculators who willingly lent mountains of money to our governments during years of easy credit and now compel citizens to pay back the debt through compulsory reductions in wages, increased taxes and cuts in social welfare programs. Creditors, not elected governments, are the new governing powers and authority in the era of “economic government.”

B. FREE LABOR AND DEMOCRACY

Forced labor, of course, violates the “...discursive processes of opinion – and will-formation in which the sovereignty of the people assumes a binding character.”¹⁵⁵ Regardless of a laborer’s consent, a contract of peonage or forced labor is fundamentally antithetical to democratic discourse principles that require mutual recognition and equal participation of all citizens in the society. If workers are not recognized in the process that determines their conditions of work, then their interests will not be represented, nor will the state take seriously their dignity as equal citizens. Recognition and participation in the governance process are thus essential features of a democratic society in a constitutional system.¹⁵⁶ As Axel Honneth has recently observed: “The longing for a job that provides not only a livelihood, but also personal satisfaction, has in no way disappeared; it is just that this longing no longer dictates public

contracts is a sober lesson not just about race, but also the exploitation of labor by governments seeking to recover from the damage of debt caused by the civil war. The result was a clash between human freedom and the market. Involuntary servitude came about because poor blacks and whites lacked the “power below” to protect themselves from labor exploitation and because the market lacked “incentives above” to end the system of domination and subjugation created by the institution of slavery.

¹⁵⁵ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 104 (1996).

¹⁵⁶ Labor is thus relevant to conditions necessary for recognizing the personhood of the worker. See ALEX HONNETH, THE I IN WE: STUDIES IN THE THEORY OF RECOGNITION 56-74 (Joseph Ganahl trans. 2013). Alex Honneth is a critical political theorist who has developed a theoretical political argument for the central importance of human recognition as an essential requirement for a humane democratic government.

discourse or the arena of political debate.”¹⁵⁷ Free labor requires the possibility for the recognition of those who labor in the economy and who discover their self-worth and identity in the work they do. Hence, “the expectation that each person must work is linked to the condition that each receive a living wage.”¹⁵⁸

The libertarian ideas of voluntariness and the belief in free contract makes sense in a system of market-mediated exchange. The employer and employee are thus thought to be private autonomous beings who act in pursuit of their own economic interests. The libertarian ideas about the nature of work strip from the work relationship the moral possibility for recognition of the individual and the possibility for solidarity and community. The moral promises described in terms of phrases like “ ‘self-respect,’ ‘fair day’s pay for a fair day’s work,’ and ‘meaningful work,’” are meaningful only if we understand work not just as a medium for advancing economic efficiency, but rather as a relation necessary for social integration.¹⁵⁹

Human recognition is erased and rendered incomprehensible in labor markets where populations must work to stay alive, when a part of their wages goes to pay back the debt of their government, and when sovereign debt becomes an excuse for stripping workers of their collective bargaining rights. Sovereign debt shares a similarity between wage labor and slavery, in that the relationship between master and slave and employer and employee treats labor impersonally as a means to an end. It matters not whether you enter the relation voluntarily or involuntarily, once the relationship is created and legally recognized, it is the master or the employer that can give orders. If there is no collective power to protect, either because unions are no longer on the scene to protect workers or because

¹⁵⁷ *Id.* at 57. Honneth argues that the human and moral significance of work has been lost in our political discourses about work because modern theorists regard labor unity as “wishful thinking” of utopian expectations and instead accept the notion that conditions of labor are left to the “globalizing forces of the capitalist labour market.” *Id.* at 58.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 71 (arguing that if we regard the work relation as merely an economic relation we will fail to understand the moral implications embedded in the work relation that are necessary for social integration in a modern capitalist system).

anti-labor economic austerity policy is enacted without electoral participation, then there can be no possibility for “power below” or “incentive above” to protect workers from unwholesome working conditions. When the economy presents few job opportunities, workers will be compelled to work under conditions not of their making. The fact that self-determination is absent renders the voluntary choice to work under such conditions in effect, involuntary. The once popular notions that people voluntarily accept obligations necessary for survival or they can, if they choose, leave their community, are too silly to take seriously. The right to change employers, to join a union, or to migrate to escape unwholesome working conditions are no longer meaningful in a world governed by sovereign debt and austerity that forces workers and their unions to accept wage cuts and/or unemployment.

The three building blocks of a democratic system that Jürgen Habermas sets forth as essential in a democratic society—the *constitution of a community of legal persons*, the *authorization of collective action*, and the *shared unity of civic solidarity* - can be achieved only if there is “power below” from citizens organized in groups capable of providing “incentives above” in the legal system for the recognition of all citizens of the political society. “Power below” and “incentive above” provide the guidance for democratic procedure both at the national level as well as the supranational level. The coupling of law and politics is thus possible if citizens and workers are allowed to engage in collective associations that naturally arise in the workplace and which provide the political motivation for the creation of “incentives above” in the legal and legislative arenas of a democratic society. It is the dynamic of power from the workplaces of society which create the incentives from above that are crucial for establishing and enforcing human rights and human dignity in a democratic society. It is from the power of people at everyday levels of society that citizens can realize and experience what Habermas envisions as the capacity for democratic government practiced by people who are both citizens of a state and citizens of a federal government.

In the absence of “power below” and “incentives above” for democratically enacted laws, law and society will develop along the lines of market imperatives and the power of global finance. Because the constitutions in America and in Europe do not require a democracy, it is left to politics to determine whether or

not democracy is to be the form of government people shall have. If markets and finance are allowed to govern the affairs of society, then constitutional law and politics will become the handmaidens of the wealthy. If American democracy is to survive the current global crisis, it will be because working people and ordinary citizens care enough to preserve the democratic vision expressed in the original reasons for the founding of both America and the European Union.

Solidarity, a movement that changed the world, was organized by people who risked imprisonment for going into factories in Poland to distribute a workers bill of rights. Worker awareness was in fact an integral part of the liberation movements in South Africa during apartheid, and in Prague where workers joined with citizens to resist the Communist rule. In Madison, Wisconsin, it was an important part of the demonstrations and protest of teachers, snow plows drivers and pro-union protestors – men and women who rushed to the Wisconsin capital building to protest a law that would end fifty years of collective bargaining by state workers. It was the image of mothers, teachers, policemen and fireman sitting-in and occupying the Wisconsin Capital building in the spring of 2010 that ignited the awakening of a middle class union protest movement signaling other sit-ins and protests in Ohio, Michigan, Illinois and other states throughout the Midwest of America. It is the history of struggle of labor to escape servitude and the peonage contracts established by indebtedness that can also shed light on what is happening with democratic governance in the euro zone and in the United States.

V. CONCLUSION

In order for politics and society to build up to the capacity for joint action at the supranational level, as Habermas wishes they should, collective bargaining and worker rights must be protected and even advanced to protect the living conditions necessary for political integration. Political promises based on future imaginary benefits that will come after self-sacrifice and austerity are based on a “... devil’s bargain ... without ... a quid pro quo.”¹⁶⁰ The problem of the jobless recovery continues and

¹⁶⁰ See Fischl, *Labor Law, The Left, and the Lure of the Market*, *supra* note 117, at 956-57.

sovereign debt becomes an ever-compelling excuse for governments to break free from the social contract with workers and citizens. This then bogs down the response of the demos and thus prevents the working out of political compromises for the sharing of burdens and responsibilities in the current crisis. Polarization and inequality are created when the debt burdens of the state are unequally shared and distributed and this in turn creates divisions between the rich and the poor.

Sovereign debt and austerity policy has fragmented solidarity between people and classes of people: pitting creditors versus debtors, investors versus lenders, investors versus workers, and transferring economic government from electorally-controlled entities to capital markets. Fragmentation inflames prejudice and breaks the bonds of unity and recognition between people and is thus destructive of democratic values and practices. Prejudice and fragmentation, working in conjunction with crushing debt and persistent unemployment, have transformed free labor into a form of servitude resembling the nineteenth-century peonage system that was once ruled by masters and landlords rather than by popular sovereignty or citizen based democracy. The disintegration of social cohesion in the Euro Zone threatens the fate of workers and citizens not just in the Euro Zone, but also in America, as economic conditions that spill over borders intensify inequality and weaken democratic governments. Economic governance as now practiced in Europe and America is destroying the solidarity of workers and citizens needed for will-formation both in Europe and in America.

Europe matters because if the EU should break up, there would be a void in the balance of economic power in the midst of a financial and debt crisis that would render America and Asia less effective in dealing with the crisis. The danger is that Europe might descend into a doom loop, bringing down economic and social standards that would, in a global competitive economy, make it difficult to maintain standards of living in competing nations, including the United States. Because we live in an ever-interconnected world, the protection of economic and social justice depends on an ever-increasing transnational institutional structure. Allowing the EU to fragment and descend into the old model of the nation-state would be a regressive development in governance at a time when global finance and markets are beginning to rival the sovereign power of the nation-state.

If the EU should collapse, the consequences would enhance the power of global finance given that nation-state sovereignty has already receded as politicians have shifted more of the state's power to satisfy the needs of global capital markets. Without an effective supranational system of law capable of taming the power of global finance, workers in the Euro Zone will suffer as work and social welfare contracts are redrawn to satisfy the interest of creditors and as politicians, who seek to satisfy the interests of an unelected class of financiers, terminate hard-won labor rights. The implications of such changes would mean that the already downward trend of labor in America would only be accelerated, as there would no longer be a European pro-labor model to inspire American workers and their unions. The pressure of European labor competition would lead to a further downward spiral in wages and would be a defeat for the idea of law as a means for advancing human dignity and human freedom. Meanwhile, constitutional libertarians, some of whom teach constitutional law in America, cheerfully claim that a return to *laissez-faire* markets of the *Lochner* era remains an option for America.¹⁶¹

Europe matters because the fate of democracy is tied to the success or failure of Europe as a "union" of nations capable of establishing democratic government at the supranational level. What is at stake is whether globalization will be ruled by economic rather than democratic government. Habermas argues that there must be a constitution for the European Union that contains the forms of rights necessary to create the basis for a democratic union to insure the necessary 'incentive above' to protect and preserve democratic rights. The EU does not have a constitution, and the absence of a political framework is what is now missing in order to move the EU from just a trading regime to a global democratic regime. The extent to which this occurs will be affected not just by economics and global societal forces, but also by politics capable of shaping the global legal framework of the EU for countervailing a global financial authority that now polarizes workers and facilitates the growing inequality in the world.

The future of democracy in this century may thus depend on whether politics will serve to finish the project that was started

¹⁶¹ See Barnett, *supra* note 139, at 5.

with the forming of the European Union so that it is capable of responding both to the risks posed by an unregulated financial global system as well as the needs of the vulnerable groups of people who have suffered. Citizen participation in global financial decisions must be woven into the existing global governing structures by recognition of a global constitution capable of taming the excess of greed and risk while protecting human dignity necessary for democracy. Proposals for constraints on executive compensation, capital requirements and global coordination of risk, information, and tax policy have given life to a new public discourse about the global sphere, and we should exploit the opportunity this discourse offers for development of democratic practice on the global or supranational level. In a global system that is now highly sensitive to moneyed interest, inequality and lack of solidarity between people create imbalances in political and economic power, reinforcing economic government at the expense of democratic values.¹⁶²

The European Union matters because it represents not just a collection of separate sovereign trading states, but a union signifying solidarity between people of different cultures that remains unfinished and which offers the opportunity for creating a supranational structure of government capable of taming the excesses of global finance through democratic rather than economic power. What are at stake are the values of justice, recognition, dignity, and the right of the people to have a role in the exercise of power that has the ability to determine one's life chances and well-being. Europe matters because it may be where the struggle to save democratic values and rights in the global arena will be won or lost.

Habermas's *Crisis of the European Union* thus remains singularly significant in warning how the influence of an unaccountable global form of government in Europe is eroding democratic forms of governance not just in Europe, but in an increasingly globalized society. However, so long as workers continue to suffer economic conditions that deny them the opportunity to participate in the politics that determine their economic and social fate there will be no real chance to realize

¹⁶² See STIGLIZ, *supra* note 9.

the Habermasian ideal whether it be in the supranational, national or world arena.

Sovereign debt should also be seen for what it is – the consequence of an autocratic and irrational financial subsystem of modern society that has been allowed to become closed and resistant to democratic and legal intervention. Its resistance to democratic and legal intervention forces the most vulnerable groups of society into conditions that resemble involuntary servitudes. Debt servitude will be a source of deep division between people so long as there is no “power below” and no “incentive above” to control conditions that allow the domination of one person, or one class of people, over another, for profit or for payment of a debt. Europe matters because it is a forum for saving democratic government from the onslaught of economic governance at the global level. Although Europe may seem far away and its problems may seem unique to it, the fate of the European Union weighs heavily, not just on the American economy, but also on the future of democracy, which needs a structure to coexist in a globalized world increasingly ruled by finance and sovereign debt.