

# The Perils of Passivity in the Rule of Law Crisis: A Response to von Bogdandy

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In [a recent contribution to Verfassungsblog](#), Professor Armin von Bogdandy observes, “European constitutionalism is perhaps facing a ‘constitutional moment’. The European Union has to decide whether it *comprises* illiberal democracies or whether it  *fights* them.” Readers might assume that passage is the preface to a call for action. But anyone expecting an unequivocal declaration that the EU must now finally defend its legal and democratic values will be disappointed. Rather than calling on the EU to stand up to increasingly authoritarian member governments, von Bogdandy concludes that, “Powerful arguments suggest caution.”

Though von Bogdandy acknowledges certain conditions that could justify action by the Union to defend European values, the main thrust of his intervention is that the EU should remain hesitant to intervene. His call for restraint is grounded in a series of warnings and in an empirical claim. First, von Bogdandy warns that EU efforts to defend democratic values might have a variety of unintended negative consequences. Second, von Bogdandy suggests – without quite saying so explicitly – that while there may be certain ‘red lines’ in terms of European values, the crossing of which would justify action by the EU, any such red lines have not yet been crossed by backsliding member governments. Von Bogdandy is far from alone in making such arguments: Other prominent scholars and policymakers have claimed that despite the problematic behavior of the Hungarian and Polish regimes they remain democracies, such that a decisive EU intervention would be ill-advised. For instance, [Joseph Weiler](#) goes even further than von Bogdandy, cautioning that “Orban might be many things, but Dictator he is not: he gives perfect expression to the wishes of a majority of Hungarian citizens and for many of whom he is even considered moderate.” In this context, vigorous EU rule of law enforcement functions as a “check on democratic majoritarian decisions... [which] sowed the seeds of its own self-destruction.”

We find these appeals for restraint to be untenable for two sets of reasons – one normative, one factual.

First, scholars should be wary of emphasizing the risks of EU intervention in ways that tap into the very rhetoric mobilized by Hungarian and Polish officials to undermine the EU’s willingness to act. Not only does this embolden passivity and legitimate the claims of recalcitrant governments, but it also overestimates the risks of action while underestimating the costs of inaction. Second, von Bogdandy’s (and Weiler’s) core empirical presumption – that all of the EU’s member states remain democracies – is simply incorrect.

## Beware "Rhetorics of Reaction"

Von Bogdandy's admonitions offer a lesson into how scholars can inadvertently propagate what political economist Albert Hirschman described in his 1991 book as *The Rhetoric of Reaction*. Hirschman traced how for centuries opponents of progressive reforms have relied on three standard narratives: (1) the *perversity* thesis, which posits that a reform designed to remedy a problem may in fact exacerbate the problem; (2) the *futility* thesis, which holds that the reform effort is doomed to fail; and finally (3) the *jeopardy* thesis, which maintains that the costs of the proposed reform are too high because the reform will threaten previous accomplishments in some other area. However inadvertently, von Bogdandy's analysis concedes far too much to such rhetoric, thus playing into efforts to prevent the EU from defending its legal and democratic values.

Indeed, traces of all three reactionary rhetorics identified by Hirschman are present in von Bogdandy's analysis. He raises the futility thesis by arguing that, "It seems possible that a European defence of values may fail, which might inflict lasting damage on the Union's authority and demonstrate the frailty of the very foundations of the common European house." But even as he warns that the EU's efforts to defend democracy may prove futile, von Bogdandy also raises the (contradictory) jeopardy thesis, cautioning that "success, too, might plunge the Union into serious trouble" as this "would imply an enormous proof of power" likely to "trigger fierce reactions." Taking both claims seriously clearly works to freeze EU action in its tracks.

Yet von Bogdandy's use of the rhetoric of perversity is the most concerning. He opens the piece invoking the specter of a Schmittian "tyranny of values:" In acting to defend core EU values, the EU would become a militant democracy risking "a defence of values which destroys the very values it aims to protect." We find this perversity narrative worrisome because it precisely mirrors the rhetoric weaponized by the Hungarian and Polish governments. For instance, the day before the European Parliament voted to trigger Article 7(1) TEU against Hungary in September 2018 in light of the risk of a serious breach in the rule of law, Viktor Orbán [chastised the MEPs](#) as follows:

"Hungary's decisions are made by the voters in parliamentary elections. What you are claiming is no less than saying that the Hungarian people are not sufficiently capable of being trusted to judge what is in their own interests. You think that you know the needs of the Hungarian people better than the Hungarian people themselves."

Just two years prior Poland's Minister of Justice, Zbigniew Ziobro, mobilized a similar rhetoric when the Commission initiated a dialogue with the Polish government under the 2014 Rule of Law Framework. In a [letter](#) to Commission Vice President Frans Timmermans, Ziobro accused the Commission of

"attempt[ing] to exert pressure upon the democratically elected Parliament and Government of the sovereign republic of Poland... Law and Justice (PiS), which is the first political party in Polish history to win a majority in

the parliamentary elections and therefore enjoys an undisputed democratic mandate."

According to their logic, efforts to push EU rule of law enforcement beyond soft dialogue with recalcitrant member state governments amounts to an undemocratic supranational interference upon national democracy. For scholars nourished on a steady diet of debates surrounding the EU's own democratic deficit, these claims have face validity. Their appeal grows when they are buttressed with the Hungarian and Polish governments' remarkably successful campaign to brand themselves as promoters of "[illiberal democracy](#)" and spokesmen of the "[will of the people.](#)" Indeed, von Bogdandy [warns](#) that if EU "institutions urge or even try to force democratically elected governments to revise important political projects, by invoking European values, they run the risk of being rejected as self-important, arbitrary and illegitimate actors." And as noted above, Joseph Weiler agrees, for "the aggression against the core values is often done in the name of national democracy and as an expression of popular will as represented by voter preference in national elections."

This is the point where it becomes clear that the rhetoric of perverse effects of EU action hangs on an empirical assumption: that the countries in question are democracies. Yet this is no longer the case.

### **What is Your Red Line?**

There is some ambiguity in von Bogdandy's discussion of 'red lines.' He suggests that red lines should "be interpreted such as to only prohibit particularly problematic measures, but without indicating a 'right way,' let alone stipulating the basic organization of Member State institutions." Without explicitly defining these red lines, he offers some suggestions as to what they might be, and he implies that Hungary and Poland have not yet crossed them because they remain "democratically elected governments.

The problem with this line of argument is that already one EU member state – Hungary – is no longer a democracy, and another – Poland – is governed by a party that is racing to dismantle the country's core democratic institutions. In Freedom House's most recent annual report, Hungary was ranked "[partly free](#)" – marking the first time an EU member state has been demoted from the category of free countries. Further, Hungary and Poland are two of the eight countries in the world to experience "[the most widespread democratic erosion.](#)" according to the International Institute for Democracy and Electoral Assistance.

Though Orbán refers to his regime as an illiberal democracy, scholars of comparative politics describe it as a [competitive authoritarian regime](#) or competitive autocracy. The professors that introduced this concept, Steven Levitsky and Lucan Way, [recently underscored](#) that "Orban's Hungary is a prime example of a competitive autocracy." Indeed, the Organization for Security and Cooperation in Europe (OSCE) found the last two parliamentary elections in Hungary (2014 and 2018) [were decidedly unfair](#), with the governing party using state resources to tilt the playing field in its favor. The regime has been sharply criticized by the Council of Europe, the European Parliament, and a variety of international actors that monitor

democracy and fundamental democratic values like judicial independence and freedom of the press. Poland has not yet crossed the line to become a competitive authoritarian regime, but the Law and Justice (PiS) party government is racing to dismantle democracy. Poland's de facto leader, Jarosław Kaczyński, has openly declared his intent to emulate the Orbán model once promising "Budapest in Warsaw," and since its first election in 2015, PiS has systematically attacked the rule of law and other pillars of liberal democracy. It has unconstitutionally captured the Constitutional Tribunal, replaced 40% of the judges on the Supreme Court, used the Ministry of Justice to replace 149 court presidents in the ordinary judiciary, turned the state media into a crude propaganda mouthpiece, targeted NGOs, and – as highlighted last week in Verfassungsblog itself – attacked academic freedom by bringing [bogus criminal charges against dissident academics](#).

If developments in Hungary and Poland do not cross a red line, what exactly would? We suspect that scholars like von Bogdandy and Weiler may have in mind the autocracies of yesteryear – those that arise from military coups, are run by bloodthirsty dictators, and abolish elections. But this view of authoritarianism is decisively out of date.

Steven Levitsky and Daniel Ziblatt [warn](#) that "since the end of the Cold War, most democratic breakdowns have been caused not by generals and soldiers but by elected governments themselves... Democratic backsliding today begins at the ballot box." Nobody contests that Fidesz and PiS won free and fair democratic elections the first time around. Yet once in power, [today's aspiring autocrats](#) rule *by law* to remove constitutional checks on their authority and create an uneven playing field to make it difficult or impossible for them to be replaced via regular democratic means. They undermine judicial independence by packing the courts and placing public prosecutors under increasing political control. They slowly dismantle press freedom and enable regime-friendly oligarchs to control media outlets. They harass NGOs, universities, and civil society to demobilize popular opposition. And they alter electoral rules to construct legislative majorities or supermajorities with only a plurality of the votes.

This transposable ["script"](#) represents the ["learning curve"](#) of today's authoritarians, who know that they stand a much better chance of ruling indefinitely if they stop short of violent repression by bleeding democracy to death by a thousand cuts. [After all](#), "[k]illing a journalist or firing on crowds of protesters can easily rally international opinion and turn an autocrat into a pariah. But few notice or care if party supporters infiltrate the electoral commission or a pro-government entrepreneur uses government funds to take control over an opposition website."

By failing to appreciate that today's competitive authoritarian regimes avoid taking overtly repressive actions and use subtler techniques of political control, arguments like von Bogdandy's risk inadvertently legitimating these regimes' claims to democratic legitimacy. Tolerating a minimal level of electoral competition does not make regimes like Orbán's "democratic," no matter what adjective ("illiberal," "imperfect," etc.) is used to qualify the term or what policy outputs these governments achieve. In [the words of Larry Diamond](#), "the test of a democracy is not whether the economy is growing, employment is rising, or more couples are

marrying, but whether people can choose and replace their leaders in free and fair elections. This is the test that Hungary's political system now fails." Alarming, the PiS government in Poland has made it clear that it intends to replicate this model.

### **The Price of Inaction**

Our point is not, of course, that there is no risk of unintended consequences should the EU take more forceful action to enforce the rule of law. The point is that the far greater risk lies in letting autocracy fester. While von Bogdandy warns that, "powerful arguments suggest caution," we believe that far more powerful arguments demand action.

First, as von Bogdandy acknowledges and as Vice President of the European Commission Frans Timmermans has repeatedly emphasized, the dismantling of the rule of law in Hungary and Poland not only infringes the rights of their own citizens, but also undermines EU legal rights across entire Union. These regimes cannot be relied upon to respect EU legal norms and to implement EU policies in good faith. This adversely affects citizens and businesses of other member states that have little choice but to interact with such regimes when they live, work, or conduct business there.

Second, failure to confront emerging autocracies in the EU threatens to make a mockery of the EU as the 'union of values' that Hungarian and Polish citizens sought to join in the first place. EU membership has consistently been highly valued by [Polish](#) and [Hungarian](#) citizens, many of whom view(ed) European integration as an insurance policy against the return of autocracy. But how much longer can this popular support last, given the EU's overly cautious approach in rule of law enforcement? Further, a failure to defend democracy and the rule of law undermines the Union's very *raison d'être* in ways that also reverberate internationally. The EU has consistently exercised its soft power to promote democracy and the rule of law abroad. But "the [internal integrity](#) of democratic and rule of law conditions within the Union is intimately linked to the EU's external ability to credibly co-operate with others on the subject." How can the EU continue to stand for democracy and legality around the world when it tolerates autocracy among its members?

Finally, we must take seriously the reality that authoritarianism is contagious. The EU's failure to confront Orbán's regime years ago when he launched his effort to consolidate autocratic rule emboldened Kaczyński to emulate his model. The fact that the two have been met with so little resistance is now emboldening other aspiring autocrats to follow their [playbook](#). Moreover, once such leaders are comfortably ensconced within the Union, they can wreak havoc, acting as [Trojan horses](#) for other powerful authoritarian regimes around the world to undermine the Union from within. Autocratic member governments play spoilers on sensitive issues within the Council: For instance, Article 7(2) TEU becomes all but unusable where autocrats multiply and back each other. They can also undermine the legitimacy of the European Parliament by holding EP elections that are less than free and fair and sending MEPs from autocratic ruling parties to take up powerful positions within the Parliament. As [research in comparative politics](#) reminds us, authoritarian member state regimes can poison the political unions of which they are members.

Passivity is perilous. Over the past decade, the EU has followed the sort of cautious approach advocated by von Bogdandy, and it has a track record of abysmal failure. This approach has led to the emergence of the EU's first competitive authoritarian regime in Hungary and has seen democracy substantially degraded in Poland. So much for caution. While it is helpful to point out the potential unintended consequences of EU action, scholars should take great care to not contribute to a rhetoric of reaction that would paralyze the Union and give succor to autocrats who undermine its very *raison d'être*.

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