



Constitutional Democracy and the Protection of Fundamental Rights: Contemporary Challenges in Modern Governance

Rizal Wahyudi¹, Ardiana², Sofyan Hadi²

¹ Pancasila University, Indonesia. E-mail: rizalwahyudi@gmail.com

² Pancasila University, Indonesia. E-mail: ardiana@gmail.com

³ Pancasila University, Indonesia. E-mail: sofyanhadi@gmail.com

ABSTRACT

Constitutional democracy has long been regarded as the most legitimate framework for safeguarding fundamental rights through the dual mechanisms of popular sovereignty and judicially enforced constitutional constraints. In recent years, however, this model has faced an unprecedented confluence of threats—ranging from democratic backsliding and abusive constitutionalism to the securitization of emergency powers and the rise of algorithmic governance—that collectively erode the protective architecture of rights. While extensive scholarship has examined individual challenges, a systematic integrated analysis that links these phenomena to the functional deterioration of constitutional rights protection remains underdeveloped. This study addresses that gap by constructing a unified analytical framework to assess how contemporary transformations in governance reshape the capacity of constitutional democracies to safeguard fundamental rights. Employing a doctrinal legal methodology combined with comparative constitutional analysis of illustrative jurisdictions, the article identifies four principal patterns of rights erosion: the instrumentalization of constitutional amendment processes, the normalization of perpetual emergency regimes, the displacement of substantive rights by digital surveillance capitalism, and the majoritarian reframing of constitutional identity. The findings reveal that rights protection is increasingly undermined not through outright abolition but through sustained procedural and discursive subversion that preserves formal constitutional structures while emptying them of normative force. The study contributes a novel theoretical lens—constitutional simulacra—to explain how rights protection can be simultaneously affirmed and neutralized. Practical implications for judicial design, transnational constitutional oversight, and civil society resilience are discussed.

Keywords: Abusive Constitutionalism; Constitutional Democracy; Democratic Backsliding; Digital Constitutionalism; Emergency Powers; Fundamental Rights; Judicial Review; Populism

Citation: Wahyudi, Rizal, Ardiana and Hadi, Sofyan. 2024. "Constitutional Democracy and the Protection of Fundamental Rights: Contemporary Challenges in Modern Governance". *JLCS: Journal of Law and Cultural Studies* 1 (1), 1-16. <https://doi.org/10.30872/jlcs.v1i1.1>.

1. INTRODUCTION

The post-war consolidation of constitutional democracy established an interlocking system in which electoral legitimacy and fundamental rights protections were mutually reinforcing. Democratic institutions were entrusted with the articulation of the popular will, while constitutional courts and rights charters acted as counter-

majoritarian bulwarks against legislative encroachments on individual liberties (Dworkin, 1996; Waldron, 2006). For decades, this equilibrium underpinned the expansion of rights across consolidated and transitional democracies alike. Yet, the twenty-first century has witnessed a paradoxical erosion: constitutional forms remain visibly intact, but the substance of rights protection is being hollowed out through processes that are legal, incremental, and discursively framed as democratic renewal (Bermeo, 2016; Ginsburg & Huq, 2018a). Contemporary governance no longer confronts rights exclusively through overt authoritarian rupture; instead, it frequently operates through the sophisticated manipulation of constitutional tools—amendments, referenda, emergency decrees, and digital architectures—that systematically relocate power while proclaiming fidelity to constitutionalism (Scheppele, 2018; Landau, 2013).

Empirical indices confirm a global democratic recession. The V-Dem Institute's data demonstrate that the share of the world's population living in autocratizing regimes has risen sharply, with a marked increase in what Lührmann and Lindberg (2019) term "autocratization by legal means." This form of regression is particularly insidious because it exploits the very institutions designed to preserve rights. Hungary's Fundamental Law of 2011, enacted through a parliamentary supermajority, dismantled the independent constitutional court's jurisdiction and entrenched illiberal values, all while maintaining the formal veneer of constitutional amendment procedure (Halmay, 2019; Bánkuti et al., 2012). Poland's ruling party replicated this strategy by capturing the Constitutional Tribunal and subsequently using it to legitimize sweeping curtailments of judicial independence and media freedom (Sadurski, 2019). Beyond Central Europe, major democracies have exhibited their own vulnerabilities: India's citizenship laws and digital surveillance policies have been criticized for violating equality and privacy guarantees under the guise of national security (Bhatia, 2020); the United States has seen the expansion of executive emergency powers and the erosion of reproductive and voting rights through politically reconstituted courts (Ackerman, 2010; Levitsky & Ziblatt, 2018); Brazil's presidency deployed expansive decree powers and social media mobilization to challenge checks and balances (Hunter & Power, 2019).

Simultaneously, the digital transformation of governance introduces structural challenges that constitutional frameworks designed in the analogue era are ill-equipped to address. Private technology platforms now perform public functions—moderating speech, shaping political discourse, and collecting behavioral data on a scale that fundamentally alters the conditions for privacy, autonomy, and democratic deliberation (Balkin, 2018; Zuboff, 2019). States, in turn, harness these same infrastructures for mass surveillance, often circumventing constitutional safeguards through partnerships with private actors or reliance on emergency justifications (De Gregorio, 2021). The result is a layered environment in which rights are constrained by both public law and private ordering, creating accountability gaps that traditional constitutional remedies cannot easily close.

Despite a wealth of literature on democratic backsliding, emergency governance, and digital constitutionalism as separate domains, insufficient theoretical attention has been devoted to how these phenomena converge to reconstitute the function of

fundamental rights within constitutional democracies. Much of the existing research remains siloed: comparative constitutional law focuses on judicial independence and amendment rules (Ginsburg & Melton, 2015; Roznai, 2017); emergency studies examine derogation regimes (Gross & Ní Aoláin, 2006); and digital rights scholarship develops new lexicons for platform governance (Celeste, 2019). What is missing is an integrated analysis that traces the common logics through which contemporary governance techniques subvert constitutional rights protection while preserving the outer shell of democratic legitimacy.

This article addresses that lacuna by asking: How do contemporary transformations in governance—specifically, abusive constitutionalism, perpetual emergency normalization, and algorithmic state–corporate surveillance—collectively reshape the protective capacity of constitutional democracies concerning fundamental rights? To answer this question, the study develops a unified conceptual framework and applies it through doctrinal analysis and comparative illustrations drawn from Hungary, Poland, India, the United States, and Brazil. The novelty lies not in isolating any single challenge, but in demonstrating that these phenomena are interconnected symptoms of a deeper shift: a transition from substantive constitutionalism to what this article conceptualizes as constitutional simulacra—a regime in which constitutional forms persist as symbolic tokens, while their rights-protective functions are systematically disabled. The study’s significance is both theoretical, advancing the understanding of constitutional decay, and practical, informing judicial strategies, transnational oversight mechanisms, and civil society advocacy. The following section reviews the theoretical foundations and extant scholarship, leading to the articulation of the conceptual framework.

2. LITERATURE REVIEW

The protective architecture of constitutional democracy rests on two foundational tensions: the tension between majoritarian democracy and individual rights, and the tension between constitutional stability and democratic adaptability. Classic liberal constitutional theory resolved the first tension through the institution of judicial review, which empowers courts to invalidate legislative acts that contravene constitutionally entrenched rights (Dworkin, 1996). The counter-majoritarian difficulty, as famously articulated by Bickel (1962) and later developed by Ely (1980), questioned the democratic legitimacy of unelected judges overriding the popular will; yet, the dominant settlement accepted that a rights-based democracy requires the insulation of certain fundamental interests from ordinary political contestation. Waldron (2006) challenged this consensus from within democratic theory, arguing that a well-functioning legislature with robust participatory mechanisms could adequately protect rights, but even Waldron’s critique presupposed a reasonably healthy democratic culture—a condition that contemporary backsliding directly dismantles.

The second tension—between constitutional permanence and democratic change—has been managed through amendment procedures that balance rigidity and flexibility. The comparative constitutional literature established that excessively rigid amendment rules can freeze outdated norms, while excessively flexible ones invite

majoritarian abuse (Lutz, 1994; Ginsburg & Melton, 2015). Roznai (2017) advanced the doctrine of unconstitutional constitutional amendments, positing that certain fundamental principles, including the protection of core rights, are unamendable even through formally correct procedures. This theory gained traction in several constitutional courts, notably in India (the basic structure doctrine) and Colombia. Yet, the rise of abusive constitutionalism exposes the limits of this doctrine: when the entire institutional environment—including the judiciary—is captured, the unamendability doctrine itself becomes a hollow proclamation (Landau, 2013).

The literature on democratic backsliding has substantially refined our understanding of how constitutional democracies erode without an identifiable moment of rupture. Bermeo (2016) distinguished classic coups from “promissory coups,” executive aggrandizement, and strategic election manipulation, showing that contemporary backsliding is predominantly legal and incremental. Waldner and Lust (2018) synthesized this literature into a framework emphasizing that backsliding occurs through changes in the meaning of institutions rather than their formal replacement. Scheppele (2018) coined the term “autocratic legalism” to describe the Hungarian phenomenon of using constitutional law to destroy constitutionalism, a process in which every step is legally validated by a previously captured constitutional court. Halmai (2019) extended this analysis to Poland, demonstrating how illiberal governments systematically dismantle checks and balances while maintaining electoral legitimacy. Central to this literature is the insight that rights are not primarily abrogated through overt repeal; they are rendered ineffective through jurisdictional stripping, court packing, procedural burdens, and the redefinition of rights themselves.

Parallel to the democratic backsliding scholarship, a growing body of work examines the transformation of emergency governance. The classical model distinguished between normalcy and exception, positing that constitutional orders could temporarily suspend certain rights during genuine crises, with the expectation of restoration (Rossiter, 1948). Schmitt (1922/2005) radicalized this dichotomy, arguing that the sovereign is he who decides on the exception, a logic that threatens to consume the norm. Gross and Ní Aoláin (2006) documented how post-9/11 counterterrorism measures normalized emergency powers, embedding them within ordinary legal frameworks. More recently, the COVID-19 pandemic accelerated the worldwide adoption of executive decree powers, digital surveillance, and restrictions on movement and assembly, often justified under public health emergencies (Ginsburg & Versteeg, 2021). The danger, as Ackerman (2010) warned, is that temporary emergency measures congeal into permanent fixtures, creating a “state of exception” that becomes the new normal, eroding due process, privacy, and non-discrimination guarantees.

The digital dimension adds a further layer of complexity. The rise of platform capitalism and algorithmic governance has generated what Celeste (2019) calls “digital constitutionalism”—an emergent field that interrogates how constitutional values translate into the digital environment. Balkin (2018) demonstrated that freedom of speech in the algorithmic society is increasingly governed by private platforms whose content moderation decisions are opaque, unaccountable, and driven by business

models rather than constitutional principles. Zuboff (2019) theorized surveillance capitalism as a new economic logic that expropriates human experience as raw material for behavioral prediction, fundamentally undermining autonomy and privacy—rights that are constitutionally protected but rendered practically unenforceable against the scale and secrecy of data extraction. De Gregorio (2021) examined how European digital constitutionalism attempts to reframe rights and powers, but noted persistent gaps between normative declarations and enforcement realities. States exploit these gaps by outsourcing surveillance to private actors, creating hybrid public–private regimes that evade constitutional constraints (Murray, 2019).

Populist constitutionalism provides a discursive bridge between democratic backsliding, emergency normalization, and digital populism. Blokker (2019) argued that populist constitutionalism is not anti-constitutional per se, but advances a particular conception of constitutionalism rooted in a unitary, homogeneous “people” whose will must be unmediated by liberal checks and balances. Müller (2016, 2017) characterized populism as inherently anti-pluralist, claiming a moral monopoly on representing the authentic people, a stance that inevitably clashes with minority rights protections. Corrias (2016) linked populist constitutionalism to the concept of constituent power, showing how populist actors invoke the people’s original sovereign authority to bypass existing constitutional constraints. This discursive move delegitimizes courts, human rights institutions, and civil society organizations as obstacles to the popular will, paving the way for their circumvention or capture.

Despite these rich and diverse literatures, a critical gap persists: the three phenomena—abusive constitutionalism, emergency normalization, and algorithmic governance—are typically studied in isolation, obscuring their synergistic effects on rights protection. When emergency decrees are executed through digital platforms that are themselves regulated by captured courts, the resulting regime is more than the sum of its parts. This article integrates these literatures into a coherent analytical framework, introducing the concept of constitutional simulacra to capture the process by which rights-protective functions are systematically disabled while constitutional forms, symbols, and rhetoric are preserved. The following section outlines the methodology employed to apply and substantiate this framework.

3. METHODOLOGY

This study adopts a qualitative, doctrinal legal research design with a comparative constitutional dimension. The doctrinal method is appropriate because the research question concerns the interpretation, operation, and transformation of constitutional norms, doctrines, and institutions governing fundamental rights protection (Hutchinson & Duncan, 2012). The analysis systematically examines legal texts—constitutions, statutes, judicial decisions, emergency decrees—as well as the surrounding discursive practices that give them operative meaning. The comparative approach is employed not to generate statistically generalizable causal claims, but to illuminate patterns of constitutional subversion through the careful selection of illustrative cases that represent distinct institutional and political contexts (Hirschl, 2014).

The case selection follows a “most different systems” logic to demonstrate that the identified challenges are not confined to a single region or regime type. The five jurisdictions—Hungary, Poland, India, the United States, and Brazil—span consolidated and backsliding democracies, parliamentary and presidential systems, common law and civil law traditions, and different levels of economic development. Hungary and Poland represent the paradigmatic Central European cases of autocratic legalism within the European Union’s supranational oversight framework (Scheppele, 2018; Sadurski, 2019). India exemplifies the world’s largest democracy, with a strong tradition of judicial activism and basic structure doctrine that has faced recent challenges from majoritarian policies and digital surveillance (Khosla, 2012; Bhatia, 2020). The United States, as an established presidential democracy, illustrates how emergency powers and politically polarized judicial appointments can erode rights even in long-consolidated constitutional orders (Ackerman, 2010; Levitsky & Ziblatt, 2018). Brazil provides a Latin American case where populist executive aggrandizement, coupled with widespread social media mobilization, tested the resilience of a relatively young democratic constitution (Hunter & Power, 2019). These cases are not treated as independent units for controlled comparison, but as empirical sites that collectively reveal recurring patterns of constitutional subversion.

The data sources are exclusively publicly available primary and secondary legal materials. Primary sources include constitutional texts, legislative acts, constitutional court and supreme court decisions, emergency decrees, and international human rights body reports. Secondary sources encompass the extensive scholarly literature from constitutional law, political science, and digital governance studies. The analysis proceeds in two stages. First, a thematic doctrinal analysis identifies the legal mechanisms through which fundamental rights protections have been reconfigured in each jurisdiction, focusing on amendment procedures, judicial independence frameworks, emergency powers architecture, and digital surveillance legislation. Second, a cross-case synthesis extracts common logics and patterns, linking them to the theoretical framework developed from the literature. This synthesis generates the integrated findings on how abusive constitutionalism, emergency normalization, and digital governance collectively restructure rights protection.

No human participants or confidential data are involved; therefore, formal ethical approval is not required. The study adheres to principles of academic integrity, transparency, and rigorous source attribution. The reliability of the analysis is enhanced through triangulation across multiple sources and jurisdictions, while validity is supported by grounding every interpretive claim in specific legal provisions, judicial reasoning, and contextual scholarly analysis. The following section presents and discusses the findings, organized around four interlocking patterns of rights erosion that emerged from the analysis.

4. RESULTS AND DISCUSSION

The analysis reveals that the protection of fundamental rights in contemporary constitutional democracies is being reconfigured not through frontal assault but through four interconnected processes: (1) the instrumentalization of constitutional amendment

and judicial capture, (2) the normalization of emergency governance and rights derogation, (3) the emergence of algorithmic state–corporate surveillance as a parallel rights-constraining architecture, and (4) the discursive reframing of constitutional identity in majoritarian terms. Each pattern is examined below, integrating empirical presentation, interpretation, theoretical linkage, and comparative discussion.

4.1 Instrumentalized Amendment and Judicial Capture

The Hungarian case exemplifies the paradigmatic sequence. Following the 2010 election, the Fidesz-KDNP coalition secured a two-thirds parliamentary supermajority, enabling it to enact a new Fundamental Law in 2011 through ordinary amendment procedures that were themselves constitutionally permissible (Bánkuti et al., 2012). The process epitomized abusive constitutionalism: legal form was meticulously observed, yet the cumulative effect dismantled the prior constitutional order’s rights-protective capacity. The new constitution reduced the Constitutional Court’s jurisdiction over fiscal matters, altered judicial appointment mechanisms to ensure ruling-party dominance, and entrenched policy preferences—such as the definition of marriage as a union between a man and a woman—that directly contravened equality rights (Halmai, 2019). Subsequent amendments further targeted judicial independence, forced the retirement of judges, and created a new administrative court system under executive control. The European Court of Human Rights and the Court of Justice of the European Union repeatedly found violations of judicial independence and due process, yet compliance remained partial and strategically managed (Scheppele, 2022).

Poland followed a strikingly similar trajectory. After the Law and Justice (PiS) party won the presidency and parliamentary majority in 2015, it immediately moved to paralyze the Constitutional Tribunal by refusing to seat lawfully appointed judges and appointing loyal replacements (Sadurski, 2019). The captured Tribunal then validated legislative packages that undermined judicial independence, media pluralism, and civil society organizations. The process did not abolish the constitution; it reinterpreted it. Rights such as freedom of assembly and privacy were formally retained but operationally restricted through procedural barriers, new police powers, and surveillance laws.

India presents a less linear but instructive pattern. The Supreme Court’s development of the basic structure doctrine in *Kesavananda Bharati* (1973) was long celebrated as a robust barrier against abusive amendments (Khosla, 2012). However, the doctrine’s effectiveness depends on the continued independence and assertiveness of the judiciary itself. Recent scholarship documents how executive pressure, opaque judicial appointments, and the strategic use of caseload management have incrementally shaped the court’s behavior in rights-sensitive cases (Bhatia, 2020). The passage of the Citizenship Amendment Act (2019), which combined with a proposed National Register of Citizens, raised serious concerns about religious discrimination and the right to equality, yet the constitutional challenge remains pending amid procedural delays. While India has not experienced the overt court-capture witnessed in Hungary or Poland, the combination of majoritarian legislative dominance and subtle judicial deference has produced a gradual constriction of minority rights, underscoring that

judicial review alone is an insufficient guardian when the broader political culture shifts decisively.

These findings align with Landau's (2013) concept of abusive constitutionalism but also extend it. The original framework focused on the use of constitutional amendment and replacement to entrench authoritarian rule. The cases examined here reveal a more insidious variant: the constitution is not necessarily replaced but continuously reinterpreted and procedurally burdened so that rights remain textually present yet practically inaccessible. This phenomenon is what the present study conceptualizes as constitutional simulacra—the constitution persists as a symbol of legitimacy, but its functional capacity to protect rights is systematically disabled. The theoretical implication is that the binary opposition between “amendment” and “replacement” loses analytical purchase; what matters is the sustained, cumulative process of disabling rights-enforcing institutions.

The practical implications are profound. International and regional oversight mechanisms, including the EU's rule-of-law conditionality mechanism, face the challenge of distinguishing between legitimate constitutional change and abusive subversion when both proceed through formally identical procedures. The Hungarian and Polish cases demonstrate that ex post judicial interventions from Strasbourg and Luxembourg are necessary but insufficient; preventive mechanisms, such as the early involvement of the Venice Commission and civil society monitoring, are essential. Furthermore, domestic constitutional designers should consider incorporating substantive unamendability clauses that explicitly protect not only rights but also the institutional prerequisites for their enforcement—judicial independence, access to justice, and the pluralistic composition of rights-protective bodies (Roznai, 2017).

4.2 Emergency Normalization and Permanent Rights Derogation

Emergency powers have historically been justified as temporary deviations necessary to preserve the constitutional order. The contemporary challenge is the erosion of the temporary/normal distinction, resulting in what might be termed a permanent state of mitigated emergency. The United States exemplifies this trend in the post-9/11 context. The Authorization for Use of Military Force (2001) became a quasi-constitutional blank check for executive military and surveillance actions across multiple administrations, extending far beyond its original temporal and geographical scope (Ackerman, 2010). The USA PATRIOT Act and subsequent legislation expanded surveillance authorities, while the Foreign Intelligence Surveillance Court operated with minimal adversarial scrutiny. Although the Supreme Court in *Boumediene v. Bush* (2008) affirmed habeas corpus rights for Guantánamo detainees, the broader architecture of the “war on terror” normalized practices—indefinite detention, targeted killing, mass metadata collection—that would be constitutionally suspect in the ordinary criminal justice context. Ackerman (2010) warned that the emergency constitution was becoming entrenched, and subsequent developments, including the invocation of national emergency to fund border wall construction, validated this concern.

India's experience with emergency governance predates the contemporary wave. The 1975–1977 Internal Emergency under Indira Gandhi demonstrated how constitutional emergency provisions could be abused to suspend fundamental rights, including habeas corpus, with the Supreme Court's infamous acquiescence in *ADM Jabalpur v. Shiv Kant Shukla* (1976). The post-Emergency constitutional amendments strengthened safeguards, but more recent uses of preventive detention laws, the Armed Forces (Special Powers) Act in conflict zones, and sweeping internet shutdowns in Jammu and Kashmir and elsewhere reveal that emergency logics persist in ordinary legislation and executive action (Bhatia, 2020). The COVID-19 pandemic further normalized expansive executive decree-making, often bypassing parliamentary oversight and judicial scrutiny under the pressure of public health urgency. Hungary's 2020 Enabling Act granted the government power to rule by decree indefinitely, a move criticized by the Council of Europe as incompatible with democratic accountability (Ginsburg & Versteeg, 2021).

These cases illustrate a pattern that goes beyond the Schmittian exception or the classical derogation model. The concept of “permanent emergency” does not imply a continuous declaration of martial law; rather, it denotes a structural condition in which exceptional measures are embedded within ordinary law, diffused across multiple statutes, and justified through ongoing, diffuse threats—terrorism, organized crime, migration, pandemics, cyberattacks. The effect on fundamental rights is cumulative: the presumption of liberty is replaced by a presumption of security, reversing the burden of justification that liberal constitutionalism traditionally placed on the state. Privacy, freedom of movement, freedom of assembly, and due process are all incrementally eroded under the guise of necessity.

Theoretically, this pattern reinforces the constitutional simulacra thesis: emergency powers become a permanent feature while the constitution's bill of rights remains formally untouched. The right to privacy, for example, is not repealed; it is simply rendered inoperative through pervasive surveillance statutes that courts validate under generous “national security” exceptions. Gross and Ní Aoláin (2006) anticipated this trajectory by documenting how counter-terrorism measures become entrenched through institutional habituation and legislative inertia. The present analysis extends their work by linking emergency normalization to abusive constitutionalism: once the judiciary is captured or cowed, it ceases to function as a check on emergency overreach, enabling the executive to operate in a zone of legal impunity that the constitutional text no longer constrains.

Practical implications involve rethinking constitutional emergency clauses. Constitutions should impose strict sunset provisions, require periodic legislative renewal by supermajority, and absolutely exclude derogation from core judicial review and habeas corpus—a principle partially enshrined in international human rights law but inconsistently implemented domestically. Furthermore, the digital dimension, examined next, amplifies the reach of emergency powers exponentially.

4.3 Algorithmic Surveillance and the Hollowing Out of Privacy and Autonomy

The third pattern concerns the emergence of algorithmic state–corporate surveillance as a parallel constitutional architecture that constrains fundamental rights outside the traditional public-law framework. This development is not primarily driven by constitutional amendment or formal derogation, but by the material transformation of the informational environment in which rights are exercised. When the state partners with private platforms to collect, analyze, and act upon massive datasets, rights to privacy, freedom of expression, and non-discrimination are affected in ways that existing constitutional doctrines struggle to address (Balkin, 2018; Zuboff, 2019).

The Snowden revelations (2013) exposed the scale of state surveillance programs that secretly compelled private companies to disclose user data under expansive interpretations of national security authorities, bypassing the Fourth Amendment’s warrant requirements as traditionally understood. The USA FREEDOM Act (2015) introduced modest reforms but left the core architecture intact. In Europe, the Court of Justice of the European Union’s decisions in *Digital Rights Ireland* (2014) and *Tele2 Sverige* (2016) invalidated blanket data retention regimes, affirming that mass surveillance violates the essence of privacy rights under the EU Charter. Yet, member states have responded by passing revised legislation that maintains bulk collection under different legal labels, demonstrating the resilience of surveillance imperatives.

India’s Aadhaar biometric identification system, upheld by a fractured Supreme Court in *Puttaswamy II* (2018), illustrates how state-driven digital identity infrastructure creates new vectors for rights erosion. While the Court affirmed the fundamental right to privacy in *Puttaswamy I* (2017), the subsequent Aadhaar judgment permitted the mandatory linking of biometric identifiers to tax returns and welfare benefits, raising serious concerns about exclusion, surveillance, and algorithmic discrimination. The legislative framework for data protection remained pending for years, leaving a regulatory vacuum that allowed both state and private actors to process personal data with minimal accountability (Bhatia, 2020). Brazil’s *Lei Geral de Proteção de Dados* (LGPD, 2018) represents a more robust regulatory effort, but enforcement capacity remains nascent, and the Bolsonaro administration’s expansive use of social media surveillance and disinformation machinery demonstrated that even well-drafted data protection laws can be circumvented through executive practice and platform complicity (Hunter & Power, 2019).

These findings align with the digital constitutionalism literature but also reveal a deeper structural shift. Celeste (2019) and De Gregorio (2021) emphasize the need to translate constitutional values into the digital sphere; however, the cases examined show that such translation is systematically obstructed because the same actors who control constitutional meaning—captured courts, hegemonic executives—also control the regulatory frameworks for digital governance. The constitutional simulacra dynamic thus extends to the digital realm: the constitution guarantees privacy, but the operational legal and technical infrastructure renders that guarantee functionally meaningless. The theoretical contribution is to integrate the algorithmic dimension into the broader analysis of constitutional decay, showing that digital surveillance is not a

separate policy issue but a central mechanism through which contemporary governance disables rights while proclaiming their continued validity.

The practical implications demand a rethinking of constitutional remedies. Courts must develop doctrines that recognize the de facto constraint on rights imposed by data architectures, going beyond formalistic distinctions between state action and private conduct. The EU's General Data Protection Regulation and the emerging AI Act represent experimental attempts to impose rights-protective frameworks on both state and corporate actors, but their effectiveness depends on the independence of supervisory authorities—precisely the kind of institution vulnerable to capture. International cooperation on digital constitutionalism, such as the Budapest Convention on Cybercrime and the Council of Europe's work on AI and human rights, offers supplementary pathways, though they face enforcement challenges.

4.4 Majoritarian Reframing of Constitutional Identity

The fourth pattern is discursive and ideological: the reframing of constitutional identity in majoritarian, culturally homogeneous terms that delegitimize rights protections as externally imposed constraints on the authentic popular will. This discursive shift provides the ideological glue that binds abusive constitutionalism, emergency normalization, and digital surveillance into a coherent political project. Populist constitutionalism, as theorized by Blokker (2019) and Müller (2016), posits that the “people” constitute a singular, indivisible entity whose will is the sole source of constitutional legitimacy. Within this frame, constitutional courts, human rights treaties, and minority protections are portrayed as obstacles erected by elites or foreign interests to thwart genuine democracy.

In Hungary, this discourse was institutionalized through the Fundamental Law's National Avowal, which defines the nation in ethnic and Christian terms, explicitly rejecting the multicultural, liberal conception of constitutional identity (Halmai, 2019). The government's campaigns against George Soros and “Brussels bureaucrats” frame fundamental rights—particularly asylum rights and LGBTQ+ equality—as alien impositions that threaten national sovereignty. Poland's ruling party similarly invoked a vision of constitutional identity grounded in Catholic tradition and national sovereignty, using this framing to justify judicial “reforms” and attacks on the independence of the judiciary, which was cast as a holdover from the communist era needing democratic purification (Sadurski, 2019). India's ruling Bharatiya Janata Party increasingly advances a vision of constitutional identity rooted in Hindu majoritarianism, challenging the secular, pluralistic vision that had been central to the post-independence constitutional settlement (Khosla, 2012). The Citizenship Amendment Act and the rhetoric around “illegal immigrants” map neatly onto the majoritarian reframing of who belongs to the constitutional community and who is entitled to rights.

The effect on fundamental rights is profound. When rights are reframed as external impositions rather than inherent guarantees, their violation ceases to be a legal wrong and becomes an act of democratic self-assertion. Courts that enforce rights are attacked as undemocratic, creating a political environment in which compliance with

judicial decisions becomes optional. The comparative analysis reveals that this discursive shift is remarkably consistent across different institutional contexts, suggesting a common logic of populist constitutionalism that transnationalizes through networks of illiberal actors and digital platforms.

Theoretically, this pattern completes the constitutional simulacra framework. The constitution remains in place as a symbolic object—a national banner—while its substantive normative content is replaced by an identitarian narrative that equates the people with the ruling majority. The originality of this contribution lies in showing that the cultural reframing is not merely epiphenomenal but structurally necessary: it resolves the cognitive dissonance that would otherwise arise when a regime claims democratic legitimacy while systematically violating rights. By redefining rights as undemocratic, the regime achieves consistency on its own terms.

The practical implications are among the most intractable, because they involve contesting hegemonic narratives rather than simply reforming institutions. Legal strategies alone cannot restore rights protection when the political culture delegitimizes the very concept of counter-majoritarian rights. Transnational civil society, independent media, and educational initiatives that cultivate constitutional literacy and pluralism are essential complements to judicial and legislative interventions. The Council of Europe's Democratic Governance indicators and UNESCO's media literacy programs represent nascent efforts, but they require sustained investment and political will that are often lacking.

In sum, the four patterns—instrumentalized amendment, emergency normalization, algorithmic surveillance, and majoritarian reframing—are not independent threats but interlocking components of a systemic reconfiguration of constitutional democracy. The next section synthesizes the principal conclusions and outlines implications for theory, practice, and future research.

5. CONCLUSION

This article set out to examine how contemporary governance transformations collectively reshape the capacity of constitutional democracies to protect fundamental rights. The integrated analysis of abusive constitutionalism, emergency normalization, digital surveillance, and populist constitutional identity revealed a consistent underlying dynamic: rights are not abolished but are systematically disabled through processes that maintain the formal facade of constitutionalism. This condition, conceptualized here as constitutional simulacra, represents a new modality of rights erosion that challenges the binary categories—democracy versus authoritarianism, norm versus exception—upon which constitutional theory has long relied.

The principal findings are fourfold. First, constitutional amendment and judicial capture operate as a central vector for disabling rights enforcement, particularly when unchecked by robust transnational oversight. Second, the normalization of emergency powers embeds exceptional measures within ordinary law, creating a permanent state of rights derogation that courts largely validate. Third, algorithmic state–corporate

surveillance constructs a parallel governance architecture that circumvents constitutional protections through technical means and public–private collusion. Fourth, the majoritarian reframing of constitutional identity delegitimizes the very idea of counter-majoritarian rights, transforming their violation into an act of democratic authenticity.

The theoretical contribution lies in the articulation of the constitutional simulacra framework, which synthesizes previously siloed literatures and provides a diagnostic tool for identifying regimes where constitutional forms mask rights-inimical practices. This framework extends Landau’s abusive constitutionalism, Ackerman’s emergency constitution, and Celeste’s digital constitutionalism by revealing their interconnected operation. The concept of simulacra foregrounds the performative dimension of contemporary constitutionalism, where the display of rights language serves to legitimize the very governance structures that undermine those rights.

The practical implications are significant. For constitutional designers, the findings underscore the necessity of protecting not only rights but also the institutional prerequisites of their enforcement—-independent courts, access to justice, and pluralistic oversight bodies—through unamendable clauses and procedural entrenchment. For transnational actors such as the European Union, the Council of Europe, and the Inter-American system, the analysis highlights the need to move beyond reactive infringement procedures toward preventive monitoring that detects the early stages of constitutional simulacra, including subtle changes in judicial appointments, emergency legislation, and surveillance laws. For civil society and the private sector, the findings emphasize the importance of digital constitutionalism frameworks that impose rights-protective obligations on platforms and data controllers irrespective of state action doctrines.

The study has limitations that suggest avenues for future research. The qualitative comparative case selection, while methodologically appropriate for theory-building, limits generalizability. Future studies could develop quantitative indicators of constitutional simulacra based on the dimensions identified here, enabling large-N testing across a broader set of countries. The analysis focused primarily on civil and political rights; the implications for economic, social, and cultural rights—which are often the first casualties of resource-diverting emergency measures and algorithmic exclusion—warrant dedicated investigation. Furthermore, the article concentrated on national-level constitutional dynamics; the interaction with international investment law, trade agreements, and global supply chain governance creates additional layers of rights erosion that remain underexplored. Finally, while this study diagnosed the problem, the normative and strategic question of how to reverse constitutional simulacra once entrenched remains pressing. Processes of democratic re-consolidation, such as those seen in some Latin American and Eastern European contexts, may offer lessons for designing resilience and restoration mechanisms.

In an era where the global democratic recession shows no clear signs of reversal, understanding the mechanisms through which constitutional democracies fail to protect rights while claiming to uphold them is not merely an academic exercise. It is an essential

precondition for renewing the democratic promise that fundamental rights belong to all persons, not only to those whom the reigning majority recognizes as part of the authentic people.

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