POPULISTS IN POWER AND CONSTITUTIONAL COUNTERNARRATIVES

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In this essay I shall comment on A Pluralist Theory of Constitutional Justice *by Professor Michel Rosenfeld, by developing three points that have to do with the legacy of Carl Schmitt's constitutional theory. The first is about the progressive weaponization of constitutional law that characterizes what I call the populist constitutional counternarrative. In particular, I will explore how populists in power use constitutional law. The second point has to do with the notion of constituent power in a context of comprehensive pluralism. The third point is about the relationship between constitutionalism and political theology. The intuition behind this is that populisms (in the plural) have evolved, so to speak, to the point of constructing a true constitutional counternarrative. By constitutional counternarrative, I mean the abuse of the categories of constitutional theory and the tools of constitutional law with the aim of manipulating the wording of constitutional provisions.*

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INTRODUCTION

Commenting on *A Pluralist Theory of Constitutional Justice*[2] by Professor Michel Rosenfeld is a daunting task. Undoubtedly this is a powerful book, a very inspiring read, and a welcome contribution, which represents the outcome of a long journey.

For the purposes of this Article, I shall identify some points in an attempt to do justice to the many aspects of this volume. Given the richness of the book, these considerations will inevitably be incomplete and selective, and I am fully aware of this. I am going to focus on chapters four (mainly) and eight in order to develop three points that have to do with the legacy of Carl Schmitt's constitutional theory.

The first point is about the progressive weaponization of constitutional law, which characterizes what I call the populist constitutional counternarrative. In particular, I will explore how populists in power use constitutional law (Parts I and II). The second point has to do with the notion of constituent power in a context of comprehensive pluralism (Part III). The third point is about the relationship between constitutionalism and political theology (Part IV). The intuition behind this Article is that populisms (in the plural) have evolved, so to speak, to the point of constructing a true constitutional counternarrative. By constitutional counternarrative I mean an abuse[3] of the categories of constitutional theory and the tools of constitutional law with the aim of manipulating the wording of constitutional provisions.

I. THE "EROSION FROM WITHIN": CONSTITUTIONAL LAW AND POPULISTS

"Populism" is a key word in the book. It is mentioned thirty times, and the word "populist" is used thirty-four times. For Rosenfeld, "[p]opulism both on the right and on the left is illiberal in nature."[4] Illiberalism can be defined only in a negative manner (or, better, in a relational manner), in the sense that, in order to understand what

2 MICHEL ROSENFELD, A PLURALIST THEORY OF CONSTITUTIONAL JUSTICE (2022).

3 David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191 (2013) ("Abusive constitutionalism involves the use of the mechanisms of constitutional change—constitutional amendment and constitutional replacement—to undermine democracy. While traditional methods of democratic overthrow such as the military coup have been on the decline for decades, the use of constitutional tools to create authoritarian and semi-authoritarian regimes is increasingly prevalent.").

4 *See* ROSENFELD, *supra* note 2, at 136.

illiberalism means, it is first of all necessary to clarify what one means by liberalism.

Illiberalism is also a dynamic concept, and therefore refers to a situation of transition, in the sense that it refers to a detachment or a partial divergence from liberal values.

Against this background, it is interesting to note the approach that distinguishes between illiberalism and anti-liberalism. This approach is taken by, for instance, Neil Walker, according to whom "illiberalism views the purpose and priorities of government by other standards, according to which liberal values are treated as secondary and at least in some measure dispensable."[5]

To understand what secondary value means in this context, it is useful to make reference to Carl Schmitt and his view on rights. Although Schmitt was not a fan of the Constitution of the Republic of Weimar, to a certain extent he tolerated its second principal part, that devoted to rights.[6] As Lars Vinx put it, for Schmitt:

> [L]iberal rights were to be respected, as the German people had chosen to create a liberal constitution, but only on the condition that public order and security had been secured. For Schmitt, individual freedoms, even where constitutionally guaranteed, are to be regarded as concessions of the state to the individual since they are subject, in the last instance, to suspension through a sovereign decision on the exception.[7]

Since for Schmitt the Weimar Constitution was above all a political decision, it made sense to protect rights since the German people had decided to preserve them by means of the constitution, but this did not make rights untouchable vis-à-vis the political. In this sense, they were secondary values when compared to other constitutional goods.[8] The

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5 Neil Walker, *Illiberalism and National Sovereignty*, *in* THE ROUTLEDGE HANDBOOK OF ILLIBERALISM 250 (András Sajó, Renáta Uitz & Stephen Holmes eds., 2022).

6 BENJAMIN A. SCHUPMANN, CARL SCHMITT'S STATE AND CONSTITUTIONAL THEORY: A CRITICAL ANALYSIS 174–76 (2017) ("It may surprise that Schmitt defended the Weimar Constitution at all, let alone the Second Principal Part guaranteeing basic rights. It flies in the face of almost everything known about him: that Schmitt is the paradigmatic twentieth-century illiberal and that illiberalism is the defining feature of his thought. Schmitt is often accused of being 'relentlessly' illiberal; others dismiss him as, at best, opportunistically or 'ironically' liberal. . . . Schmitt suggests that he could accept a liberalism that was consciously political and fought against its Enemies' attempts at insurrection and revolution of its order.").

7 Lars Vinx, *Carl Schmitt*, THE STANFORD ENCYCLOPEDIA OF PHIL. (Aug. 29, 2019), https://plato.stanford.edu/entries/schmitt [https://perma.cc/5RUM-Y9DH].

8 ROSENFELD, *supra* note 2, at 137 ("Schmitt's condemnation of liberalism and its associated individualism is by no means limited to a rejection of the latter's insistence on keeping law above

reference to Schmitt is therefore very useful when trying to understand the core of illiberalism, even if not all scholars agree on his role in the history of this phenomenon.[9]

If illiberalism refers to a transition, it is not predefined whether or not this divergence from a liberal system is functional to the transformation into an anti-liberal system. Since illiberalism refers to a deviation from liberal values, it is perhaps worth trying to identify some concrete, dangerous signs that may indicate such a shift. Without claiming to be exhaustive, one could argue that, in an illiberal regime, sovereignty is perceived in a closed and holistic manner, as if it were the reflection of a static identity rooted in a mythical past and nourished by traditional values.

Having clarified how illiberalism should be understood for the purpose of this Article, we can now move on to the relationship between populism and constitutionalism.

How do populist leaders approach constitutions? Constitutional law scholars have traditionally answered this question by focusing mainly on the phenomena of unconstitutional constitutional amendments[10] or the abuse of emergency powers.[11] These are important phenomena, but in my view, they represent only the tip of the iceberg. This is particularly true in established democracies, where the erosion of the countermajoritarian chains of constitutionalism often occurs in a more subtle manner, as Professor Rosenfeld points out: "[P]opulist illiberalism changes the liberal constitution from within, and does so, for the most part, by turning the means provided by the liberal constitution against the latter."[12] These words reveal that, contrary to what one might intuitively think, illiberal populists are interested in constitutional law, since they want to make it part of their political strategy.

Building upon this enlightening passage, I shall argue that populists have different strategies, when approaching the constitutional text, that do not necessarily lead to explicit and total rejection. They can, for

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politics. Instead, Schmitt accuses liberalism of engaging in a much more radical project consisting in minimizing the state and in eliminating politics.").

9 *See* Laetitia Houben, *Carl Schmitt: The Ultimate Illiberal?*, 15 EUR. CONST. L. REV. 599 (2019) (reviewing SCHUPMANN, *supra* note 6).

10 Using a concept described in YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 5–8 (2017).

11 *See* Patrick Gardiner, *Conflating the Powers of the Commissarial and the Sovereign Dictator in Tunisia*, VERFASSUNGSBLOG (Nov. 29, 2022), https://verfassungsblog.de/conflating-the-powers-of-the-commissarial-and-the-sovereign-dictator-in-tunisia [https://perma.cc/S29M-AJMS].

12 *See* ROSENFELD, *supra* note 2, at 16.

example, formally follow the constitutional amendment procedure to change the text. This is obviously an instrumental approach to the amendment. We know in fact that populists do not normally acknowledge the distinction between constitutional and nonconstitutional politics, and this reveals a sort of legal skepticism that can be traced back to what Paul Blokker calls "legal resentment," which "refers to a critique of what is perceived as an excessive or skewed form of legalism."[13] The "regeneration of the people"[14]—as stressed by Andrew Arato—occurs by instrumentalizing constitutional categories, and is connected to populism's tendency "to occupy the space of the constituent power."[15] This also explains why populists tend to perceive limits and procedures as obstacles in the path of establishing the democratic principle.

This was the case in Italy when the *MoVimento 5 Stelle* (Five Star Movement) managed to get parliament (with the ambiguous support of part of the *Partito democratico*) to approve a reduction in the number of its members. Indeed, the recently approved Italian reform that reduces the number of representatives is characterized by a punitive approach to institutions in the name of a relatively small economic saving. It is not the first time that the number of representatives has been changed,[16] but the reasons why this has been done now are questionable. The Five Star Movement accused the Italian parliament of being overrepresentative and inefficient, but, despite their argument, Italy was not an exception from the standpoint of comparative law.[17]

However, populists do not always succeed in amending the constitution and, indeed, amendment is not the only strategy used by them to attack the constitution. As Pietro Faraguna highlighted:

> Populists in power usually stay away from constitutional amendment and tend to prefer constitutional replacement, or unilateral major constitutional changes, as in the cases of Venezuela, Ecuador and

13 Paul Blokker, *Populism and Illiberalism*, *in* THE ROUTLEDGE HANDBOOK OF ILLIBERALISM, *supra* note 5, at 261, 265.

14 Andrew Arato, *Political Theology and Populism*, 80 SOC. RSCH 143, 148 (2013).

15 Andrew Arato, *How We Got Here? Transition Failures, Their Causes, and the Populist Interest in the Constitution*, 45 PHIL. & SOC. CRITICISM 1106, 1111 (2017).

16 Emanuele Rossi, *Il numero dei parlamentari in Italia, dallo Statuto albertino ad oggi*, *in* MENO PARLAMENTARI, PIÙ DEMOCRAZIA? SIGNIFICATO E CONSEGUENZE DELLA RIFORMA COSTITUZIONALE 17 (Emanuele Rossi ed., 2020).

17 Giacomo Delledonne, *Un'anomalia italiana? Una riflessione comparatistica sul numero dei parlamentari negli altri ordinamenti*, *in* MENO PARLAMENTARI, PIÙ DEMOCRAZIA? SIGNIFICATO E CONSEGUENZE DELLA RIFORMA COSTITUZIONALE, *supra* note 16, at 55.

> Turkey . . . Constitutional replacement may be preceded by specific amendments, removing any possible constitutional hurdles to the populist project of constitutional replacement. This was the case in Hungary. However, constitutional amendment is not always available as a constitutional tool . . . serving populists' projects of constitution-making.[18]

If populists in power do not manage to pursue the route of constitutional amendment, they may follow other strategies. For instance, populist leaders may more obviously attack particular portions of the constitutional framework by selectively contesting certain provisions without openly rejecting the entire constitution as such. Silvio Berlusconi was a pioneer in adopting such a confrontational approach to the constitution, and his example is also very interesting for understanding some of the aspects that have characterized the Trump presidency in the United States. For instance, in 2003, Berlusconi attacked Article 41 of the Italian Constitution[19] concerning the right to economic initiatives, maintaining that this constitutional provision was Soviet inspired: "I have also repeatedly publicly complained that our Basic Law gives little room for companies . . . . The wording of Article 41 et seq. is affected by Soviet implications which refer to the Soviet culture and constitution."[20]

In 2009, Berlusconi publicly asserted that "the Constitution is a law made many years ago under the influence of the end of a dictatorship and with the presence at the [drafting] table of ideological forces that considered the Russian Constitution as a model from which to take numerous indications."[21] These are just some examples of the systematic attacks made by Berlusconi on the Italian Constitution.[22]

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18 Pietro Faraguna, *Populism and Constitutional Amendment*, *in* ITALIAN POPULISM AND CONSTITUTIONAL LAW: STRATEGIES, CONFLICTS AND DILEMMAS 97, 105 (Giacomo Delledonne, Giuseppe Martinico, Matteo Monti & Fabio Pacini eds., 2020).

19 ART. 41 COSTITUZIONE (COST.) (It.) ("Private economic enterprise shall have the right to operate freely. It cannot be carried out in conflict with social utility or in such a manner as may harm health, the environment, safety, liberty and human dignity. The law shall determine appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and coordinated for social and environmental purposes.").

20 *Berlusconi: "La Costituzione è di ispirazione sovietica,"* LA REPUBBLICA (Apr. 12, 2003), https://www.repubblica.it/online/politica/berluparla/torino/torino.html [https://perma.cc/2LXK-PMH4] (translation by author).

21 *Berlusconi: "Costituzione ideologizzata,"* CORRIERE DELLA SERA (Feb. 7 2009), https://www.corriere.it/politica/09_febbraio_07/berlusconi_costituzione_bd1e8990-f53f-11dd-a70d-00144f02aabc.shtml [https://perma.cc/LBQ4-E9WA] (translation by author).

22 On Berlusconi's approach to constitutional politics, see ALESSANDRO PIZZORUSSO, LA COSTITUZIONE FERITA (1999).

Similar dynamics can be found in the United States during the presidency of Donald Trump. Trump defined the U.S. constitutional system as a "very rough system . . . an archaic system," and then added that "[i]t's a really bad thing for the country,"[23] blaming the Constitution for limiting his authority.

At the same time, this confrontational approach does not exclude dynamics aimed at instrumentalizing the Constitution, arguing in favor of its selective application only in certain cases, following a logic according to which the Constitution is applied differently depending on whether the interlocutor is seen as a friend or an enemy of the people. The most interesting case concerns precisely the First Amendment: indeed, Trump considered those who challenged his position as enemies of the people, riding on an attitude that was anything but pluralist.[24]

As commentators noted,

> [H]is feud with Twitter is another example of the ways in which the president has routinely distorted the principles of the First Amendment in order to undermine the very freedoms he claims to be championing—as well as American democracy more broadly . . . . Trump attacked Twitter, accusing it of stifling 'free speech' and threatened to take measures to strongly regulate social media platforms or to potentially close them down entirely.[25]

Moreover, in his speeches he insisted on the idea that enemies of the people should not be allowed to benefit from the First Amendment:

> One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other

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23 Benjamin Kentish, *Donald Trump Slams 'Archaic' US Constitution that Is 'Really Bad' for the Country*, THE INDEPENDENT (May 1, 2017, 8:56 AM), https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-us-constitution-archaic-really-bad-fox-news-100-days-trump-popularity-ratings-barack-obama-a7710781.html [https://perma.cc/LCS8-CBJH].

24 ROSENFELD, *supra* note 2, at 136 ("Schmitt insists that pluralism is flatly incompatible with politics. Accordingly, the only kind of democracy that seems genuinely capable of achieving legitimacy within the bounds of Schmittian politics is democratic populism. Democratic populism is built on the friend/enemy model, with the 'people' being defined as including part of the polity's citizenry against both internal and external 'enemies.'" (citation omitted)).

25 Eliza Bechtold, *Donald Trump's Attacks on Social Media Threaten the Free Speech Rights of all Americans*, THE CONVERSATION (May 29, 2020, 9:01 AM), https://theconversation.com/donald-trumps-attacks-on-social-media-threaten-the-free-speech-rights-of-all-americans-139588 [https://perma.cc/TQF6-VVH5].

> reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected.[26]

The argument runs that if the First Amendment does not apply to enemies of the people, it certainly applies to those who speak on behalf of the people and, in particular, its leader. Indeed, the First Amendment was recalled by his defense after the events on Capitol Hill and this argument is also present in the trial memorandum, in which it was argued that:

> Aside from the fact that it does not constitute a crime, let alone a high crime or misdemeanor, President Trump's speech at the January 6, 2021, event fell well within the norms of political speech that is protected by the First Amendment, and to try him for that would be to do a grave injustice to the freedom of speech in this country. Perhaps in realization that Mr. Trump's speech was clearly within the bounds the protections afforded by the First Amendment, the House Managers attempt to erect artificial roadblocks to prevent the Senate from even considering First Amendment principles in these impeachment proceedings. These efforts—as fully discussed below—are complete sophistry that should be rejected by the Senators, who are duty bound to consider and apply the First Amendment.[27]

These examples reveal how Trump's approach to the Constitution is instrumental and cherry-picked in nature. They clearly reveal a sort of double standard according to which constitutional freedoms apply to those who belong to his political faction (who are understood to be "the real people").

However, the instrumental use of amendments and the selective application of the constitution are just two examples of how populists in power use constitutional law to erode the system "from within." More frequently—and this is my interpretation of Professor Rosenfeld's caveat about how dangerous populists are for democracy—populists in power try to legitimize themselves before the constitution.

Elsewhere,[28] I have tried to describe this approach by relying on the concepts of mimetism and parasitism. Parasitism is not a new concept in

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26 Hadas Gold, *Donald Trump: We're Going to "Open Up" Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 [https://perma.cc/8R5B-E58J].

27 Trial Memorandum of Donald J. Trump, 45th President of the United States of America at 37–38, *In re* Impeachment of Former President Donald J. Trump (2021), https://context-cdn.washingtonpost.com/notes/prod/default/documents/9fc7df1f-2945-4be7-80bc-7e0f928c78b2/note/4430abec-b677-4bfd-9232-d45145aca1cb.#page=1 [https://perma.cc/7VAX-YRTK].

28 GIUSEPPE MARTINICO, FILTERING POPULIST CLAIMS TO FIGHT POPULISM: THE ITALIAN CASE IN A COMPARATIVE PERSPECTIVE 11 (2021).

the field of studies on populism: scholars have already used this analogy to describe how populism can affect the equilibria of constitutional democracy.[29] Mimetism here describes how populist leaders endeavor to present themselves as consistent and compatible with the language of constitutionalism or, in other words, how they hide behind the words of the constitution in order to legitimize their claims.

An example of this approach is a speech given by the Five Star Movement leader Giuseppe Conte at the UN in 2018. Giuseppe Conte is also a law professor, and this is not a mere detail. On that occasion he tried to find a basis for populism and souverainism in Article 1 of the Italian Constitution.[30]

In this way, populists contribute to the creation of a constitutional counternarrative by manipulating the categories of constitutional theory and the instruments of constitutional law. In this respect, from a normative point of view, Professor Rosenfeld's comprehensive pluralism offers many arguments to challenge their constitutional counternarrative. However, Professor Rosenfeld's book is also important because it represents an important "wake-up call" for constitutional theorists and constitutional lawyers who have, for too long, left the study of populisms to scholars from other disciplines.[31] Indeed, populisms are, in my

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29 Benjamin Arditi, *On the Political: Schmitt Contra Schmitt*, 142 TELOS 7, 20 (2008); Nadia Urbinati, *Democracy and Populism*, 5 CONSTELLATIONS 110, 110 (1998); Theo Fournier, *From Rhetoric to Action, A Constitutional Analysis of Populism*, 20 GERMAN L.J. 362, 364 (2019).

30 On that occasion he argued that: "When some accuse us of souverainism or populism, I always enjoy pointing out that Article 1 of the Italian Constitution cites sovereignty and the people, and it is precisely through that provision that I interpret the concept of sovereignty and the exercise of sovereignty by the people." Giuseppe Conte, Prime Minister of Italy, Remarks to the 73rd Session of the United Nations General Assembly (Sept. 26, 2018), http://www.voltairenet.org/article203153.html [https://perma.cc/UKN6-ZHFY]. Here, we can see an attempt to find a reading consistent with the text of the Italian Constitution by stretching, at the same time, some of its key concepts and—most importantly—exercising a sort of cherry-picking approach to the constitution. Indeed, when referring to Article 1 of the Italian Constitution, populists tend to mention only a part of the relevant provision (the part recognizing the principle of "popular sovereignty") in order to find confirmation of their majoritarian approach to the fundamental charter, and to reinforce the false dichotomy between themselves (the people voted in by the people) and the "others." In so doing, they tactically omit the fact that the same Article 1 of the Italian Constitution subsequently makes it clear that popular sovereignty should be understood as being limited by the constitution itself, as the provision reads: "Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution." ART. 1 COSTITUZIONE (COST.) (It.).

31 Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 EUR. CONST. L. REV. 6, 7 (2016) ("Constitutional theorists have not devoted a lot of attention to the phenomenon of populism . . . . There may be two interpretations of this silence. Either constitutional theory has nothing to say about populism, in which case the

opinion, interesting to constitutionalist law scholars for at least three reasons: extreme majoritarianism, the politics of immediacy, and identity politics.

Extreme majoritarianism refers to the way in which populists perceive constitutional constraints. For them, constitutions are straitjackets and obstacles to the fulfilment of the will of the people, the real democracy. By arguing in this way, populists create a false dichotomy between democracy and constitutionalism, and understand constitutionalism as a *dispositif* of depoliticization. How do populists attack the constitution in this context? By rehabilitating the concept of constituent power. I shall return to this point later.

The politics of immediacy, as Luigi Corrias called it,[32] refers to the issue of the centrality of a parliament and how populists question it by galvanizing the tools of direct democracy, in particular referenda. Consider, for example, how Theresa May used the Brexit referendum to destabilize the British Parliament. Think of the speech that Theresa May gave to the nation in 2019, in which she accused members of the British Parliament of delaying the Brexit process.[33]

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silence is justified, or constitutional theory does have something to say, in which case the silence is unjustified and (potentially) problematic.").

32 *Id.* at 19 ("What I have called a 'politics of immediacy' often shows itself in a plea for the means of direct democracy (e.g. referenda): these serve to get confirmation from 'the people' for what is, according to the populist, a fortiori the only morally right political position. Again, I argue that this aspect of the constitutional theory of populism is not in accordance with contemporary constitutional theory. It fails to take into account the constitutive role of representation in a democracy.").

33 The strategy undertaken by the May government, which came to power soon after the referendum that was held on June 23, 2016, was clear in wanting to automatically (that is, without parliamentary mediation) decide to notify its intention to leave the EU. In this way, an attempt was made to centralize the issue, justifying the possible exclusion of parliament on the basis of democratic principle. This is also confirmed by May's March 20, 2019, statement on Brexit, which has many populist traits due to its Manichean and moralistic "us" versus "them" approach that rejects mediation and is based on the leader-people continuum ("I am on your side"): "In March 2017 I triggered the article 50 process for the UK to exit the EU and parliament supported it overwhelmingly. Two years on, MPs have been unable to agree on a way to implement the UK's withdrawal. As a result, we will now not leave on time with a deal on 29 March." Theresa May, Prime Minister of the United Kingdom, Statement on Brexit (Mar. 20, 2019), https://www.gov.uk/government/speeches/pm-statement-on-brexit-20-march-2019 [https://perma.cc/SEW3-DSGK]. After having sought "immediate contact" with "the people", the then British Prime Minister identified parliamentary institutions as being solely responsible for the delay and "betrayal" of the "people's mandate" that arose from the result of the Brexit referendum. This was a "betrayal" that, in May's rhetoric, frustrated not only the people, but also the then Prime Minister who seemed to identify with them almost completely: "This delay is a matter of great personal regret for me. And of this I am absolutely sure: you the public have had enough. You are tired of the infighting. You are tired of the political games and the arcane procedural rows. Tired of MPs talking about nothing

Identity politics is often codified in constitutions and emphasized in illiberal constitutions. This is the case of Article R.4 of the Hungarian Basic Law, according to which "[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State."

Another striking example is provided by certain provisions of the Russian Constitution of 1993, as amended in 2020. Articles 67.1(2) and (3), introduced in 2020, provide that "the Russian Federation, united by thousand-year history . . . *honours the memory of defenders of the Fatherland, provides protection of the historical truth. Diminution of the heroic deed of the people defending the Fatherland is precluded.*"[34] These lines remind us of the fight for the monopoly of the public use of history in Russia and how important this is for Putin's political strategy.[35]

More generally, these provisions are very telling of the progressive weaponization of constitutional law and of the codification of the image of the enemy in these contexts,[36] in the sense that these values are set in

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else but Brexit when you have real concerns about our children's schools, our National Health Service, knife crime. You want this stage of the Brexit process to be over and done with. I agree. I am on your side. It is now time for MPs to decide. . . . Do they [MPs] want to leave the EU with a deal which delivers on the result of the referendum—that takes control of our money, borders and laws while protecting jobs and our national security? . . . It is high time we made a decision. So far, Parliament has done everything possible to avoid making a choice." *Id.* Finally, in the passage quoted one can also find a form of self-absolution on the part of the then Prime Minister for having tried to keep the country united while—in the narrative deployed by populists—parliamentary uncertainties were splitting it.

34 For an in-depth analysis of this reform, see Caterina Filippini, *L'introduzione in Russia del procedimento di modifica della Costituzione in deroga*, 2 F. DI QUADERNI COSTITUZIONALI RASSEGNA 878, 897 (2020).

35 NICOLAS WERTH, POUTINE: HISTORIEN EN CHEF (2022).

36 Attila Antal, *The Constitutionalised Image of Enemy in the Hungarian Fundamental Law* 5–6 (Univ. of Copenhagen, Faculty of L., iCourts Working Paper No. 311, 2022) ("The defining characteristic of the Hungarian Fundamental Law is its strong constitutional identity: the political identity of the supermajority has become constitutionalized. This identity image has a number of positive elements (i.e., elements that have been defined as desirable, a kind of fundamental characteristic of the public law system). These include Christianity, active memory politics, national cohesion, various aspects of sustainability. . . . [I]n addition to the explicitly strong positive constitutional identity elements, the constitutional power intended that negative identity elements should be at least as strong as the positive ones (in many ways even stronger and more important in the daily political struggles relying constitutional identity). . . . [T]he negative constitutional identity has been presented in the original constitutional conception, which started to unfold in 2010, but also since 2015 (embedded in the amendments to the Fundamental Law) the constitutional enemy formation pervades public law and political debates. Three basic strands of Constitutionalised Image of Enemy (CIE) have emerged (and this reflects the constitution-power's view of history and the past): (1) anti-Communism framed in actual political framework; (2) anti-immigration; (3) anti-gender as the opposition to non-heterosexual forms of coexistence.").

stone in the constitution and are used against those who are not seen as part of the true "people." These provisions pave the way for the creation of an identitarian public law. Identitarian public law makes instrumental use of moral argument, historical argument, and religious argument. It is based on an organicist reading of the concept of the people.

In this context, the constitution becomes, above all, an instrument of government that loses its countermajoritarian flavor, and constitutionalism is perceived as a device for depoliticization that places obstacles in the way of the sovereign will of the people. Rights are perceived as factors of fragmentation that undermine solidarity and community values. The result of these considerations can be labelled identitarian public law because of the importance of identity politics and homogeneity to such a conception.

II. IDENTITARIAN PUBLIC LAW IN ACTION: THE COMBINATION OF IDENTITY AND SOVEREIGNTY

Examples of the populist constitutional counternarrative can be found in the way constitutional clauses on the cession of sovereignty are interpreted in connection with participation in international or, where there are specific clauses, supranational organizations. In these cases, sovereignty is interpreted as if it were only a shield that is unilaterally activated to protect the national interest (whatever that means[37]); the fact that, in post-totalitarian constitutionalism, sovereignty is not only a shield but is also, and above all, a key that allows participation in multilateral organizations, is forgotten. In other words, while sovereignty in post-totalitarian constitutionalism is open, in the reconstruction supported by populist forces it is presented as if it were a closed and holistic concept. The tragedies of World War II had a clear impact on the way sovereignty was conceived in traditional political theory,[38] with particular regard to constitutional politics, which experienced a profound

37 On the ambiguity of national interest, see SERENA GIUSTI, THE FALL AND RISE OF NATIONAL INTEREST: A CONTEMPORARY APPROACH (2022).

38 JEAN BODIN, THE SIX BOOKS OF THE COMMONWEALTH (Julian H. Franklin trans., 1992). When recalling Bodin as the theorist of an absolutist and undivided concept of sovereignty, one should also take into account the particular historical context in which his theory emerged. *See* Edward Andrew, *Jean Bodin on Sovereignty*, 2 REPUBLICS LETTERS 75, 78 (2011) ("Bodin's theory of sovereignty responded to a number of pressing problems of his time and place besides the moderation of religious conflict between the Huguenots and the Catholic League. Bodin was also concerned to establish the independence of sovereign states from claims of overlordship by the Holy Roman Empire and the papacy.").

rethinking of "positivist sovereignty."[39] The rejection of nationalism and war[40] have transformed sovereignty, making it less absolute[41] and more relational. Indeed, this context has led to the overcoming of the traditional concept of sovereignty "referring to the conjunction of a (sovereign) claim to final, absolute, and singular political authority and a (national) cultural project that fosters a sense of identity and common cause consistent with the sustenance of such an ambitious authority claim."[42]

Another mantra of the populist constitutional counternarrative consists in the use of the argument of constitutional identity, based on the textual reference to the duty to respect national identities.[43]

Sometimes sovereignty and constitutional identity are used by populists in conjunction, as if they were twin notions. An emblematic example of this is the famous Hungarian Constitutional Court ruling on asylum seekers in 2016. It is therefore worth analyzing the offending passage of the Hungarian Constitutional Court's ruling and then pointing out its inconsistencies and manipulative contours. This was a ruling on the subject of asylum, in which the constitutional judges were asked to interpret the constitutional text with reference to Council Decision (EU) 2015/1601 of 22 September 2015.[44] In the words of the Court:

> According to Article 4(2) TEU, "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

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39 LUCIA RUBINELLI, CONSTITUENT POWER: A HISTORY 141–42 (2020) ("Positivist sovereignty, they maintained, raised two sets of problems. The first was methodological in scope, as positivist accounts of sovereignty failed to take into consideration the nonlegal origins of the legal and political system. If sovereignty was to be considered as an attribute of the legal order, how could the creation and validity of the latter be explained? The second set of issues was more directly political and pragmatic. It pointed out that legal definitions of sovereignty reduced all political issues to questions of jurisprudence and legal interpretation. As a consequence, they were unable to account for the involvement of the people in politics, and thus somehow prevented it.").

40 See the chapters included in CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II: AN EXAMINATION OF SIGNIFICANT ASPECTS OF POSTWAR PUBLIC LAW WITH PARTICULAR REFERENCE TO THE NEW CONSTITUTIONS OF WESTERN EUROPE (Arnold J. Zurcher ed., 1955).

41 BODIN, *supra* note 38, at 1 ("Sovereignty is the absolute and perpetual power of a commonwealth . . . .").

42 Walker, *supra* note 5, at 251.

43 Consolidated Version of the Treaty on European Union art. 4, ¶ 2, June 7, 2016, 2016 O.J. (C 202) 18 [hereinafter Treaty on European Union].

44 Council Decision (EU) 2015/1601 of 22 Sept. 2015, Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, 2016 O.J. (L 248) 80.

> The protection of constitutional identity should be granted in the framework of an informal cooperation with EUC based on the principles of equality and collegiality, with mutual respect to each other, similarly to the present practice followed by several other Member States' constitutional courts and supreme judicial bodies performing similar functions.
>
> The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution—as required by Article R) (3) of the Fundamental Law . . . . The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law—it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty—Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. *Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.*[45]

In this passage, the Hungarian Constitutional Court takes as its starting point Article 4.2 of the Treaty on European Union (TEU), which mentions the concept of "national identity," but then, however, uses the concept of "constitutional identity," coupling this with the need to preserve national sovereignty (a term not employed by the letter of Article 4 of the TEU). Finally, the Hungarian Constitutional Court reads the concept of constitutional identity in light of Article R.3 of the Hungarian Constitution, thereby offering an alternative reading of the same term. In so doing, the Hungarian Constitutional Court knowingly ignores the fact that respect for national identity must necessarily be read in conjunction with Article 4.3 of the TEU, which codifies the principle of sincere cooperation.

On closer inspection, in fact, it could be said that the reference to respect for national identity makes the principle of sincere cooperation bilateral, understanding the latter not only to refer to the duty to

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[45] Alkotmánybíróság (AB) [Constitutional Court] Nov. 30, 2016. 22/2016, ¶¶ 62–64, 67 (Hung.) (emphasis added).

implement EU law, but also to imply the obligation to respect the constitutional structure of national systems. This is an integration that offers interesting hermeneutical perspectives, even if some authors have expressed skepticism as to the real impact of these combined provisions (Articles 4.2 and 4.3 of the TEU) on the jurisprudence of the Court of Justice.[46] There are then textual elements that contradict the Hungarian Constitutional Court's reconstruction, particularly the confusion made between national identity and constitutional identity, with the latter not being mentioned in the letter of Article 4.2 of the TEU. Much has been written on this last point—the Court of Justice itself, moreover, seems to use the two formulae in a fungible manner—but some authors have challenged this reconstruction.[47] These considerations bring us back to another key word used by the Hungarian Constitutional Court—that of sovereignty—which is not a concept that is mentioned in the letter of Article 4.2 of the TEU and is only partly implicitly protected by it, but is extolled by the Hungarian judges, not coincidentally given the sovereignist rhetoric that characterizes Viktor Orbán's thinking.[48] In other words, the alternative reading of national identity offered by the

46 MARCUS KLAMERT, THE PRINCIPLE OF LOYALTY IN EU LAW 84 (2014).

47 Elke Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, 45 NETH. J. LEGAL PHIL., no. 2, 2016, at 82, 83–84 ("This article swims against the tide. It defies the conflation of national and constitutional identity prevalent in European constitutionalism. To this end, it makes three central points. First, it is submitted that the said conflation is not founded on a solid theory of legal interpretation. Second, this paper advances the argument that the obligation to respect the national identities of the Member States, as enshrined in Article 4(2) TEU, rests on different normative assumptions than the claim, made by certain constitutional courts, that European law must comply with constitutional identity for it to be applicable in the domestic legal order. Whereas the Union's obligation to pay heed to *national* identity is grounded in a liberal concern for the respectful treatment of the members of a multinational political community, the constitutional courts' preoccupation with *constitutional* identity rests on a particular conception of sovereignty. In other words, the demands for respect for national and constitutional identity are informed by distinct theoretical narratives. Third, it is argued that the Treaty makers had good reasons for writing into the EU Treaty a requirement of respect for the Member States' national identities rather than the States' sovereignty, or their constitutional identity, for that matter. The Treaties' focus on national identity should therefore be embraced and taken seriously.").

48 Julian Scholtes, *Abusing Constitutional Identity*, 22 GERMAN L.J. 534, 546 (2021) ("The differences between the Hungarian judgment and those of other constitutional courts across Europe lie in the context. The Hungarian Constitutional Court was packed by the government—the same government that also wrote Hungary's illiberal constitution. Hungary is one of the prime examples of illiberal constitutionalism emerging in Europe and elsewhere. Its core characteristic is its hollowing out of the core of liberal institutions whilst retaining their shell as a cloak for authoritarianism. Under these circumstances, constitutional identity can no longer be seen as a means of engaging in good-faith judicial dialogue about the boundaries of EU law. Rather, it becomes an instrument to be wielded against EU law at the government's whim.").

Hungarian Constitutional Court clearly conflicts with the TEU provision referred to by the same judges in the ruling. This confirms the instrumental, selective, and manipulative use of relevant supranational normative provisions made by populists. After the ruling, in 2018, a constitutional reform was passed that introduced the formulation "constitutional identity" into Article R(4) of the Hungarian Constitution (which was mentioned earlier in this article).[49]

In this identity-based public law, the argument of homogeneity plays a central role and, not surprisingly, it reveals a clear Schmittian matrix. For Schmitt, after all, public law was part of a constitutional narrative that represented the people as being shaped by a static and homogeneous identity that had to be traced back to the origin of the system. This is a central point: many of the readings criticizing the text of Article 4.2 of the TEU tend to decontextualize the reference to national identity from the rest of the provision. By a strange twist of fate, a similar reading was also set out in the ruling of the Hungarian Constitutional Court, which read the reference to the element of identity in a manner that was disconnected from the rest of the provision. The reference to the principle of competence alone serves to limit the temptation to make unilateral use of the reference to national identity. To this limitation, however, must be added that of the principle of cooperation, referred to in Article 4.3. On closer inspection, the connection between respect for national identity and the principle of cooperation has been emphasized by some Advocates General.[50]

The split between national identity and common constitutional traditions brought about by the Lisbon Treaty, which codified in two different provisions (former Article 6 TEU) two aspects that had previously been included in the same provision, has perhaps given the impression that respect for national identity can be interpreted in splendid isolation from other Treaty provisions. However, to give in to this hermeneutical temptation would be to commit an enormous interpretative (and, at the same time, political) error, thus supporting the populist counternarrative.

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49 MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. R(4).

50 Opinion AG Campos Sánchez-Bordona, C-621/18, Wightman, ECLI:EU:C:2018:978; Opinion AG Bobek, par. 96, C-391/17, European Commission v. United Kingdom of Great Britain and Northern Ireland, ECLI:EU:C:2019:97.

III. CONSTITUENT POWER AS AN UNBOUND ENTITY

My second point has to do with the concept of constituent power in a context of comprehensive pluralism. Michel Rosenfeld's book seems to be more interested in the life of a constitutional polity that has already been created and does not seem to pay much attention to the moment of genesis. Indeed, I note that in his book Michel Rosenfeld does not use the formula "constituent power." I am curious to explore what role, if any, constituent power can play in his comprehensive pluralism. Should we renounce the idea of constituent power and the myth of the generative violence, or can comprehensive pluralism somehow tame the dangerous implications of this concept? This is something that came to my mind when reading Professor Rosenfeld's powerful book.

There are many different understandings of the concept of constituent power. Some of them are, in my view, incompatible with comprehensive pluralism, while others could be compatible with it.

Generally, scholars' idea of constituent power is of a power that is somehow limitless, unleashed, and ungovernable by law because it intrinsically implies the breaking of law and the foundation of law at the same time. This very wide-ranging concept of constituent power as pure power operating in a legally empty space is probably down to Carl Schmitt,[51] who famously distorted Emmanuel Sieyès's thought.[52] But this view does not actually correspond to Sieyès's idea that natural law was "[p]rior to the nation and above the nation,"[53] understood as the bearer of constituent power. In this context, natural law ideally represents a sort of external limit on the will of the nation.

Nowadays constituent power can be conceptualized as a legal-historical fiction behind which there is a normative claim. Indeed, behind the correspondence between the constitution and constituent power is the need to conceive the constitution as the willed product of a preexisting political entity (the people). This serves as a source of legitimacy, helping

51 CARL SCHMITT, CONSTITUTIONAL THEORY 126 (Jeffrey Seitzer ed. & trans., Duke U. Press 2008) (1928).

52 RUBINELLI, *supra* note 39, at 23.

53 EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? (1789), *reprinted in* EMMANUEL JOSEPH SIEYÈS: THE ESSENTIAL POLITICAL WRITINGS 43, 89 (Oliver W. Lembcke & Florian Weber eds., 2014); Mario Dogliani, *Potere costituente e revisione costituzionale nella lotta per la costituzione*, *in* IL FUTURO DELLA COSTITUZIONE 253 (Gustavo Zagrebelsky, Pier Paolo Portinaro & Jörg Luther eds., 1996).

us to conceive the constitution—both the product and the limit on the constituent power—as "democratic."[54]

The fiction of the constituent power is employed to set up and justify the rupture with the past and the new constitutional design present in the fundamental charter. In Dieter Grimm's words:

> We attribute this power to the people. We behave as if the constitution is a product of the popular will. The fiction helps to bring the act in line with the requirements of democratic legitimacy. However, the term "fiction" should not be misunderstood as a mere imagination. It makes a difference whether the constituent power is or is not attributed to the people. If the fiction is taken seriously it establishes a relationship of accountability between the government and the people which in spite of its fictitious basis has real consequences.[55]

Another confirmation of the fact that we are describing a fiction is given by a historical argument: very frequently, constitutions and the revolutions behind them—understood in a technical sense, as breaks in the chain of validity à la Hans Kelsen[56]—have been a product of the action of the elite.

The obsession with constituent power has led to the United Kingdom being described as having the only example of an evolutionary (i.e., nonrevolutionary) constitutionalism in Europe, but actually many other experiences, although provided with written constitutions, are in a problematic relationship with the "constituent power." The German and French cases (1958) are two examples of this problematic trend.[57] Many other EU Member States also do not have a document formally called a constitution (e.g., Sweden and the Netherlands). Another example is

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54 D.J. Galligan, *The Paradox of Constitutionalism or the Potential of Constitutional Theory?*, 28 OXFORD J. LEGAL STUD. 343, 353 (2008) ("When the discourse moves from the descriptive to the normative, it changes and becomes the claim that the constituent power in modern societies should be the people, for democracy is tied to the people and the legitimacy of legal authority depends on a democratic foundation.").

55 Dieter Grimm, *Constituent Power and Limits of Constitutional Amendments*, NOMOS: LE ATTUALITÀ NEL DIRITTO (2016), https://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2016/09/Grimm_Nomos22016.pdf [https://perma.cc/ALE5-NBCQ].

56 HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115 (Aders Wedberg trans., The Lawbook Exchange, Ltd. 2007) (1945); G. Maher, *Analytical Jurisprudence and Revolution*, 5 MEMORIA DEL X CONGRESO MUNDIAL ORDINARIO DE FILOSOFÍA DEL DERECHO Y FILOSOFÍA SOCIAL 343, 344 (1981).

57 Christoph Möllers, *We Are (Afraid of) the People: Constituent Power in German Constitutionalism*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 87 (Martin Loughlin & Neil Walker eds., 2007); PAOLO PASSAGLIA, LA COSTITUZIONE DINAMICA: QUINTA REPUBBLICA E TRADIZIONE COSTITUZIONALE FRANCESE (2009).

represented by the Eastern European countries that are characterized by atypical constituent processes because they are influenced by the international community.

Another flaw in this approach of making constituent power a fundamental element of any constitutional process is the fact that it proves too much, since it is always possible to find a constituent power that might be traced back to that idea of revolution mentioned above. Nowadays, constituent power rarely appears in its revolutionary forms; as has been argued, constituent power has been replaced by the constituent process[58]: a set of procedures that guarantee a gradual, incremental, and inclusive transition to a new constitution. The classic example is provided by the 1996 Constitution of South Africa, which, indeed, shows that constituent authority can operate within a sort of horizon of legality.[59]

These reflections have induced scholars to claim the possible exhaustion of constituent power,[60] and to stress either its redundancy or the possible shift from the idea of constituent power to that of constituent process. In the field, there are different theoretical views that, however, share the idea that the constitution does not always and necessarily presuppose a preexisting cultural and political identity; indeed, legal norms (particularly constitutional norms) often contribute to creating homogeneity by paving the way to inclusion. In other words, as has been effectively said, "[i]nclusiveness is the contemporary mechanism for ensuring that a constitution actually is an exercise of the constituent power."[61]

One could therefore ask whether it is necessary to abandon,[62] rather than rehabilitate, the concept of constituent power in order to achieve a complete democratization of post-totalitarian constitutionalism. In the words of Mark Tushnet: "Contemporary constitution-making processes must be inclusive in some general sense. Satisfying that requirement at both the drafting and the adoption stages raises some interesting general questions."[63] Against this background, inclusiveness serves another

58 Peter Häberle, *Die Verfassungsgebende Gewalt des Volkes im Verfassungsstaat*, 112 ARCHIV DES ÖFFENTLICHEN RECHTS 54 (1987).

59 GARY J. JACOBSOHN & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION 137 (2020).

60 Dogliani, *supra* note 53.

61 MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 24 (1st ed. 2014).

62 Sergio Verdugo, *Is it Time to Abandon the Theory of Constituent Power?*, 21 INT'L J. OF CONST. L. 14 (2023).

63 TUSHNET, *supra* note 61, at 19.

purpose: to make the transition peaceful, by giving voice to the pluralism of values present in a society in order to prevent only one dominant view of society from prevailing.

Moreover—and this happens even more frequently in the context of the growing importance of the international community—constituent processes under constitutionalism often cannot deviate from those values and rights that respond to a kind of general international consensus.

I am dwelling on this debate because populists frequently resort to the concept of constituent power, in particular rediscovering its Schmittian version. The extreme majoritarianism characterizing populisms, coupled with their legal resentment,[64] makes constituent power a very dangerous instrument that is used to marginalize minorities in the fundamental choices of the community. Since populists are allergic to countermajoritarian dynamics, for them the only possible form of constitutionalism is a "weak" one, that is, a type of constitutionalism that abandons eternity clauses and supermajorities and recognizes the virtues of permanent constituent power.

Joel Colón-Ríos (building on Antonio Negri's well-known thesis[65]) has produced important research on weak constitutionalism, laying the groundwork for what Arato has labelled "the best attempt I know to redeem a strong, populist notion of the constituent power."[66]

Colón-Ríos's main thesis is that a truly democratic constitutionalism should renounce the imposition of limits on constituent power, since "only a conception of constituent power according to which its exercise

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64 Paul Blokker, *Populism as a Constitutional Project*, 17 INT'L J. CONST. L., 536, 549 (2019) ("Legal resentment, so I argue, is a crucial dimension of the populist constitutional program, and comes forth out of a distinctive populist reading of liberal constitutionalism. The populist approach regards liberal constitutionalism as both a mindset and a practice. The latter could be aptly described as the post-World War II 'default design choice for political systems across Europe and North America,' in the form of a constitutionalism that 'typically hinges on a written constitution that includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law.' In this, the populist criticisms are not unlike those that have emerged in academic debates on 'new constitutionalism' and judicial review. Populists tend to be critical about the strong and independent nature of apex courts, the role and form of judicial review, and the extensive and entrenched nature of individual rights.").

65 ANTONIO NEGRI, INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE (Maurizia Boscagli trans., U. of Minn. Press, 1999) (1992).

66 Andrew Arato, *Endorsement* to JOEL COLÓN-RÍOS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER, at V (2012).

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."[67]

These approaches, perhaps not consciously, end up being perversely fascinated by the "Schmittian ghost"[68] of constituent power, understood as unlimited and loose, and see in it the full expression of democracy. In this sense, the new populist wave becomes a challenge for constitutional law, which should avoid a mere defensive approach, seeking to transform "mounting distrust into an active democratic virtue."[69] These are powerful words, but how can we do that? The recent innovations introduced in the comparative constitution-making process suggest that constitutionalism should be democratized by favoring transparency and participation as much as possible, and models for this are not lacking in comparative law. However, these experiences (in Iceland, Chile, and Tunisia) have—for different reasons—failed thus far.

As mentioned at the beginning of this Part, different ideas of constituent power are possible. Perhaps the only understanding of constituent power that could be made compatible with comprehensive pluralism is a discursive version, according to which:

> The notion of constituent power is strictly related to the notion of sovereignty as creative power, i.e. the power to constitute, to found — as opposed to sovereignty as coercive or repressive power. This productive, creative dimension of sovereign power, as an original power that simultaneously grounds a constitutional order from within and generates it from the outside, has been often associated with "the people" by some of the earlier theorists of liberal constitutionalism as noted earlier. However, constituent power does not consist merely in the exercise of a specific type of power by a people at any given moment. It also constitutes people as an entity that did not exist beforehand. The consideration of the self-constituting nature of this power leads to a deeper reflection on the problem of attribution of acts to a collective subject.[70]

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67 COLÓN-RÍOS, *supra* note 66, at 8. Colón-Ríos himself, perhaps aware of the consequences of his theoretical proposals, clarified, in a footnote, that the concept of populism used in his book should not be understood as referring to "dictatorships covered by a thick layer of democratic rhetoric" but "as a way of describing a regime based on democratic self-rule." COLÓN-RÍOS, *supra* note 66, at 52 n.10.

68 Dogliani, *supra* note 53, at 270.

69 ALBERTO ALEMANNO, LOBBYING FOR CHANGE: FIND YOUR VOICE TO CREATE A BETTER SOCIETY 273 (2017).

70 Massimo Fichera, *The Idea of Discursive Constituent Power*, 3 JUS COGENS 149, 163 (2021); *see also* Massimo Fichera, *Rethinking the Notions of Constitution and Constitution-Making Process*, 7 RIVISTA DI DIRITTI COMPARATI 19, 28 (2023); ROSENFELD, *supra* note 2, at 1–4 ("In the

In this context, again, constituent power is not exercised once and for all in a mythical moment in the past, but is something that may occur sequentially across generations.[71] This kind of view seems to depart from the idea of constituent power as a vehicle for legal resentment, since it is in principle inclusive and could theoretically be galvanized by the shift from constituent power to constituent process.

In conclusion, constituent power has been one of the pillars of Schmittian constitutional theory and is still very influential today. My idea is that it can only work if it is understood as a historical-legal fiction, since if it is taken too seriously it risks feeding exclusionary constitutional politics. I am wondering whether its absence from Professor Rosenfeld's considerations can be explained as a choice to abandon the concept or whether there might exist versions of constituent power (for instance a discursive one) that are compatible with his comprehensive pluralism.

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broadest terms, the liberal constitution that typically prevails in many contemporary democracies is principally meant to secure four essential pillars: the institution of 'checks and balances' through imposition of limitations on the powers of government; adherence to the rule of law; protection of a core of fundamental rights; and assuring certain guarantees necessary for the maintenance of a working democracy . . . . Of these, by requiring that everyone be equal before the law and that similar cases be treated consistently, the rule of law does impose a minimum of process-based justice. In addition, insofar as the right to equality is included among the core ones that are afforded constitutional protection, this also assures some minimum of justice which may be largely formal if constitutional equality extends only to rights and procedures without regard to manifestly widely unequal material conditions or consequences. Finally, to the extent that the constitutional guarantee of democracy secures the 'one person one vote' principle, it does assure a minimum of representational equality among citizens. . . . The impression that liberal constitutionalism is largely cut off from distributive justice concerns seems reinforced by the recently mounted critiques by illiberals, populists, and authoritarians who purport to appropriate the constitutional enterprise in order to stir it towards what they cast as better ends. . . . With this in mind, I will advance the proposition that going back to its late eighteenth-century origins, liberal constitutionalism has been inherently committed, implicitly or explicitly, to advancing distributive justice objectives. That commitment has often been very hard to discern, however, because liberalism as a philosophical and political world view has been associated with several mutually contesting divergent theories of distributive justice. Indeed, these theories range from warranting mere formal equality with respect to fundamental rights to exhaustive redistribution of wealth and other benefits and burdens to achieve a highly egalitarian end state. In contrast, liberal constitutionalism, which provides its own set of criteria for the structure and functions of constitutions, is consistent not only with philosophical liberalism but also with other world views, such as those advanced by pluralism, republicanism, and certain iterations of communitarianism.").

71 *See* ALESSANDRO FERRARA, SOVEREIGNTY ACROSS GENERATIONS: CONSTITUENT POWER AND POLITICAL LIBERALISM 1 (2023); Frank I. Michelman, *Constitutional Authorship*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64 (Larry Alexander ed., 1998).

IV. CONSTITUTIONALISM AND POLITICAL THEOLOGY

My third point has to do with constitutionalism and political theology. One of the ideas that I appreciated in Professor Rosenfeld's book is that illiberal threats are not limited to right-wing populisms. This is an important consideration that is confirmed by comparative law, especially when one considers the nature of Latin American populisms. Normally, especially in Europe, lawyers who have studied populisms have done so with only right-wing movements in mind, but I believe that illiberal populist forces of the right and the left share many common premises, and some are clearly influenced by a polemical approach to constitutionalism, understood as a normative movement aimed at limiting power. As we shall see, contrary to what is often asserted in the literature, human rights (and constitutionalism) have been attacked not only by right-wing, but also by left-wing, forms of illiberalism and this is an area that I would like to explore. After all, as we know, the revival of Schmitt's theories has not been monopolized by right-wing thinkers. I am thinking of those reflections that see human rights as projections of neoliberal power structures that must be challenged.[72] Although I understand (and to a certain extent like) the antiuniversalist and anti-colonial flavor of their argument, these views perhaps forget the subversive potential that rights have traditionally had in their function of contesting power structures.[73] To answer the question of how both left- and right-wing illiberalisms conceive of human rights, we must again rely on the concept of legal resentment, which is a bridge connecting these

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72 Iona Cable, *The Complicity of Human Rights in Neoliberalism: Beyond Redemption?*, HUM. RTS. PULSE (April 27, 2021), https://www.humanrightspulse.com/mastercontentblog/the-complicity-of-human-rights-in-neoliberalism-beyond-redemption [https://perma.cc/YY5T-32AL] ("The human rights framework is heralded as an emancipatory apparatus to promote equality, peace, and representation, based on the assumption that all humans have certain unalienable rights by virtue of being born. Belief in the inherent goodness of human rights has preserved the notion that this framework exists in a celestial vacuum, unsullied by global hierarchies. On the contrary, rights are deeply embedded in power structures, and the perception that they are neutral disguises their role in the perpetuation of injustice. Human rights language has been used to globally disseminate neoliberal economic policies which maintain inequality, forcing postcolonial states into the global market and prohibiting development.").

73 On the connection between rights and revolutions in France and the United States, see Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1024 (1989) ("The two revolutions were related in more fundamental respects. Both revolutions claimed that their central motivation was to secure fundamental human rights. The American Declaration of Independence remains probably the most famous articulation of the idea of rights. In France, the National Assembly adopted the Declaration of the Rights of Man and of the Citizen during the early days of the Revolution.").

two forms of illiberalism. Legal resentment refers to the way in which illiberal populists approach legality.

Legal resentment is based on the claim that "law and human rights are crowding out politics as well as societal traditions," since both the left-wing and the right-wing forms of illiberalism question "the universalist, liberal project and its understanding of the law, particularly regarding international law, EU law, and human rights."[74] In other words, human rights (whose protection is part of the normative mission of constitutionalism) would take space away from politics and would impede politics in doing its job, by contributing to the creation of a scenario in which the space for politics is too crowded with rights that exclude democratic views (understood as majority decisions).

Indeed, human rights (which become fundamental once they are protected by a constitution) identify areas that are non-negotiable. It is not a coincidence that this criticism is frequently combined with the rejection of what some authors call "over-constitutionalization," or constitutional law occupying the space of politics.[75]

In this sense, rights, and especially fundamental rights, pay the price of being a countermajoritarian bastion. The assault on human rights can be seen then as an emanation of a more general siege against constitutionalism, especially in its thick version, since there might be cases in which "constitutionalization means de-politicization."[76] This debate has developed in the context of EU law, which is often accused of being a neoliberal entity that emanates mercantilist globalization[77] and attacks the traditional values of national identity or social justice. More recently, scholars have accused colleagues interested in European

74 Blokker, *supra* note 13, at 265–66.

75 For this concept, see DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE 307 (2016).

76 Dieter Grimm, *The Democratic Costs of Constitutionalism: The European Case*, 21 EUR. L. J. 460, 460 (2015) ("Constitutionalization means de-politicization. What has been regulated on the constitutional level is no longer open for political decision-making. Thus, in the EU political decisions of high salience are not only withdrawn from the democratically legitimized institutions, but also immunized against political correction."). For an in-depth analysis of why constitutionalization does not mean depoliticization, see OLIVER GERSTENBERG. EUROCONSTITUTIONALISM AND ITS DISCONTENTS (2019).

77 ROSENFELD, *supra* note 2, at 284–85 ("Populists can point to the pairing of liberal constitutional democracy with globalization as a convenient means of enabling and legitimating the ever more disproportionate enrichment of economically dominant elites at the expense of their ever more marginalized compatriots. . . . [T]he populism in question would pit the people as a whole against the economic and political elites that appear to have commandeered certain liberal constitutional democracies for their own purposes, and would be intent on neutralizing these elites for purposes of returning the affairs of the polity to the people.").

constitutional law of constructing a dangerous mythology and have also boldly suggested that "it is simply impossible to claim that acknowledging to European law the condition of 'constitutional order' is either a neutral way of referring to the object of study of a legal-dogmatic discipline, or a means of promoting the transformation of European law in the semblance of democratic and social constitutionalism."[78] In works like these, the European Union today is depicted as a dangerous and undemocratic ordoliberal entity, the rejection of everything that constitutionalism stands for.

These approaches are open to criticism from various points of view. Firstly, from a terminological point of view, they often confuse ordoliberalism and neoliberalism,[79] and seem to reduce the liberal tradition to the thought of Friedrich von Hayek, referred to as the inspirer of supranational economic federalism.[80] Secondly, they base their arguments on (at least) questionable dichotomies, such as that between democratic and social constitutionalism and liberal constitutionalism,[81] as if the former were not also based on liberal premises. Finally, they are often vitiated by a certain determinism that leads them to see, in the European integration process, a "neo-liberal device"[82] from the very beginning.

Professor Rosenfeld also dwells heavily on the social justice implications of this controversy, which, however, does not only concern the European Union. Indeed, the debate on the constitutionalization of EU law is a projection of a broader debate on the crisis of liberal constitutionalism. In this sense, recent books by Martin Loughlin[83] and Roberto Gargarella[84] are only the latest products of a reading that cyclically returns, albeit with different arguments, and that argues the

78 Marco Dani & Agustín José Menéndez, *European Constitutional Imagination: A Whig Interpretation of the Process of European Integration?* 42 (Univ. of Copenhagen, Faculty of L., iCourts Working Paper No. 243, 2021).

79 *See, e.g.*, ALESSANDRO SOMMA, QUANDO L'EUROPA TRADÌ SÉ STESSA E COME CONTINUA A TRADIRSI NONOSTANTE LA PANDEMIA (2021).

80 Friedrich A. von Hayek, *The Economic Conditions of Interstate Federalism*, 5 NEW COMMONWEALTH Q. 131 (1939); *see also* Hjalte Lokdam & Michael Wilkinson, *The European Economic Constitution in Crisis: A Conservative Transformation* 1 (LSE L. Working Paper No. 02/2021, 2021) ("The original constitution of Economic and Monetary Union (EMU) rested on a neoliberal approach to interstate federalism à la Hayek.").

81 Marco Dani & Agustín José Menéndez, *È ancora possibile riconciliare costituzionalismo democratico-sociale e integrazione europea?*, 10 DPCE ONLINE 289 (2020).

82 SOMMA, *supra* note 79, at 181.

83 MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2022).

84 ROBERTO GARGARELLA, THE LAW AS A CONVERSATION AMONG EQUALS (2022).

(now contingent, now structural) incompatibility between constitutionalism and democracy. It is a strand that includes different views: its range of criticism goes from the incredible power granted to judges (in particular, in constitutional courts)—which would end up distorting the role of political actors—to the limits that constitutionalism—in particular, post-totalitarian constitutionalism in Europe—places on the exercise of constituent power. All of these (legitimate) criticisms are based on the struggle of liberal constitutionalism to explain why countermajoritarian constraints are not anti-democratic but function to preserve fundamental goods that belong to all, first and foremost to minorities.

These kinds of reflections, which I repeat are legitimate, have been to some extent appropriated by supporters of illiberal populisms, particularly on the left (and thus not only on the right), who have ended up seeing constitutionalism as a form of hubris. This view has been developed by those who build upon the Schmittian political tradition,[85] according to whom constitutionalism is arrogant since it contributes to the overcoming of the idea of political theology[86] by seeking an alternative for the foundation of political power. Against this background, the formula "legal-moral theology"[87] used by Geminello Preterossi, for instance, is employed to describe how constitutional law could slip more and more into moral sacralization since it identifies areas rendered untouchable by political power.[88] Such a legal-moral theology would be functional in justifying and preserving the status quo. Liberal constitutionalism[89] is seen as a conservative force that aims to preserve rights, understood as projections of neoliberal power structures. In this

85 *See* GEMINELLO PRETEROSSI, POLITICAL THEOLOGY AND LAW (2023).

86 ROSENFELD, *supra* note 2, at 214 ("Among the most notable consequences that follow from Schmitt's brand of political theology is the rejection of pluralism alluded to earlier as well as that of liberal democracy's separation of powers.").

87 PRETEROSSI, *supra* note 85, at 2 ("The term 'legal theology' stresses the tendency towards the moralisation of legal normativity, which came to the fore in particular following the caesura of 1989 in concomitance with a highly optimistic vision of globalisation and the so-called humanitarian wars (from ex-Yugoslavia to Iraq and Libya). This was a reaction against the political genealogy of law focused on problems of sovereignty and its legacy, in which context the European public law of classical modernity was able to assert itself as an autonomous and prevalent sphere over religion and the economy.").

88 *Id.* at 186 ("Law tends to slip into moral sacralisation aimed at symbolically highlighting areas rendered untouchable in increasingly secularised legal systems, so as to respond to the neoliberally subjectivated need for victims, witnesses, and exemplary stories with which to identify.").

89 Preterossi seems to understand social constitutionalism in a positive manner, although he argues that "the weapons to defend social constitutionalism are therefore blunt." *Id.* at 152.

sense, the supposed universalism of constitutionalism, combined with its low political intensity, would turn out to be unjust:

> In short, legal–moral theology is ideological and functional in justifying and bestowing a "regulatory" guise on the agenda dictated by the "indirect" powers of globalisation. Its alleged low-political-intensity universalism turns out to be profoundly asymmetrical. In this context, the symbolic function of the language of rights, which in fact represents one of the few possible sources of mobilisation for dissident subjects, can only be removed from neoliberal instrumentalisation if it is repoliticised in terms of polemical constitutionalism, immunising it from the juridification of a subjectivistic, purely emotional ethic. Whereas legal theology, which leads to the moralistic instrumentalisation of law, fails to compensate for the crisis of the "political", i.e. the expression of demands for legitimacy and justice laden onto the legal system and the impossibility of realistically meeting them, once the autonomy of politics is deactivated. It is, thus, an effect of neoliberal political anti-theology and an illusory attempt to respond to its disruptive outcomes. If political theology replaces the "theological" with the "political", legal theology replaces the "political" with the "moralised legal.[90]

For these authors, a kind of constitutionalism that dares to disregard political theology is seen as a device (a *dispositif*) for depoliticizing and neutralizing conflicts, seen as the heart of democracy. In other words, constitutionalism would deprive politics of its function. Here, Schmitt is often somewhat mixed with Michel Foucault,[91] another very relevant author in the critique of the autonomy of the legal who perhaps would have deserved some space in the book by Professor Rosenfeld.

I do not think that constitutionalism aims to replace political theology with a form of legal moral theology and, above all, the very (again) dichotomous reading of the relationship between democracy and constitutionalism risks being misleading. I would like to close this piece by recalling a lesson that I learned many years ago when attending a summer law school course given by Professor Rosenfeld at the European

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90 *Id.* at 186.

91 MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978–1979, at 84 (Michel Senellart ed., Graham Burchell trans., Palgrave Macmillan 2008) (2004) ("The economy produces legitimacy for the state that is its guarantor. In other words, the economy creates public law, and this is an absolutely important phenomenon, which is not entirely unique in history to be sure, but is nonetheless a quite singular phenomenon in our times."). On Schmitt and Foucault as used by illiberal populists, see PIER PAOLO PORTINARO, LE MANI SU MACHIAVELLI: UNA CRITICA DELL'«ITALIAN THEORY» 129 (2018).

University Institute. I was a young student at the time and was about to start my doctoral courses in Pisa. For me, attending that summer course was a real turning point. On that occasion, Professor Rosenfeld offered a wonderful analysis of *Reference re Secession of Quebec*,[92] treating it not only as a decision on secession but also as a veritable compendium of political and constitutional theory.

I will always cherish the richness of that lesson, and it was on that occasion that I first noticed a central passage in which the Canadian Supreme Court rejected the thesis of the alleged incompatibility between democracy and constitutionalism. Indeed, in paragraph 78, the Canadian Supreme Court stressed that constitutionalism takes the democratic ideal to a further level, by arguing that:

> It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. *Constitutionalism facilitates—indeed, makes possible—a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it.* Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.[93]

This is a powerful passage that confirms that the Canadian Reference has great potential to challenge the constitutional counternarrative employed by populists.

A Pluralist Theory of Constitutional Justice: Assessing Liberal Democracy in Times of Rising Populism and Illiberalism by Professor Rosenfeld is a very welcome book and is crucial in reviving important legal and theoretical concepts of constitutional theory (people, sovereignty, and identity, among others) that must be defended with ideas, rather than handed over to the advocates of illiberal constitutional counternarratives. This approach is absolutely necessary within such a polarized political and academic debate, and indeed this book does not renounce the defense of concepts but still analyzes them critically, believing in academic and political dialogue.

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92 [1998] 2 S.C.R. 217 (Can.).

93 *Id.* ¶ 78 (emphasis added).