

University of Bologna Law Review

<https://doi.org/10.60923/issn.2531-6133/23600>

The Wounds of Constitutionalism: An Editorial

I would like to thank the editors of the University of Bologna Law Review for kindly inviting me to contribute these few pages, which, given the current circumstances, offer readers some rather somber reflections on the future of liberal constitutionalism.

Over the last decade, constitutional law scholars have taken a systematic interest in the phenomenon of populism¹ and, above all, in its impact on the structures of constitutional democracy. In doing so, they have used various terms to describe this impact, including “authoritarian reversion,” “constitutional retrogression,”² “democratic backsliding,” “constitutional rot,” and “constitutional crisis.”³ In academic reflection, scholars have not been limited to dealing with the question of “How to Do Constitutional Theory While Your House Burns Down”⁴; they have also been trying to address how to “repair”⁵ constitutional democracies following an illiberal government. The debate on Poland is particularly instructive in this regard. Even countries regarded as “cradles” of liberal constitutionalism have suffered significant blows to their centuries-old structures. One need only think of what Brexit has meant for the UK constitutional system⁶ or the disastrous effects of the two Trump presidencies in the United States.⁷ Scholars are also divided on how to respond to these phenomena. On the one hand, some

¹ See Corrias’s remarks, made only nine years ago, on the lack of interest in populism among scholars of constitutional theory and constitutional law: Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 EUR. CONST. L. REV. 6 (2016): “Constitutional theorists have not devoted a lot of attention to the phenomenon of populism”, at 7. More recently, however, we have seen the publication of some very important volumes, for instance see Mark Tushnet & Bojan Bugarič, *Power to the People: Constitutionalism in the Age of Populism* (Oxford Univ. Press, 2021); Wojciech Sadurski, *A Pandemic of Populists* (Cambridge Univ. Press, 2022). M. Krygier, A. Czarnota, W. Sadurski (eds.), *Anti-Constitutional Populism* (Cambridge Univ. Press, 2022). J.M. Castellà Andreu, M.A. Simonelli (eds.), *Populism and Contemporary Democracy in Europe: Old Problems and New Challenges* (London: Palgrave, 2022).

² For these concepts see Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018). See also Aziz Huq & Tom Ginsburg, *The Comparative Constitutional Law of Democratic Backsliding: A Report on the State of the Field*, Droit Public Comparé, <https://publications-prairial.fr/droit-public-compare/index.php?id=88>.

³ On these concepts see Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147 (2017).

⁴ See Jack M. Balkin, *How to Do Constitutional Theory While Your House Burns Down*, 101 B.U. L. REV. 1723 (2021), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860214.

⁵ See Tom Gerald Daly, *Constitutional Repair: A Comparative Theory*, Constitutional Repair Working Paper Series, No. 2-2023, <https://static1.squarespace.com/static>.

⁶ See Patrick Birkinshaw, *Brexit’s Challenge to the UK’s Unwritten Constitution*, 26 EUR. PUB. L. 29 (2020).

⁷ See Cas Mudde, *Why Is Trump Deploying National Guard Troops to Washington DC?*, THE GUARDIAN (Aug. 13, 2025), <https://www.theguardian.com>.



emphasise the importance of constitutional design;⁸ on the other, some others stress the need to move beyond a purely defensive stance⁹ and to engage with civil society. Arato's studies, for example, illustrate that we cannot expect the courts to do the "dirty work," as they risk eventual capture¹⁰ without the backing of civil society.¹¹ Constitutional scholars have also examined efforts by constitutional courts to adopt new communication strategies,¹² aiming to explain their work to the public and to shield themselves from disinformation. In other words, constitutional courts are becoming more proactive, explaining their role and mission to the public and civil society before populists can frame them in their own terms. Yet how well equipped are the courts for this task, and to what extent does it truly fall within their mandate? Generally, Arato and Cohen's scholarship reminds us that defending the status quo is not enough to counter the erosion of liberal democracy in the face of rising populism:

We doubt that, even in the relatively short run, liberal democracy can be successfully defended by a conservative relation to its contemporary forms, i.e., based on a desired return to liberal parliamentarism or presidentialism as they were in the past. In most places, these systems are under strain, whether due to internal oligarchic tendencies in representative systems, the decline of party representation, or the strong external constraints imposed by globalized capitalism on the ability of democratic states to deliver improvements in social welfare or equal life chances to their populations. We also do not believe that populism in any of its forms can successfully address what we will call three deficits: those of democracy, welfare, and social solidarity.¹³

This is a compelling argument that serves as the foundation for their research, which also provides insightful perspectives on the crisis of liberal constitutionalism (and democracy more broadly). As Gargarella notes in *The Law as a Conversation among Equals*,¹⁴ the relationship between constitutionalism and democracy is not always harmonious;

⁸ See Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy*, 172, Chicago Univ. Press (2018). Giacomo Delledonne, "Cattura" delle corti costituzionali e designazione dei loro componenti: un quadro comparato, *Enacting Policy Paper Series*, No. 1/2022, <https://www.stals.santannapisa.it/sites/default/files>.

⁹ See Ana M. Alteiro, *Reactive vs. Structural Approach: A Public Law Response to Populism*, in *GLOB. CONSTITUTIONALISM*, 270 (2019).

¹⁰ See Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 *EUR. CONST. L. REV.* 48 (2019); see also Davic Kosař & Katarína Šipulová, *Comparative Court-Packing*, 21 *INT'L J. CONST. L.* 80 (2023).

¹¹ See Andrew Arato, *How We Got Here? Transition Failures, Their Causes and the Populist Interest in the Constitution*, 45 *PHILOS. & SOC. CRIT.* 1106 (2019).

¹² See Angioletta Sperti, *Constitutional Courts, Media and Public Opinion* (Oxford: Hart Publishing, 2025).

¹³ See Andrew Arato, *Populism and Civil Society 1* (Oxford Univ. Press, 2022).

¹⁴ See Roberto Gargarella, *The Law as a Conversation Among Equals* (Oxford Univ. Press, 2022).

tensions may arise when constitutionalism constrains the political process. In this light, Loughlin's recent *Against Constitutionalism*¹⁵ represents the latest expression—albeit grounded in different reasoning—of a recurring intellectual current that regards constitutionalism and democracy as (at times contingently, at times structurally) incompatible.¹⁶ Within this body of thought, one finds a variety of positions, ranging from critiques of the exceptional authority vested in judges, especially constitutional courts, to objections to the restrictions that eternity clauses¹⁷ impose on the exercise of constituent power.¹⁸ Such arguments are not new; for instance, in 1992, Negri described constitutionalism as the negation of democracy, precisely because it places limits on majority decision-making.¹⁹

Rather than merely defending the pillars of constitutionalism and liberal democracy, the central question now seems to be how to reactivate the civic energies of civil society—how to transform “mounting distrust into an active democratic virtue”.²⁰ Here too, constitutional lawyers and political scientists have made essential contributions, often emphasising the benefits of deliberative democracy.²¹ This effort also involves reinventing our democracies, perhaps even viewing the most recent wave of populisms as a window of opportunity—provided that we filter some of the proposals put forward by these movements, which are often wrongly perceived as purely negative. However, this approach is feasible as long as the untouchable core of liberal constitutionalism remains intact.²² Yet the high rates of voter abstention that have marked recent popular consultations (whether elections or other popular votes) in many Western countries are hardly encouraging.²³ Perhaps we should ask whether people genuinely wish to be involved.

¹⁵ See Martin Loughlin, *Against Constitutionalism* (Cambridge MA: Harvard Univ. Press, 2022).

¹⁶ See Antonio Negri, *Il potere costituente: Saggio sulle alternative del moderno* (Milano: SugarCo, 1992).

¹⁷ On eternity clauses in comparative law see Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford Univ. Press, 2021).

¹⁸ See Joel I. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* 33 (London & New York: Routledge, 2012) (“Only a conception of constituent power according to which its exercise can be triggered at any moment in the life of a constitutional regime can be made consistent with the basic thrust of the democratic ideal”).

¹⁹ See Negri, *supra* note 17, at 368.

²⁰ See Alberto Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society* 103 (London: Icon Books, 2017).

²¹ For a comprehensive overview of this debate see R. Levy, H. Kong, G. Orr, J. King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, (Cambridge Univ. Press, 2018); A. Bächtiger, J. S. Dryzek, J. Mansbridge, M. D. Warren (eds.), *The Oxford Handbook of Deliberative Democracy* (Oxford Univ. Press, 2018).

²² Giuseppe Martinico, *Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective* (Cambridge Univ. Press, 2021).

²³ G. Delledonne, L. Gori, G. Martinico, F. Pacini (eds.), *Il peso dell'assente: Il fenomeno dell'astensionismo elettorale in Italia* [The weight of the absent: The phenomenon of electoral abstention in Italy] (Soveria Mannelli: Rubbettino, 2025).

This problem is not confined to Europe, as evidenced by the failure of almost all participatory constitutional processes—the most striking examples being those in Chile and Australia.²⁴

While these pages have so far focused on attempting to rationalise a debate with primarily practical consequences, elsewhere I have sought to reflect on the role that international law can play in safeguarding national democracies.²⁵ Here too, however, without retracting what I said on that occasion, international law is not faring well either. It suffices to recall the powerful words spoken a few months ago by the European Court of Human Rights in *Ukraine and the Netherlands v. Russia*:

As noted above, the Court has previously been required to examine applications arising out of situations of conflict in Europe (see paragraph 167 above). However, the events in Ukraine are unprecedented in the history of the Council of Europe. The nature and scale of the violence, as well as the ominous statements concerning Ukraine's statehood, its independence, and its very right to exist, represent a threat to the peaceful co-existence that Europe has long taken for granted. As already explained, this dangerous rhetoric has also on occasion been extended to encompass other Council of Europe member States, including Poland, Moldova, and the Baltic countries. These actions seek to undermine the very fabric of the democracy on which the Council of Europe and its member States are founded by their destruction of individual freedoms, their suppression of political liberties, and their blatant disregard for the rule of law. In none of the conflicts previously before the Court has there been such near universal condemnation of the "flagrant" disregard by the respondent State for the foundations of the international legal order established after the Second World War and such clear measures taken by the Council of Europe to sanction the respondent State's disrespect for the fundamental values of the Council of Europe: peace, as already underlined, but no less importantly human life, human dignity and the individual rights guaranteed by the Convention.²⁶

²⁴Sergio Verdugo, Luis E. García-Huidobro: *How Do Constitution-Making Processes Fail? The Case of Chile's Constitutional Convention (2021–22)* 13 GLOB. CONST. 154 (2024); James Gardiner, *Australia Votes 'No' to Constitutional Recognition of Its First Peoples*, 1 *Costituzionalismo Britannico e Irlandese* 361 (2024).

²⁵Giuseppe Martinico & Diego Mier Galera, *El desafío liberal a la independencia judicial: La contribución de los tribunales internacionales*, 22 INT'L J. CONST. L. 1251 (2024).

²⁶*Ukraine & the Netherlands v. Russia*, (Applications Nos. 8019/16, 43800/14, 28525/20 and 11055/22), par. 177.

Unsurprisingly, similar concerns have also been raised regarding international economic law, particularly WTO law, which is facing a crisis more acute than ever in this era of renewed unilateralism. This crisis in international law inevitably reverberates within domestic constitutional systems, particularly those established after World War II, given that openness to international law forms a fundamental part of their DNA.²⁷

In light of the discussion above, the million-dollar question is how we can safeguard our constitutional democracies. For experts in comparative law, the answer inevitably depends on context. In Europe, one factor that can contribute to “constitutional resilience”²⁸ is undoubtedly membership in a particular legal and political entity, such as the European Union. Indeed, the EU is not merely an external constraint—as its detractors often claim—but an added value to constitutionalism and national democracy.²⁹ Consider, for example, its role in containing illiberal tendencies and counterbalancing the forces of transnational global capitalism, as well as the new rights (and remedies) it provides to individuals through the principle of direct effect.³⁰ And make no mistake: we are not only talking about the rights of economic elites, but also those of the most vulnerable. For example, on 1 August 2025, the Court of Justice of the European Union (CJEU) delivered a significant judgement, ruling that EU law does not preclude a Member State from “designating third countries as safe countries of origin by means of a legislative act, provided that such designation is subject to judicial review—by any national court hearing an action against a decision on an application for international protection examined under the special regime applicable to such countries—of compliance with the substantive requirements set out in Annex I to that directive.”³¹

²⁷Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT’L L. 427, 429 (1994); Antonio Cassese, *Politica estera e relazioni internazionali nel disegno emerso alla Assemblea Costituente*, in *Scelte della Costituente e cultura giuridica. I: Costituzione italiana e modelli stranieri* 505, 519 (U. de Siervo ed., Bologna: Il Mulino, 1980).

²⁸Defined as the “the capacity of a constitutional system to withstand attempts aimed at changing or violating its core elements”, by András Jakab, *Constitutional Resilience*, in Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL] (2021), <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e845?prd=OXCON>.

²⁹Giuseppe Martinico, *Sovranismo giuridico e Unione Europea: Una introduzione* [Legal Sovereignism and the European Union: An Introduction], in G. Martinico, L. Pierdominici (eds.), *Miserie del sovranoismo giuridico: Il valore aggiunto del costituzionalismo europeo* [Poverty of legal sovereignism: The added value of European constitutionalism] 5 (Roma: Castelveccchi, 2023).

³⁰Daniele Gallo, *Direct Effect in EU Law* (Oxford Univ. Press, 2025).

³¹Case C-758/24 *Alace* and Case C-759/24 *Canpelli*, ECLI:EU:C:2025:591 (Aug. 1, 2025) (CJEU). For a first analysis see: Chiara Favilli & Luisa Marin, “Alace and Canpelli: The Court of Justice Firmly Constrains Domestic Extraterritorial Asylum Processing Politics” (Aug. 14, 2025), <https://eulawanalysis.blogspot.com/2025/08/alace-and-canpelli-court-of-justice.html>.

The Italian Presidency of the Council of Ministers responded on President Meloni's social media accounts and on its official website with a highly controversial statement, arguing that such rulings are problematic because they ultimately undermine political decisions.³²

Even before the ruling of the Court of Justice of the EU, one of the political forces of the current Italian government had proposed a constitutional amendment³³ to affirm the primacy of Italian law over European law and prevent judges from disapplying national rules. Although the reform is unlikely to succeed, it illustrates the effectiveness of EU law as a tool for defending fundamental rights and as a limit on the power of majorities.

In particular, the proposed amendments seek to introduce a clear obstacle to the Simmenthal mandate³⁴ by establishing that: "In the course of judicial proceedings, where the judicial authority finds a conflict between a legal provision or an act having the force of law and a directly applicable European rule, it must raise the question of constitutionality."³⁵

These examples reveal several key points: that immigration is primarily framed as a security issue, and that the EU Court of Justice has been remarkably successful over the years in protecting the rights of the most vulnerable, including irregular immigrants, who enjoy fundamental rights. Courts are then attacked or portrayed by populists as dangerous actors for national democracies. In doing so, it is conveniently forgotten—deliberately so—that democracy is not merely the rule of the majority, but also the protection of pluralism and minorities.

This view, which depicts counter-majoritarian actors as anti-democratic, is a fundamental element of what I have elsewhere called *constitutional counter-narratives*.³⁶ By this I mean the instrumental, selective, and manipulative use of constitutional law arguments—a common feature of all populisms, especially authoritarian or illiberal ones.

As so often happens, the ideal enemy is a scapegoat—someone unable to defend themselves. Populisms, particularly illiberal variants, excel at mobilising the masses against minorities, especially those perceived as "different": foreigners are the perfect enemy. To activate and unite the masses, these actors often resort to conspiracy theories. In many speeches—for example, those of Salvini, Le Pen, and Orbán—foreigners

³²"Decision of the Court of Justice of the European Union on Safe Countries, Note from Palazzo Chigi", <https://www.governo.it/it/articolo/decisione-della-corte-di-giustizia-ue-merito-ai-paesi-sicuri-la-nota-di-palazzo-chigi/29389>.

³³"Constitutional Bill No. 1917, 13 June 2024, List of proposed amendments (262) in the First Committee in the relevant chamber published in the Bulletin of the Councils and Committees of 05/11/2024 (no. 396) referring to C. 1917, in order of publication", <https://documenti.camera.it/apps/emendamenti>.

³⁴Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal*, ECLI:EU:C:1978:49 (Mar. 9, 1978) (CJEU).

³⁵See amendments 7.02 and 7.03, published on 5 Nov. 2024, <https://documenti.camera.it/apps/emendamenti>.

³⁶See Martinico, *supra* note 24.

are portrayed as invaders who seek to take away “our” values and replace us. The “great replacement” theory is a recurring theme.³⁷ This phenomenon, of course, is not confined to Europe.

Nevertheless, even the EU is not immune, in the long term, to the perilous advance of regressive forces that are gaining traction at the national level. This vulnerability arises from the inherently political, not simply technocratic, nature of the Union. If, in many democracies, the forces that win elections are extremists (mainly, far-right movements),³⁸ it is reasonable to expect that such trends will eventually influence the composition and orientation of supranational structures as well. This is why, at least on the European continent, the preservation of national democracies depends on our ability to defend the EU against the rampant illiberalism that seems to be spreading everywhere. This issue is the focus of a fascinating book recently written by András Jakab, a judge of the European Court of Human Rights, and Lando Kirchmair.³⁹ It is a truly remarkable volume, which I highly recommend to our readers. The argument may seem paradoxical, given that the EU has often been accused of contributing to depoliticisation and has been characterised by a democratic deficit.⁴⁰ Yet there is also what I would call a cultural battle, one that involves reclaiming specific terms and concepts—such as identity, people, and sovereignty—that, while central to the vocabulary of democracy, are increasingly monopolised by the champions of illiberal populism. This represents the first major pitfall of this complex phenomenon: the emptying of the language of democracy.

It is no coincidence, then, that the European Union is being targeted by the enemies of liberal democracy (and democracy tout court). Consider the harsh words spoken by President Trump and Vice President Vance against the European Union on numerous public occasions, which are reiterated in the United States’ 2025 National Security Strategy.⁴¹ In this document, the EU is criticised for undermining political liberty and national sovereignty, suppressing free speech, and enforcing overregulation. It warns that, if current trends continue, some EU countries may struggle to remain strong and reliable allies, and calls for Europe to regain its self-confidence and preserve

³⁷Renaud Camus, *Le Grand Remplacement* (Paris: David Reinharc, 2011).

³⁸However, I have tried to explain why illiberalism can also be fueled by extreme left-wing forces: Giuseppe Martinico, *Populists in Power and Constitutional Counternarratives*, 45 *CARDOZO L. REV.* 1527 (2024).

³⁹András Jakab & Lando Kirchmair, *Saving the European Union from Its Illiberal Member States* (Oxford Univ. Press, 2025).

⁴⁰On this debate see Andreas Follesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 *J. COMMON MKT. STUD.* 533 (2006); R. Daniel Kelemen, *Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union*, 52 *GOV’T & OPP.* 211 (2017).

⁴¹For a deeper analysis of the topic see “National Security Strategy of the United States of America”, <https://www.whitehouse.gov/wp-content/uploads/2025/12/2025-National-Security-Strategy.pdf>.

its civilisational identity. The argument that the EU is a threat to freedom of expression has also been used recently by Elon Musk.⁴² This shows that champions of authoritarian culture have appropriated concepts and terms belonging to the language of constitutionalism. Musk also called for the abolition of the EU, an appeal that was echoed by Medvedev and Putin. This is clearly a strategic choice that reinforces the legitimacy of EU law in the eyes of those who value constitutional democracy.

Giuseppe Martinico

*Full Professor of Comparative Public Law
Sant'Anna School of Advanced Studies, Italy*

⁴²See “ ‘Abolish the EU’: Elon Musk clashes with Europe over X’s transparency violations.” FRANCE 24, 9 December 2025, <https://www.youtube.com/watch?v=ePjZQQmrnq0>.