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## The People Against the Constitution

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# THE PEOPLE AGAINST THE CONSTITUTION

Aziz Z. Huq\*

WHAT IS POPULISM? By *Jan-Werner Müller*. Philadelphia: University of Pennsylvania Press. 2016. Pp. 103. \$19.95.

## INTRODUCTION

As the twenty-first century staggers into its adolescence, a specter haunts its liberal democracies. The new century was famously supposed to mark an “end of history,” an age in which liberal democracy would congeal, inexorably and glacier-like, into a global, hegemonic plateau.<sup>1</sup> Instead, the new century has proved convulsive, angry, and pregnant with fearful uncertainty, even though it has not yet been punctuated by the world wars that convulsed its precursor. Whether it is slouching toward global catastrophe, or redemption, remains a live question on which reasonable minds can disagree.

Why has our century proved so febrile? One obvious candidate cause is political violence. The new century has been tragically striated by international terrorism, which took on new forms and political salience in the wake of September 2001. But liberal democracies have faced intensive terrorism threats from overseas since the early 1970s.<sup>2</sup> Even if today’s specter may be accelerated by public anxiety about terrorism,<sup>3</sup> it cannot be reduced to the fear of political violence.

A more consequential specter has instead emerged from within. For in the first decade of the twenty-first century, a distinct form of political mobilization has simultaneously and unexpectedly emerged in several more or less entrenched democracies. In Washington, Warsaw, Caracas, Budapest, and Ankara, a political movement, party, or leader has seized the commanding heights by deploying political strategies or claims that can loosely be denominated as “populist” (although that label is rarely embraced by those to whom it is affixed). And even when populism falters at the polls, it can

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1. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* xi, 211 (1992).
2. See, e.g., *1970: Hundreds Held in Series of Hijacks*, BBC: ON THIS DAY, [http://news.bbc.co.uk/onthisday/hi/dates/stories/september/6/newsid\\_2500000/2500667.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/6/newsid_2500000/2500667.stm) [<https://perma.cc/KG3P-ZSDH>] (describing the September 1970 hijacking of four New York-bound airliners by the Popular Front for the Liberation of Palestine).
3. Aziz Z. Huq, *Terrorism and Democratic Recession*, 84 U. CHI. L. REV. (forthcoming 2018) (manuscript at 15), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2974006](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2974006) [<https://perma.cc/FVK8-QL5T>].

score destabilizing policy victories, as the surprise outcome of the British referendum on European Union membership demonstrates. In either case, populism as movement or governance repudiates some or all of the values and institutional commitments underpinning liberal democracy. Commitments that once seemed secure, unquestioned, and even hegemonic suddenly are publicly scorned and ridiculed as alien and unwelcome impostures.

All this is obvious. But what exactly is “populism”? The question is more perplexing than it seems at first blush. To the extent populism is often characterized as a “style,”<sup>4</sup> it can seem elusive and subjective. Further, the term appears to encompass campaigning or governing in a way that claims the authority *of the people*. But to the extent the term sweeps in political movements or institutional arrangements that purport to vocalize “We the People,” it might cover almost any kind of democratic politics. This provides little analytic clarity. It also fails to capture the sense of novelty in recent developments. For example, in the United States, conjuring the “people” in political rhetoric has never been the preserve of one racial or social class. It rather evinces some “idealistic discontent that did not always obey demographic borders.”<sup>5</sup> But movements identified as populist today often isolate a single ethnic or racial group as “the people,” either implicitly or explicitly, in a deeply exclusionary manner.

Nevertheless, it will not do to reject the concept out of hand. A set of recognizably parallel political strategies has yielded striking political developments, such as the 2016 Brexit and U.S. election surprises, the near-victories of the *Front National* in France in 2017, and the *Freiheitliche Partei Österreichs* in Austria in 2016.<sup>6</sup> It is thus hard to deny that *something* distinctive is at work within contemporary democracy, something that should engage students of constitutional democracy in particular.

Legal scholars, and in particular constitutional law scholars, are only beginning to grapple with the idea of populism and its implications for the range of normative ends public lawyers typically pursue. It would be regrettable indeed if constitutional scholars, whether focusing on the domestic American context or applying a comparative lens, ignored the rise of populism. The phenomenon presents a legion of new questions about the vitality, feasibility, and future of what otherwise might have seemed fixtures in the constitutional firmament—among them, the centrality of competitive elections to the constitutional form, the (contested) ideal of the rule of law, the primacy of judicial review in constitutional enforcement, and the force of individual rights. Populism calls all of these apparent bedrock principles into

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4. See Benjamin Arditi, *Populism, or Politics at the Edges of Democracy*, 9 CONTEMP. POL. 17, 20–21 (2003).

5. MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 2 (1995).

6. See Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (Harvard Kennedy Sch. Faculty Research Working Paper Series, Paper No. 16-026, 2016) (analyzing the potential political motivations behind the popularity of Donald Trump and Brexit and how such motivations are now being used by political parties in countries such as Austria and France).

question. The threat to the constitutional predicates of liberal democracy from this new style of politics may be either more or less grave. Some elements of current constitutional dispositions may be exposed whereas others are sheltered. But without a vocabulary for designating the basic dynamics of populism, and thereby plotting its potential repercussions, legal scholars are bereft of basic, albeit needful, analytic tools for estimating the threat's magnitude and implications.

This Review frames populism as a problem for public law scholars in general and American constitutional scholars in particular. Its focal point is a monograph entitled *What is Populism?* by Jan-Werner Müller,<sup>7</sup> a text that provides perhaps the most resonant recent theoretical introduction to contemporary populism. Müller sets forth a succinct and generalizable account of the basic internal logic of populism as a strategy for both mobilizing public sentiment and also deploying the levers of state power. He defines "populism" as a coherent political strategy based on a "moralistic imagination of politics" as a Manichean confrontation between a morally purified "people" and a corrupt and irremediable "elite" (pp. 19–20; emphasis omitted). As I explain below, Müller's approach conflicts with other scholarly definitional efforts in illuminating ways. Set in the wider intellectual context, his monograph provides an effective fulcrum with which to dissect the complex relationship between populism and liberal constitutionalism in its American variant.

Building on Müller's account of populism, I sketch three ways in which core elements of that account raise fresh challenges and questions about American constitutional law. First, it is worth asking whether populism as it manifests today is consistent with the purpose and design of political representation by the national institutions fashioned in the Constitution. Second, populism calls into doubt important norms of legality upon which systemic constitutional stability rests. Third, Müller's definition of populism engenders serious challenges to traditional understandings of whether and how individual constitutional rights can be vindicated. To the extent one perceives a new efflorescence of populism in national American politics—and there is ample evidence, somewhat on the left and increasingly on the right, to support this perception—the development presages an embarrassment of novel analytic, prescriptive, and normative questions for American constitutional scholars. For ordinary citizens who stand outside the scope of the populist project, the prospect of populist rule bodes ill for stability, legality, and the preservation of rights related to equality and democratic participation.

In Part I, I begin by situating Müller's analysis and reconstruction of a theoretically coherent account of populism as a political form in the larger context of political-theory work on democracy and populism. In particular, I contrast Müller's definition with its competitors in the political-science literature. In Part II, I deploy Müller's theorization of populism as a platform to identify three implications of his analysis for U.S. constitutional law

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sketched above. This is an exercise in diagnosis, and the question of how to remedy populism's pathologies must await another occasion given the limits of the essay form.

## I. THE DIFFICULTY OF DISCERNING POPULISM

### A. *Varieties of Populism*

Talk of “populism” is hardly new. To the contrary, the term can be used to capture a range of historical phenomena across a widely dispersed geographic range. Mapping this range clarifies the challenge of identifying a workable definition of populism, as opposed to “a map of the linguistic dispersion that has governed the uses of the term ‘populism.’”<sup>8</sup> The result, as Müller notes with worry at the opening of his monograph, is that “we seem to lack coherent criteria for deciding when political actors turn populist” (p. 2).

A history of populism might start with the early nineteenth-century European reaction to increasing commercial and social cosmopolitanism that stressed “spiritual superiority,” ethnic identity, and cultural nationalism.<sup>9</sup> In the United States, it is possible to affix the label “populist” to national movements such as Andrew Jackson’s Democratic-Republican party in the 1820s and 1830s, the Know-Nothings of the 1840s, and the Populist Party of the 1880s. Even within a singular national context, variation, rather than continuity among so-called populists, dominates. Hence, the Know-Nothings are centrally identified by their ugly polemics and actions against Catholics, East Asians, and immigrants of all stripes.<sup>10</sup> The more agrarian and egalitarian populist movement demanded redistribution on the ground that “[w]ealth belongs to him who creates it”<sup>11</sup> but lacked the consistent bile of its Know-Nothing precursors. Still, they were a “grass-roots revolt against the elite or plutocrats.”<sup>12</sup>

A “modern form of populism” is traceable to General Juan Domingo Perón’s Argentina (1946–1955), which was to prove a model for subsequent Mexican and Brazilian leaders in short order.<sup>13</sup> In Western Europe, aversion to the actions of fascist governments before and during World War II dampened the appeal of far-right parties, slowing the rise of populism in most contexts.<sup>14</sup> Political movements that have been labeled populist started to

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8. ERNESTO LACLAU, *ON POPULIST REASON* 7 (2007).

9. PANKAJ MISHRA, *AGE OF ANGER: A HISTORY OF THE PRESENT* 169 (2017).

10. ROGER DANIELS, *COMING TO AMERICA* 265–84 (2d ed. 2002).

11. SEAN WILENTZ, *THE POLITICIANS & THE EGALITARIANS: THE HIDDEN HISTORY OF AMERICAN POLITICS* 56 (2017) (alteration in original).

12. MARGARET CANOVAN, *POPULISM* 58 (1981).

13. Federico Finchelstein, *Returning Populism to History*, 21 *CONSTELLATIONS* 467, 468 (2014).

14. See JEAN-YVES CAMUS & NICOLAS LEBOURG, *FAR-RIGHT POLITICS IN EUROPE* 53 (2017).

emerge only in the early 1980s, albeit with “relatively modest” electoral success.<sup>15</sup> For example, the French *Front National*, founded by Jean-Marie Le Pen in 1972, received only 0.76 percent of votes cast in the 1974 election.<sup>16</sup> In North America, the Canadian Social Credit party had regional political success in the post-war period but never secured national success.<sup>17</sup> In the United States, populism never entirely evaporated and never entirely failed. Whereas George Wallace and Ross Perot were unsuccessful as presidential candidates, it is quite plausible to discern elements of populism both in midcentury anti-Communism and also in the racial politics of the Nixon–Atwater campaign.<sup>18</sup>

Today, a wide range of candidates, parties, and movements can be categorized as labeled populist. In Europe, the most successful populist parties are Fidesz in Hungary and the Law and Justice (“PiS”) party in Poland. Both came to power on the basis of election campaigns raging against elites and promising a fresh start for the disempowered or excluded. Both then implemented a wide array of constitutional and legal changes that dramatically tamped down on political competition.<sup>19</sup> Elsewhere in Europe, right-of-center parties have secured solid parliamentary footing by cultivating a fear of Muslims and an aversion to immigration.<sup>20</sup> In the United Kingdom, a populist movement waved the same anti-elite and anti-immigration flags to secure exit from the European Union.<sup>21</sup> Unlike its Polish and Hungarian counterparts, which have effectively consolidated power in ways that render electoral displacement unlikely, the British populist U.K. Independence Party fell into a disarray after the Brexit vote, with “prominent defections,” “vicious feuding,”<sup>22</sup> and (for now) an electoral rout.

Finally, U.S. populism has never left the American political scene. Both the Occupy Wall Street and the Tea Party movements, for example, exemplify forms of populism, as did the earlier campaigns designed to elicit the

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15. Cas Mudde, *Three Decades of Populist Radical Right Parties in Western Europe: So What?*, 52 EUR. J. POL. RES. 1, 14 (2013).

16. JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* 98 (2016).

17. CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* 23–24 (2017).

18. *Id.* at 24–25.

19. Miklós Bánkuti et al., *Hungary’s Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 139 (2012); Joanna Fomina & Jacek Kucharczyk, *Populism and Protest in Poland*, 27 J. DEMOCRACY 58, 61–62 (2016).

20. See Farid Hafez, *Shifting Borders: Islamophobia as Common Ground for Building Pan-European Right-Wing Unity*, 48 PATTERNS PREJUDICE 479, 481–82 (2014).

21. See Craig Calhoun, *Brexit Is a Mutiny Against the Cosmopolitan Elite*, NEW PERSP. Q., Summer 2016, at 50, 51; Sara B. Hobolt, *The Brexit Vote: A Divided Nation, a Divided Continent*, 23 J. EUR. PUB. POL. 1259, 1263 (2016).

22. Griff Witte, *From Britain’s Populist Right, Brexit Success Comes with a Poisoned Pill*, WASH. POST (May 31, 2017), [https://www.washingtonpost.com/world/europe/for-britains-populist-right-brexit-success-comes-with-a-poisoned-pill/2017/05/31/12b5c4c4-368a-11e7-ab03-aa29f656f13e\\_story.html](https://www.washingtonpost.com/world/europe/for-britains-populist-right-brexit-success-comes-with-a-poisoned-pill/2017/05/31/12b5c4c4-368a-11e7-ab03-aa29f656f13e_story.html) [https://perma.cc/3WUG-49PZ].

votes of so-called Reagan Democrats.<sup>23</sup> Yet in the 2016 campaign, Republican candidate Donald Trump and Democratic candidate Bernie Sanders sought public support by “taking aim at the neoliberal agenda,” and so both earned the sobriquet of populist despite their differences along many other important margins.<sup>24</sup> Further, 2016 marked the first time that a populist candidate won the White House. Populism was no longer merely an electoral strategy; it was a practice of national governance in the context of an extensive and highly bureaucratized administrative state in which values of legality, regularity, and technocratic competence loom large.

Nevertheless, it is important not to allow evenhandedness to get in the way of clear analysis. On the Republican side, the 2016 campaign diverged from earlier campaigns in other ways. It was the first time, for example, any candidate attacked a sitting federal judge on the basis of his national origin,<sup>25</sup> refused to disclose tax documents,<sup>26</sup> threatened to prosecute his opponent,<sup>27</sup> and explicitly refused to commit to accepting defeat at the polls.<sup>28</sup> It was also the first time campaign staff and supporters harassed and threatened press perceived as hostile, sometimes with violent, anti-Semitic threats.<sup>29</sup> To the extent these tactics embody populism in action, they suggest some tension with the ideal of liberal democracy under law as we today understand it.

Given this historical and geographic heterogeneity, it is hardly surprising that standard examples of populism reflect a large diversity of institutional circumstances and policy orientations. One of Müller’s useful preliminary contributions is his catalogue of all the analytic criteria that fail as common ground for the identification of populists, including a singular socioeconomic basis or a common emotional appeal to popular “anger” or “resentment” (pp. 12–19).

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23. See JUDIS, *supra* note 16, at 39–61.

24. *Id.* at 63.

25. Matt Ford, *Why Is Donald Trump So Angry at Judge Gonzalo Curiel?*, ATLANTIC (June 3, 2016), <https://www.theatlantic.com/politics/archive/2016/06/donald-trump-gonzalo-curiel/485636/> [<https://perma.cc/XN5A-RPT9>].

26. Steve Benen, *Team Trump Admits, Public Won’t See Candidate’s Tax Returns*, MSNBC (Oct. 31, 2016, 9:22 AM), <http://www.msnbc.com/rachel-maddow-show/team-trump-admits-public-wont-see-candidates-tax-returns> [<https://perma.cc/NQ8P-BVK7>].

27. Gregory Krieg, *Trump Threatens to Jail Clinton if He Wins Election*, CNN (Oct. 10, 2016, 11:30 AM), <http://www.cnn.com/2016/10/09/politics/eric-holder-nixon-trump-presidential-debate/index.html> [<https://perma.cc/TF5U-959J>].

28. Patrick Healy & Jonathan Martin, *Donald Trump Won’t Say if He’ll Accept Result of Election*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/us/politics/presidential-debate.html> (on file with the *Michigan Law Review*).

29. See, e.g., Matt Katz, *Jewish Reporters Harassed By Trump’s Anti-Semitic Supporters*, NPR (July 6, 2016, 4:29 PM), <http://www.npr.org/2016/07/06/484987245/jewish-reporters-harassed-by-trumps-anti-semitic-supporters> (on file with the *Michigan Law Review*).

Of particular note, Müller observes that it is a mistake to suggest that populist movements cannot govern or pursue their own policy agendas because they must inevitably “re[ly] on . . . a bureaucracy.”<sup>30</sup> Certainly, there are some populist movements that fizzle as soon as they grasp power. In addition to UKIP’s meltdown, populism in Taiwan has proved fragile in office, with one president lasting barely five months in power.<sup>31</sup> But Müller points out that “[p]opulists can govern” even if they “engage in occupying the state, mass clientelism and corruption” (p. 102).

He might have added that it is equally possible for populists to build highly successful political parties, which provide a social and organizational basis for the exercise of political power. Hungary’s Fidesz party is one example; Turkey’s AK Party is another. Populism, in short, can take a variety of more or less durable organizational forms.<sup>32</sup> And whereas Müller identifies the disappearance of “party democracy” as a cause of populism (p. 78), I think it is more accurate to say that populism bubbles up when established party systems are in crisis and realignment—as was manifestly the case in the French presidential election of 2016<sup>33</sup>—but that populism can work through either a *new* party or a more charismatic mode lacking in any broad-based party infrastructure.

This is hardly surprising on reflection: populism, still loosely defined, has proved a durable and persistent feature of democratic practice around the world for almost a century. Several regimes that can be denominated populist, including the Peronist regime in Argentina, the AK Party in Turkey, Fidesz, and the PiS either remained in office for a protracted period or appear to be well set up now to do so.<sup>34</sup> The historical record thus belies any suggestion that populism as a strategy of governance is either intrinsically self-defeating or self-limiting. Left liberals hoping that President Trump will

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30. Cf. Eric A. Posner, *Can It Happen Here?: Donald Trump and the Paradox of Populist Government* 3 (Chi. Unbound Pub. Law and Legal Theory Working Papers, No. 605, 2017), [http://chicagounbound.uchicago.edu/public\\_law\\_and\\_legal\\_theory/606/](http://chicagounbound.uchicago.edu/public_law_and_legal_theory/606/) [<https://perma.cc/4H97-NF57>].

31. MUDDE & ROVIRA KALTWASSER, *supra* note 17, at 38–39.

32. Robert R. Barr, *Populists, Outsiders and Anti-Establishment Politics*, 15 PARTY POL. 29, 41–42 (2009).

33. See Uri Friedman, *How Populism Took Root in France*, ATLANTIC (Apr. 20, 2017), <https://www.theatlantic.com/international/archive/2017/04/france-election-populism/523500/> (on file with the *Michigan Law Review*).

34. See Finchelstein, *supra* note 13, at 468, 476 (discussing the phenomenon of the Pernoist regime); Emre Erdoğan & Sezin Öney, *And the Winner of Turkey’s Presidential Election Is . . . Populism*, WASH. POST (Aug. 8, 2014), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/08/08/and-the-winner-of-turkeys-presidential-election-is-populism/?utm\\_term=.020d48ab0c5b](https://www.washingtonpost.com/news/monkey-cage/wp/2014/08/08/and-the-winner-of-turkeys-presidential-election-is-populism/?utm_term=.020d48ab0c5b) [<https://perma.cc/9AZH-WNQ2>] (noting the AK party’s dominance since 2002); Thomas Greven, *The Rise of Right-Wing Populism in Europe and the United States*, FRIEDRICH EBERT STIFTUNG 3 (May 19, 2016), [http://www.fesdc.org/fileadmin/user\\_upload/publications/RightwingPopulism.pdf](http://www.fesdc.org/fileadmin/user_upload/publications/RightwingPopulism.pdf) [<https://perma.cc/9USZ-ERJS>] (describing the Fidesz Party as governing Hungary after the end of Soviet communism); Fomina & Kucharczyk, *supra* note 19, at 58 (PiS).



somehow self-immolate in a bonfire of his failed policies and engorged vanities are, in short, dallying with a fantasy.

Two further forms of internal heterogeneity across examples of populism beyond those enumerated are worth underscoring. First, it is implicit in Müller's analysis, but worth drawing out more expressly, that there are populisms of both the right and the left, committed to very different bundles of public policies. In the U.S. context, for example, it is conventional to contrast candidates Trump and Sanders as divergent forms of populism.<sup>35</sup> In Latin America, which has witnessed three distinct waves of populist electoral success since the 1930s, the resulting governments pursued both socialist and neoliberal policy agendas.<sup>36</sup>

The potential for policy divergence even between closely aligning populist regimes is most crisply evident in Eastern Europe. In Hungary, Müller observes that Fidesz's Viktor Orbán has managed to make "savage cuts to the welfare state," while maintaining his popularity among the general public by posing conspicuously as "a strong leader ready to nationalize companies and use the state to protect ordinary folk" (p. 59). The PiS, in contrast, "emphasises the need to tackle inequality and propagates strong welfare policies."<sup>37</sup> At the same time, differences in social policy do not prevent convergence on the creation of what Müller calls "defective democracy," in which changes to the electoral framework ensure that there is little chance of an opposition victory at the polls (p. 58).

Second, Müller resists an explanation of populism that hinges on fears of globalization or modernization (p. 12). Populism, in his view, is not merely a political or psychological symptom of an underlying material distress (p. 15). The point might be both resisted and extended. On the one hand, analysis of global income-distribution trends reveals that although the last two decades have witnessed the rise of a "global middle class" in developing economic powerhouses such as India and China, it has also seen a collapse in the share of incomes flowing to the working- and middle-class populations of Europe and North America.<sup>38</sup> Some commentators have diagnosed populism as "a solidaristic alternative to unbridled capitalism . . . sustained by a purely negative definition of equality."<sup>39</sup> On this view, rising support for populism "reflect[s] divisions between the winners and losers from global markets, and thus whether lives are economically secure or insecure."<sup>40</sup>

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35. See, e.g., JUDIS, *supra* note 16, at 62–87.

36. MUDDE & ROVIRA KALTWASSER, *supra* note 17, at 28–32.

37. Remi Adekoya, *Xenophobic, Authoritarian—and Generous on Welfare: How Poland's Right Rules*, GUARDIAN (Oct. 25, 2016, 4:15 AM), <https://www.theguardian.com/commentisfree/2016/oct/25/poland-right-law-justice-party-europe> [<https://perma.cc/P6B6-AU53>].

38. BRANKO MILANOVIC, GLOBAL INEQUALITY 30–32 (2016).

39. Pierre Rosanvallon, *How to Create a Society of Equals*, FOREIGN AFF. (Dec. 14, 2015), <https://www.foreignaffairs.com/articles/2015-12-14/how-create-society-equals> [<https://perma.cc/5KDE-RNDY>].

40. Inglehart & Norris, *supra* note 6, at 11.

But the reality, in my view, is somewhat more complex. There is some evidence from the European context that economic insecurity is positively correlated with support for right-of-center populism.<sup>41</sup> At the same time, it is hard to credit economic insecurity as a complete explanation for the success of populist parties. Populist parties have taken root in countries such as Austria that are wealthy in both comparative and historical terms.<sup>42</sup> In Turkey, the AK Party's support base comprises not only the working class, but also the petite bourgeoisie, who embrace "its record of economic growth and relative stability after decades of turbulence."<sup>43</sup>

More generally, a recent study using data from the well-respected European Social Survey found "mixed and inconsistent" evidence of economic motivations for populism but stronger support for "cultural value[s]," including "anti-immigrant attitudes, mistrust of global governance, mistrust of national governance, support for authoritarian values, and left-right ideological self-placement."<sup>44</sup> In the United States, Gallup survey data shows only "mixed" evidence of economic distress as a predictor of favoring Trump in the 2016 election and stronger evidence that "living in racially isolated communities with worse health outcomes, lower social mobility, less social capital, greater reliance on social security income and less reliance on capital income, predicts higher levels of Trump support."<sup>45</sup> Again, my view is that sociocultural factors—albeit ones closely tied to economic considerations—explain recent populist successes at the polls better than experiences of economic distress alone.

### B. Müller on Populism

The semantic promiscuity of the term "populism" has implications for any definitional exercise. Populism's specific articulations may well share only a Wittgensteinian family resemblance,<sup>46</sup> but maintaining the capacious colloquial sense of populism might have consequences for analytic clarity today. For example, constitutional scholars might be concerned with the implications of stylistic choices between different packages of political tactics and claims for the stability and integrity of the constitutional system. If the

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41. Duane Swank & Hans-Georg Betz, *Globalization, the Welfare State and Right-Wing Populism in Western Europe*, 1 *SOCIO-ECON. REV.* 215, 215–16 (2003).

42. See, e.g., Reinhard Heinisch, *Austria's Populist Puzzle*, *FOREIGN AFF.* (Dec. 9, 2016), <https://www.foreignaffairs.com/articles/austria/2016-12-09/austrias-populist-puzzle> [<https://perma.cc/53Y7-4BRF>].

43. Max Rodenbeck, *Erdogan's New Sultanate*, *ECONOMIST* (Feb. 6, 2016), <http://www.economist.com/news/special-report/21689871-under-recep-tayip-erdogan-and-his-ak-party-turkey-has-become-richer-and-more-confident> [<https://perma.cc/Y9PL-HSYJ>].

44. Inglehart & Norris, *supra* note 6, at 27–28.

45. Jonathan Rothwell & Pablo Diego-Rosell, *Explaining Nationalist Political Views: The Case of Donald Trump*, SSRN 1 (Nov. 2, 2016), <https://ssrn.com/abstract=2822059> [<https://perma.cc/B6UW-KWHT>].

46. Margaret Canovan, *Populism for Political Theorists?*, 9 *J. POL. IDEOLOGIES* 241, 243 (2004).

adoption of a particular style of politics has downstream implications for the achievement of needful public goods under a constitution—say, the realization of democratic voice, the remediation of abusive behavior using state power, or the vindication of positive or negative rights—then scholars should embrace a definition that helps them isolate the relevant forms of political life. Definitions, that is, flow not from a theory of natural kinds but from the scholar’s analytic and normative agenda.

It is in this context that Müller’s approach to populism is worth evaluating and comparing to close competitors. Müller has surfaced a definition of populism that is more demanding than some alternative definitions. As such, it provides a useful starting point for legal analysis, even if it might not yield an appropriate frame for, say, a sociological analysis of what is, at least in the demotic, labeled a species of populism.

Müller defines populism as a “set of distinct claims . . . [with] an inner logic” (p. 10) pitched first in general terms, and then defined in terms of an enumeration of specific traits. Pitched at this abstract level, populism is cast as “a particular moralistic imagination of politics, a way of perceiving the political world that sets a morally pure and fully unified . . . people against elites who are deemed corrupt or in some other way morally inferior” (pp. 19–20; emphasis omitted). Populism hence is less a matter of policy preferences and more a question of the guiding assumptions about how democracy can and should work and how leaders can and should relate to the people.

His general claim can be decomposed into two elements. First, a populist asserts a “moralized antipluralism” predicated on the claim that “they, and they alone, represent the people” (p. 3). Any other electoral option or policy choice is illegitimate and perhaps futile, in the sense that it will “amount to mere administration or cooptation into existing political and social arrangements” (p. 69). By implication, there is always a remainder that “can be dismissed as immoral and not properly a part of the people at all” (p. 3). This element of Müller’s account mirrors the notion of ideological antisystemicness used to describe political parties that opposes some, but not necessarily all, predicates of a democratic system.<sup>47</sup>

Core cases of moralized antipluralism are easy enough to adumbrate. Müller quotes Donald Trump’s campaign statement that “the only important thing is the unification of the people—because the other people don’t mean anything” (p. 22) as a recent example. Trump’s campaign threats to prosecute Hillary Clinton and to resist any vote count that cut against him have the same flavor.<sup>48</sup>

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47. Giovanni Capoccia, *Anti-System Parties: A Conceptual Reassessment*, 14 J. THEORETICAL POL. 9 (2002) (distinguishing “ideological” and “relational” antisystemicness, and noting that the latter “do[es] not necessarily require an opposition of the party to values that are fundamental to all democracies,” whereas the former “consists in the incompatibility of its ideological referents, and therefore its political goals, with democracy”).

48. See *supra* notes 26–27 and accompanying text. I limit myself to examples during the campaign. There is a risk that if I select a post-inauguration example, that example will come to seem quaint in light of subsequent, even more alarming events.

Outside such core examples, however, there are likely to be many peripheral cases, which might count as moralized antipluralism depending on whether they are understood to deny the legitimacy of opposing or alternative perspectives or values. For example, consider when one national political party declares that a president who has won in the electoral college is *per se* illegitimate and must therefore be limited to one term at any and all cost. This might be taken merely as a judgment about that president's policy choices. Alternatively, it may well be more than a merely consequentialist claim. It may also sound in a moral register and repudiate the very possibility that the president might be recognized as legitimate. In the latter form, such a declaration would count as populism. Müller might have said more to help sort through these close cases.

Second, the populist has a “noninstitutionalized notion of ‘the people’” (pp. 31–32). This means that the populist asserts or assumes that there is a singular and morally privileged understanding or will that has not been manifested through the formal structures of democratic choice. Müller quotes Perón's assertion that “the political leader is the one who does what the people want” as an instance of such a claim of immanent and noninstitutionalized popular will (p. 31). This claim impinges on democratic accountability. Whereas on the ordinary understanding of democracy the actions of a specific coalition or leader are always amenable to critique as misleading or unlawful, it is never possible to launch a parallel challenge against a populist leader. If “‘the people’ have willed it,” there is “no action of a populist government [that] can be questioned” (p. 77). An implication of this view—drawn out best by the political theorist Nadia Urbinati—is that the back-and-forth of electioneering and legislative debate is superfluous.<sup>49</sup> If the leader intuits the needs of the people, the process of representation though elections is a mere formality.

Again, there are core and peripheral instances of this logic. For example, national security decisions in the American context are often framed as beyond questioning in the courts, with dissenting voices receiving vituperative criticism. At what point does the demand for absolute deference on national security policy, and the dismissal of criticism, amount to a form of populism? The path of extravagant claim making by presidents in the name of national security, in my view, makes this a very open question in the U.S. context. Müller supplies the core version of the populist logic but does not spell out how this sort of peripheral case should be categorized.

Here, Müller's analysis harkens back to a dynamic identified by Margaret Canovan, an earlier theorist of populism. Canovan linked populism to what she called the “Bagehot Problem,” after the leading theorist of the British constitution, Walter Bagehot.<sup>50</sup> Bagehot had celebrated the British monarchy on the ground that it was intelligible to the mass of the citizenry.<sup>51</sup> By

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49. See Nadia Urbinati, *The Populist Phenomenon*, 51 *RAISONS POLITIQUES* 137, 145–46 (2013).

50. See Canovan, *supra* note 46, at 244–45.

51. See *id.*

contrast, modern representative forms of democracy tend to be predicated on complex institutional arrangements that seek to account for a plurality of interests and public goods that might bear on governance. The result, Canovan noted, is often “a tangled network that cannot make sense to most of the people it aims to empower.”<sup>52</sup> Populism exploits the necessary complexity of representative democracy by offering a more parsimonious, seemingly more candid, and more authentic alternative.

The Bagehot Problem is surely one that bedevils the American system of a tripartite federal government, intertwined with a lattice of checks and balances and perched precariously on a jostling array of sovereign states with shared, overlapping regulatory authority. The American system blends, trims, and tuck-points a governing frame that makes little intuitive sense. Little wonder then that the history of American politics can be glossed as the ebb and flow of populist formations.

So defined, populism exploits and amplifies a series of basic dilemmas of constitutional democracy. These dilemmas are both theoretical and practical. At a conceptual level, democracy demands a definition of the relevant polity but itself supplies no criteria for the identification of its own boundaries (pp. 80–81). At a moral level, democratic procedures (and, in particular, legislative institutions) are justified by the fact of deep and abiding disagreement within a polity.<sup>53</sup> But Müller contends the empirical fact of pluralism, and hence disagreement, has no necessary normative implication of recognition and respect for pluralism (p. 82), at least without deriving an “ought” from an “is.” (Why live with disagreement, when you can extirpate it? The question does not answer itself.) Finally, there is a practical problem of how democracies respond to endogenous movements that aim, explicitly or implicitly, at dismantling the institutional struts of democratic choice.<sup>54</sup> Under what circumstances is a democratic system warranted in taking antiliberal steps in self-preservation?

### C. *Alternative Definitions of Populism*

Is Müller’s the most useful definition of populism? Consideration of three alternatives circulating in the contemporary literature suggests that it is.

First, John Judis defines populism in terms of “the conflictual relationship between” a “people” and an “elite.”<sup>55</sup> Judis’s definition encompasses a range of political actors who have in some way juxtaposed themselves against an extant power structure. At its margins, Judis’s conceptualization seems to sweep in any and all parties that position themselves in relation to

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52. *Id.* at 245.

53. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 23–24 (1999) (noting that legislatures “do [their] work by *internalizing* [the] disagreements, by building them into the institutional structure of [the] assembly”).

54. See p. 83.

55. JUDIS, *supra* note 16, at 15.

incumbents. It is not hard to imagine that this might capture virtually all insurgent political movements at some moment in time. So defined, populism is an immense category with little resolving power.

One might use Müller's definitional approach to resist this conclusion and determine that what some political scientists have called "agrarian populism" falls outside the category of interest here.<sup>56</sup> The American Populist Party, for example, offered acerbic critiques of capitalists and industrialists and indulged in what now is recognized as invidious invectives against Asian and black labor; but the Party was not *antipluralist*. To his credit, Müller recognizes as much (p. 88). To some, exclusion of what might have been thought a core case may seem problematic. Alternatively, Müller's anti-nominalism advances a theoretical agenda in ways that bring clarity to other questions of constitutional law and design.

Second, Cas Mudde and Cristóbal Rovira Kaltwasser define populism as "a thin-centered ideology that considers society to be ultimately separated into two homogenous and antagonistic camps, 'the pure people' versus 'the corrupt elite,' and which argues that politics should be an expression of the *volonté générale* (general will) of the people."<sup>57</sup> While there are many parallels between this and Müller's definition, Mudde and Rovira Kaltwasser introduce additional new criteria beyond Müller's, including "homogenous," "antagonistic," "pure," and the "general will."

The latter concept derives from Jean-Jacques Rousseau's well-known theorization of the social contract. It also introduces substantial new complications. Rousseau does not invoke the idea of a "general will" without specifying a precise institutional setting. Although he assumed a well-ordered society would possess a general will, he anticipated that a process of voting would be required to elicit it and even "carefully specified" the voting procedure used to identify the content of the general will in a particular case.<sup>58</sup> Whereas invocation of Rousseau's general will implies that the choice of voting procedures has a "moral significance," Müller's more abstemious definition stresses the fact that populist claims to legitimacy supervene over and render irrelevant the technical details of electoral systems. Further, Rousseau's account of the role of the people in government is not inconsistent with the idea that the people would "discuss and oppose" measures initially proposed by the government.<sup>59</sup> In this sense, it is not easily squared with populism.

Finally, Müller's definition is in stark contrast with an account of populism that emerges out of the post-Frankfurt School body of critical theory closely associated with Ernesto Laclau. For Laclau, populism arises from unsatisfied demands by marginalized and frustrated members of the polity,

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56. CANOVAN, *supra* note 12, at 8.

57. MUDDÉ & ROVIRA KALTWASSER, *supra* note 17, at 6.

58. Melissa Schwartzberg, *Voting the General Will: Rousseau on Decision Rules*, 36 POL. THEORY 403, 403, 419 (2008).

59. Ethan Putterman, *Rousseau on the People as Legislative Gatekeepers, Not Framers*, 99 AM. POL. SCI. REV. 145, 145 (2005).

demands articulated in a process of mobilization that terminates in “that moment of crystallization that constitutes the ‘people.’”<sup>60</sup> Laclau’s concept of populism is synonymous with the political, which in turn seems to exclude “sedimented social forms which have blurred the traces of their original political institution.”<sup>61</sup> The net result is populism comes to stand for all that is fluid, contingent, and subject to contestation—a floating platform that either can come to stand for the vindication of human rights (or totalitarianism)<sup>62</sup> or seems necessary for the vindication of popular sovereignty.

Unlike Müller, who categorically rejects the notion that population is necessary for “reasserting popular sovereignty” (p. 103), Laclau tenders an understanding of populism hinged on process rather than a polity’s discernable traits. That process, moreover, cannot easily be discerned in real-world examples. As one commentator notes, “the task of determining when an ephemeral equivalence becomes a stable system of signification” is not easy or objective.<sup>63</sup> Laclau’s account also has a trace of teleological, Marxian optimism about the spontaneous, organic eruption of the oppressed. As such, it rests on a controversial set of predictive and normative commitments—orthogonal to the liberal, democratic commitments that animate much of American constitutional law—such that its utility as a general framework for identifying and analyzing populism is necessarily limited.

To recapitulate, then, Müller’s is but one in a crowded field of competing contemporary approaches to populism. His twofold definition focusing on *moralized antipluralism* and a *noninstitutionalized idea of the people* usefully excludes the large class of cases in which a movement has been categorized as populist simply because its rhetorical strategy aligns it with the “people” (however that term is understood): that is too blunt an analytic instrument. Yet Müller also evades theoretical entanglements with Rousseauian notions of the general will or Marxian critical theory that entangle other approaches.

This is not to say that Müller’s approach is divorced from theory. Rather, populism as mapped by Müller claims intellectual roots in the work of German jurist Carl Schmitt (pp. 27–29). Like Laclau, Schmitt offered a definition of what constitutes the political, albeit one with no aspirational, Marxian overtones. For Schmitt, the political was the “most intense and extreme antagonism” between the friend and the enemy; this antagonism

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60. LACLAU, *supra* note 8, at 72–77, 93.

61. *Id.* at 154.

62. *Id.* at 171.

63. See Benjamin Arditi, *Populism Is Hegemony Is Politics? On Ernesto Laclau’s On Populist Reason*, 17 *CONSTELLATIONS* 488, 495 (2010).

arises when “one fighting collectivity of people confronts a similar collectivity” within the polity.<sup>64</sup> Dismissing the “empty and trivial formality” of legislative debate, Schmitt went on to praise dictatorship as “just as little the definitive antithesis of democracy as democracy is of dictatorship.”<sup>65</sup>

Müller captures this Schmittian quality of populism—its contempt for the complex and cumbersome mechanics of democratic representation, its tendency to see absolute conflict between social group as constitutive of the state, and its judgment that “political parties in general . . . pose a threat to state sovereignty”<sup>66</sup>—that distinguishes it from other styles of political mobilization. And it is what makes populism a distinctly worthwhile object of legal and constitutional analysis.

Schmitt wrote five books and more than thirty-five tracts in support of the Third Reich.<sup>67</sup> So it should not be surprising that his logic of populism shades into more sinister “Caesarian” logics.<sup>68</sup> Pursued far enough, that is, the dynamic of populism entails not just the “moral[ization of] political conflict” (p. 42); it requires the triumph of one right side and the withering away of political pluralism. The logic of populism is thus contiguous with (if not identical to) the defense offered by Giovanni Gentile of “[t]he Fascist State . . . [as] a people’s state, and, as such, the democratic State *par excellence*.”<sup>69</sup>

Müller’s definition of populism as a touchstone for constitutional analysis thus captures a style of political claim-making, and a school of political mobilizations, that both raise concerns about the vitality and survival of democracy. In contrast to Laclau’s approach—which takes populism as the realization *par excellence* of autochthonic and participatory politics—Müller casts populism as democracy’s natural antagonist. It is this position that renders it of especial interest to legal and constitutional scholars.

## II. POPULISM AND THE AMERICAN CONSTITUTION

The Constitution creates a set of institutional channels for national politics as a way to create certain public goods. The political institutions created by the Constitution must decide how plural and partially incommensurable goals are pursued, and traded off, even as they resolve ambiguities in the definitions of the goals themselves. The capacity of institutions fashioned by the Constitution to achieve these ends depends on the style of politics employed by those elected to public office.

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64. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 28–29 (George Schwab trans., Univ. of Chi. Press 2007) (1932).

65. CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 32, 50 (Ellen Kennedy trans., MIT Press 1988) (1926).

66. David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 *AM. POL. SCI. REV.* 121, 125 (1997).

67. Richard Wolin, *Carl Schmitt, Political Existentialism, and the Total State*, 19 *THEORY & SOC’Y* 389, 389 (1990).

68. Urbinati, *supra* note 49, at 148.

69. Giovanni Gentile, *The Philosophical Basis of Fascism*, 6 *FOREIGN AFF.* 290, 302 (1928).



Political leadership in a populist vein, whether in the White House or Congress, therefore has implications for the Constitution's ability to realize public goods or to channel and resolve disagreements as to which, and how much, of such public goods should be realized. My aim in this Part is to frame a series of questions about the interaction of constitutional design in the U.S. context and populism, the political style defined by Müller in terms of moralized antipluralism and a noninstitutionalized idea of the people. This Part takes up three ways in which those interactions may play out.

The question examined here—how populism (as defined per Müller) and constitutional design interact in ways that influence the realization of valued public goods—must be distinguished from a lexically proximate question of whether constitutionalism should be “popular.” Müller notes as much,<sup>70</sup> but only fleetingly, and it is useful to say why.

Popular constitutionalism claims that the people “retain authority in the day-to-day administration of fundamental law.”<sup>71</sup> There is no necessary connection between popular constitutionalism so conceived and the constitutional claims advanced by populists. Instead, the logic of populism suggests that the *leader* channels a singular and prepolitical understanding of what the people want (p. 25). Broad public contestation over this vision may be inconsistent with the populist style in many instances. In short, if there is a linkage between popular constitutionalism and the constitutional views of populist movements it is likely a negative, aversive one.

The question pursued here is also distinct from the (related) question of whether the Constitution's structuring of democratic politics makes it more or less likely that populists in fact come to power at the national level. The latter question is most sensibly asked in a comparative context, in which one can contrast the relative risks of presidential and parliamentary systems. The analysis here asks whether populism once in power, or at its gates, imposes pressures on the U.S. Constitution (or at least its continued operation in practice) in terms of its continuing ability to produce valuable public goods of a national character.

#### A. *Representative Democracy Under the Constitution*

Perhaps surprisingly, the original design of the Constitution and the implicit representational theory of populism start from the same premise—the inimical relationship between a government of the people on the one hand and a diversity of political parties on the other hand. Common diagnosis, however, does not conduce common cure.

I have already sketched populism's aversion to a multiplicity of parties. What of the Constitution's? The latter's designers had a negative view of the national political parties that some of them would go on to create. They viewed national political parties as “vehicles by which self-interested groups

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70. See p. 61.

71. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 961 n.3 (2004).

. . . coordinated and pressed their efforts to seize political power . . . [and] pursue their own private self-interest at the expense of the common good.”<sup>72</sup> In Federalist 10, Madison condemned faction as a “disease” and a “dangerous vice” that “tainted our public administration” in language that resonantly applied to parties.<sup>73</sup> And in his Farewell Address, George Washington also cautioned against parties’ “baneful effects.”<sup>74</sup> Parties nonetheless emerged (and, indeed, coalesced around Madison, Jefferson, and Washington) because of the candidates’ need to mobilize potential voters. In other words, the Constitution’s reliance on elections generated unraveling pressure on the design’s antipluralist commitments.

Even if populism shares with the Constitution’s drafters an aversion to the multiplicity of parties that we now associate with competitive democracies, it nonetheless reaches for a different remedy. The Constitution maintains a commitment to pluralism that populism denies. This is restaged most overtly in the document’s recognition of the independent authority of the sovereign states.<sup>75</sup> In the Framers’ original scheme, these supplied alternative centers of political authority that could be mobilized were the central government to overreach.<sup>76</sup>

Additionally, the Framers installed an elaborate apparatus of federal representation, including tripartite reflection of the people in two houses and the presidency, staggered elections, and (prior to the Seventeenth Amendment) indirect selection of the Senate. That finely calibrated and complex machinery would perform a clarifying filtration of the vast array of public preferences, and thereby “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>77</sup> In the background to the mechanism of democratic transfiguration is an implicit, yet firmly held, belief that a natural aristocracy existed, ready to sift out and slot into legislative and executive leadership positions.<sup>78</sup>

Populism as a political strategy exploits both these solutions to the problem of representation. First, as noted, the complexity of the filtration mechanism invites the Bagehot Problem limned above.<sup>79</sup> The legislative process’s complexity, and in particular its proliferation of vetogates, invites at

72. James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 668 (2000).

73. THE FEDERALIST No. 10, at 77–78 (James Madison) (Clinton Rossiter ed., 1961).

74. George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1902, at 213, 218 (James D. Richardson ed., 1907).

75. See U.S. CONST. amend. X.

76. THE FEDERALIST, *supra* note 73, No. 46, at 298–99 (James Madison).

77. *Id.* No. 10, at 82 (James Madison).

78. See J.G.A. POCKOCK, THE MACHIAVELLIAN MOMENT 515 (1975) (“In most American colonies a patrician elite . . . stood ready to play the role of natural aristocracy.”).

79. See *supra* notes 50–52 and accompanying text.

best deliberate and careful policymaking, and at worst gridlock. Second, the constitutional system's reliance on the assumption that a natural aristocracy would populate federal offices<sup>80</sup> leaves the system vulnerable not only to attack on the basis of its implicit elitism but also because it is open to the populist to assert that he or she is a constitutional aristocrat, privileged with unique access to and understanding of the popular will.

The Constitution's theory and institutional practice, in short, invite a populist riposte. And they have received such a response repeatedly from the time of Andrew Jackson onward.<sup>81</sup> To be sure, this Achilles' heel in the constitutional design has rarely been successfully exploited at the level of the White House—but it is quite plausible to hypothesize that its persisting presence ensures the continuing availability of populism as a viable political strategy at the national context.

### B. *Legality and the Stability of the Constitutional System*

Populist leaders and movements claim authority not on the basis of electoral success but on the basis of their unique and privileged access to the will of the people. A correlative of this charismatic claim to legitimacy is that both the “empirical outcome of elections” and the quality of policy consequences are deemed no longer relevant as criteria of democratic judgment (p. 52). The populist's claims, as Müller puts it, are “immune to empirical refutation” (p. 102). In particular, evidence that populist movements are as corrupt as the former elites they inveighed against and ousted can have no effect on their public standing (pp. 4, 47). As the sociologist Arlie Russell Hochschild observes, populists appeal not to voters' material self-interest but to their “emotional self-interest.”<sup>82</sup> By presenting themselves as defenders of genuine national interests, populists can deflect blame for material degradation in their constituents' conditions (pp. 58–59). Indeed, to the extent that support for populists is correlated with the felt experience of limited life opportunities for self and family, populists' failure to better the material conditions of their constituents may well prolong the conditions that produced their ascent in the first instance.

This stock of populist tactics for preserving power, Müller notes, has the tendency to provoke “severe constitutional conflicts” (p. 67), often driven by presidential initiatives. Populist executives in Venezuela, Bolivia, Hungary, and Poland have all pressed (and in some instances achieved) constitutional or quasi-constitutional changes that weaken coordinate branches or free-standing institutions of horizontal accountability, such as ombudsmen.<sup>83</sup> The modal forms of populist governance that Müller identifies—stacking

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80. See *supra* notes 78–79 and accompanying text.

81. See *supra* Section I.A.

82. ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND* 228 (2016).

83. See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2901776](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901776) [<https://perma.cc/RAW6-5BSV>].

the bureaucracy with partisans, making patronage a regulative principle of government largess, and using law to suppress dissent and undermine civil society—all run up against constitutional constraints contained in a relevant organic document, deepening the legal and institutional conflicts implicit in their efforts to maintain power.<sup>84</sup>

Transposed to the American context, Müller's model of populist governance has subtly different implications. On the one hand, the Constitution reflects a commitment to an ideal of legality and the rule of law at a relatively abstract level. Several clauses in the Constitution reflect textual commitments to ideals of legality, formality in the exercise of governmental power, and an aversion to personalistic modes of governance. The Take Care Clause, for example, seems to impose an obligation of legalistic compliance on the president tied to the scope of statutory mandates.<sup>85</sup> As Justice Holmes once said, "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."<sup>86</sup> The Supremacy Clause and the Oath Clause of Article VI, analogously, impose direct obligations of fealty to written law on both state and federal officials.<sup>87</sup> The oath, Chief Justice John Marshall famously underscored in *Marbury v. Madison*, "certainly applies in an especial manner" to "conduct in [an] official character."<sup>88</sup>

Beyond the textual commitment to legality that coruscates across the Constitution's surface, there is a deeper relation between legality and the U.S. constitutional order. It is difficult to see how the processes of electoral choice, legislation through bicameralism and presentment, and implementation through retail, discretionary prosecutorial and regulatory decisionmaking happen without a high degree of internalization of the law. Absent a shared commitment to the law, that is, the constitutional system could not function in the manner the Constitution's text suggests as a going concern. In this regard, it is incorrect to distinguish constitutional rules from the norms and conventions that surround them. Norms of legality and constitutional rules are symbiotic, not separable.

But move from the abstract and another picture emerges. Our Constitution is conspicuously lacking in the practical instruments needful to making the abstract ideals of legality, in the sense of limiting government action to the ex ante boundaries established in written law, that other countries' constitutions have. The U.S. Constitution, for example, does not protect the civil service from polarizing co-optation by a populist president. To the contrary, the Take Care Clause has been persistently (if erroneously) read to vest the president with largely unfettered authority to terminate officials, even

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84. *Id.*

85. U.S. CONST. art. II, § 3.

86. *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting). Where Congress has over time accreted a large volume of overlapping statutory authority, it may fairly be questioned whether this clause has the same effect.

87. U.S. CONST. art. VI, §§ 2–3.

88. 5 U.S. (1 Cranch) 137, 180 (1803).

when they are engaged in oversight of malfeasance of those close to the Oval Office.<sup>89</sup> This arrangement exacerbates the risks of populist officeholding without discernable countervailing gains.

Nor does the Constitution establish any independent bodies of internal accountability within the federal government beyond the tripartite division of the branches. Notwithstanding Madison's famous dictum in *Federalist* 51,<sup>90</sup> the U.S. Constitution is singularly wanting in "auxiliary precautions," particularly ones that remain effectual in moments of unified government and judicial sympathy with a dominant regime. Rather, the Constitution depends on the exercise of *ex post* discretion by voters at the ballot box as "the primary control on the government."<sup>91</sup> But if populist leaders are successful in appealing to voters' emotional self-interest, thereby deflecting blame for deterioration in material condition, that "primary control" will fail as a disciplining mechanism.

In sum, the Constitution's combination of a high-minded but abstract commitment to legality and the rule of law with a singular dearth of practical instruments for maintaining those system-level properties regardless of the level of partisan heterogeneity across the branches renders the Constitution perhaps uniquely vulnerable to some of populism's most corrosive effects. Rather than a wise institutional equilibrium, this might be glossed as a design especially susceptible to the pathological tendencies that emerge when populists strive to maintain power.

### C. *The Challenge to Constitutional Rights*

Populist governments impose stress on the individual interests protected in the form of constitutional rights along two distinct margins. First, the installation of partisan cronies in bureaucratic power and the reliance on patronage as a mechanism for maintaining prestige and authority creates the risk that "only some of the people should get to enjoy the full protection of the laws" (p. 46).

Although Müller does not develop this point, populism pushes even further than mere unequal protection. If populism is characterized by a Manichean division of the polity into the people and its enemies, and if reliance on charismatic and personalistic means of maintaining power brings a disregard for the truth, then the populist leader will be tempted strongly to take one step further. It is a logical consequence of populism to identify groups (whether political, racial, ethnic, or class-based) as the enemy and to attack them on the basis of false accusations. Policy failures may render it especially likely, and especially alluring, to engage in the degradation of the other, with physical violence following somewhat inexorably in the wake of rhetorical violence.

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89. See, e.g., *Myers*, 272 U.S. at 164.

90. *THE FEDERALIST*, *supra* note 73, No. 51, at 322 (James Madison).

91. *Id.*

What follows might be described as a form of “discriminatory legalism” (p. 46), in which groups styled as the people’s enemy receive markedly harsher treatment. Alternatively, a populist might try to govern by relying upon, or even creating, a series of “small emergencies,” in which “problems . . . are deemed worthy of exceptional solutions, but are simultaneously deemed too minor to warrant a full-fledged reassessment of constitutional structures and constitutional aspirations.”<sup>92</sup> It is not hard to see how this can tip imperceptibly or suddenly into atrocity, whether large or small.

Second, the populist’s “moral[ization of] political conflict” (p. 42) creates a pressure toward the dismantling of institutions that enable fair elections in which populists’ opponents have a chance of winning. A wide range of tools, often facially innocuous, allow for effectual electoral competition to be corroded from within. For instance, Hugo Chavez’s government responded to the victory of opposition candidate Antonio Ledezma in the Caracas mayor’s election in 2008 by creating a new “capital district” and transferring a portion of the budget and authority of the mayor’s office to the new entity controlled by the ruling party.<sup>93</sup> When the latter lost 2015 elections to the National Assembly, it again simply created a new legislature.<sup>94</sup>

Once again, there is an odd dissonance in the American Constitution. On the one hand, the text of the Constitution is replete with individual rights, albeit framed at a general and relatively abstract level.<sup>95</sup> On the other hand, with the exception of the Suspension Clause,<sup>96</sup> the Constitution does not address the mechanisms through which infringements on such rights would be prevented or remedied. Indeed, the availability of remedial mechanisms has never been certain, stable, or independent of the vicissitudes of the partisan-political moment. Until the end of the nineteenth century, the task of constitutional remediation fell largely on state courts, applying state-law forms of action.<sup>97</sup> The Court has allowed much of this common-law structure to be overtaken by statutory remedial mechanisms available in the Administrative Procedure Act,<sup>98</sup> or has replaced it with federal common law rules that are far less generous in their remedial effect.<sup>99</sup> If the coverage of

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92. Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 835 (2006).

93. Tamara Pearson, *Venezuelan President Designates New Caracas Head and Communications Minister*, VENEZ. ANALYSIS, (Apr. 16, 2009), <https://venezuelanalysis.com/news/4371> [<https://perma.cc/2N9K-VUUA>].

94. Daniel Lansberg-Rodríguez, *Maduro and His Imaginary Parliament*, FOREIGN POL’Y (Dec. 22, 2015), <http://foreignpolicy.com/2015/12/22/president-maduro-and-his-imaginary-parliament-venezuela-elections/> [<https://perma.cc/Y8A4-8BCB>].

95. See, e.g., U.S. CONST. art. IV, § 2.

96. *Id.* art. I, § 9, cl. 2.

97. Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 13–14 (2015).

98. 5 U.S.C. §§ 551–559 (2012).

99. See Huq, *supra* note 97, at 15–19; see also Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940016](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940016) [<https://perma.cc/A3B2-GJ8R>].

constitutional remedies in the mine-run of circumstances is patchy, its application to instances in which the president invokes the national interest as in peril is varnish thin. Hence, whatever rights might exist on the books, a populist is likely to find that the clunky apparatus of judicial enforcement creates little effectual checking power.

#### CONCLUSION

The foregoing analysis suggests that once in power, populists can work considerable harm to the U.S. constitutional system. Their claims to legitimate authority are parasitic on the complexity of representative government pursuant to the Framers' carefully calibrated design. Their mode of governance undermines the dispositions of legality and probity that are in practice necessary predicates for a working constitutional system. And they are likely to push the polity toward serial violations of political rights and minority rights. It may then be true, as Müller carefully explains, that populists are not ipso facto averse to constitutionalism, at least so long as it inclines to their benefit (pp. 61–62). But in the U.S. context, a populist mode of governance places great strain on the extant constitutional order.

The great advantage of Müller's monograph is that it isolates and succinctly captures the form of politics that generates these pressures. He further provides important caution against assuming, cavalierly and incorrectly, that populists need to be tamed by having to rely on entrenched bureaucracies in order to demonstrate policy successes, or that mere constitutional rules will be alone to rein in populist capture of national high office. At its core, though, Müller's argument is a proper cautionary tale about political movements that view themselves as having a monopoly on truth or right, and that govern without respect and a measure of reverence for the institutional structures that furnish, and hence render habitable, our democratic constitution.<sup>100</sup> His monograph's central virtue today is that it makes legible the nature and extent of the populist challenge to the project of democratic constitutionalism that has been unfurling, hesitantly and sometimes in the wrong direction, in the United States since 1789.

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100. See JEREMY WALDRON, *POLITICAL POLITICAL THEORY* 294–95 (2016).