

2017

# The People Against the Constitution

Aziz Huq

Follow this and additional works at: [https://chicagounbound.uchicago.edu/public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

---

## Recommended Citation

Huq, Aziz, "The People Against the Constitution" (2017). *Public Law and Legal Theory Working Papers*. 670.  
[https://chicagounbound.uchicago.edu/public\\_law\\_and\\_legal\\_theory/670](https://chicagounbound.uchicago.edu/public_law_and_legal_theory/670)

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

## **The People Against the Constitution**

Aziz Z. Huq\*

A review essay of  
*What is Populism?* By Jan-Werner Müller, Philadelphia: University of Pennsylvania  
Press. 2016. 136 pp. \$19.95.

(forthcoming in 116 *Michigan Law Review* –)

### **Abstract**

“Populism” as a political phenomenon has returned to public attention, but its implications for public law, and in particular constitutional law, remain poorly understood. This review-essay uses the monograph *What is Populism?* by Jan-Werner Müller to examine the salience of populism as a distinctive modality of political claim-making to U.S. constitutional law. To that end, I contrast Müller’s definition of populism with alternative accounts, and suggest reasons why constitutional scholars should employ Müller’s. Leveraging that definition, I develop a series of tensions between populism and the observed tenets of liberal constitutional democracy under law in the United States.

---

\* Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School.

## Introduction

As the twenty-first century staggers into adolescence, a specter haunts its liberal democracies. The new century was famously supposed to mark an “end of history,” insofar as liberal democracy would congeal, inexorably and glacier-like, its global, hegemonic grasp.<sup>1</sup> Instead, the new century has proved convulsive, angry, and pregnant with fearful uncertainty—and this, despite the fact that it has not yet been punctuated by the world wars that convulsed its precursor.

Why? The most 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 September 2001. But liberal democracies have faced intensive terrorism threats from overseas since the early 1970s.<sup>2</sup> Policy responses—a mix of surveillance, noncriminal detention, torture, and military force—have not changed in kind (even if they have changed in intensity) since then.<sup>3</sup> The external security environment for liberal democracies is thus not that different from thirty years ago, even if old worries take new organizational forms. Hence, even if today’s specter may be accelerated by public anxiety about terrorism,<sup>4</sup> it cannot be removed to the fear of political violence.

The specter instead emerges from within. For in the first decade of the twenty-first century, a distinct form of political mobilization has simultaneously unexpectedly emerged in several more-or-less entrenched democracies. This political form resonates historically with earlier styles of popular claim-making in democracies. But it chimes discordantly with the hegemonic liberal form democracy is assumed to now take. This shock wave is global: In Washington, Warsaw, New Delhi, Moscow, Copenhagen, Caracas, Buenos Aires, 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 scores 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.

---

<sup>1</sup> FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 211 (1991) (“[A]t the end of history, there are no serious ideological competitors left to liberal democracy.”); see also Andreas Schedler, *What is Democratic Consolidation*, 9 J. DEM. 91, 91-92 (1998) (describing democracy as “the only game in town”).

<sup>2</sup> Gary LaFree & Laura Dugan, *Introducing the Global Terrorism Database*, 19 TERRORISM & POL. VIOLENCE 181, 192 (2004).

<sup>3</sup> For example, tactics such as waterboarding (which was highly controversial when used by the CIA), have a history in postcolonial conflicts. Richard Brody, *Godard’s Truthful Torture Scene*, NEW YORKER, Mar. 6, 2013, <http://www.newyorker.com/culture/richard-brody/godards-truthful-torture-scene>.

<sup>4</sup> See Aziz Z. Huq, *Terrorism and Democratic Recession*, 84 U. CHI. L. REV. – (forthcoming 2018).

All this is tolerable obvious. But what exactly is “populism”? The question is more perplexing than seems at first blush. To the extent populism is often characterized as a “style,”<sup>5</sup> it can seem elusive and subjective, something that exists only in the eye of the beholder. 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, and 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 that did not always obey demographic boundaries.”<sup>6</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 Brexit, the 2016 U.S. election surprise, the near-victories of le Front National in France (in 2017), and the Freiheitliche Partei Österreichs in Austria (in 2016). All these events happened within liberal constitutional democracies. 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.

These developments have seeded a proliferating debate in other domains. In the political science context, there has long been a flourishing scholarship on populism,<sup>7</sup> including its history and its relation to other deviations from a democratic benchmark.<sup>8</sup> More recently, a related debate has bubbled up as to whether the world is in the midst of a democratic “recession,”<sup>9</sup> a claim often made on the basis of developments in political regimes that are shaped currently by populism.

In contrast to the emerging debate among political scientists, 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 typically pursued by public lawyers. It would be regrettable indeed if constitutional scholars, whether focused 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,

---

<sup>5</sup> Benjamin Ardit, *Populism, or politics at the edges of democracy*, 9 CONTEMP. POL. 17, 22 (2003) [hereinafter “Arditi, *Populism*”]; KAZIN, *supra* note 6, at 5-6 (framing populism as a “mutable style of political rhetoric”).

<sup>6</sup> MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 2 (1995).

<sup>7</sup> Seminal work includes MARGARET CANOVAN, *POPULISM* (1981); GINO GERMANI, *AUTHORITARIANISM, FASCISM, AND NATIONAL POPULISM* (1978); *POPULISM: ITS MEANING AND NATIONAL CHARACTERISTICS* (Gjita Ionescu & Ernest Gellner, eds. 1969); *see also infra* Part I.B (discussing more recent scholarship in political science and political theory).

<sup>8</sup> Sheri Berman, *Populism is not Fascism: But it could be a Harbinger*, 95 FOR. AFF. 39 (2016); *see also* Federic Finchelstein, *Returning Populism to History*, 21 CONSTELLATIONS 467 (2014).

<sup>9</sup> Compare JOSHUA KURLANTZICK, *DEMOCRACY IN RETREAT* 10-11 (2013) (arguing that democratic practice has been faltering), with Steven Levitsky & Lucan Way, *The Myth of Democratic Recession*, 26 J. DEM. 45 (2015) (arguing that this perceived trend away from democracy is illusory).

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,”<sup>10</sup> the primacy of judicial review in constitutional enforcement, and the force of individual rights. Populism calls all of these seeming bedrock principles into 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.

My aim here is to frame populism as an important new 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>11</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.<sup>12</sup> He defines “populism” as a coherent political strategy based on what he calls a “moralistic imagination of politics” as a Manichean confrontation between a morally purified “people” and a corrupt and irremediable “elite” (pp. 19-20). 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 via the institutions fashioned in the Constitution. *Second*, populism calls into doubt norm of legality upon which systemic constitutional stability rests. *Third*, populism as explained 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 for this somewhat on the left and increasingly on the right—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.

---

<sup>10</sup> See JOSEPH A. RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 211, 214 (1979) (distinguishing “thin” and “thick” variants on the rule of law).

<sup>11</sup> Professor of Politics, Princeton University.

<sup>12</sup> Müller’s is not, however, the sole recent work on populism. See also JOHN JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* (2016). CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* (2017). I draw on both these insightful books in this review.

A threshold caveat: Although President Donald Trumps inevitably looms large in the recrudescence of American populism,<sup>13</sup> this is not an essay aimed at evaluating Trump qua president or politician. Indeed, to the extent feasible, I will keep some distance from the particularities of Trump’s actions and political strategies. I do so not because I think the latter unworthy of serious scholarly attention—far from it—but rather because my ambition here is more abstract. I hope to provide a larger, generalizable framework for thinking about the questions that populism, largely as viewed through Müller’s analytic lens, presents for constitutional democracy. In any case, events on the ground are moving speedily at the time of this writing, such that any attempt to make this essay timely would rapidly be outpaced.

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 its second part, I deploy Müller’s theorization of populism as a platform to identify three implications of his analysis for U.S. constitutional law adumbrated 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>14</sup> The result, as Müller notes with worry at the opening of his monograph, is that “we seem to lack coherent criteria for when political actors turn populist” (p. 2).<sup>15</sup>

A history of populism, as that term has been employed in the scholarly literature, might start with the middle European reaction at the beginning of the nineteenth century to increasing commercial and social cosmopolitanism that stressed “spiritual superiority,” ethnic identity, and cultural nationalism, one intellectual formation that finally matured into an “existential politics of survival.”<sup>16</sup> In the United States at roughly the same time period, 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

---

<sup>13</sup> This position is neither new nor controversial. Martin Eiemann, *How Trump Fits into the History of American Populism*, 33 *NEW PERSP. Q.* 29 (2016).

<sup>14</sup> ERNESTO LACLAU, *ON POPULIST REASON* 7 (2007).

<sup>15</sup> *Accord* CANOVAN, *supra* note 7, at 3 (noting that the term populism “is exceptionally vague and refers in different contexts to a bewildering variety of phenomena”).

<sup>16</sup> PANKAJ MISHRA, *AGE OF ANGER: A HISTORY OF THE PRESENT* 169 (2017).

the 1840s<sup>17</sup> and the Populist Party of the 1880s.<sup>18</sup> 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>19</sup> The more agrarian and egalitarian Populist movement demanded redistribution on the ground that “[w]ealth belongs to he who creates it,”<sup>20</sup> but (largely) lacked the bite and bile of their Know-Nothing precursors. Still, they were a “grass-roots revolt against the elite or plutocrats.”<sup>21</sup>

A “modern form of populism” is arguably traceable to General Juan Domingo Perón’s Argentina (1946-1955), with Mexican and Brazilian leaders quickly following suit.<sup>22</sup> In Western Europe, aversion of 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>23</sup> Political movements that have been labeled populist started to emerge only in the 1970s and early 1980s, after a post-war albeit with “relatively modest” electoral success at first.<sup>24</sup> The French Front National, founded by Jean-Marie Le Pen in 1972, for example received only 0.76 percent of votes cast in the 1974 election.<sup>25</sup> (In contrast, Le Pen *fille* secured 33.5 percent of the national vote in 2017.<sup>26</sup>) In North America, the Canadian Social Credit party had regional political success in the post-war period, but never secured national success.<sup>27</sup> In the United States too, populism never evaporated entirely, 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>28</sup>

Today, a wide range of candidates, parties, and movements can be labeled as labeled populist in many corners of the world. In Europe, perhaps 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

---

<sup>17</sup> See W. D. OVERDYKE, *THE KNOW-NOTHING PARTY IN THE SOUTH 20-45* (1950) (describing the origins, and the spread of the “the Know-Nothings,” and their development into the American Party).

<sup>18</sup> The leading work on this period is KAZIN, *supra* note 6; Succinct account include ROBERT W. CHERNY, *POPULISM, PROGRESSIVISM, AND THE TRANSFORMATION OF NEBRASKA POLITICS, 1885-1915*, at 151-66 (1981); RICHARD HOFSTADTER, *THE AGE OF REFORM 131-34* (1955).

<sup>19</sup> See, e.g., ROGER DANIELS, *COMING TO AMERICA 265-84* (1990).

<sup>20</sup> SEAN WILENTZ, *THE POLITICIANS AND THE EGALITARIANS: THE HIDDEN HISTORY OF AMERICAN POLITICS 56* (2016) (citation omitted).

<sup>21</sup> CANOVAN, *supra* note 7, at 58; see also KAZIN, *supra* note 6, at 30-42 (developing an intellectual synthesis of populism).

<sup>22</sup> Finchelstein, *supra* note 8, at 468; Bernard Crick, *Populism, Politics, and Democracy*, 12 *DEMOCRATIZATION* 625, 627 (2005) (tracing populism back to Napoleon Bonaparte).

<sup>23</sup> JEAN-YVES CAMUS & NICHOLAS LEBOURG, *FAR-RIGHT POLITICS IN EUROPE 53* (2017). I view fascism as a distinctive and different political form from populism.

<sup>24</sup> Cas Mudde, *Three Decades of Radical Right Parties in Western Europe: So What?*, 52 *EUR. J. POL. RES.* 1, 14 (2013).

<sup>25</sup> JUDIS, *supra* note 12, at 98.

<sup>26</sup> Gregor Aisch et al., *How France Voted*, *N.Y. TIMES*, May 7, 2017, [https://www.nytimes.com/interactive/2017/05/07/world/europe/france-election-results-maps.html?\\_r=0](https://www.nytimes.com/interactive/2017/05/07/world/europe/france-election-results-maps.html?_r=0).

<sup>27</sup> MUDDE & KALTWASSER, *supra* note 12, at 23-24.

<sup>28</sup> *Id.* at 25; KAZIN, *supra* note 6, at 222-26 (tracing this development from Wallace to Nixon and Reagan).

promising a fresh start for the disempowered or excluded. Both then implemented a wide array of constitutional and legal changes that tamped dramatically down on political competition.<sup>29</sup> Elsewhere in Europe, right-of-center parties have secured solid parliamentary footing by cultivating a fear of Muslims an aversion to immigration, and an appeal to patriotic memes.<sup>30</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>31</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 and vicious feuding,”<sup>32</sup> and (for now) an electoral rout.

Finally, the U.S. Populism has never left the American political scene. Both the Occupy and the Tea Party movements, for example, exemplify forms of populism, as did the earlier campaigns designed to elicit the votes of so-called “Reagan Democrats.”<sup>33</sup> Yet in the 2016 campaign, both 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.<sup>34</sup> Further, 2016 marked the first time that a populist candidate won the White House. Populism was no longer merely an electoral strategy, but also 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 let evenhandedness 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, that any candidate, whether Republican or Democrat, attacked a sitting federal judge’s integrity on the basis of his national origin; refused to disclose tax documents showing his financial interests and potential conflicts of interest; threatened to prosecute and imprison his opponent; and explicitly refused to commit to accepting a loss at the polls.<sup>35</sup> It was also the first time campaign staff and supporters had harassed and threatened press perceived as hostile,

---

<sup>29</sup> For Poland and Hungary see respectively, Joanna Fomina and Jacek Kucharczyk, *Populism and Protest in Poland*, 27 J. DEM. 58 (2016); Miklós Bankuti, Gábor Halmai, and Kim Lane Scheppele, *Hungary’s Illiberal Turn: Disabling the Constitution*, 23 J. DEM. 138 (2012).

<sup>30</sup> See Farid Hafiz, *Shifting borders: Islamophobia as common ground for building pan-European right-wing unity*, 48 PATTERNS OF PREJUDICE 481, 481-82 (2014).

<sup>31</sup> For analyses that emphasize the anti-elite and anti-immigration strands of the Brexit campaign, see respectively, Craig Calhoun, *Brexit is a Mutiny Against the Cosmopolitan Elite*, 33 NEW PERSP. Q. 50 (2016), and Sara Hobolt, *The Brexit vote: a divided nation, a divided continent*, 23 J. EUR. PUB. POL. 1259 (2016).

<sup>32</sup> Griff Witte, *From Britain’s populist right, Brexit’s 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?utm\\_term=.8b84dea92060](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?utm_term=.8b84dea92060).

<sup>33</sup> JUDIS, *supra* note 12, at 37, 55-61.

<sup>34</sup> *Id.* at 63.

<sup>35</sup> See Steven Levitsky & Daniel Ziblatt, *Is Donald Trump a Threat to Our Democracy?*, N.Y. TIMES, Dec. 16, 2016, at SR5, <http://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html>.



sometimes with violent, sometimes anti-Semitic threats.<sup>36</sup> Finally, it was the first time that having prevailed at the polls, a candidate still threatened to denaturalize or imprison those who protested his victory; complained of (non-existent) voter fraud; and exercised an unusual amount of personalistic control over executive-branch positions that had previously been thought to lie beyond the ken of partisan politics. Certainly, it is an open question which of these innovations in political tactics flows from populism, and which is distinct and separable. But at a minimum, such tactical innovations point toward the possibility of a deep tension between populism and liberal democracy under law as it has come to be understood in the United States.

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 a cataloging of all the 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).

Of particular note, Müller observes that it is a mistake to suggest that populist movements cannot govern, or that pursue their own policy agendas because they must inevitably "rely[] on ... a bureaucracy."<sup>37</sup> Certainly, there are some populist movements that fizzle as soon as they grasp power. In addition to UKIP's meltdown, in Taiwan populism has proved fragile in office, with one such president lasting barely five months in office.<sup>38</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 organization basis for the exercise of political power. Hungary's Fidesz party is one example,<sup>39</sup> Turkey's AK party is another.<sup>40</sup> Populism, in short, can take a variety of more or less durable organizational forms.<sup>41</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—but that populism can either work through a *new* party or through a more charismatic mode lacking in any broad-based party infrastructure.

---

<sup>36</sup> Erik Wemple, *Megyn Kelly's Personal Horror Stories*, WASH. POST, Nov, 13, 2016, [https://www.washingtonpost.com/opinions/megyn-kelly-divulges-her-own-private-horrors-of-donald-trump/2016/11/11/01f2da30-a82f-11e6-8042-f4d111c862d1\\_story.html?utm\\_term=.27f348778af2](https://www.washingtonpost.com/opinions/megyn-kelly-divulges-her-own-private-horrors-of-donald-trump/2016/11/11/01f2da30-a82f-11e6-8042-f4d111c862d1_story.html?utm_term=.27f348778af2)

<sup>37</sup> This claim is advanced in Eric A. Posner, *Can it Happen Here? Donald Trump and the Paradox of Populist Government* 6 (Jan 3, 2017), [http://chicagounbound.uchicago.edu/public\\_law\\_and\\_legal\\_theory/606/](http://chicagounbound.uchicago.edu/public_law_and_legal_theory/606/).

<sup>38</sup> MUDDE & KALTWASSER, *supra* note 12, at 38-39.

<sup>39</sup> See Zsolti Enyedi, *Populist Polarization and Party System Institutionalization: The Role of Party Politics in De-Democratization*, 63 PROB. POST-COMMUNISM 210, 214 (2016).

<sup>40</sup> S. Erdem Aytaç & Ziya Önis, *Varieties of Populism in a Changing Global Context*, 47 COMP. POL. 41, 45 (2014).

<sup>41</sup> Robert R. Barr, *Populists, Outsiders and Anti-Establishment Politics*, 15 PARTY POL. 29, 42 (2009) ("[I]t would be best to de-link populism from any specific organizational form.").

This is hardly surprising on reflection: Populism (for now, still loosely defined) has proved a durable and persistent feature of democratic practice around the world for almost a century now. 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. 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 somehow self-immolate in a bonfire of his own vain making are, in short, dallying with fantasy.

Two further forms of internal heterogeneity across examples of populism beyond those enumerated by 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>42</sup> In Latin America, which has witnessed three distinct waves of populist electoral success since the 1930s, the resulting governments have pursued both socialist and neoliberal policy agenda.<sup>43</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 Victor Viktor has pursued “savage cuts” to the welfare state, while maintaining its popularity by posing as “a strong leader ready to nationalize companies and use the state to protect ordinary folk” (p. 59). The PiS, in contrast, “emphasizes the need to tackle inequality and propagates strong welfare policies.”<sup>44</sup> At the same time, differences in social policy do not prevent convergence on what 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 turns on fears of globalization or modernization (p. 12).<sup>45</sup> Populism, in his view, is not merely a political or psychological symptom of an underlying material distress. The point might be both resisted and extended. On the one hand, analysis of global income distribution trends reveals that although the last three 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

---

<sup>42</sup> JUDIS, *supra* note 12, at 62-87.

<sup>43</sup> MUDDE & KALTWASSER, *supra* note 12, at 28-32; *see also* Karen L. Remmer, *The Rise of Leftist-Populist Governance in Latin America: The Roots of Electoral Change*, 45 COMP. POL. SCI. 947, 949-52 (2012) (documenting the third wave in detail).

<sup>44</sup> Remi Adekoya, *Xenophobic, authoritarian—and generous on welfare*, THE GUARDIAN, Oct. 25, 2016, <https://www.theguardian.com/commentisfree/2016/oct/25/poland-right-law-justice-party-europe>.

<sup>45</sup> Elsewhere, however, he rehearses a form of this argument attributable to Chantal Mouffe without clearly rejecting it (pp.52-53).

Europe and North America.<sup>46</sup> Some commentators have diagnosed populism as “a solidaristic alternative to unbridled capitalism ... sustained by a purely negative definition of equality.”<sup>47</sup> On this view, rising support for populism “reflect[s] divisions between the winners and the losers from global markets, and thus whether lives are economically secure or insecure.”<sup>48</sup> This is a story with intuitive appeal, and no little anecdotal support.<sup>49</sup>

But the picture turns out to be more complex. There is some evidence from the European context that economic insecurity is positively correlated to support for right-of-center populism.<sup>50</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>51</sup> In Turkey, the AK party’s support base comprises working-class and petit bourgeoisie, who embrace “its record of economic growth and relative stability after decades of turbulence.”<sup>52</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 values,” including “anti-immigrant attitudes, mistrust of global governance, mistrust of national governance, support for authoritarian values, and left-right ideological self-placement.”<sup>53</sup> In the United States, an analysis of Gallup survey data found 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>54</sup> Again, sociocultural factors—albeit ones closely tied to economic considerations—explain recent populist successes at the polls better than experiences of economic distress alone.

---

<sup>46</sup> BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* 30-32 & fig. 1.3 (2016).

<sup>47</sup> Pierre Rosanvillon, *How to Create a Society of Equals*, FOR. AFF., Dec. 14, 2015, at 16, 19, <https://www.foreignaffairs.com/articles/2015-12-14/how-create-society-equals>.

<sup>48</sup> Ronald F. Ingelhart & Pippa Norris, *Trump, Brexit, and the Rise of Populism* 11 (July 29, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2818659](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818659).

<sup>49</sup> See, e.g., Bob Davis and Jon Hilsenrath, *How the China Shock, Deep and Swift, Spurred the Rise of Trump*, WALL ST. J., Aug. 11, 2016, <https://www.wsj.com/articles/how-the-china-shock-deep-and-swift-spurred-the-rise-of-trump-1470929543>.

<sup>50</sup> Duane Swank & Hans-Georg Betz, *Globalization, the welfare state and right-wing populism in Western Europe*, 1 SOCIO-ECON. REV. 215, 215-16 (2003); see also Anthony Mughan, Clive Bean, and Ian McAllister, *Economic globalization, job insecurity and the populist reaction*, 22 ELECTORAL STUD. 617 (2003) (same for Australia).

<sup>51</sup> Jan-Werner Müller, *Austria: The Lessons of the Far Right*, N.Y. REV. BOOKS, July 25, 2016, <http://www.nybooks.com/daily/2016/07/25/austria-freedom-party-populism-lesson-far-right/>.

<sup>52</sup> Max Rodenbeck, *Erdogan’s New Sultanate*, THE 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>.

<sup>53</sup> Ingelhart & Norris, *supra* note 48, at 27-28.

<sup>54</sup> Jonathan T. Rothwell & Pablo Diego-Rosell, *Explaining Nationalist Political Views: The Case of Donald Trump* 1 (November 2, 2016), <https://ssrn.com/abstract=2822059>.

To summarize, I have aimed in this section to draw out the internal heterogeneity of the term “populist” as it has been used historically and with respect to different geographical domains. Given that diversity, the question arises whether the term has a cogent, useful core meaning or set of applications—a question that leads to the heart of Müller’s analysis.

## **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>55</sup> but maintaining the capacious colloquial sense of populism might have consequences for analytic clarity. 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 adoption of a particular style of politics has downstream implications for the achievement of needful public goods under a constitution<sup>56</sup>—say, the realization of democratic voice, the remediation of abusive behavior using state power, or the vindication of positive or negative rights—then constitutional scholars should search for a definitional template that helps them isolate the relevant forms of political life. Definitions, that is, flow not from a theory of natural kinds, but from the analytic and normative ends of interest to the scholar.

It is in this context that Müller’s approach to populism is worth evaluating and comparing to close competitors. In my view, Müller has surfaced a definition of populism that is more demanding (and hence less capacious) than some alternative definitions, and also more appropriate for constitutional scholars than other options. 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 in the demotic labeled 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 were were deemed corrupt on in some other way morally inferior” (pp. 19-20). Populism hence is less a matter of policy preferences, and

---

<sup>55</sup> CANOVAN, *supra* note 7, at 7.

<sup>56</sup> Constitutions are typically shaped by a range of goals, including the creation of channels for peaceful political contestation, the enabling of public-good creation, the fostering of legitimacy (democratic or otherwise), and the minimizing of agency costs. Tom Ginsburg & Aziz Z. Huq, *Introduction*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* 14-23 (Tom Ginsburg & Aziz Z. Huq, eds. 2016) (setting out four criteria for the evaluation of a constitution’s success). The same is true for key structural elements of the U.S. Constitution, such as the separation of powers. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 382-91 (2016).

more a matter of the guiding assumptions about how democracy can and should work, and how leaders can and should relate to the people.<sup>57</sup>

This 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” (pp. 32). 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).<sup>58</sup> This element of Müller’s account mirrors the notion of “ideological anti-systemicness” developed by Giovanni Capoccia to describe a political party that opposes some, but not necessarily all, qualities of a democratic system.<sup>59</sup>

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

Outside such core examples, however, there are likely to be many peripheral cases, which might or 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 and their likely consequences. Alternatively, it may well be more than a merely consequentialist claim. It may also be a claim, however, that sounds in a moral register and that repudiates the very possibility that the president might be recognized as legitimate. In the latter form, such a declaration would presumably 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 manifest through the formal structures of democratic choice. Müller quotes Peron’s assertion that “the political leader does what the people want” as an instance of such a claim of immanent and noninstitutionalized

---

<sup>57</sup> In contrast, Barr offers an institutional definition. See Barr, *supra* note 41, at 38 (“[P]opulism is a mass movement led by an outsider or maverick seeking to gain or maintain power by using anti-establishment appeals and plebiscitarian linkages.”). I am not persuaded, however, that the plebiscite is the best model for the relation between populist leaders and their rank-and-file. Cf. *id.* at 35-36 (defining “plebiscitarian linkages”).

<sup>58</sup> Müller elsewhere explains that “[f]or a political actor or movement to be populist, it must claim that a part of the people is the people” (p.22). This criteria eliminates many invocations of the “We the People” in U.S. history from the definition.

<sup>59</sup> Giovanni Capoccia, *Anti-System Parties: A Conceptual Reassessment*, 14 J. THEORETICAL POL. 9, 20, 24 (2002) (“A party’s ideological anti-systemness ... consists in the incompatibility of its ideological referents, and therefore its political agenda, with democracy.”).

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 once “‘the people’ have willed,” there is “no action of a populist government [that] can be questioned” (p. 77). An implication of this view—drawn out best in the political theorist Nadia Urbinati’s analysis of populism—is that the back-and-forth of both electioneering and legislative debate are rendered superfluous.<sup>60</sup> Urbinati, like Müller, discerns a necessary tension between democracy and populism that other analysts reject or minimize.<sup>61</sup>

Once again, there are both 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? Again, Müller supplies the core, but does not spell out how peripheral cases should be categorized.

In this regard, Müller’s analysis harkens back to a dynamic identified by the one the leading theorists of populism of the late twentieth century, Margaret Canovan. According to Canovan, populism fed on what she called the “Bagehot problem,” after the leading theorist of the British constitution Walter Bagehot.<sup>62</sup> Bagehot had celebrated the British monarchy on the ground that it was intelligible to the mass of the citizenry. By 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 of most of the people it aims to endeavor.”<sup>63</sup> Populism takes advantages of the necessary complexity of representative democracy by offering a more parsimonious, seemingly more candid, and often more emotionally authentic alternative.

The Bagehot problem is surely one that bedevils our own system. Consider in this regard the American system of a tripartite federal government, intertwined with a lattice of checks and balanced, and perched precariously on a jostling array of sovereign states with shared, overlapping regularity authority. Rather than clarity, the American system blends, trims, and tuck-points a governing frame that makes little intuitive sense. It is perhaps little wonder then that the history of American politics can be glossed as the ebb and flow of various 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.80-82). As the

---

<sup>60</sup> Nadia Urbinati, *The Populist Phenomenon*, 3 *RAISONS POLITIQUES* 137, 145 (2013).

<sup>61</sup> See, e.g., JUDIS, *supra* note 12, at 15 (contending that populism “operates within a democratic context”).

<sup>62</sup> Margaret Canovan, *Populism for Political Theorists*, 9 *J. POL. IDEOLOGIES* 241, 245 (2004).

<sup>63</sup> *Id.*

political scientist Robert Goodin has demonstrated, though, taking an internal criterion for democratic boundary-setting, such as the identification of all affected interests, quickly leads to infeasible outcomes.<sup>64</sup> 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>65</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 institutions struts of democratic choice.<sup>66</sup> Under what circumstances, that is, is a democratic system warranted in taking antiliberal steps in self-preservation?

### C. Alternative Definitions of Populism

The twofold definition advanced by Müller stands apart from other leading definitions. Three alternative approaches merit discussion. Side-by-side of the various available options points toward the superiority of Müller’s approach, at least for the purpose of using populism as a distinct object of analysis in legal and constitutional reflections.

To begin with, it is more demanding than other definitions of populism. John Judis, for example, defines the latter in terms of “the conflictual relationship between” a “people” and an “elite.”<sup>67</sup> Judis’s definition allows him to study a range of political actors who have in some way juxtaposed themselves against an extant power structure.

But so defined, populism is an immense category with little resolving power. At its margins, Judis’s conceptualization seems to sweep in any and all parties that position themselves in relation to incumbents. It is not hard to imagine that this might capture virtually all insurgent political movements at some moment in time. To resist this conclusion, one might observe that a consequence of Müller’s definitional approach is that what some political scientists have called “agrarian populism” falls to the wayside.<sup>68</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<sup>69</sup>—but they are not well described as *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 antinomialism advances a

---

<sup>64</sup> Robert E. Goodin, *Enfranchising all affected interests, and its alternatives*, 35 PHIL. & PUB. AFF. 40 (2007).

<sup>65</sup> See JEREMY WALDRON, LAW AND DISAGREEMENT 24 (1999) (“[L]egislatures incorporate disagreement into their proceedings, and make their decisions in the midst of it.”).

<sup>66</sup> For a survey of the instruments used in different constitutions for addressing this problem, see SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015).

<sup>67</sup> JUDIS, *supra* note 12, at 15.

<sup>68</sup> CANOVAN, *supra* note 7, at 8.

<sup>69</sup> KAZIN, *supra* note 6, at 36-42.

theoretical agenda in ways that—as I explore below—may 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>70</sup>

On the one hand, there are many parallels between this and Müller’s definition. On the other hand, Mudde and Rovira Kaltwasser introduce a number of additional terms and criteria beyond Müller, including “homogenous,” “antagonistic,” “pure,” and the “general will.” The latter concept, which derives from Jean-Jacques Rousseau’s theorization of the social contract, introduces new complications. Taken seriously, it would cleave the Mudde-Rovira Kaltwasser definition from what Müller offers.

The reason for this is that Rousseau does not invoke the idea of a “general will” without specifying its institutional setting to some degree. Although Rousseau assumed that a well-order society would possess a general will, he also explicitly assumed that voting would be required to elicit it, and, moreover, “carefully specified” the structure of the voting procedure used to identify the general will.<sup>71</sup> Whereas invocation of Rousseau’s concept of the general will thus implies that the choice of voting procedures has a “moral significance,” Müller’s more abstemious definition stresses the way in which populist claims to legitimacy supervene over and render irrelevant the technical details of electoral systems and voting rules.

Moreover, Rousseau’s account of the role of the people in government is not inconsistent with the idea would “discuss and oppose” measures initially proposed by the government.<sup>72</sup> These elements of Rousseau’s account of the general will are not obviously in harmony with the otherwise Manichean vision of politics that Mudde and Rovira Kaltwasser spell out.<sup>73</sup>

In short, although Mudde and Rovira Kaltwasser might be read to incorporate the term “general will” without incorporating by reference the theoretical apparatus developed in *The Social Contract*, I am not persuaded that their more reticulated definition adds clarity rather than introducing new and unnecessary qualifications and ambiguities. For this reason, I am inclined to think that Müller has offered the more usefully and analytically tractable approach.

---

<sup>70</sup> MUDDE & KALTWASSER, *supra* note 12, at 6.

<sup>71</sup> Melissa Schwartzberg, *Voting the General Will: Rousseau on Decision Rules*, 36 POL. THEORY 403, 403, 419 (2008) (distinguishing between instances in which Rousseau insisted on a majority as opposed to a supermajority rule).

<sup>72</sup> Ethan Putterman, *Rousseau on the People as Legislative Gatekeepers, Not Framers*, 99 AM. POL. SCI. REV. 145, 145 (2005).

<sup>73</sup> In a similar vein, Müller notes that “Rousseau’s general will ... requires actual participation by citizens,” (p. 29), which populism does not.



Finally, Müller's definition is in quite stark contrast with an account of populism that emerges out of the post-Frankfurt School body of critical theory, and that is most closely associated with the Argentinian theorist Ernesto Laclau. For Laclau, populism arises from unsatisfied demands by marginalized and frustrated members of the polity, demands articulated in a process of mobilization that terminates in a "a moment of crystallization that constitutes the 'people.'" <sup>74</sup> Mao Tse Tung's so-called "Long march" is offered as an example—suggesting that Laclau's notion of populism is rather different from the traditional one. <sup>75</sup> Ultimately, Laclau asserts that his 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>76</sup> The net result is that populism comes to stand for all that is fluid, contingent, and subject to contestation—a floating platform that can come to stand either for the vindication of human rights (or totalitarianism), <sup>77</sup> but that 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 discernable traits. That process, moreover, cannot easily be discerned in real-world examples. As one (sympathetic) commentator notes, "the task of determining when an ephemeral equivalence becomes a stable system of signification" is not an easy or objective one. <sup>78</sup> Moreover, Laclau's account has more than a trace of teleological, Marxian optimism about the spontaneous, organic eruption of the oppressed. Indeed, his account is fairly read as a celebratory anticipation of the coming self-actualization of the oppressed masses, and a warning against the pitiless efforts by the ruling classes to capture and deflate this process. As such, Laclau's account 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. In my view, 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. On the other hand, Müller evades the theoretical entanglements with Rousseau's account of the social contract and Marxian critical theory that entangle other approaches.

---

<sup>74</sup> LACLAU, *supra* note 14, at 72-77, 93.

<sup>75</sup> *Id.* at 122. Further distancing his concept, Laclau draws on the work of French psychoanalyst Jacques Lacan to articulate a series of seemingly paradoxical claims between popular demands and the "people." *Id.* at 118.

<sup>76</sup> *Id.* at 154.

<sup>77</sup> *Id.* at 171; *id.* at 191 (noting that populism can become trapped in the form of "petty demagoguery").

<sup>78</sup> Benjamin Arditi, *Populism is Hegemony is Politics? On Ernesto Laclau's On Populist Reason*, 17 CONSTELLATIONS 488, 495 (2010). It cannot help that Laclau is said to "think[] outside the parameters of a Cartesian universe." *Id.*

This is not to say that Müller’s approach is divorced from theory. Rather, the idea of populism mapped by Müller claims intellectual roots in the prewar work of the German jurist Carl Schmitt (pp. 28-29).<sup>79</sup> In *The Concept of the Political*, Schmitt (like Laclau) offered a definition of what constitutes the political, albeit one that lacks for any aspirational, Marxian overtones.<sup>80</sup> For Schmitt, this lay in the “most extreme and intense antagonism” between the friend and the enemy that arises “when one fighting collectivity of people confronts a similar collectivity” within the polity.<sup>81</sup> Dismissing the “empty and trivial formality” of legislative debate, Schmitt went on to tantalizingly hold up dictatorship as “just as little the definitive antithesis of democracy as democracy is of dictatorship.”<sup>82</sup> It is the Schmittian quality of populism—its contempt of the complex mechanics of 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>83</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 authored five books and more than 35 tracts in support of the Third Reich.<sup>84</sup> So it should not be surprising that the logic of populism shades into more sinister “Caesarian” logics.<sup>85</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 the one, right side, and the withering away of political pluralism.<sup>86</sup> The logic of populism is thus contiguous with (if not identical to) the defense offered by Giovanni Gentile of “the Fascist state ... [as] a people’s state, and, as such, the democratic state *par excellence*.”<sup>87</sup>

Here then, we have a *normative* reason for taking Müller’s definition of populism as a touchstone for constitutional analysis. So defined, populism captures a style of political claim-making, and a school of political mobilizations, that 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

---

<sup>79</sup> See also Urbinati, *supra* note 60, at 147 (recognizing Schmitt as sharing the same view of politics as populists).

<sup>80</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab, trans. 2007).

<sup>81</sup> *Id.* at 28-29.

<sup>82</sup> CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 32, 50 (Ellen Kennedy, trans. 1998)

<sup>83</sup> David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 AM. POL. SCI. REV. 121, 125 (1997).

<sup>84</sup> Richard Wolin, *Carl Schmitt, political existentialism, and the total state*, 19 THEORY & SOC. 289, 289 (1990).

<sup>85</sup> Urbinati, *supra* note 60, at 148.

<sup>86</sup> Schmitt himself celebrated that “[i]n the one-party state of National Socialist Germany, the danger of a pluralistic dismemberment of Germany ... has been vanquished.” Wolin, *supra* note 84, at 409 (citation and footnote omitted).

<sup>87</sup> Giovanni Gentile, *The Philosophical Basis of Fascism*, 6 FOR. AFF. 290, 291 (1928).

The Constitution creates a set of institutional channels for national politics; it recognizes, more or less explicitly, the existence of parallel state institutions more decentralized politics. As the preamble makes clear, it does so with certain public goods in mind.<sup>88</sup> These goals are not self-defining, and in some instances partially overlap, and at other times partially conflict. The “common defense” might be advanced in ways that undermine the “Blessings of Liberty” for some, and both terms are surely contestable. The political institutions created by the Constitution thus have a plurality of tasks. They must decide how plural and partially incommensurable goals must be pursued, and perhaps traded off, even as they resolve ambiguities in the definitions of the goals themselves.

The capacity of institutions fashioned by the Constitution to juggle these tasks depends on the style of politics of those elected to inhabit them. Some of the Constitution’s drafters, including James Madison, assumed that the institutional location of an official would determine his or her motives.<sup>89</sup> But it is widely recognized that institutional loyalties are not as powerful as Madison had hoped,<sup>90</sup> although it is premature to assume that they have no effect at all.<sup>91</sup> Hence, the interaction of political coalitions and styles on the one hand, with the Constitution’s institutional design will in many instances determine whether the public goods purportedly furthered by the Constitution are in fact realized. For example, it is now widely recognized that the degree to which Congress superintends the executive branch (and hence realizes the public good of democratic accountability) is a function of whether there is united or divided government.<sup>92</sup>

Less familiar is the question whether political leadership in a populist vein, whether in the White House or Congress, 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. My aim here, to be clear, is not to plumb the dynamic interactions of the populist style and the constitutional design exhaustively, but rather to gesture toward the kinds of questions and problems that might arise. The interactions

---

<sup>88</sup> U.S. CONST. preamble (setting forth as the Constitution’s goals “to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity”).

<sup>89</sup> THE FEDERALIST No. 51, at 319-20 (James Madison) (Clinton Rossiter, ed., 1961) (“Ambition must be made to counteract ambition ... The interests of the man must be connected with the constitutional rights of the place.”).

<sup>90</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2323 (2006).

<sup>91</sup> David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 84 U. CHI. L. REV. – (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940769](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940769).

<sup>92</sup> See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 443 (2012).

mapped out here, moreover, are specific to the U.S. context. Pathways of constitutional dissolution tend to be specific to a given design. Any analysis of the interaction of political style and constitutional design, therefore, must be tethered to the local circumstances of a given polity.

The question examined here—how populism (hereinafter, as defined by 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 (p. 61), but only fleetingly, and it is useful to say why. Closely tied to the work of Larry Kramer and Mark Tushnet, popular constitutionalism advances some idea that the people retain authority in the day-to-day administration of fundamental law.<sup>93</sup> There is no necessary connection between popular constitutionalism so conceived, and the constitutional claims advanced by populists. Further, there is no reason why a populist movement must recognize or incorporate any form of popular constitutionalism.<sup>94</sup> Instead, it is arguably implicit in the logic of populism as defined by Müller that a leader channels a singular and prepolitical understanding of what the people want. 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 to be 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. But I am concerned here as to whether populism once in power, or at its gates, imposes pressures on the U.S. Constitution or its continued of in terms of its abiding production of valuable systemic goods.

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

Both the Constitution and populism are embedded in conceptions of how political representation should work, and when it has become dysfunction. 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.

---

<sup>93</sup> Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CALIF. L. REV. 959, 961 n.3 (2004); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

<sup>94</sup> I read Laclau to require a process in which demands bubble up from within the public, and crystalize into a self-conscious entity called the people. *See infra notes 74 to 78*. If one accepts this account of populism, it may well be that ‘constitutional’ claims (in the sense of claims about how political society ought to be constructed) are often a part of the popular imaginary. But in practice, the relationship between the populist leader and his or her ‘people’ can be constructed through mass media channels that generate popular identification and investment without regard to the actual platform pursued. *See Arditì, Populism, supra note 5*, at 24-25 (making this point in respect to the campaign of Mexican president Vicente Fox).

Common diagnosis, however, does not conduce to common cure. A gap emerges in the solutions implied to the pathology of pluralism in the Constitution and populism.

I have already sketched populism's aversion to a multiplicity of parties,<sup>95</sup> 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 ... coordinated and pressed their efforts to seize political power ... [and] pursue their own private self-interest at the expense of the common good."<sup>96</sup> In Federalist 10, Madison condemned them as "a "disease" and a "dangerous vice" that "tainted our public administration."<sup>97</sup> And in his Farewell address, George Washington also cautioned against parties' "baneful effects."<sup>98</sup> Parties emerged (and indeed, coalesced around Madison, Jefferson, and Washington) because of the candidates' need to mobilize potential voters.<sup>99</sup> In other words, the Constitution's reliance on elections—directly in the case of the House of Representatives, but only indirectly in respect to the Senate—generated unraveling pressure on the design's anti-pluralist 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 a very different remedy for that shortfall. Madison, of course, resisted the allure of an enforced homogeneity of opinion.<sup>100</sup> In this regard, the Constitution maintains a commitment to pluralism that populism denies. This commitment is restaged in the document's recognition of the independent authority of the sovereign states. In the Framers' original scheme, these supplied alternative centers of political authority that could be mobilized were the central government to overreach.<sup>101</sup>

Moreover, the Framers further 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

---

<sup>95</sup> See *supra* text accompanying notes 57 to 58.

<sup>96</sup> James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 667 (2000).

<sup>97</sup> THE FEDERALIST NO. 10, at 77-78 (James Madison) (Clinton Rossiter ed., 1961).

<sup>98</sup> George Washington, *Farewell Address* (Sept. 17, 1796), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 210-13 (James D. Richardson ed., 1897).

<sup>99</sup> JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 68-95 (1995).

<sup>100</sup> THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) ("As long as the reason of man continues to be fallible, and he is at liberty to express it, different opinions will be formed.")

<sup>101</sup> THE FEDERALIST NO. 46, at 298-99 (James Madison) (Clinton Rossiter ed., 1961) (explaining that "ambitious encroachments of the federal government on the authority of the State governments ... would be signals of general alarm").

considerations.”<sup>102</sup> In the background to mechanism of democratic transfiguration is an implicit, yet firmly held belief, that a natural aristocracy existed, ready to fill legislative and executive leadership positions.<sup>103</sup>

Populism as a political strategy exploits both these solutions to the problem of representation. First, as noted, the complexity of the filtration mechanism designed in Philadelphia invites the Bagehot problem limned above.<sup>104</sup> The legislative’s process’s complexity, and in particular its proliferation of vetogates, invites at best deliberate and careful policymaking, and at worst gridlock.<sup>105</sup> Second, the constitutional system’s reliance on the assumption that a natural aristocracy would populate federal offices 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>106</sup> To be sure, this Achilles heel in the constitutional design has rarely been successfully exploited at the level of 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 no longer relevant criteria of democratic judgment (p.52). The populist’s claims, as Müller nicely 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 has no effect on their public standing (p.4, 47). As the sociologist Arlie Russell Hochschild puts it, populists appeal not to voters’ material self-interest but to their “emotional self-interest.”<sup>107</sup> By presenting themselves as defenders of genuine national interests, populists are able to deflect blame for material degradation in their constituents’ conditions (pp.58-59). Indeed, to the extent that support for populist is correlated with the felt experience of

---

<sup>102</sup> THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961); *see also* HANNAH ARENDT, ON REVOLUTION 227 (1977) (suggesting that a representative system is a way to pass opinions “through the sieve of an intelligence that will separate the arbitrary and the merely idiosyncratic, and thus purify them into public views”).

<sup>103</sup> *See* J. G. A. POCOCK, THE MACHIAVELLIAN MOMENT 515 (1975) (contending that the Framers believed that “democracy could discover the [natural] aristocracy by using its own modes of discernment ....”); *accord* DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS 75-141 (1974).

<sup>104</sup> *See supra* text accompanying notes 62 to 63.

<sup>105</sup> William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756, 758-59 (2015).

<sup>106</sup> *See supra* Part I.A.

<sup>107</sup> ARLIE RUSSELL HOCHSCHILD, STRANGERS IN OUR OWN LAND (2016).

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 their 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. Indeed, 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>108</sup> The modal forms of populist governance that Müller identifies—stacking 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>109</sup>

Transposed to the American context, Müller's model of populist governance, however, 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 with legalistic compliance on the president.<sup>110</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>111</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>112</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>113</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 decision-making happens without a high degree of

---

<sup>108</sup> See Tom Ginsburg & Aziz Z. Huq, *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); Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEM. 55, 59-62 (1994) (describing this dynamic in Latin America).

<sup>109</sup> Ginsburg & Huq, *supra* note 108.

<sup>110</sup> U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”).

<sup>111</sup> *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); *accord Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 613 (1838) (“To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”).

<sup>112</sup> See U.S. CONST. art. VI, §§ 2-3; *see also* art. II, § 1, cl. 8 (reproducing the presidential oath).

<sup>113</sup> *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

internalization of the law.<sup>114</sup> 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 probably incorrect to distinguish constitutional rules from the norms and conventions that surround them.<sup>115</sup> Norms of legality on the one hand, and constitutional rules are symbiotic, and 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 cooption by a populist president. To the contrary, the Take Care Clause has been persistently (if arguably erroneously) read to vest the President with largely unfettered authority to terminate officials, even when they are engaged in oversight of malfeasance of those close to the Oval Office.<sup>116</sup>

Nor does the Constitution establish any independent bodies of "horizontal accountability" within the federal government beyond the tripartite division of the branches.<sup>117</sup> Notwithstanding Madison's famous dictum in Federalist 51, the U.S. Constitution is singularly wanting in "auxiliary precautions,"<sup>118</sup> 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 sensible *ex post* discretion by voters at the ballot box as the "the primary control on the government."<sup>119</sup> But if populist leaders are successful in appealing to voters' emotional self-interest, and thereby deflecting blame for deterioration in material condition, that "primary control" will fail as a disciplining mechanism.<sup>120</sup>

---

<sup>114</sup> My claim here is empirical and particular, but parallels H.L.A. Hart's theoretical and abstract argument about the role of internalized obligation in defining law. H.L.A. HART, *THE CONCEPT OF LAW* 117 (2d ed. 1994) (stipulating that "officials of the system ... must regard [the constitution] as common standards of official behavior and appraise critically their own and each other's deviations as lapses").

<sup>115</sup> For an example of scholarship making this sharp distinction, see Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181-94 (2013).

<sup>116</sup> The relevant Supreme Court precedent, I should add, does not reach cases in which the terminated subordinate is investigating the president or those close to him. *Cf. Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (invalidating limits on presidential control of an accounting oversight board nested within the Securities and Exchange Commission). *But see Aziz Z. Huq, Removal as a Political Question*, 65 STAN. L. REV. 1, 24-52 (2013) (criticizing the logic of *Free Enterprise Fund*).

<sup>117</sup> On the idea of "horizontal accountability" as an endogenous mechanism of restraining state power, see Guillermo O'Donnell, *Horizontal Accountability in New Democracies*, in *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 29, 29 (Andreas Schedler et al. eds., 1999)

<sup>118</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter, ed., 1961); accord Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1343 (1994) ("By 'auxiliary precautions' Madison had in mind the division of power within the national government (and the federal structure of the republic), rather than anything like the APA or the Sunshine Act.").

<sup>119</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter, ed., 1961).

<sup>120</sup> For this reason, I disagree with Eric Posner's prediction that populist government in the American constitution will be self-limiting, in the sense of generating the conditions for its own electoral demise before imposing excessive damage. *See Posner, supra* note 37, at 20-22. Quite apart from the fact that



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 instead 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.

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 that 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>121</sup> It is not hard to see how this can tip imperceptibly or suddenly into some form of atrocities, 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' government responded to the victory of opposition candidate

---

populists, as Müller notes, can "unleash terror against those deemed *hors la loi*" in short order (p. 61), it is simply not the case that poor performance in any traditional sense will conduce to populists' electoral defeat. This is but one reason why it is inadequate to rely on political checks on executive power either in the case of populists or more generally. Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777 (2012).

<sup>121</sup> Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 835-36 (2006).

Antonio Ledezma in the Caracas mayor's election in 2008 by created a new "capital district" and transferred most of the budget and authority of the mayors office to the new entity controlled by the ruling party.<sup>122</sup> When the latter lost 2015 elections to the National Assembly, it again simply created a new legislature.<sup>123</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. On the other hand, with the exception of the Suspension Clause,<sup>124</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 certain or stable. Until the end of the nineteenth century, the task of constitutional remediation fell largely on state courts, applying state-law forms of action.<sup>125</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>126</sup> or has replaced it with federal common-law rules that are far less generous in their remedial effect.<sup>127</sup> If the coverage of 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.<sup>128</sup> 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 imposes pressure on the dispositions of legality and probity that are in practice necessary predicates for the constitutional system to work. 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 (p. 61-62). But in the U.S. context, a populist mode of governance places great strain on several structural elements of the extant constitutional order.

---

<sup>122</sup> Tamara Pearson, *Venezuelan President Designates New Caracas Head and Communications Minister*, VENEZUELA ANALYSIS, Apr. 16, 2009, <https://venezuelanalysis.com/news/4371>; for analogies to this development in the U.S. context, see Ginsburg & Huq, *supra* note 108.

<sup>123</sup> Daniel Lansberg-Rodriguez, *Maduro and his Imaginary Parliament*, FOREIGN POL., Dec. 22, 2015, <http://foreignpolicy.com/2015/12/22/president-maduro-and-his-imaginary-parliament-venezuela-elections/>.

<sup>124</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>125</sup> See Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*. 65 DUKE L.J. 1, 13-15 (2015) [hereinafter "Huq, *Judicial Independence*"].

<sup>126</sup> 5 U.S.C. 551 *et seq.*

<sup>127</sup> Huq, *Judicial Independence*, *supra* note 125, at 20-40.

<sup>128</sup> See, e.g., *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1966) (suggesting that a court cannot enjoin the president in person from executing an act of Congress). *But see* Int'l Refugee Assistance Project v. Trump, No. 17-1351, 2017 WL 2273306 (4th Cir. May 25, 2017), *as amended* (May 31, 2017) (relying on presidential statements evincing discriminatory animus to enjoin executive order restricting nationals of six countries from entering the United States).

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 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>129</sup> His monograph's central virtue today is that it makes legible the nature and extent of the populist challenge the project of democratic constitutionalism that has been unfurling, hesitantly and sometimes in the wrong direction, in the United States since 1789.

---

<sup>129</sup> See JEREMY WALDRON, *POLITICAL POLITICAL THEORY* 294-95 (2016) (developing this metaphor based on the work of Hannah Arendt).