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Populist constitutionalism is a kind of intermediate category between these two concepts and refers to the constitutional approach, aspirations, or activities of populism. The conceptualization of populism is difficult not only because it is a very abstract concept, but also because it signifies a phenomenon that does not fit, or fits only with difficulty, into other existing conceptual frameworks. Populism is not a recently discovered concept; its roots go back to the 19th century, and it was first used, perhaps, for the Populist Party in the United States and for the Narodnik movement in Russia at the end of that century. The debates on populism have also reached the constitutional discourse, recognizing that one of the distinguishing features of modern populism is its ‘constitutional project’, that is, the ambitions of populists to pursue constitutional changes to achieve their goals when they come to power.

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The concept of legal interpretation has several meanings. It is usually understood as determining the meaning of a legal norm; that is, this definition treats the process as a rational activity by which a meaning is derived from a linguistic formula. The uncertainty or multiple meanings of the text make certain legal disputes ‘hard cases’ that can be resolved only by interpretation. Missing provisions often cause problems in fundamental rights matters, not only if the text does not include an explicit entrenchment of a universally accepted freedom, but also when the constitution does not provide guidance on how to restrict fundamental rights or to reconcile them when they come into conflict with each other. The theories of constitutional interpretation are normative approaches about how the constitution should be interpreted in general. In fact, constitutions often use ambiguous, uncertain and contradictory terms, or remain silent on issues that need to be resolved in constitutional disputes.

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Liberal constitutions should not and do not want democracies to die. Constitutional interpretation is an inexhaustible topic that has been explored under innumerable aspects. A large part of the recent literature on constitutional interpretation takes a court perspective, e.g. which kind of interpretation methods and style of reasoning courts use, whether they lead an interpretive dialogue with other courts or even governments and legislatures, whether they exercise strong- or weak-form review, etc. In liberal and illiberal democracies, instead, the constitution as such will be heeded since in both types of democracies the commitment to popular sovereignty as the source of the constituent power vests the constitution with a status that cannot be overthrown easily. The rules considered to be relevant in this context are rules that guide the interpretive organs with regard to method and yardstick of constitutional interpretation.

**Chapter 4**

[Can there be autochthonous methods of constitutional interpretation?](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-5/autochthonous-methods-constitutional-interpretation-mark-tushnet?context=ubx&refId=48ada026-6dfd-4e96-a752-3879f34f395a)*By Mark Tushnet*

Originalism in Austria means examining the historical materials associated with the adoption of the Austrian constitution; originalism in India means examining the historical materials associated with the adoption of the Indian constitution. A striking example is provided in the South African constitution. Many nations limit the time that a person can be held after arrest but before presentation to a judicial officer. Often these provisions state that the person must appear before a judge within a reasonable period. Scholars interested in the constitutional and nature see this as either a crystallization of inchoate ideas rattling around in other constitutional systems, or as foreshadowing a coming general recognition of ecological rights. Interpretations of identical substantive provisions also vary, though the case is complicated by questions of translation and contextual understanding. National political and social cultures determine the weight given to at least some constitutional values.

**Chapter 5**

[Formalism and judicial self-restraint as tools against populism?](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-7/formalism-judicial-self-restraint-tools-populism-konrad-lachmayer?context=ubx&refId=d1714154-1d90-4a18-b377-94ee47702361)Considerations regarding recent developments of the Austrian Constitutional Court*By Konrad Lachmayer*

Populism is not a new phenomenon of the last decade in Austria but can be traced back to the 1990s. The developments of the last 30 years have challenged the Austrian constitutional order in many ways, but they also have affected the Austrian Constitutional Court. The term populism is highly contested in international scholarship. In a general sense populism is understood as a political programme that ‘claims to champion the common person, usually by favourable contrast with a real or perceived elite or establishment’. Populism in Austria is deeply linked to Jorg Haider’s takeover of the Freedom Party in 1986. The coalition government between the People’s Party and the right-wing, populist Freedom Party was viewed domestically as a political trick by the conservatives, but it was never understood as a real threat to Austrian democracy as a whole. The international perception of the Austrian political shift was much more dramatic and the reaction far greater than in Austria itself.

**Chapter 6**

[The Czech Constitutional Court in times of populism](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-8/czech-constitutional-court-times-populism-zden%C4%9Bk-k%C3%BChn?context=ubx&refId=e2fc8218-83e2-4d5b-9892-3f5b7922a1ea)From judicial activism to judicial self-restraint*ByZdeněk Kühn*

The Czech Constitutional Court (CCC) is one of the strongest constitutional tribunals anywhere in the world. Its design is framed after the German model of the Federal Constitutional Court. Between 1993 and 2020, the political landscape of the Czech Republic has changed significantly. The strategies and the nature of presidential appointments have differed, depending on the president in question. The Chief Justice preferred legal wisdom over political ideology. It was only when the President realized that the CCC was not functioning in the way he would like that he interrupted his consultations with the Chief Justice. The institutional position of the CCC has been markedly strengthened by its own decision-making in the first two decades of its existence. The new court appointed by the third President, Zeman, continued on this newly opened path of judicial self-restraint. The situation began changing only in 2001, in response to certain constitutional excesses by the parliamentary majority.

**Chapter 7**

[Popular initiatives, populism and the Croatian Constitutional Court](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-9/popular-initiatives-populism-croatian-constitutional-court-djordje-gardasevic?context=ubx&refId=2fc3a179-c4e8-4a73-94ae-4bc635575b84)*By Djordje Gardasevic*

The Croatian example of the popular referendum initiative in this context functions well because the initiative is constitutionalized, it transgresses the boundaries of an advisory institution, and it may be used to decide on a quite extensive range of issues. Since 1990, the Croatian Constitution has been amended five times in total, four times in the Parliament and once through a referendum. The populist note generally inherent in such specifically constitutional initiatives is clearly visible. The early case of the 2010 referendum on the Labor Law presents an opening example because it was the first instance in which the Court had to formally deal with the case of a popular initiative. Factually, a number of trade unions had started an initiative for a referendum on the rejection of the governmental proposal to amend the Labor Act and thus prevent restrictions on workers’ benefits. The opening words of the Constitutional Court’s reasoning in this case revealed several important standpoints.

**Chapter 8**

[Constitutional identity as a populist notion?](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-10/constitutional-identity-populist-notion-apostolos-vlachogiannis?context=ubx&refId=ead141e5-4636-4177-a61e-2b9b2cdb3355)The Council of State and the forging of the Greek constitutional identity through the crisis*By Apostolos Vlachogiannis*

Populism and constitutional identity are both two relatively vague notions presently in fashion. In the current debate about populism and the need to combat it, courts play a double role: that of the victim of populism and that of the possible obstacle to populism. The notion of constitutional identity has not been a complete stranger to the jurisprudence of the Council of State (CoS), even before the crisis. The case law of the CoS relating to the notion of constitutional identity emerged in the context of the crisis and contains primarily three Plenary Session judgments pertaining to three thorny societal issues: nationality, Sunday laws and compulsory religious education. Right after the entry into force of the Lisbon Treaty, and especially during the recent economic crisis, the notion of constitutional identity has been seen as the new means of limiting and certainly, up to a point, challenging European integration.

**Chapter 9**

[Constitutional interpretation under the new Fundamental Law of Hungary](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-11/constitutional-interpretation-new-fundamental-law-hungary-fruzsina-g%C3%A1rdos-orosz?context=ubx&refId=3793cacb-7c24-440e-baf7-5a544ff62765)*By Fruzsina Gárdos-Orosz*

Hungary is categorized as a Member State of the European Union that is ruled by a populist Government. The Hungarian Government is qualified as populist because according to the scholarship of political science, many elements of the definition of populism fit with the Hungarian political system. The populist interpretation of constituent power puts the rule of the people above the rule of law, a ‘collective subject’ moulded by tradition, common suffering and destiny receives greater competence in direct decision making. Populist constitutionalism can be characterized by the absolutization of the majority principle, as long as the populist parties have won the election. The Hungarian Constitutional Court was established on 1 January 1990, right after the democratic transition of 1989–1990. The content of the unwritten, historical constitution was inherently ever-changing, and there is no guidance to determine which period or state of the historical constitution the new constitution should take as its reference point.

**Chapter 10**

[The populist reforms in Italy and the instrument of the constitutionally conforming interpretation](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-12/populist-reforms-italy-instrument-constitutionally-conforming-interpretation-gianmario-demuro-riccardo-montaldo?context=ubx&refId=b302d5f7-aeaa-40bd-b6fe-505baafa4252)*By Gianmario Demuro, Riccardo Montaldo*

A leader who immediately interprets the people’s will and protects it from all that is different from the people themselves, be it intermediary bodies and entities, international organisations such as the European Union, or the financial market, but also and above from all the individuals that stand out from the majority: immigrants, Muslims, Jews, Roma, and so on. The reform proposal aims to strengthen this instrument by introducing a ‘deliberative’ or ‘propositional’ referendum, which would be called for if a law initiative is not approved by the Parliament within 18 months, or if it is approved with substantial changes. The importance of these provisions for the present analysis is justified by their markedly populist imprint, which allows people, as will be seen in the rest of this contribution, to analyse their impact on the constitutional order and its ability to react to them, in particular by means of the common judges and the Constitutional Court.

**Chapter 11**

[Whatever works](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-13/whatever-works-wojciech-brzozowski?context=ubx&refId=b039b1a0-99a0-4569-8eed-0399dfb43934)Constitutional interpretation in Poland in times of populism*By Wojciech Brzozowski*

The anatomy of constitutional populism is a matter of ultimate concern to so many public law scholars these days that even approaching this topic requires a great deal of boldness. It needs to be remembered that the populist revolution relied greatly on constitutional arguments and interpretations put forward by the political branches of government and by their committed supporters – interpretations which were proposed and enforced precisely against the judges and the courts. The consistency of the approach means that actions required or justified by such an approach should demonstrate commitment to some coherent abstract principles. The cornerstone of the populist critique of liberal democracy is the profound distrust of the elites and the judiciary. At the early stage of the Polish constitutional crisis, the foundations of the populist legal philosophy were probably best explained by the late Lech Morawski, one of the quasi-judges of the Polish Constitutional Tribunal.

**Chapter 12**

[Non sequiturs in constitutional adjudication](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-14/non-sequiturs-constitutional-adjudication-alexandra-mercescu?context=ubx&refId=b88b62fe-2cd1-41c1-b9bc-a2d192c780de)Populism or epistemic deficit?*By Alexandra Mercescu*

Judicial review is yet to become the universal weapon against the fight of political unruliness. From a comparative perspective, unlike Hungary, whose constitutional judges are now to interpret at least in part an overtly non-liberal new constitution,6 and Poland, whose Constitutional Court ‘realizes the politics of the ruling majority’, ‘effectively desisting from protecting the constitutional order against unconstitutional measures’, Romania’s constitutionalism has been quite unspectacular. The country has witnessed in recent times a series of political initiatives which were problematic from a rule of law point of view, the most worrisome of which were the attacks on the judiciary. After 2003, in any case, when the Romanian Constitutional Court (RCC) started to consolidate its power, political constitutionalism emphasizing the importance of legislatures over courts did not emerge in scholarship. The procedure of removal essentially involves three authorities: the Minister of Justice, the Superior Council of Magistracy and the President of Romania.

**Chapter 13**

[Constitutional interpretation and populism in contemporary Spain](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-15/constitutional-interpretation-populism-contemporary-spain-francisco-balaguer-callej%C3%B3n?context=ubx&refId=cfaa73fd-4edb-4a33-9791-d1be03d54539) *By Francisco Balaguer Callejón*

The relationship between populism and constitutional interpretation has various aspects that must be analysed before concluding with the negative response that could be given in the first place regarding the specific interpretation of constitutional jurisdiction in Spain. Naturally, the definition of what populism is considered to be and also of what is understood by constitution and constitutional interpretation are prior factors that can determine different responses to this radical incompatibility. The analysis carried out attempts to be essentially constitutional and is based on some very precise theoretical lines that will allow people to point out the problems that populism poses in its essential features and in relation to the constitutional rule of law and normative constitutions. The radical incompatibility between populism and constitution occurs because populism breaks up the constitution’s space and time coordinates. The political and social context of Spain has been transformed in a very significant way in recent years.

**Chapter 14**

[Populism, UK sovereignty, the rule of law and Brexit](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-16/populism-uk-sovereignty-rule-law-brexit-john-mceldowney?context=ubx&refId=0c279ff1-a3e5-459d-b695-55445f531a8b)*By John McEldowney*

This chapter considers the implications of the result of the referendum vote in 2016 in favour of Brexit, and the possible influence of populism. Support for a referendum, to be included in the United Kingdom (UK’s) unwritten constitutional arrangements, has a long history. Political expediency underpins reasons for holding a referendum. While a referendum may allow a form of direct democracy, it is often in opposition to representative or parliamentary democracy. The reconciliation of different forms of choice – the party political and the popular have proved difficult. In the UK the referendum is normally non-binding, authorised by an Act of Parliament, triggered by a dissatisfaction with the politics of political parties or an inability of groups within political parties to agree. Control of policy-making, traditionally vested in the government of the day, underwent unprecedented challenge as the government struggled to secure agreement within its own ranks as to the best policy to pursue in negotiations with the European Union.

**Chapter 15**

[Born populist](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-18/born-populist-mark-graber?context=ubx&refId=31580d81-2962-44d8-b91a-1ee85fb7b68d)The Trump administration, the courts and the Constitution of the United States*By Mark A. Graber*

This chapter explores the possibility that right-wing populist constitutionalism in the United States differs from right-wing populist constitutionalism in Europe and South America because the United States was born populist. It examines the similarities and differences between constitutional manifestations of right-wing populism in the United States and elsewhere by examining the life, death, and jurisprudence of Supreme Court Justice Antonin Scalia. Justice Antonin Scalia’s influence on the course of American constitutional law helps explain why Donald Trump and Republicans in 2016 inherited constitutional doctrine and a judiciary that was largely born populist instead of becoming so. Scalia served as an associate justice on the Supreme Court of the United States from 1986 to 2016. The Romer dissent feeds into a common right-wing populist narrative that sees straight white male Protestants as the victims of laws than ban discrimination on the ground of sexual orientation, race, gender, and religion.

**Chapter 16**

[Constitutional interpretation](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-19/constitutional-interpretation-martin-loughlin?context=ubx&refId=05030f36-5c16-4564-a252-f7233324b42e)What can Europeans learn from US debates?*By Martin Loughlin*

The growing influence of the Constitution is attributable to many factors but, whatever the causes, the effect has been to expand remarkably the power of constitutional courts. All states are constituted, but not all have a Constitution. The distinction is significant. Dieter Grimm explains it by stating that constitution in the former sense ‘refers to the nature of a country with reference to its political conditions’, whereas in the latter it is ‘a law that concerns itself with the establishment and exercise of political rule’. The Constitution, by contrast, is a text that is drafted and adopted within the state at a particular moment in its development. The Constitution acquires its normative authority in part through the coherence of the governmental scheme it establishes and in part by virtue of the process by which, through an exercise of the people’s constituent power, the Constitution is drafted and ratified.

**Chapter 17**

[Populist and non-democratic reading of the Constitution](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-20/populist-non-democratic-reading-constitution-pablo-riberi?context=ubx&refId=8fe6c320-8018-489b-b231-def9d3b8849b)Sad lessons from Latin America*By Pablo Riberi*

The Argentine Supreme Court along with several high tribunals and Constitutional Courts in the region offer multiple examples of biased non-democratic case law interpretation, a phenomenon which, unfortunately, is nowadays on the rise. Civilian and military dictatorships and a myriad of populist experiences throughout Latin American history have undoubtedly been supported by whimsical anti-normative readings of the Constitution. In Bruce Ackerman’s words, the nightmare refers to a recurrent traumatic phenomenon that depicts constitutional design failures in the region. The tension between political vis-a-vis legal constitutionalism is inevitable. A fair grasp of constitutional interpretation needs to take notice of some of the underlying concepts at stake. It is a well-known fact that most Latin American highest courts have not only developed a Kelsenian controlling role as a negative legislator. The Argentine Supreme Court has had prominent justices and has bequeathed some excellent rulings to the country.

**Chapter 18**

[Populist challenges to constitutional interpretation](https://www.taylorfrancis.com/chapters/oa-edit/10.4324/9781003148944-22/populist-challenges-constitutional-interpretation-fruzsina-g%C3%A1rdos-orosz-zolt%C3%A1n-szente?context=ubx&refId=3a6d5720-2f5d-4fa5-a484-3284a87be858)An assessment*By Fruzsina Gárdos-Orosz, Zoltán Szente*

This chapter discusses the various forms of populism in the countries examined, before exploring how courts performing constitutional review have responded to the populist challenge by constitutional interpretation. Populism is present in different forms in different political systems. Among the countries where populism has emerged as an organized political movement, populists have gained a constitution-making majority only in Hungary, while in some other countries they have a parliamentary majority and a dominant position in government but they alone cannot achieve formal constitutional changes. Many claim that Poland has been following the path trodden by Hungary in many respects since the right-wing nationalist Law and Justice Party (PiS) came to power in 2015. Modern Italian populism emerged as a result of the decline of the traditional party system in the mid-1990s, when the coalition of Forza Italia , formed by Silvio Berlusconi, the Northern League, and the National Front came to power in 1994.