

# POPULISM AND CONSTITUTIONALISM: AN ESSAY ON DEFINITIONS AND THEIR IMPLICATIONS

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## INTRODUCTION

Around the world governments characterized by observers as populist have taken power. Many of their actions have been incompatible with tenets of modern liberalism. This has generated commentary suggesting that populism is itself incompatible with constitutionalism.

This Essay challenges that commentary. We agree that some variants of populism are incompatible with modern liberal constitutionalism but argue that the tension between populism as such and constitutionalism as such, though real, is significantly narrower than much commentary suggests. We begin in Part II by offering “barebones” definitions of populism and constitutionalism so that we can tease out precisely what the tension between them is. Part III turns to case studies of challenges to judicial independence, of the use of referendums, and of innovative methods of determining the public’s views. As with our discussion of defining populism and constitutionalism, here we attempt to identify whether (or the degree to which) the case studies demonstrate a tension between populism and constitutionalism. Our conclusion is that sometimes we can see such a tension and sometimes we cannot, and that the analysis of specific populisms and their policies in relation to constitutionalism must be highly sensitive to context.

Part IV applies the argument to two developments in the United Kingdom: the Brexit referendum and the attempt by Boris Johnson to prorogue Parliament and the ensuing decision by the UK Supreme Court finding the prorogation unlawful. Here our conclusion once again is that analysis of populism’s relation to constitutionalism must be sensitive to context: the referendum was flawed but not in ways that cast a bad light on populism as such, and the prorogation, while perhaps unlawful, was not clearly anti-constitutional.

Overall, we argue against generalized claims about populism as such and constitutionalism as such. There are many populisms and at least a few constitutionalisms, and scholars and observers should direct their attention to the questions posed by specific actions taken by individual populist governments. Sometimes populist governments will act in anti-constitutional ways, and sometimes they will not. We believe that this conclusion is appropriately deflationary.

## I. AN OVERVIEW: DEFINITIONS AND BAREBONES DEFINITIONS

The contemporary literature on modern populism is filled with claims that populism is in some tension with constitutionalism. Of course we can *define* both terms in ways that make them incompatible (for example by defining populism as necessarily committed to ethno-nationalism, untrammled executive power, and a non-pluralist opposition between a unified “People” and cosmopolitan elites, and constitutionalism as necessarily committed to an extremely thick conception of liberal constitutionalism replete with all sorts of rights-guarantees).<sup>1</sup> Suppose, though, we started with relatively barebones definitions of each term and *then* examined the degree to which they are incompatible. That is our strategy here.<sup>2</sup> We begin with an inevitably incomplete survey of some definitions of populism offered in the existing literature. We then offer our barebones definitions of populism and constitutionalism, and the real—and perhaps unimportant—conflict between populism and constitutionalism under those definitions. Our theme is this: because populism takes many forms,<sup>3</sup> the conflict between populism “as such” and constitutionalism, while real, is narrower than often posited, and sometimes constitutionalism might properly come out the loser in such conflicts.<sup>4</sup>

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<sup>1</sup> See, e.g., WILLIAM A. GALSTON, *ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY* (2018) (defining the terms in these ways).

<sup>2</sup> For a similar, but not the same approach, see David Fontana, *Unbundling Populism*, 65 *UCLA L. REV.* 1482 (2018), distinguishing between unbundled and bundled populism, the former roughly similar to our barebones definition, the latter including thicker definitions.

<sup>3</sup> For an earlier discussion of this point by one of us, see Bojan Bugarič, *Could Populism Be Good for Constitutional Democracy?*, 15 *ANN. REV. L. & SOC. SCI.* 41 (2019).

<sup>4</sup> We note two normative commitments that animate our effort: (1) We believe that important aspects of the programs of some populist political movements are normatively attractive. These movements include late nineteenth century U.S. populism, the movements supporting Senators Bernie Sanders and Elizabeth Warren in the United States, and *Podemos* and *Syriza* recently (though of course not all aspects of the programs of those movements), and (2) The (mere) fact that “the People” support a political program counts in favor of the program’s adoption even when we individually disagree with important aspects of the program (at least as long as the program remains within quite broad bounds), although that fact can be outweighed by other considerations.

### A. *Definitions of Populism: An Overview*

Handbooks, research guides, and companions to populism abound.<sup>5</sup> Authors use the term to refer to a large number of political movements, and no agreed-upon definition has yet emerged. Jan-Werner Müller's formulation is probably the most widely cited: for him, populism is "a particular *moralistic imagination of politics*, a way of perceiving the political world that sets a morally pure and fully unified—but . . . ultimately fictional—people against elites who are deemed corrupt or in some other way morally inferior."<sup>6</sup> As we describe next, though, other authors attribute other characteristics to populism, and some omit one or more features of Müller's definition. Our view is that, to use a tired metaphor, populisms may share a family resemblance, but the family is an extended one whose dispersal around the world has produced members who could have little to say to each other at a family reunion.<sup>7</sup>

We take as our initial texts two articles appearing in a symposium on "Public Law and the New Populism," published in the *International Journal of Constitutional Law* (I-CON), a leading journal in the field of comparative constitutional law.<sup>8</sup> Because we do not pretend that these articles provide a comprehensive dictionary entry on "populism," we then turn to a selection of additional articles. Along the way we make some critical comments on each definition, hinting at the components of the barebones definition we offer in the following Section.

Neil Walker supplements Müller's definition with a related phrase—populists see politics as "involving a binary opposition between 'two homogeneous and antagonistic camps'"—from another highly cited work, Mudde and Kaltwasser's *Populism: A Very Short*

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<sup>5</sup> See, e.g., THE OXFORD HANDBOOK OF POPULISM (Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo & Pierre Ostiguy eds., 2017); CAS MUDDÉ & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION (2017); JOHN B. JUDIS, THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS (2016); ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY (2018); MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY (rev. ed., 1998).

<sup>6</sup> JAN-WERNER MÜLLER, WHAT IS POPULISM? 19–20 (2016).

<sup>7</sup> Cf. Bojan Bugarič, *Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism*, 17 INT'L J. CONST. L. 597, 599 (2019) ("[R]ather than analyzing populism per se, we should recognize that it takes a variety of guises.") (paraphrasing Anna Grzymala Busse, *Global Populisms and Their Impact*, 76 SLAVIC REV. 3 (2017)).

<sup>8</sup> The symposium appears in *Public Law and the New Populism*, 17 INT'L J. CONST. L. 515 (2019). One of us (Bugarič) contributed to the symposium.

*Introduction.*<sup>9</sup> Mudde and Kaltwasser’s modification is important because it makes explicit the proposition that populism, in their understanding, is by definition anti-pluralist. Though Müller puts anti-pluralism at the center of his analysis, his presentation, in contrast, *could* be understood to refer to nearly all forms of political activity by “ordinary” people unified for political purposes only in a project aimed at displacing existing ruling elites with political leaders more attuned to the interests of the people—interests that could in principle vary depending on which groups of ordinary people are most immediately affected by specific policies. The corruption and moral inferiority that Müller sees in populism’s description of ruling elites could, again in principle, be a way of characterizing their failure to take the interests of (a possibly pluralist) “ordinary” population adequately into account.<sup>10</sup>

Paul Blokker advances a more tentative definition of populism, in large part because he expressly includes left- and right-wing versions within his purview. For him, in populist constitutionalism, “the actual engagement of (different groups of) citizens in society is substituted for by the idea of a united people, represented by the populist leader. The main culprit is identified in corrupt elite rule,” which, he notes earlier, is “detrimental to the common good.”<sup>11</sup> Further, populism “tend[s] to deny a strong separation of politics and law and endorse[s] a stronger link between constitutions and the people.”<sup>12</sup> Populists criticize “the idea of the law as *non-political and neutral*,” and “what is perceived as a strong separation between law, on the one hand, and politics and morality on the other.”<sup>13</sup> With others, Blokker describes this attitude as “instrumentalism.”<sup>14</sup> This makes populists “critical about the strong and independent nature of apex courts, the role and form of judicial review, and the extensive and entrenched nature of individual rights.”<sup>15</sup> It “tend[s] to suffer from an exclusionary tendency, which results from the quest for an authentic people, and in practice risk[s] sliding into

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<sup>9</sup> Neil Walker, *Populism and Constitutional Tension*, 17 INT’L J. CONST. L. 515, 516 (2019) (citing MUDDE & ROVIRA KALTWASSER, *supra* note 5, at 6). We note that we are not here describing Walker’s central argument, but only his reference to another work.

<sup>10</sup> Classical conservative politics, driven by the view held by traditional elites that they know best how to govern in the interests of all, falls outside the understanding of politics we sketch here, but that form of politics may be the only one that does.

<sup>11</sup> Paul Blokker, *Populism as a Constitutional Project*, 17 INT’L J. CONST. L. 535, 540 (2019).

<sup>12</sup> *Id.* at 537 n.4.

<sup>13</sup> *Id.* at 549.

<sup>14</sup> *Id.* at 545.

<sup>15</sup> *Id.* at 549.

either authoritarian or ‘leaderist’-plebiscitarian modes.”<sup>16</sup> Finally, Blokker asserts that “majoritarianism” is a characteristic feature of populism, and that populism involves “a political appeal to the people, and a claim to legitimacy that rests on the democratic ideology of popular sovereignty and majority rule.”<sup>17</sup>

As this last quotation suggests, we believe that much of what Blokker described as characteristic of populism is more accurately described as characteristic of democratic politics and of law itself. We can imagine a view of politics as founded on natural law or something similar, but most democratic theorists, we believe, agree that democracy ultimately “rests on” some version of an “ideology of popular sovereignty.”<sup>18</sup> Similarly with majoritarianism: a well-known result in social/public choice theory shows that majoritarianism is the only voting rule that generates stable policies (as long as preferences are stable).<sup>19</sup> And there is a jurisprudential defense of an instrumentalist view of law rooted not only in Carl Schmitt’s work, to which Blokker alludes,<sup>20</sup> but also in the American Legal Realist tradition and its descendant Critical Legal Studies. The Realists and their successors argued that *in the end*, though not necessarily proximately, law was always instrumental. *Avant la lettre*, they were critical of aggressive forms of constitutional review and skeptical about claims that general guarantees of individual rights generated specific outcomes in controversial cases.<sup>21</sup> We think it worth entertaining the view that

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<sup>16</sup> *Id.* at 537 n.4. We emphasize that “leaderism” is for Blokker only a tendency. We suspect that only specialists in Spanish and Greek politics could name off the top of their heads the leaders of Podemos and Syriza, often described as populist parties in those nations. Though Blokker does not associate “leaderism” with charismatic leaders, the association is often made. *See, e.g.*, Jane Mansbridge & Stephen Macedo, *Populism and Democratic Theory*, 15 ANN. REV. L. & SOC. SCI. 59, 60 (2019) (describing as a “non-core” characteristic of populism “a single leader embodying the people”). We note that not all populist leaders are fairly described as charismatic, Jaroslaw Kacynski being the most obvious. On the value of and limits to populist plebiscitarianism, see *infra* Section I.B.

<sup>17</sup> Blokker, *supra* note 11, at 541 (quoting Margaret Canovan, *Taking Politics to the People: Populism as the Ideology of Democracy*, in DEMOCRACIES AND THE POPULIST CHALLENGE 25, 25 (Yves Mény & Yves Surel eds., 2002)).

<sup>18</sup> *Id.*

<sup>19</sup> This is May’s Theorem. Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952).

<sup>20</sup> Blokker, *supra* note 11, at 549.

<sup>21</sup> For a discussion of what we call this specification problem, see *infra* Section I.B. Elsewhere Blokker writes that conservative populists “justify their legal actions by taking issue with legalistic or liberal understandings of law and constitutionalism.” Paul Blokker, *Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism*, 15 EUR. CONST. L. REV. 519, 531 (2019). The alternatives he describes are different, in our view: the (instrumental) critique of legalism is jurisprudential while the anti-liberal critique is political (and, of course, conservative).

populists have a better understanding of law *as such*, that is, as ultimately instrumental, than their critics.

As with Mudde and Kaltwasser, for Blokker what appears to single out populism from other forms of political activity by ordinary people, then, is a principled anti-pluralism. And here we note that one regime often described as populist, Bolivia under Evo Morales, promoted a constitution that expressly described the nation as “plurinational,” in implicit contrast to the prior (liberal?) constitutional regime that was exclusionary.<sup>22</sup> Hannah Arendt famously argued that the liberal revolutions of the eighteenth and nineteenth century transformed subjects into citizens, that this elimination of formal exclusions from citizenship opened up what she called the “social question” of effective but informal exclusions, and that later revolutions (which she criticized) sought to resolve the social question.<sup>23</sup> On this view, existing liberal constitutional regimes are in practice exclusionary (anti-pluralist, in a sense), and populism can be inclusionary.

We agree that *some* populist movements have the characteristics described by Müller, Mudde and Kaltwasser, Walker, and Blokker.<sup>24</sup> But, as Robert Howse writes in the I-CON symposium, “[t]he populist label is a form of ‘othering’ that eschews serious engagement with those who see more promise than peril in today’s disruptive politics,” and that it is often attached to give “a pejorative cast on disruptive democratic politics of any sort that challenges elitist liberal democracy.”<sup>25</sup> He also observes that “[t]he answer, ‘that’s just . . . how we define populism’ . . . seem[s] thoroughly question-begging.”<sup>26</sup> We turn now to our barebones definitions, first of populism and then of constitutionalism, with the aim of determining whether or to what extent populism as we define it is inconsistent with constitutionalism.

### B. *Barebones Populism and Constitutionalism*

Begin with populism. In our barebones definition populism is a theory of political choice according to which the reliably determined

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Similarly with his undifferentiated list of the idea, criticized by conservative populists, “of a neutral, universalist, individualist, and secularist understanding of law.” *Id.* at 533.

<sup>22</sup> The overall story about Bolivia, including the manner in which Morales was removed from office, is quite complex, and we refer here only to the initial stages of the events.

<sup>23</sup> HANNAH ARENDT, *ON REVOLUTION* (1963).

<sup>24</sup> Blokker deploys his analysis in connection with what he expressly describes as conservative populism in Blokker, *supra* note 21.

<sup>25</sup> Robert Howse, *Epilogue: In Defense of Disruptive Democracy—A Critique of Anti-Populism*, 17 INT’L J. CONST. L. 641, 642, 645 (2019).

<sup>26</sup> *Id.* at 645.

views of a current majority of citizens on any issue dictate policy until a later majority of citizens chooses, again through a method that reliably identifies current preferences, to alter the policy.<sup>27</sup> In addition, as already indicated, populism differs from mere majoritarianism in its emphasis on the role of “ordinary” people in forming majorities, as against “elites.”<sup>28</sup> Drawing on a long sociological tradition,<sup>29</sup> populism understands elites to be groups, defined variously by class position, ethnicity, religion, or other characteristics (including ideological orientations), who have become entrenched in a nation’s governing structure.

The first key concept here is that the range of policy choice is unrestricted: Populist decision-making can deal with tax policy or (in contrast to thick specifications) human rights policy or anything else. Nothing is taken off the table for decision by majorities (again, subject to the requirement that the majority’s preferences be reliably determined).

The second key concept is that of reliable determination. This is a *substantive* criterion, not a procedural one. Some procedures might make us more confident that the determination is more reliable than the determination by other procedures. Notably, though, decisions taken by bodies (“legislatures”) comprised of representatives elected on general party platforms are not necessarily more reliable than those taken through direct consultation with the citizenry through a referendum.<sup>30</sup> And, indeed, sometimes a system of informal

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<sup>27</sup> We note, and will expand upon, the problems lurking in making “citizens” the relevant population. For now, we assume that, in the barebones conception, the population governed by populist decision-making has relatively few “mere” subjects (to use a term familiar from discussions of the political revolutions of the eighteenth century).

<sup>28</sup> For a similar barebones definition, see Mansbridge & Macedo, *supra* note 16, at 60, who define the “core” of populism as pitting “(a) the people (b) in a morally charged (c) battle against (d) the elites.” They supplement this definition with:

[T]wo categories of non-core characteristics. The first category includes characteristics that the core elements strongly suggest but do not require: the homogeneity of the people, its exclusivity, greater direct rule, and nationalism. The second category includes characteristics frequently correlated with the core elements: a single leader embodying the people, antagonism to vulnerable out-groups, and a collection of characteristics that we have labeled “the people know.”

*Id.* They note that “[t]hese strongly suggested and frequently correlated characteristics often pose great dangers to the tolerance and inclusion vital to pluralistic democracies.” *Id.*

<sup>29</sup> The tradition includes work by Vilfredo Pareto on politics as the “circulation of elites,” and Robert Michels on the iron law of oligarchy.

<sup>30</sup> Note a lurking temporal problem, associated with Brexit and the Affordable Care Act (Obamacare): Occasionally we can think that the citizenry has made a policy choice (reliably determined) but the policy does not take effect immediately—and we can think that between the



consultations might be as reliable as a formal vote for parties with general platforms.<sup>31</sup>

Finally, the barebones definition allows for the possibility that “the majority” is a fluid concept, shifting as different policy issues come to the fore. On each issue political leaders will claim to be speaking for “the People,” and sometimes issues will cluster in ways that allow political leaders to assemble a reasonably comprehensive political platform. In some sense, even a pluralist majority will stand in opposition to those who oppose the majority on a range of issues. But, on the barebones definition, this simply describes how majoritarian politics operates; it is not a definition of social reality external to politics. For populists, opposition to the policies favored by a majority of ordinary people reflects the interest of entrenched elites in maintaining their privileged position, not a genuine concern that the proposed policies are bad for ordinary people themselves.

A reliable determination of preferences does require mechanisms for voicing disagreement with policy proposals (“free expression” in a barebones sense). Further, those who disagree with a policy proposal, or with an entire array of proposals, are met with efforts to persuade rather than with force.<sup>32</sup>

Next, consider our barebones definition of constitutionalism. It too has several key components. First, the policy space is divided into two domains. In one, decisions are taken according to roughly majoritarian procedural rules defined in the constitution (the “mere policy” domain). In the other (the “rights” domain), certain substantive decisions—identified in the constitution—cannot be made pursuant to the rules governing the policy domain.<sup>33</sup> Decisions in this domain can be made *after* those rules are altered by an amendment process requiring more than that used in the policy domain (typically, some sort of formal supermajority requirement).

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policy’s adoption and its implementation conditions have changed such that we lack confidence that a *current* majority continues to support the policy. The populist solution here is relatively straightforward: If our lack of confidence is above some relatively high threshold we should seek a reliable determination of current policy preferences. All the interesting work, of course, lies in determining how high that threshold should be and how we can (reliably) determine that it has been met.

<sup>31</sup> The literature on reliable determination includes JOHN RAWLS, *THE LAW OF PEOPLES* (1999) (describing a “consultation hierarchy”), modern modes of deliberative polling, internet town meetings, participatory budgeting, and—alas—the communist *theory* of democratic centralism.

<sup>32</sup> For additional discussion, see the treatment of specifications below, especially the discussion of the causal connection between dissent and social harm. *Infra* Section I.B.

<sup>33</sup> Many constitutions allow for the effective temporary elimination of the second domain in emergencies declared according to substantive and procedural criteria set out in the constitution.

Second, as already indicated, rules regulate how policy is to be determined within the policy domain. Those rules are typically designed to ensure that when new policy is adopted (enacted by a legislature or promulgated by an executive), it probably has the support of a current majority of citizens. But, in the barebones conception of constitutionalism the rules rather than the support by the citizenry matters. In particular, the “mere” fact that according to some reliable indicators of current popular will a majority prefers that policy be changed is not enough: Policy change can occur only through using the prescribed processes. Typically—though not universally—the prescribed processes contain “veto gates,” that is places where those with less than majority support can block movement toward a policy’s adoption.

Third, disputes will inevitably arise about the application of enacted laws in individual cases. Barebones constitutionalism requires that those disputes be resolved with reference to law, which in turn requires that the judges deciding them orient themselves to law rather than to politics—or more precisely, orient themselves to politics only to the degree that the law itself requires them to do so (the instrumentalism implicit in law, as we suggested above).<sup>34</sup>

We pause to note that barebones constitutionalism does *not* require judicial resolution of disputes about whether enacted statutes are consistent with the nation’s constitution (and so does not require that there be independent constitutional courts at all). What recent theorists have labeled “political constitutionalism,” in which constitutional limits on legislative power are enforced through political mechanisms, is entirely consistent with barebones constitutionalism.<sup>35</sup>

On these barebones definitions populism and constitutionalism do conflict. Constitutionalism restricts the range of policies as to which majoritarian preferences can prevail, and even within the “mere policy” domain its procedural rules can impede the adoption of policies (not affecting “rights”) that majorities prefer. Consider a nation whose constitution entrenches a bicameral legislature, with the lower house elected every three years by proportional representation in the nation

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<sup>34</sup> The notion of “being oriented to law” is itself quite complex. For an effort by one of us to cash it out (roughly, as acting in accordance with the judgment of what counts as law by well-informed members of the relevant legal community), see Mark Tushnet, *Judicial Accountability in Comparative Perspective*, in ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION (Nicholas Bamforth & Peter Leyland eds., 2013).

<sup>35</sup> For the most influential early discussion of political constitutionalism, see RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007). We emphasize once again that we are here describing possibilities; clearly there are social, economic, and historical considerations that make political constitutionalism more or less attractive in specific socio-political orders.

as a whole and an upper house elected every six years by plurality voting in each province. It is not unimaginable that legislation supported by a national majority would be blocked by the upper house either for several years or even permanently.

The next question, though, is whether the fact that populism and constitutionalism conflict in these ways is an argument against populism or, instead, an argument against constitutionalism. Consider for example the possibility that a populist party's major policy proposal is a substantial increase in the taxes paid by the extremely wealthy. We can of course have substantive discussions of whether such a proposal is a sound one, and if the people reject it no populist could reasonably complain. But, if the populist party prevails and its proposal is blocked at one of the procedural veto gates, the argument for constitutionalism over populism is not obviously the better one.<sup>36</sup>

Constitutionalism's purely procedural requirements can operate within the "mere policy" domain to block populist policies with majority support (reliably determined in some manner independent of those procedural requirements). Perhaps some purely procedural requirements have strong normative justifications. Some defend bicameralism on the ground that it improves the quality of legislation, for example. Some defend it on the ground that different bases for representation obstruct legislation that might be inconsistent with aspects of national identity reflected in those different bases. If these normative claims are accepted, constitutionalism may be an argument against populism.

What, though, of the "rights" domain? Here what matters is whether the rights singled out are thinly or thickly specified. A thinly specified right is identified in the constitution at a rather high level of generality ("freedom of expression" or "equality"); increasingly thick specifications give increasingly detailed content to the rights. Thicker specifications remove more choice (with respect to rights) from the domain in which (under populism's first component) reliably determined preferences prevail and (under constitutionalism's procedural version) preferences that are procedurally validated prevail. Thicker rights-specifications set populism against constitutions with thick specifications (though they also set such constitutions against constitutionalism's commitment to validation of policy choice by adherence to procedural rules).<sup>37</sup>

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<sup>36</sup> Populists correctly will not think that the response, "amend the procedural rules as provided by the constitution's supermajority requirements," is adequate because their position is, not unreasonably, that within the domain of "mere policy" the views of a current majority should prevail.

<sup>37</sup> The latter is the so-called countermajoritarian difficulty.

It is hardly obvious that (all) rights within the rights domain should be thickly specified. Perhaps the only right as to which there is a consensus on relatively thick specification is the right against torture. Others such as freedom of expression are (typically) thinly specified. And thin specifications can substantially reduce the tension between populism and constitutionalism.

Consider the example of freedom of expression. Reasonable people can disagree over a host of questions about specifications: Does banning hate speech violate the (thinly defined) right of free expression? If some bans on hate speech do not do so, under what circumstances will a statute banning hate speech be drafted in terms that do not pose a danger to freedom of expression? Another example: speech—even about core political matters—can sometimes cause social harm (from “mere” law violation when speech critical of an enacted policy induces people to refuse to comply with that policy, through, and up to, quite violent resistance to the government generally (“seditious speech” leading to attempted revolution)). How tight must the causal connection be between the speech and the ensuing harm (a tendency to cause harm, presenting a clear and present danger of harm, inciting imminent action that will cause harm)?

Suppose a (populist-governed) nation has a constitution with thinly specified rights and adopts a rights-related policy that is inconsistent with thickly specified rights. On the barebones conceptions we see no conflict between populism and constitutionalism—as long as the populist policy is within the range of reasonable disagreement about the proper specification of the right in question.

There are two complications here. The smaller one lies in defining what counts as a reasonable disagreement over specification. “Reasonableness” must be given a generous definition lest the distinction between thin and thick specifications collapse.<sup>38</sup> The larger difficulty is that specifications that are reasonable when seen in isolation or outside the precise political context within which they are adopted and implemented might be unreasonable in that context. Kim Lane Scheppele has identified the “frankenstate,” an authoritarian regime composed of elements extracted from non-authoritarian systems, where those elements constrain government, and stitched together in a

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<sup>38</sup> The Swiss minaret ban is a decent testing case. Notably, though, the European Court of Human Rights, no slouch in defending human rights against violations, did not find that the ban violated the European Convention. The decision, rejecting a challenge as “inadmissible”—roughly, because the challengers lacked what U.S. scholars would call standing—is *Ouardiri v. Switzerland*. *Ouardiri v. Switzerland*, App. No. 65840/09 (June 28, 2011), <http://hudoc.echr.coe.int/eng?i=001-105619> [<https://perma.cc/G68P-VBVU>] (in French).

way that leaves the government effectively unconstrained.<sup>39</sup> The mechanism by which these elements, reasonable specifications in the abstract, become unreasonable in the aggregate is this: (1) In Nation A, element X constrains government because of its interaction with element Z; (2) in Nation B, element Y constrains because of its interaction with element not-Z; (3) X, Y, Z, and —importantly—not-Z are all reasonable specifications of the relevant constitutional provisions; but (4) combining element X with element not-Z leaves the government unconstrained. Under these conditions we will indeed find a conflict between constitutionalism and *that particular brand of populism*.

That, though, is quite different from finding a *general* conflict between constitutionalism and populism. And that, ultimately, is our critique of the argument that constitutionalism and populism conflict. We ought to criticize specific populisms when they are inconsistent with constitutionalism, but on the barebones definitions we should not find a general conflict. Or, put another way, the argument that constitutionalism and populism conflict is too often a concealed way of criticizing specific regimes—and that form of criticism can slop over into criticism of *other* populist regimes that are consistent with constitutionalism in the barebones definition.

## II. DEEPENING THE ARGUMENT

In this Part we examine several topics that have provoked discussions about the conflict between populism and constitutionalism. In the terms introduced above, three deal with the procedural dimension of constitutionalism—modifications of procedural mechanisms that define judicial independence (primarily on connection with constitutional courts), the use of referendums to determine policy (displacing a legislative decision with respect to the subjects of the referendums), and what we call creative populist institutions for determining popular policy preferences. The order of our presentation reflects our judgment that policies affecting the courts are the most likely to challenge constitutionalism, that referendums can sometimes raise questions about the reliability of the outcomes in reflecting popular preferences, and that the creative devices we describe are unlikely to be inconsistent with barebones constitutionalism and even with notions of constitutionalism that have more flesh on the bones. The final discussion deals briefly with the rights-domain.

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<sup>39</sup> Kim Lane Scheppele, *The Rule of Law and the Frankenstein: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559 (2013).

Throughout, though more explicitly in the final one, we rely on the distinction we have introduced between thick and thin specifications of structures and rights. And, as throughout, our theme is that resolving questions about conflicts between populism and constitutionalism requires attention to actual local circumstances; it cannot be done wholesale on the conceptual level.

#### A. *Judicial Independence*

We argued above that barebones constitutionalism requires judicial resolution of disputes over the implementation of enacted legislation pursuant to law rather than “mere” politics, though we stress that the distinction between law and politics is sometimes thin. Judicial independence (from “mere” politics) is the institutional mechanism for securing that form of resolution. Constitutions design that mechanism in many ways, ranging from complete discretion in the executive to appointment of judges by judges themselves.<sup>40</sup> There are, that is, numerous institutional specifications for mechanisms designed to secure judicial independence.

Populists dissatisfied with the performance of their nation’s constitutional courts sometimes propose to change from one mechanism to another. These proposals are often characterized as “assaults” on judicial independence. It should be clear, though, that a simple change from one mechanism to another is not necessarily such an assault: sometimes the changes are defensible as improvements in a system that in operation has proven flawed, sometimes they are defensible as the substitution of one mechanism for another that has simply become politically unpopular.

We next provide brief case studies from India, Israel, and Poland of populist-motivated changes in the mechanisms for judicial appointment and removal to expose the difficulties associated with determining when a change is better described as an assault than as an improvement or neutral alternative. In each case the alterations were largely *motivated* by disagreement with important constitutional court decisions. We think it is more difficult to determine, though, whether those motivations produced new mechanisms that actually threatened judicial independence.

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<sup>40</sup> For constitutional courts, Canada and Australia illustrate the former, though in Canada the executive is slightly constrained by a requirement that Quebec have appropriate representation on the Supreme Court, and in both countries the executive is constrained by rather strong norms enforced politically. Italy and, as we will show, India illustrate the latter.

For India, we think it quite difficult to see an assault rather than an alternative, though we concede that observers more closely attuned than we are to local politics might conclude otherwise.<sup>41</sup> For Israel, we think the proposals sought to change outcomes the Supreme Court would reach and so were in some sense an assault on judicial independence, though sometimes the outcomes were themselves choices by the Supreme Court to reject reasonable specifications of constitutional rights. And for Poland, we think the answer is unequivocal: the changes were designed for, and have largely accomplished, the subordination of law to politics—a true assault on judicial independence.

### 1. India

The Indian Constitution provides that the President appoints Supreme Court justices “after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose.”<sup>42</sup> Several major decisions interpreting this provision produced a requirement that the President appoint justices recommended by the “collegium”—basically, a small council of senior Supreme Court justices.<sup>43</sup> The court’s decisions defended this self-perpetuating feature as essential to achieve the degree of judicial independence the constitution required. It was obviously in some tension with standard views of constitutionalism that require some degree of democratic accountability in the appointment process, particularly because the President of India, though elected, is a typical “head of state” rather than “head of government.” Further, the collegium’s decision-making processes are quite opaque; insiders can sometimes discern what they think are the standards the collegium uses—including demographic and geographic representativeness—but

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<sup>41</sup> Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS HUM. RTS. 49 (2020), describes the Indian story as part of a larger effort consisting of many seemingly small changes that in the aggregate have advanced authoritarian rule. This might be seen as a specific version of the “Frankenstate” idea. See Scheppele, *supra* note 39. For our comment on this specific component of Khaitan’s argument, see *infra* note 59.

<sup>42</sup> INDIA CONST. art. 124 § 2.

<sup>43</sup> For an overview of the developments, see ARUN K. THIRUVENGADAM, *THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS* 132–34 (2017).

with no real confidence about how those standards are applied in specific appointments.<sup>44</sup>

The “democratic deficit” in the appointment process, perhaps only modest, is augmented by other features of the Supreme Court’s functioning. The Supreme Court is large, currently with thirty-four members. Ordinarily the court sits in panels of three to five, the number and the members chosen by the Chief Justice. In important cases the Chief Justice can convene a large panel of five or more judges.<sup>45</sup> This arrangement means that outcomes can vary widely depending on which judges sit on (or are chosen to sit on) the larger benches. Inevitably, judgments attract political criticism from one or another side of the political spectrum, taking the form of assertions that the bench in question decided with reference to politics rather than law.<sup>46</sup>

In 2014 Narendra Modi of the Bharatiya Janata Party (BJP) became prime minister when his party won a majority in the lower house.<sup>47</sup> The BJP was a Hindu-nationalist party. In 1994 the Supreme Court addressed the nation’s constitutional commitment to secularism in the course of several opinions dealing with presidential decrees dismissing BJP-led governments in three state governments.<sup>48</sup> The opinions embedded secularism in the constitution’s “basic structure,” meaning that even a constitutional amendment could not alter that commitment. The BJP took this to threaten its ability to advance important parts of its political agenda, even though the force of the court’s opinions was weakened by subsequent cases defining “Hindutva,” a Hindu-focused ideology to which the BJP was itself committed, as consistent with secularism.<sup>49</sup>

Early in its tenure the Modi government introduced and a nearly unanimous parliament enacted a constitutional amendment that altered the method of judicial appointment.<sup>50</sup> The amendment created

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<sup>44</sup> See Mukul Rohatgi, *Checks and Balances Revisited: The Role of the Executive in Judicial Appointments*, in *APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE* 87–88 (Arghya Sengupta & Ritwika Sharma eds., 2018).

<sup>45</sup> One of the court’s most important decisions was rendered by a thirteen-judge bench. *Kesavandanda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>46</sup> For a discussion of the Indian Supreme Court’s “polyvocality,” see Nick Robinson, *Judicial Architecture and Capacity*, in *OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 337–40 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

<sup>47</sup> For many years after independence the Congress Party dominated Indian politics. The party’s power weakened over time, and from 1984 to 2014 a series of relatively weak coalition governments held power. The relation between this political history and India’s constitutional development is a central theme in *THIRUVENGADAM*, *supra* note 43.

<sup>48</sup> *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

<sup>49</sup> For an analysis of the decisions, see RONOJOY SEN, *ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT* xxx–xxxii, 22–25 (rev. ed. 2019).

<sup>50</sup> *INDIA CONST., amended by The Constitution (Ninety-ninth Amendment) Act, 2014.*



a judicial appointment commission that in general conformed to international standards for such commissions; its members were to be the Chief Justice, two other justices, the minister of justice, and two “eminent persons” nominated by a committee of the Chief Justice, the Prime Minister, and the leader of the opposition (or, as has been the case when there is no official opposition party, the leader of the largest single opposition party). A statute that was part of the amendment “package deal” specified that no one could be recommended by the commission if two members voted against the candidate.<sup>51</sup>

The Supreme Court held this constitutional amendment to be an unconstitutional violation of the judicial independence required by the nation’s “basic structure.”<sup>52</sup> The individual opinions in the case are long and detailed.<sup>53</sup> The guiding principle appears to be that judicial independence requires that judges have a primary or perhaps dominant role in judicial appointments. That principle generates two more particularized concerns. First, exactly half of the commission’s membership were judges. This meant that the judges could block the appointment of nominees who were in their judgment unqualified, but they could not guarantee the appointment of candidates who they deemed the most suitable.<sup>54</sup> Second, the Minister of Justice provided counsel in cases involving the government, that is, in a large swathe of the Court’s jurisdiction. That meant that the Minister would have an institutional interest in pushing through the appointment of government-friendly judges.<sup>55</sup>

The Indian judicial appointment commission was not that distinctive from other commissions around the world.<sup>56</sup> Many include

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<sup>51</sup> One “eminent person” was required to be either a woman or a member of the groups consisting of the nation’s (former) lower castes.

<sup>52</sup> *Supreme Court Advocates-on-Record v. Union of India*, Writ Petition (Civil) no. 13 of 2015, decided on Oct. 16, 2015 (SC). For a comprehensive analysis of doctrine dealing with unconstitutional constitutional amendments, see YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* (2017).

<sup>53</sup> Rohatgi, *supra* note 44, offers a number of essays on the case.

<sup>54</sup> See *Supreme Court Advocates-on-Record*, no. 13 of 2015, at ¶ 156 (opinion of Jagdish Singh Khehar, J.).

<sup>55</sup> As Mukul Rohatgi argues, this observation must be supplemented by some account of how the Minister would be able to get other members of the commission, especially the judges, to go along. Rohatgi, *supra* note 44.

<sup>56</sup> We note as well that several nations, including Australia, Canada, and the United States, have judicial appointments processes that lack *any* formal judicial role in appointments, much less judicial primacy, and yet judges there are generally regarded as sufficiently independent of political control (except perhaps, and in recent decades, in the United States). Several opinions in the Indian case addressed these comparisons but dismissed them because India’s circumstances were different, though without spelling out the differences or how they mattered.

the Minister of Justice, a point of particular concern to the Indian Court.<sup>57</sup> The Indian commission would have been smaller than many commissions,<sup>58</sup> which suggests that the Justice Minister might have had an outsized role, and one might worry as well about the Prime Minister's influence in choosing the "eminent persons" to sit on the commission. Still, these are, we think, thin reeds on which to rest the powerful weapon provided by the "basic structure" doctrine.<sup>59</sup> This is especially so because of widespread and seemingly well-founded concern that the collegium process as it had come to operate was quite flawed, and even when, as we concede, the constitutional amendment might well have been motivated by disagreement with important Supreme Court decisions. There appear to have been sound good-government reasons for altering the collegium process, and the judicial appointments commission appears to have been an improvement over that process even if not perfect. It is not clear to us that the fact that there were crass political motivations underlying the reform should strongly overcome the force of those two factors.<sup>60</sup>

The key difficulty with identifying court reforms motivated by disagreement with court decisions as assaults on the judiciary is this: disagreement with court decisions can arise not from the view that the courts *ought* to be more responsive to public sentiment—from a desire to subordinate law to politics—but rather from the view that the court decisions were legally erroneous or, less provocatively, from the view that the court mistakenly rejected as unconstitutional statutes (and constitutional amendments) that were consistent with some reasonable interpretations of the relevant constitutional terms and (an important

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For a discussion, see Suhrith Parthasarathy, *Comparative Law in the NJAC Judgment: A Missed Opportunity*, in APPOINTMENT OF JUDGES, *supra* note 44, at 197–207.

<sup>57</sup> For example, the judicial appointment commission in California has three members, two judges and the state's Attorney General. CAL. CONST. art. VI, § 7. Rohatgi, *supra* note 44, focuses on this aspect of the case.

<sup>58</sup> The commissions in Brazil and the United Kingdom have fifteen members, for example, with nine and seven judges, respectively. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMPAR. L. 103, 111 n.32, 112 n.38 (2009). Justice Khehar cited this study to support the proposition that international comparisons showed that nations were moving away from systems giving politicians a dominant role in judicial appointments. *Supreme Court Advocates-on-Record*, no. 13 of 2015, at ¶ 171 (opinion of Khehar, J.).

<sup>59</sup> As noted above, Khaitan, *supra* note 41, argues that the modified system "gave the executive the controlling hand." That seems slightly overstated. We note as well that Khaitan moves from this discussion to an account of the Modi government's reaction to the court's constitutional holding, and describes numerous examples of manipulating judicial appointments that are (obviously) independent of the thwarted change in the appointment process.

<sup>60</sup> For a strongly put contrary view, expressly directed only at the statute that implemented the constitutional amendment, see Arvind Datar, *Eight Fatal Flaws: The Failings of the National Judicial Appointments Commission*, in APPOINTMENT OF JUDGES, *supra* note 44, at 122–34.

addition) that ordinary democratic theory should counsel judges to accept legislative decisions supported by such reasonable interpretations.<sup>61</sup>

## 2. Israel

For several decades the Supreme Court of Israel has been one of the leading institutions in the nation articulating and to some extent making legally enforceable views associated with Israel's more secular, liberal, and European-origin population. During that period politics—in the legislature and so in the prime ministry and executive cabinet—has been controlled in large part by more conservative, more religious, and Sephardic and Russian-origin demographic groups. That political control has been strong but not overwhelming, and the Supreme Court has been able largely to sustain its more liberal and secular orientation, though with some modifications around the edges.<sup>62</sup> The court's role became politically contentious after what Israelis describe as the “Constitutional Revolution” inaugurated by adoption in 1992 of two new Basic Laws, the first such laws to deal with fundamental rights. The Supreme Court took their enactment to justify its adoption of a strong principle of constitutional review of legislation.<sup>63</sup> The court had already become known as “activist” through its aggressive use of administrative review and “subconstitutional law” such as rights-respecting statutory interpretation, but the Constitutional Revolution consolidated the Court's and the public's understanding of its role.

Conservative political forces in the Likud Party and in coalition governments made Supreme Court reform an item on their political agenda, though, it is important to note, court reform while always on the agenda was never a high political priority. Proposals for reform took various forms, and we focus solely on one dealing with changing the mechanism of appointment to the Supreme Court.

Israel's Basic Law: The Judiciary is the relevant “constitutional” document.<sup>64</sup> Enacted in 1984, that law creates a judicial selection

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<sup>61</sup> Pratap Bhanu Mehta, *A Plague on Both Your Houses: NJAC and the Crisis of Trust*, in APPOINTMENT OF JUDGES, *supra* note 44, at 56–70, offers a powerful version of the critique we provide here.

<sup>62</sup> For an overview, see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

<sup>63</sup> CA 6821/93 United Mizrahi Bank, Ltd. v. Migdal Coop. Vill., 149(4) PD 1, 221 (1995) (Isr.).

<sup>64</sup> As is well-known, Israel does not have a formal written constitution. Its government structures are created and regulated by a number of Basic Laws that are generally amendable through ordinary legislation, though the political barriers to altering a Basic Law appear to be somewhat higher than for amending ordinary laws.

committee of nine members: three justices of the Supreme Court including its President (chief justice), the Minister of Justice and another government minister, two members of the legislature elected by it (one of whom is by tradition not a member of the coalition supporting the government), and two representatives from the national bar association elected by the bar's governing council. For many years the three justices were thought to have coordinated their positions with respect to individual nominations, which was pejoratively described as "voting as a bloc." Further, the bar association was traditionally dominated by the same demographic and ideological forces as was the court itself. The result was a system in which a five-person majority could perpetuate the court's general orientation and, perhaps equally important, veto the appointment of justices who might form the core of a consistent and intellectually strong dissenting group.<sup>65</sup>

The tension between the government and the Supreme Court's supporters led to several changes in the nomination committee's practices. In 2008 a statute increased the number of votes required for appointment from five to seven. This had two effects: the judge-bar association members had to attract votes from the political members for any affirmative appointment, and the judicial members retained the power to veto appointments.<sup>66</sup> And in 2009 two court critics were appointed by the legislature, increasing the strength of the "political" group from three to four. This was not enough to push a nomination through without support from either the bar association members or some of the judges, but enough to veto an appointment.<sup>67</sup> One effect was the appointment to the court of Alex Stein, an Orthodox legal academic specializing in the uncontroversial fields of torts and medical ethics; conservatives hoped (without much evidence) that he would join the conservative judges already on the court, and liberals hoped (on the same evidence) that he would not.

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<sup>65</sup> The most widely cited example of these effects was the committee's refusal to approve the appointment of Professor Ruth Gavison, an extremely well-qualified legal academic and critic of the court's activism, to the court. See Ran Hirschl, *The Socio-Political Origins of Israel's Juristocracy*, 16 *CONSTELLATIONS* 476, 492 n.43 (2009). More recently, Gideon Sapir, another legal academic, was the conservative Minister of Justice's preferred candidate, but he withdrew from consideration because he believed that the three justices on the committee would vote against his nomination. Josh Breiner, *Shaked's Candidate for Supreme Court Justice: Court President Hayut Is Against Me*, HA'ARETZ (Jan. 21, 2018), <https://www.haaretz.com/israel-news/shaked-s-candidate-for-supreme-court-hayut-is-against-me-1.5749996> [https://perma.cc/GQ23-DDLT].

<sup>66</sup> Note the similarity to the situation that led the Indian Supreme Court to find the judicial appointment commission there unconstitutional.

<sup>67</sup> For these developments, see Hirschl, *supra* note 65, at 488.

Discussions of court reform proposals in Israel continued after this change. Characterizing the proposals as threats to judicial independence and constitutional rights is part of the standard vocabulary in those discussions. In 2011, for example, bills that would further tinker with the judicial selection process and allow a conservative jurist to become President of the Court were described as “bills . . . [to] compromise the Supreme Court and the independence of the judges.”<sup>68</sup> More recently, the head of the bar association referred to a proposed addition of a “notwithstanding” clause to the Basic Law: Human Dignity and Liberty in this way: “Without an independent and robust judicial system, Israeli democracy and the necessary balance between authorities will suffer a critical blow.”<sup>69</sup>

The reference to “Israeli democracy” is key here. Canada, the origin of the notwithstanding mechanism, is a well-functioning democracy in which human rights are reasonably well-protected. In other contexts, such as Israel, such a clause—and what elsewhere might seem like minor modifications in judicial selection processes—might pose more substantial threats to democracy. Again, our theme emerges: analyze specific “populist” actions in their socio-political context. That an action is motivated by opposition to, for example, prior court decisions is part of that context—but so, of course, are the merits of the decisions leading to the reform proposals.

### 3. Poland

After winning a parliamentary majority in 2015, the new Law and Justice (PiS: Prawo i Sprawiedliwość) populist government in Poland quickly identified the Constitutional Tribunal (Tribunal) as a main “obstacle” to its plans.<sup>70</sup> Jaroslav Kaczynski, the party’s leader, observed that “the reforms [of] the constitutional court . . . were needed to ensure there are no legal blocks on government policies aimed at creating a fairer economy.”<sup>71</sup> In the early years of the post-communist transition

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<sup>68</sup> Gabe Kahn, *Judicial Reform Bills Pass on First Reading*, ARUTZ SHEVA ISR. NAT’L NEWS (Nov. 14, 2011, 10:28 PM), <http://www.israelnationalnews.com/News/News.aspx/149745> [<https://perma.cc/25WN-M9UG>].

<sup>69</sup> Raoul Wootliff, *Opposition Slams PM’s Reported Plan to Override Supreme Court in Immunity Bid*, TIMES OF ISR. (May 13, 2019, 4:14 PM), <https://www.timesofisrael.com/opposition-slams-pms-reported-plan-to-override-supreme-court-in-immunity-bid> [<https://perma.cc/73R8-W23G>].

<sup>70</sup> WOJCIECH SADURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN 58 (2019).

<sup>71</sup> Pawel Sobczak & Justyna Pawlak, *Poland’s Kaczynski Calls EU Democracy Inquiry “an Absolute Comedy”*, REUTERS (Dec. 23, 2016, 10:40 AM), <https://www.reuters.com/article/us->

period, the Constitutional Tribunal emerged as a “strong protector of democratic processes and of limits upon legislative and executive powers.”<sup>72</sup> The Tribunal’s importance increased as its judgments attracted widespread attention from the legal profession and broader political audiences. Its power to review the constitutionality of statutes challenged the almost absolute supremacy the legislatures previously enjoyed. Because of the distrust of “ordinary” judges, many tainted by their service in the communist regime, constitutional courts became the centerpiece of the protection of the rule of law. But, in a centralized model of judicial review, only constitutional courts had the power of judicial review of legislation. That made the constitutional courts an easy target for populists determined to dismantle the “undemocratic” rule of elite, liberal judges.

The first time the PiS was in power, from 2005 to 2007, the tribunal blocked a number of the government’s plans. In May 2007, the tribunal invalidated several key sections of Poland’s lustration law, the signature piece of legislation of that time, which governed the participation of former communists in government and the civil service.<sup>73</sup> Angered by the ruling, then–prime minister Jaroslaw Kaczyński threatened to charge the judges for having acted “improperly.”

Eight years later, Mr. Kaczynski, PiS’s de facto leader, whose ultimate goal has been described as “a systematic and relentless annihilation of all independent powers which may check the will of the ultimate leader,”<sup>74</sup> seized the opportunity and turned the Constitutional Tribunal into an almost harmless judicial body. The government managed with relative ease to render the constitutional court toothless by using ordinary procedures to pack it with loyalists, which after one year resulted in gaining a majority over the Tribunal. As Wojciech Sadurski shows in his study of this transformation, the PiS-appointed judges “effectively paralyzed the Constitutional Tribunal, rendering it unable to subject new laws to effective constitutional scrutiny.”<sup>75</sup>

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poland-politics-kaczynski-democracy/polands-kaczynski-calls-eu-democracy-inquiry-an-absolute-comedy-idUSKBN14B1U5 [https://perma.cc/9BDQ-SFU7].

<sup>72</sup> SADURSKI, *supra* note 70, at 58; see also Herman Schwartz, *Eastern Europe’s Constitutional Courts*, 9 J. OF DEMOCRACY 100 (1988).

<sup>73</sup> The Law of 18 October 2006, amended 14 February 2007, invalidated in part by the Constitutional Tribunal judgement K2/7 of 11 May 2007, <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/k-2-07-wyrok-trybunalu-konstytucyjnego-520366461> [https://perma.cc/JPB9-MH3E].

<sup>74</sup> Wojciech Sadurski, *What Makes Kaczynski Tick?*, I-CONNECT: BLOG INT’L J. CONST. L. (Jan. 14, 2016), <http://www.iconnectblog.com/2016/01/what-makes-kaczynski-tick> [https://perma.cc/RM9Q-C3CQ].

<sup>75</sup> SADURSKI, *supra* note 70, at 62.

Gaining the blessing of powerful court for controversial initiatives required manipulation and intimidation.<sup>76</sup>

Court-packing was not the only process that PiS used to render the Tribunal subservient to its political will. The second strategy involved a series of legislative proposals clearly aiming at curtailing the Tribunal's independence. In one year, from 2015 to 2016, the PiS-controlled Parliament adopted six new statutes on the Constitutional Tribunal, transforming it into "a positive aide" to the government.<sup>77</sup> One key provision raised the bar for finding unconstitutionality substantially: rulings now have to be approved by a two-thirds majority, making it almost impossible to annul Law and Justice-backed legislation.<sup>78</sup> Moreover, the so-called Repair Act on the Constitutional Tribunal, as the new amending law is called, seems to be custom—made to paralyze the Tribunal. Cases will have to wait in the docket for at least six months before they can be decided.

Nevertheless, in March 2016, the Polish Constitutional Tribunal unexpectedly struck back, declaring many of the new provisions to be in violation of the constitution. In a decision that deepened Poland's constitutional crisis, the Tribunal ruled that the reorganization called for by the new legislation prevented the Tribunal from working "reliably and efficiently." Shortly afterward, Poland's Supreme Court (the country's highest appellate court for non-constitutional matters) passed a resolution stating that the rulings of the Constitutional Tribunal should be respected, despite its stalemate with the government. The government, however, announced that it would ignore the Tribunal's ruling and refused to publish it in the official Gazette, as required by the constitution.<sup>79</sup> An enraged Kaczyński addressed the Sejm, condemning both high courts for opposing reforms passed by parliament. "[We] will not permit anarchy in Poland," Kaczyński declared, "even if it is promoted by the courts."<sup>80</sup>

A year later, Poland's parliament approved the new Supreme Court legislation aimed at curtailing the judiciary, the country's last bastion of independence. After neutralizing the constitutional courts, the populist

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<sup>76</sup> *Id.* at 62–70.

<sup>77</sup> WOJCIECH SADURSKI, HOW DEMOCRACY DIES (IN POLAND): A CASE STUDY OF ANTI-CONSTITUTIONAL POPULIST BACKSLIDING IN POLAND (2018).

<sup>78</sup> Tomasz Tadeusz Koncewicz, *Constitutional Capture in Poland 2016 and Beyond: What Is Next?*, VERFASSUNGSBLOG (Dec. 19, 2016), <http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next> [<https://perma.cc/9RJX-7NGL>]; GABOR HALMAI, SECOND-GRADE CONSTITUTIONALISM? HUNGARY AND POLAND: HOW THE EU CAN AND SHOULD COPE WITH ILLIBERAL MEMBER STATES 7 (2018).

<sup>79</sup> CONST. OF REPUBLIC OF POL., art. 190(2) (Apr. 2, 1997).

<sup>80</sup> *Kaczyński Announces Aim to Change Polish Constitution*, RADIO POLAND (Feb. 5, 2016, 3:28 PM) <http://archiwum.thenews.pl/1/9/Artykul/251137> [<https://perma.cc/CM4L-FZ4E>].

governments continued their legal “revolution” with attacks on lower (regular) courts. The Polish government prepared three bills, recently adopted by the Sejm, which aim to control and capture the Supreme Court and the vast majority of other regular courts. By lowering the judicial retirement age (to age of 65), the government first removed most of the presidents of the courts and then replaced them with judges more to his liking.<sup>81</sup>

We have recounted only a small part of the complex and on-going story about court “reforms” in Poland motivated by hostility to prior judicial rulings and concerns about potential future ones. Even this snippet shows that the Polish story is one about a true assault on judicial independence, badly motivated and covered with at best a fig leaf of legality, if that.

#### 4. Conclusion

Scholarship on populism has taken “reforms” directed at the courts to illustrate the conflict between populism and constitutionalism. We have tried to show that the stories about specific changes motivated by hostility to the courts in place are more complex. Sometimes the challenges posed by populist reforms are ambiguous, sometimes they are clear—and perhaps, though we do not have a clear case study, perhaps sometimes they pose no real challenges to judicial independence. Our theme, though, remains the same: Analyzing the relation between populist reforms and constitutionalism (here, judicial independence) requires close attention to local circumstances rather than broad-brush derivations from general descriptions of both populism and constitutionalism.<sup>82</sup>

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<sup>81</sup> See generally SADURSKI, *supra* note 70. The new Law and Justice government also undermined Poland’s independent civil service and adopted a new legislation seeking to bring the media under direct government control. Jan Werner Müller, *The Problem with Poland*, N.Y. REV. BOOKS (Feb. 11, 2016), <http://www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland> [<https://perma.cc/2XT8-9UNN>].

<sup>82</sup> Cf. Gabriel Armas-Carona, *Context Matters: The Rule of Law and Armenia’s Referendum to Remove Constitutional Court Justices*, VERFASSUNGSBLOG (Feb. 29, 2020), <https://verfassungsblog.de/context-matters> [<https://perma.cc/X3NJ-VAP5>]. Armas-Carona argues that a proposed referendum of authorize the Prime Minister of Armenia to remove seven of the current nine justices from the nation’s Constitutional Court, which on its face would appear to be a straight-forward assault on judicial independence, is in context a pro-democratic move because those justices have been obstructing the current government’s efforts to eliminate widespread corruption (by shielding corrupt officials from the former regime from criminal punishment). *Id.* Lacking sufficient information on our own, we do not endorse this analysis, but describe it to illustrate how, as Armas-Carona writes, context matters.



### B. *Referendums*

Legislation by the people themselves may be the cleanest example of barebones populism.<sup>83</sup> We consider here what we believe to be the two most prominent concerns about the compatibility of referendums with constitutionalism: (1) that referendums can oversimplify complex policy options in ways that sometimes produce outcomes that are indefensible in principle, incoherent, and inconsistent with what the people would prefer after the kind of deliberation that occurs in representative assemblies;<sup>84</sup> and (2) that referendums systematically, though not inevitably, threaten rights of minorities that liberal constitutionalism guarantees.<sup>85</sup> The frame of the discussion, though, is that barebones populism leaves substantial room for policy choice through “ordinary” legislation pursuant to ordinary procedural rules. Barebones populism might use referendums more frequently than non-populist constitutionalist systems and, perhaps more importantly, might use referendums in exactly the circumstances in which procedural regularity obstructs the determination of what the people prefer (with the referendum serving as the mechanism for reliably determining that preference).

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<sup>83</sup> See JOHN G. MATSUSAKA, *LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE* 154 (2020) (a referendum “allows the people to choose the policy they want”). As with populism, so with referendums: the literature is quite substantial, and we do not pretend to address every issue scholars have raised. For a good relatively recent overview, see Xenophon Contiades & Alkmene Fotiadou, *The People as Amenders of the Constitution*, in *PARTICIPATORY CONSTITUTIONAL CHANGE: THE PEOPLE AS AMENDERS OF THE CONSTITUTION* 9 (2017). Rather than addressing the quite large number of policy issues associated with referendum design, we aim only to tone down claims about referendums sometimes made in connection with populism, to show how referendums within a barebones populism need not be too troubling. This Section and the following one draw heavily upon Mark Tushnet, *Liberal Democracy Without Representation: A Defense of Some Institutions of Popular Constitutionalism* (forthcoming 2022).

<sup>84</sup> For an overview of the problems associated with complexity, see Laurence Morel, *The Democratic Criticisms of Referendums: The Majority and True Will of the People*, in *THE ROUTLEDGE HANDBOOK TO REFERENDUMS AND DIRECT DEMOCRACY* 149 (Laurence Morel & Matt Qvortrup eds. 2018).

<sup>85</sup> For an overview of the problems associated with rights-related referendums, see MARTHE FATIN-ROUGE STEFANINI, *Referendums, Minorities, and Individual Freedoms*, in Morel & Qvortrup, *supra* note 84, at 371. An additional feature—sometimes amounting to a “concern”—of referendums is that they can be the instruments of parties rather than the people directly, and more particularly can be the instruments of chief executives seeking a quasi-plebiscitary personal mandate. We put this issue to one side because our interest here is in the possibility of referendums as an institution for realizing barebones populism, not in the conditions that increase the likelihood that such a possibility will be realized. MATT QVORTRUP, *THE REFERENDUM AND OTHER ESSAYS ON CONSTITUTIONAL POLITICS* (2019), collects a number of extremely valuable essays on these matters.

## 1. Complexity

The Brexit referendum illustrates many aspects of the first concern. The implications of one of the options—Exit—were unclear because Exit could occur in many ways.<sup>86</sup> We can call this a problem of complexity: the people were asked to choose between a simple option and a complex one.<sup>87</sup> Even a referendum cast in “yes–no” terms can be complex. Consider for example a referendum on this question: “Should the following complicated tax law be adopted?” Complexity cannot be eliminated by offering the people several options: “Remain,” “Exit on the following terms,” and “Exit on these alternative terms,” or the like. Formulating a complete set of options may be difficult or impossible. Even more, a referendum with more than two options makes the appearance of a Condorcet voting paradox possible, even likely, if (as might well be) the complexity is not characterized by those features of policy choices that make preference rankings single-peaked.

The idea of a voting paradox brings out one key problem with referendums on complex issues. Begin with the observation that policy proposals that are complex in this sense have numerous components. A person might prefer component A to component B only if the overall policy also contains component M. Some such preferences might be nonnegotiable, so to speak. The “only if” is quite strong. Other such preferences might be quite weak. The voter’s view is that having components A and M is desirable, but a policy that contains component A but not M is tolerable if the policy contains a substantial number of other components unrelated to A and M (and similarly for other people and other components).<sup>88</sup>

Yet, the difficulty posed by complexity might not distinguish referendums strongly enough from ordinary legislative deliberation to count against the at least occasional use of referendums to determine public policy views. A voting paradox based on nonnegotiable demands can occur with respect to ordinary legislation considered by a representative assembly, that is, even within the barebones notion of

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<sup>86</sup> Cf. MATSUSAKA, *supra* note 83, at 148–49 (arguing that “things bec[a]me . . . dysfunctional after the election” in part because the referendum did “not presen[t] voters with a concrete proposal”). Matsusaka writes that best practice in referendums is that the proposition “should ask a specific question; ideally whether to approve a specific law.” *Id.* at 228.

<sup>87</sup> Constitutions that exclude financial, budgetary, and tax issues from referendums (Albania, Azerbaijan, Denmark, Estonia, Greece, Hungary, Italy, Malta, Poland on the initiative of the citizens, Portugal, and North Macedonia) may reflect the concern that complex matters are unsuitable for submission to referendum.

<sup>88</sup> There is another sense of complexity that we explore below—issues that are complex because any simple resolution implicates competing policy and value concerns.

constitutionalism. Sometimes it is said that a referendum presents people with a choice that cannot be amended or tinkered with to come up with a better option. In contrast, it is said, legislators can negotiate until they have before them a complex proposal that has a chance of being satisfactory to a majority. That contrast is overdrawn. Referendum proposers have an interest in allowing discussion and modifications that increase the proposal's chance of adoption once submitted. A representative can refuse to vote in favor a proposal that fails to satisfy a nonnegotiable requirement; a voter can vote "No" on any proposal that similarly fails to satisfy her nonnegotiable requirements. Representatives can make judgments that the proposal before them, while not perfect, is on balance better than the status quo; so can voters.

But, one might say, legislators have an opportunity to take successive votes. If a complex proposal is defeated on the floor because it is not on balance acceptable to a majority, representatives can retreat to the committee room and modify the proposal, then present the modification to see if it is acceptable—and they can do so repeatedly.<sup>89</sup> Referendums are one-shot events, with no opportunity for a do-over. This is not a necessary characteristic of referendums. In principle the people could be asked to vote repeatedly on variants of rejected proposals. In practice, though, successive referendums on variants are unlikely.<sup>90</sup>

A clear policy can be a bad one, of course, just as legislation can be bad. The solution to a bad statute is to repeal it. The solution to a referendum that generates bad policy is the same. We can allow the legislature to treat a policy adopted through referendum as it treats any other piece of legislation, subject to immediate revision or even repeal.

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<sup>89</sup> Note that this solution is unavailable when the proposal fails because it contains some component or components that are nonnegotiablely unacceptable to enough representatives or voters to defeat the proposal, and altering those components would make the proposal unacceptable to another group large enough to defeat it.

<sup>90</sup> Note that this is different from the question of whether there should be in principle some limit on the ability to do over a referendum that accepts a complex proposal. In late 2019 the Scottish government issued a document supporting a second referendum on Scottish independence, in which a central argument was that there had been a "material change in circumstances" (the concept of *rebus sic stantibus* is part of general international law and codified in Article 62 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331) since a prior referendum rejected independence. SCOTTISH GOV'T, SCOTLAND'S RIGHT TO CHOOSE: PUTTING SCOTLAND'S FUTURE IN SCOTLAND'S HANDS (2019), <https://www.gov.scot/publications/scotlands-right-choose-putting-scotlands-future-scotlands-hands> [https://perma.cc/5ZHF-WR7B]. Whether such a change should be a necessary predicate for a second referendum is, we think, a question to be resolved politically, though we are reasonably sure that the argument against a second referendum will almost always be rather strong unless proponents can demonstrate something like materially changed circumstances.

Or, we can allow the legislature to modify a policy adopted through a referendum only after a prescribed period such as two years. Or, we can allow modifications of referendum-adopted policy only by a second referendum.<sup>91</sup>

Complex policies, and some simple ones, have other characteristics. They have to be integrated into the existing corpus juris, and they might fit badly or cause unanticipated consequences. A distinctively U.S. example is this: a referendum strictly limiting a legislature's ability to modify the existing property tax system may lead legislatures to increase sales taxes in ways that have troubling distributional effects, and it almost certainly will cause people to stay in the homes they own longer than is good for them. Again, in principle, there is a simple solution to this problem when it arises. A referendum-adopted policy with these characteristics should impose an obligation on the legislature to adapt the corpus juris to this new feature.<sup>92</sup> And, if and when unanticipated consequences appear, the overall policy-making system should be allowed to address those consequences by the mechanisms described in the immediately preceding paragraph.

Suppose we do say that referendums should be allowed only if they offer a choice between two clear policies. Where a complex policy is placed before the public, the alternative should be "No" rather than another complex policy, because "forcing" a choice between two complex policies does not allow a voter to express a preference for the status quo or for another complex policy.

We might be concerned that clarity as a solution to the problem of complexity would create a different problem. In politics clear and accurate policy descriptions might be misleading. This might be particularly true of complex policies presented to the public as a list of clear components. Ordinary people might focus on one or two of the components on the list and not appreciate how those components might interact with other components in ways that alleviate (or exacerbate) the voters' concerns. Even more, political leaders might make one or two components the focus of their campaigns for or against the referendum, again with misleading effect.

One can imagine institutional responses to concern about misleading clarity. In the United States presumptively disinterested

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<sup>91</sup> Because referendum-adopted policies are not different in principle from representative-adopted legislation with respect to quality, we doubt that there could be a principled reason for barring successive referendums when (in the view of enough people) the referendum-adopted policy has turned out to be unwise.

<sup>92</sup> Here too referendum-adopted legislation is not all that different from representative-adopted legislation: any significant piece of legislation can require changes in other laws, and good institutional design puts mechanisms for adaptation in place.

officials are sometimes charged with developing neutral and accurate descriptions of ballot propositions that are distributed to the public in advance (and that sometimes appear on the ballot as well).<sup>93</sup> More significant, though, the concern about misleading clarity rests on assumptions about voter incompetence. And barebones populism rests on the contrary assumption, that ordinary people are at least as competent as the representatives they elect in making political decisions. Perhaps critics of referendums could develop more precise accounts of specific forms of voter competence that would be consistent with the assumptions of popular constitutionalism that would allow some but not all referendums on complex policy questions.<sup>94</sup> Such accounts would of course have to explain why *representatives* would not adopt the same sort of distorting clarity in their deliberations that critics cite in opposing referendums on clear questions over which popular discussion might be distorted.

Should simplicity be another criterion for referendums? Consider a referendum on the question, “Should the legislature guarantee a minimum income of at least X—adjusted for inflation—to every person residing in the nation?” This proposal is clear.<sup>95</sup> It is not simple, though.

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<sup>93</sup> The European Commission for Democracy Through Law (Venice Commission) issued guidelines in October 2020 for holding referendums. VENICE COMM’N, *Revised Guidelines on the Holding of Referendums*, 124th Sess., Doc No. CDL-AD(2020)031 (Oct. 8, 2020), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)031-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e) [<https://perma.cc/D24V-QHJ9>]. None of the guidelines appear inconsistent with the central ideas associated with populism, though populists would sometimes put forth reasons for departing from one or another—but not all—of the guidelines.

<sup>94</sup> Consider here that constitutions sometimes prohibit referendums on specific matters. In addition to the exclusions for fiscal matters noted above, *supra* note 87, some constitutions prohibit referendums on amnesties and pardons (Albania, Azerbaijan, Georgia, Italy, Poland on the initiative of the citizens, and “Northern Macedonia”) and restrictions on fundamental rights (Albania, Armenia, Georgia). Other less common exclusions are for territorial integrity (Albania), states of emergency (Albania, Estonia), the powers of Parliament, judicial bodies and the Constitutional Court (Bulgaria), texts concerning the civil service, naturalization and expropriations (Denmark), the monarchy and the royal family (Netherlands under the temporary law applicable up to 2004, Denmark to a certain extent), legislative acts that are submitted to a special procedure and whose content is imposed by the constitution or acts constitutionally necessary for the operation of the state (Italy, Portugal), and appointments and dismissals (“Northern Macedonia”). The implementation of international treaties cannot be submitted to the decision of the people in Denmark, Hungary, Malta and the Netherlands (temporary law), so as to avoid a breach of international law. Similarly, Swiss law allows for (but does not make compulsory) an international treaty and its implementing provisions (constitutional or legislative) to be put to a single vote.

<sup>95</sup> The example is adapted from a referendum in Switzerland. A similar example can be found in a 2015 Greek referendum. Syriza proposed a referendum asking the Greeks to support Syriza. In fact the referendum endorsed an austerity program proposed (or imposed) by external financial agencies, or as some put it, whether Greece would remain in the European Union. For

It implicates complicated policy questions: How much less (if at all) will people work if guaranteed a minimum income? What will the effects on economic growth be? It also implicates moral questions: What duties do we have to non-citizen residents, whether long-term or otherwise? Barebones populism rests on the not-obviously incorrect judgment that ordinary people are not systematically worse than their representatives in assessing these policy and moral questions.<sup>96</sup>

The concerns about relative voter competence arise in connection with the policy dimension of this and similar proposals. The moral dimension is sometimes thought to raise different concerns. The problem is not that some moral questions are complicated. Rather, the problem is something akin to self-interest: Voters who asked about the rights of non-citizens are, it is suggested, likely to undervalue those rights relative to their own rights or, more important, their own interests.

## 2. Referendums on Rights

This concern is brought home most clearly in suggestions that it is inappropriate to subject questions about individual rights to referendums.<sup>97</sup> John G. Matsusaka's conclusion from his review of referendums in the United States is that "[i]nitiatives do pose a threat to minority rights, but . . . the threat is not immense."<sup>98</sup> The most common example from recent history is the Swiss referendum approving a limitation on the construction of minarets. Yet, we should keep in mind the equally recent Irish referendums on marriage equality and abortion (and the Australian quasi-referendum on marriage equality) in thinking about the "no referendums on individual rights" proposition.

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a discussion, see Alkmene Fotiadou, *The Role of the People in Constitutional Amendment in Greece: Between Narrative and Practice*, in CONTIADES & FOTIADOU, *supra* note 83, at 156.

<sup>96</sup> One might think, for example, that representatives would be better at evaluating the policy questions and worse at evaluating the moral ones, and that on balance the improved quality of the moral evaluation outweighs the weakened quality of the policy evaluation.

<sup>97</sup> For example, non-citizens of Athens were the main victims of plebiscitarian democracy in Athens. See JAMES MILLER, *CAN DEMOCRACY WORK?: A SHORT HISTORY OF A RADICAL IDEA FROM ANCIENT ATHENS TO OUR WORLD* 32–39 (2018).

<sup>98</sup> MATSUSAKA, *supra* note 83, at 211. Drawing on a comprehensive data set of referendums in U.S. states, Matsusaka observes that referendum outcomes tended to favor women and be adverse to marriage equality and minorities disadvantaged by English-only laws. *Id.* at 209–10; see also STEFANINI, *supra* note 85, at 383 ("It is difficult to draw general conclusions about the effects of referendums on fundamental rights and freedoms. The procedure . . . [and] the subject matter, how the question is formulated, how the campaign is organized and funded, are all factors that must be taken into account.").

These examples suggest that we could benefit from a more differentiated analysis. The distinction between rights and specifications can be helpful here. First, the government policies associated with specifications typically serve non-trivial public interests in a not entirely unreasonable way. Consider restrictions on tobacco advertising: In the language that prevails in comparative constitutional discourse, such restrictions impair the advertisers' free speech interests in the service of important public health goals. One might reasonably believe that specifying the content of a right of free expression so as to allow such restrictions is reasonable—though of course, one could reasonably take the converse view.

In these and similar cases, we can see how reasonable people could disagree about whether the government policy does indeed violate the right. It is not clear that ordinary people are incompetent or likely to be biased in evaluating whether a referendum threatens rights in a case of specification. Or, more narrowly, perhaps we can make progress in figuring out the difference between the Swiss minaret referendum and the Irish referendums by thinking about why ordinary people might have been biased in the first but not the second and third cases.

Second, perhaps unreasonable specifications result at least as much from self-interested decisions by political leaders—from representative government—as from self-interest among the general population. This is clearest with respect to sedition law: political leaders who develop policy are likely to be especially sensitive about criticisms of their policies, perhaps more so than the voters they represent. For that reason, they may be more likely to adopt a sedition law than would the people through a referendum. Similarly, John Hart Ely's account of the proper bases for constitutional review refers to the fact that the "Ins" are sensitive to challenges from the "Outs."<sup>99</sup> And here, he rather clearly had legislators in mind, not the voters they represent.

This second thought might also lead to a more refined account of the circumstances under which referendums implicating questions of individual rights might be appropriate—roughly, in cases involving unreasonableness. We note one difficulty, though: political leaders might see political advantage in promoting a referendum on a specification even if ordinary people on their own would not put the referendum process in motion. This might suggest some sort of institutional response through the development of some limits on the role political leaders can play in referendum campaigns. What such limits (consistent with ideas about freedom of expression) could be is unclear, though.

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<sup>99</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

### 3. The Critique Generalized

Drawing on William Scheuerman's theorization of the "social acceleration" of political time, Ming-Sung Kuo provides a general critique of what he calls "instantaneous democracy," which might be thought applicable to the populist use of referendums.<sup>100</sup> Following an outline provided by Jeremy Waldron, Kuo enumerates ten ("or so") stages that, he argues, are required for enactments and other forms of law-making such as constitutional amendment and the development of the common law. He links these to the standard Montesquiean tripartite structure of separated powers, though he does not contend that each set of grouped stages must be institutionalized in a U.S.-style separation of powers system.

Kuo argues that these stages are "articulated"—linked temporally, with some time spent at each stage. But, he argues, instantaneous democracy makes it possible to truncate the time spent at each stage. For Kuo, instantaneous democracy consists of a variety of mechanisms by which what he calls "unformed public opinion" can intervene at each stage. By "unformed public opinion," he appears to mean views of "the people" that are not sufficiently deliberated before their expression.<sup>101</sup> He contrasts this with the traditional view of public decision-making, where public opinion is mediated by such institutions as political parties and the mass media before it affects the policy-making stages.<sup>102</sup> Instantaneous democracy creates the "risk of merging [the stages] into a single, mixed stage, so to speak."<sup>103</sup>

Here are Professor Kuo's first three stages, all related to initial adoption of a legal instrument: "the people must be able to envisage the desired political action (I), formulate the action plan as a policy in a

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<sup>100</sup> Ming-Sung Kuo, *Against Instantaneous Democracy*, 17 INT'L J. CONST. L. 554 (2019). Although Professor Kuo does not focus on referendums specifically, he does mention Brexit three times. *Id.* at 554, 569 n.109, 572. We have modified our discussion of Professor Kuo's article in response to some comments he gave us.

<sup>101</sup> See *id.* at 567–68 (referring to "an instantaneous decision-making style, displacing the stepwise and deliberative political tempo that is critical to norm translation and internalization in constitutional governance") (emphasis added). We note our skepticism about the proposition that "the people's" views are ever unfounded in Professor Kuo's sense, but accept his formulation for present purposes.

<sup>102</sup> *Id.* at 557.

<sup>103</sup> *Id.* at 569. We note that Professor Kuo seems to waver between treating instantaneous democracy as a phenomenon in the real world of contemporary politics and a metaphor or a possibility. See, e.g., *id.* at 568 ("The distinction between the incubation of opinions and the formation of policies is being *virtually* obliterated."); *id.* at 569 ("Instead, the exercise of political power is *virtually* turned into an endless careless reality show . . ."). We read the word "virtually" here to mean "nearly" or "almost," rather than "by use of the technologies of the virtual space," but concede the existence of an ambiguity.



legislative bill (II), and enact the policy into law through the legislative processes of deliberation and voting (III).<sup>104</sup> Notably, referendums—even badly designed ones—proceed through these stages. *Someone*—a political party or an NGO, for example—has to come up with an idea to be put forward as a referendum and then come up with a specific proposal that can be placed on the referendum ballot. There will inevitably be discussion—deliberation?—about whether the idea is worth pursuing and about whether the particular version is desirable.

For example, Switzerland held a referendum in 2016 on whether the nation should guarantee a national income. That idea had been circulating in academic circles for years and ultimately gained support from two Swiss NGOs. They circulated a petition that obtained the requisite number of signatures. None of this was “instantaneous,” nor in any contemporary setting could it be. Professor Kuo’s third stage, then, seems to be the place where all the work is done, at least with respect to referendums, and the discussions appear to have been no less substantive and deliberative than legislative discussion would have been. As we have suggested, the relevant question is comparative: is the degree or quality of deliberation better in legislative forums than in referendum campaigns?<sup>105</sup> In Switzerland, the proposal as placed on the ballot would have provided a basic income to all Swiss residents. Among the issues discussed during the campaign was how the guaranteed income would be set, and whether it should be guaranteed only to Swiss citizens rather than all residents. As far as we can tell the quality of deliberation was no worse than it would have been in a legislative debate.

Neither a single example nor an accumulation of anecdotes can establish the general proposition that referendum campaigns are as deliberative as legislative debates. But, again as we have noted, today’s populists do not contend that referendums should completely displace legislatures, or that referendums should resolve all contentious issues of public policy.<sup>106</sup> So, the relevant question must be refined: with respect

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<sup>104</sup> *Id.* at 563.

<sup>105</sup> For a general observation, see MATSUSAKA, *supra* note 83, at 175 (questioning both the proposition that legislative debates are highly deliberative and the proposition that referendum campaign are not).

<sup>106</sup> Some supporters of populism suggest that other forms of popular participation in making public policy, such as deliberative polling and assemblies, and participatory budgeting, should be used to inform legislative resolution of some issues. See, e.g., Silvia Suteu, *The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution?*, 15 EUR. CONST. L. REV. 488 (2019). As the very names indicate, these are *deliberative* mechanisms, and, as with referendums, their value as such should be evaluated in comparison to deliberation in legislatures. For completeness we do note the science-fiction possibility of truly instantaneous

to the subset of policy issues that populists believe should be submitted to referendums, is the quality of deliberation worse than in legislative debates on the same issues? We are not clear on how the burden of proof should be allocated on the question: Should defenders of referendums or of legislation, as it actually occurs, have that burden? That, though, seems to us the real question.

C. *Creative Populist Institutions Consistent with Constitutionalism*

Barebones populism requires mechanisms for reliably determining popular views on questions of public policy. Recently scholars and practitioners of institutional design have explored mechanisms for identifying popular preferences consistent with a popular constitutionalist version of these requirements of modest constitutionalism. These mechanisms are good candidates for inclusion in the set of institutions for implementing popular constitutionalism. We describe a few here and then identify some problems with them.

*Deliberative polling.* Political scientist James Fishkin developed a technology he calls deliberative polling.<sup>107</sup> In ordinary polling, the pollster asks a large number of randomly selected people a series of relatively short questions, sometimes preceded by a tiny bit of information to set the context. A typical question might be, “Do you think President Trump’s policies are helping the nation’s economy, hurting the nation’s economy, or aren’t making much of a difference?” Answering such questions does not take much time.

Deliberative polling brings together a smaller group of randomly selected people for a longer period. A typical poll covers only a handful of issues, sometimes even just one issue. Deliberative pollsters give the respondents a packet of materials developed by experts describing the issues in some detail from a variety of political and policy perspectives. Then the respondents sit down to talk about the issues. Experience with deliberative polling strongly suggests that people who start out disagreeing with each other can hash out their differences and end up

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citizen policy-making, with different modes of displacing each of the stages by “unformed public opinion” at every stage, and observe that it is relatively easy to design both dystopian and utopian versions of such scenarios. We also observe that in traditional separation of powers systems, many of the stages can occur in a quite compressed time frame, truncating deliberation perhaps as much as instantaneous democracy does: legislatures can engage in constitutionally required first, second, and third readings in a space of hours; committee proposals running to thousands of pages can be brought to a vote within hours of their being given final form.

<sup>107</sup> JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991).

generally agreeing on how to deal with the policy questions they've been asked to consider.<sup>108</sup>

Deliberative polling has been used outside the United States to generate proposals on constitutional matters: Korean unification, schooling in Northern Ireland, and whether Australia should become a republic. Perhaps because of the scope of the issues such polls have dealt with, their immediate impact on policy has been relatively small, though the results may have had some modest effect in shaping public debates.<sup>109</sup>

*Participatory budgeting.* Participatory budgeting begins with neighborhood assemblies, usually of volunteers (but other modes of choosing members of these assemblies exist). Each assembly discusses the members' priorities for spending their portion of the city's budget and can recommend not only priorities but amounts to be spent. The recommendations from the neighborhood assemblies are sent forward to a city-wide citizen assembly, composed similarly. That assembly takes the recommendations and determines priorities and budget allocations for each neighborhood and for the city as a whole. Typically, these last determinations are simply advisory to the city's governing authorities, although in principle they could be binding, at least if the assemblies also could determine where the revenue to support spending programs would come from.<sup>110</sup> The model of participatory budgeting can be extended to regional and even national budgets.

In late 2019, the parliament of the Brussels region in Belgium adopted regulations embedding a combination of deliberative polling and participatory budgeting in its structure.<sup>111</sup> The regulations

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<sup>108</sup> There is some evidence, though, that these deliberations can sometimes push people to polarized positions, apparently when there is a slight imbalance between those who support and oppose each other on issues that both sides care deeply about. CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* (2009).

<sup>109</sup> See *What is Deliberative Polling?*, STAN. UNIV. CTR. FOR DELIBERATIVE DEMOCRACY, <https://cdd.stanford.edu/what-is-deliberative-polling> [<https://perma.cc/4RF5-LNQ8>]. It may be worth noting that juries consist of randomly selected people who make legally significant determinations of criminal and civil liability, and some theorists have suggested that random selection ("sortition") could be used more widely. For example, we might use a representative random sample of the population as the electorate for a referendum rather than a jurisdiction's entire voting population. The Wikipedia entry on sortition has a useful compilation of proposals to use sortition to generate binding law.

<sup>110</sup> For a description of participatory budgeting, see Gianpaolo Baiocchi, *Participation, Activism, and Politics: The Porto Alegre Experiment*, in *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED DEMOCRACY* 45 (Archon Fung & Erik Olin Wright eds. 2003).

<sup>111</sup> Our presentation relies on Min Reuchamps, *Belgium's Experiment in Permanent Forms of Deliberative Democracy*, CONSTITUTIONNET (Jan. 17, 2020), <http://constitutionnet.org/news/belgiums-experiment-permanent-forms-deliberative-democracy> [<https://perma.cc/L6KJ-QAEB>].

authorize the creation of a “parliamentary committee” consisting of fifteen members of parliament and forty-five randomly selected citizens to develop policy proposals on specified topics.<sup>112</sup> The committees are to meet for four days of hearings and deliberations on topics proposed by citizen petitions. The parliamentarians and the citizen-members can generate separate policy proposals, and if so, both are voted upon separately—the citizen proposals in secret, the parliamentary ones in public. Proposals that receive majority support are reported to the parliamentary members, who have six months to produce a report describing what has been done with the recommendations, offering “detailed reasons” for its actions. Among the possibilities, of course, is rejection by the Parliament as a whole.

*Drafting a new constitution for Iceland.* For about a decade, a “crowd-sourced” constitution has been on Iceland’s political agenda. Outraged at the political elite’s failures, which culminated in a disastrous financial crisis in 2008, Icelanders developed an innovative process for drafting a new constitution.<sup>113</sup>

The first step was an assembly convened by a nongovernmental organization. The assembly brought together 1,200 people chosen at random from the national census list and 300 representatives of Icelandic companies and other groups to discuss national problems. Ultimately, the assembly recommended adoption of a new constitution. The national legislature then set up elections for a “constitutional assembly.” Anyone could nominate himself or herself to sit in the assembly, but people currently serving as political party officers or holding political office were disqualified from serving. More than 500 people ran for the 25 seats.

The constitutional assembly operated as a standard constitutional convention, except that it was internet-accessible. Everything it did was almost immediately available on the internet, and it accepted suggestions from the public for constitutional provisions—the crowd-sourcing part of its design. Some of these suggestions were of course

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<sup>112</sup> The citizens are selected in two stages: a group selected at random from the entire population is invited to participate, and then a subgroup is drawn from those who respond affirmatively to produce what Reuchamps describes as “a diverse and representative selection” with respect to several demographic characteristics. *Id.*

<sup>113</sup> For descriptions of the Icelandic process, see Jón Ólafsson, *Experiment in Iceland: Crowdsourcing a Constitution*, ACADEMIA, [https://www.academia.edu/1517443/Experiment\\_in\\_Iceland\\_Crowdsourcing\\_a\\_Constitution](https://www.academia.edu/1517443/Experiment_in_Iceland_Crowdsourcing_a_Constitution) [<https://perma.cc/9J4X-NAT3>]; Thorvaldur Gylfason, *The Anatomy of Constitution-Making: From Denmark in 1849 to Iceland in 2017*, in REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES: THEORETICAL AND COMPARATIVE PERSPECTIVES (Gabriel L. Negretto ed. 2021); Bjorg Thorarensen, *The People’s Contribution to Constitutional Changes: Writing, Advising or Approving?—Lessons from Iceland*, in CONTIADES & FOTIADOU, *supra* note 83, at 103.

lunatic, and some bolstered ideas that were already on the agenda, but the assembly took some crowd-sourced suggestions seriously.

The public endorsed the constitution the assembly came up with in a referendum that was technically only advisory to the legislature. The legislature in turn stifled the proposal, partly because Iceland had recovered well from the financial crisis and partly because the legislature's political parties had opposed rewriting the constitution from the beginning. Elections in 2017 revived the idea of adopting the new constitution because of the new Pirate Party's electoral success. Though that party was ultimately left out of the coalition government, its advocacy of constitutional reform kept the issue alive.<sup>114</sup>

All of these techniques have obvious drawbacks.<sup>115</sup> Critics have questioned, for example, the neutrality of the expert briefing material presented in deliberative polling<sup>116</sup> and the possibility of getting a truly representative group of people to take the time to participate. The Icelandic constitutional process generated a document that, according to some constitutional experts, had some technical flaws. It has not yet been concluded because, by design, it bypassed the political parties whose support was important in moving the project forward. Notably, though, a new party saw political advantage in backing the proposal, and the new party's success has kept the project alive. No matter what, though, Iceland is an unusual case because the nation's population is under 350,000, and the process used there might not "scale" in larger jurisdictions. We note, though, that some versions of participatory

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<sup>114</sup> Ireland has used a similar process, though one slightly more controlled by the government in place, to generate proposals for constitutional reform, including the removal from the constitution of a ban on abortion. Eoin Carolan, *Ireland's Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change*, 13 INT. J. CONST. L. 733 (2015).

<sup>115</sup> Drawing on Irish experience, which is generally regarded as supporting arguments for innovative deliberative processes, Oran Doyle and Rachel Welsh provide a compendium of critical observations. Oran Doyle & Rachel Walsh, *Deliberative Mini-Publics as a Response to Populist Democratic Backsliding*, in CONSTITUTIONAL CHANGE AND POPULAR SOVEREIGNTY: POPULISM, POLITICS AND THE LAW IN IRELAND (Maria Cahill, Colm O'Conneide, Seán Ó Conaill & Conor O'Mahony eds., 2020). They argue that anti-constitutional populists can use the critiques they identify to further discredit the existing government, contributing to democratic backsliding. *Id.* We agree that deliberative processes no less than any institutional arrangements are susceptible to anti-populist uses. Doyle and Welsh also argue that features of Irish political culture account for much of the success of deliberative processes there. *Id.* That argument is broadly consistent with our argument that discussions of populism and constitutionalism must be quite attentive to local circumstances.

<sup>116</sup> See *id.* (identifying the problem of "artificial neutrality").

budgeting have been implemented in cities and provinces with populations much larger than Iceland's.<sup>117</sup>

We address in a bit more detail one objection to these techniques. Almost by definition they do not give special weight to those thought to be most knowledgeable about specific matters.<sup>118</sup> It might be thought undesirable for the institution that makes binding policy on matters requiring special knowledge to identify and elaborate good policy to lack guarantees of access to such knowledge.<sup>119</sup>

Populists have several plausible responses to this objection. First, it overestimates the degree to which specialists actually have specialized knowledge and underestimates the degree to which such knowledge is available within a population of ordinary people.<sup>120</sup> Second, it underestimates the degree to which the results counseled by specialized knowledge should often be modified in light of concerns that ordinary people can bring to the table at least as effectively as specialists can.<sup>121</sup> Third, sometimes domains in which specialized knowledge really is required can be identified in advance and exempted from these mechanisms.<sup>122</sup>

The technocratic concern is of course basically an objection to populism as such. It does not seem to us to identify a tension between populism and barebones constitutionalism, or even between populism and rather thicker forms of constitutionalism.

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<sup>117</sup> For a worldwide overview as of a decade ago, see WORLD BANK, PARTICIPATORY BUDGETING (Anwar Shah ed. 2007). See also HÉLÈNE LANDEMORE, OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY (2021) (arguing that many innovative forms of nonrepresentative decision-making can be scaled for large populations).

<sup>118</sup> Doyle & Walsh, *supra* note 115, describe efforts to incorporate technical expertise in deliberative processes but note that doing so might reproduce problems of technocratic governance that the processes aim at displacing.

<sup>119</sup> Doyle & Walsh observe as well that political elites can use deliberative processes to delay and ultimately defeat proposals that actually have broad popular support. *Id.*

<sup>120</sup> See Derrick Darby, *Du Bois's Defense of Democracy*, in NOMOS LXIII: DEMOCRATIC FAILURE 207 (Melissa Schwartzberg & Daniel Viehoff eds. 2021) (describing and endorsing the view held by W.E.B. Du Bois and John Dewey that ordinary people frequently have access to knowledge that can enhance overall deliberation).

<sup>121</sup> For example, economics tend to favor free trade rather strongly, without attending to the domestic distributional effects of free trade; ordinary people tend to insist upon supplementing free trade policies with forms of "trade adjustment assistance" aimed at moderating those distributional effects and tend to be skeptical about the likelihood that such assistance will actually rectify the distributional effects. For an economist's view, see BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2011 ed.) (with a chapter entitled "Evidence from the Survey of Americans and Economists on the Economy").

<sup>122</sup> A common example here is the implementation of military strategy: once the people have chosen the goals they seek through the use of military force, specialists in military operations implement those goals without further input from the people.

D. *A Note on Populism and Rights*<sup>123</sup>

The availability of reasonable alternative specifications means that the definition of constitutionalism is parasitic upon choices among controversial accounts of liberalism's requirements.<sup>124</sup> We can of course engage in reasoned discussion of which is the best account of liberalism with respect to various elements such as free expression and equality. We doubt that we gain much by escalating those discussions into the domain of disagreements about what constitutionalism requires.

In light of the availability of reasonable alternative specifications, what do we gain by defining constitutionalism in more-than-barebones terms? We might wonder why an ideal of constitutionalism is needed, rather than an ideal with respect to each of its components. That is, suppose we observe some departure from the ideal version of free expression. That provides a basis for criticizing the system with respect to free expression. But it is not obvious that it provides a basis for criticizing the system on the ground that it falls short of an ideal of constitutionalism. Suppose, for example, that system A fully satisfies a robust definition of constitutionalism with respect to equality, but falls short with respect to free expression, and that system B exhibits the departures in reverse: falling short on equality but fully satisfying free expression. Criticisms based on shortfalls on each dimension make sense; criticism that both systems are defective from the point of view of constitutionalism seems to us more questionable.

One possibility is simple: make "constitutionalism" itself a dimensional idea. We could have strong constitutionalist systems, modest constitutionalist ones, and weak constitutionalist ones. We would place systems in the appropriate categories by making a judgment about where on each component of constitutionalism the system lies (strong on the free expression dimension, weaker on the equality dimension, and the like), assigning weights to the components (free expression getting more weight than equality, or the reverse), and then aggregating those judgments. The important point here is that the terms "strong," "modest," and "weak," are descriptive, not normative. That is, weak constitutionalist systems are not inferior, qua constitutional systems, to stronger ones because each system's version

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<sup>123</sup> Some of the following Section is adapted from Mark Tushnet, *Varieties of Liberal Constitutionalism*, in ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE (Xenophon Contiades & Alkmene Fotiadou eds., 2020).

<sup>124</sup> Our account is similar to, though less ambitious than, Roberto Unger's argument that notions such as "representative democracy" are characterized by a great deal of plasticity. See ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

of each component instantiates a reasonable specification of the component's content (again, free expression, equality, and the like).

The conclusion here is, again, that we should have a language of constitutionalism capable of treating all systems that incorporate reasonable specifications of each component of liberal constitutionalism as constitutional systems tout court. This diminishes and might even eliminate the supposed tension between generic populism and constitutionalism, replacing it with a more disaggregated analysis focusing on specific populisms.

### III. THE ARGUMENT APPLIED

We provide here two case studies in which some have argued that populism conflicts with constitutionalism: the Brexit referendum, the possibility of a second Brexit referendum, and the UK Supreme Court's decision invalidating Boris Johnson's prorogation of Parliament in 2019. In each we argue that asserting that the case for a conflict between populism and constitutionalism obscures more than it illuminates, and the more granular analysis suggested by our approach is better.<sup>125</sup>

#### A. *The Brexit Referendum*

On Thursday, June 23, 2016, the United Kingdom held a historic referendum on Britain's continuing membership in the European Union. On a high turnout of 72.2% of the registered voters, 51.9% voted to leave, against 48.1% who voted to remain. The referendum was characterized as "the most significant development in the history of European integration"<sup>126</sup> and as "the most significant constitutional event in Britain since the Restoration in 1660."<sup>127</sup>

As Kenneth Armstrong explains, referendums "are not quite the constitutional novelty that they once were in the UK."<sup>128</sup> In the last four decades, there were three UK-wide referendums: two on independence of Scotland (1979 and 2014) and the Brexit referendum in 2016. Stephen Tierney identifies several important reasons for this trend both in the

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<sup>125</sup> We use these case studies because they are reasonably accessible to non-specialists, not because we think them typical in some sense.

<sup>126</sup> IAN BACHE, SIMON BULMER, STEPHEN GEORGE & OWEN PARKER, *POLITICS IN THE EUROPEAN UNION* (4th ed. 2015 & Supp. Brexit 2018).

<sup>127</sup> Vernon Bogdanor, *Brexit, the Constitution and the Alternatives*, 27 *KING'S L.J.*, 314, 314 (2016).

<sup>128</sup> KENNETH ARMSTRONG, *BREXIT TIMES: LEAVING THE EU—WHY, HOW AND WHEN* 48 (2017).



United Kingdom and around the world.<sup>129</sup> One of them is “cognitive mobilisation,” “the increasing sophistication of contemporary electorates through better education and access to information”;<sup>130</sup> this leads to stronger popular pressure for a greater say in governmental decision-making. Another is increasing voter dissatisfaction with conventional representative politics. Barebones populists need not see these developments as troublesome.

With the referendum no longer a constitutional anomaly, the Political Parties, Elections, and Referendums Act was passed in 2000 to provide basic legal rules regulating the conduct of future referendums. One of the key novelties of this act was the establishment of an Electoral Commission with oversight functions, including giving advice on referendum questions.<sup>131</sup> The Commission tests questions to determine their intelligibility and whether the question’s phrasing does not frame the matter in a way conducing voters to choose one side or the other.

In our view, the Brexit referendum failed to satisfy a central element of the barebones definition of populism—that the views of a current majority of citizens be reliably determined. The reason is that, though referendums are in principle one mechanism for obtaining a reliable determination, to do so they must avoid oversimplification of complex policy options. The Brexit referendum failed in this regard. More precisely, the reason for the failure lies not in the complexity of the “leave or stay” choice itself, but rather lay in posing the choice badly. Perhaps the question of UK membership in the European Union can be decided by the use of referendum. We agree with Richard Ekins and Graham Gee that “[a] convincing case can be made in representative democracies for occasional use of ‘constitutional referendums’ as a tool for resolving vital questions about the long-term identity of the state, such as the UK’s membership of the EU.”<sup>132</sup> The devil, though, is in the details.

In May 2015, the European Referendum Bill was introduced to the House of Commons. The bill proposed a yes/no referendum question: “Should the United Kingdom remain a member of the European Union?” The Electoral Commission determined that the proposed question was misleading because it presupposed that voters knew that the United Kingdom was already an EU member state. The

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<sup>129</sup> STEPHEN TIERNEY, *CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION* 7–9 (2012).

<sup>130</sup> *Id.* at 9.

<sup>131</sup> ARMSTRONG, *supra* note 128, at 50.

<sup>132</sup> Richard Ekins & Graham Gee, *Miller, Constitutional Realism and the Politics of Brexit*, in *THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND* 249, 252 (Mark Elliott, Jack Williams & Allison L. Young eds., 2018).

Commission recommended a new formulation, which then became the accepted version in the final bill. The referendum question therefore was: “Should the United Kingdom remain a member of the European Union or leave the European Union?”<sup>133</sup>

Framing the referendum question in such a simplistic and binary way failed to provide any guidance on what kind of a future relationship with the European Union the United Kingdom had in mind for itself. As we noted earlier, the implications of the “leave” option were unclear because Brexit could occur in many ways. For example, four such possibilities had been made clear by the European Union Committee of the House of Lords in a report entitled “Brexit: The Options for Trade.”<sup>134</sup> The report listed four options: EEA (European Economic Area) membership or the “Norway deal”; an agreement to remain in the customs union, but not in the single market (the “Turkey deal”); an ad hoc trade agreement with the EU outside the single market (the “Canada deal”); and, finally, the hard Brexit—trade on the basis of WTO rules outside of the single market. Only the last option (“hard Brexit”) is more or less straightforward because it does not require any negotiations with the European Union. As Pavlos Eleftheriadis correctly observes, “given the referendum question, voting ‘Leave’ was not a vote for choosing any particular of the four available options.”<sup>135</sup> The referendum rejected the “Remain” option, but left all other future options indeterminate. As a result, it was not clear if the Leave supporters were voting for a “hard Brexit” as the current British Prime minister claims, or for one of many “soft Brexit” options, each entailing different policy options with serious economic and political implications for the future UK-EU relationship. As Liubomir Topaloff asks, “Would voters have opted for Leave had they known that their vote would trigger a ‘hard exit’ option that would end the free movement of capital, goods, and services, along with that of people and would ultimately increase the cost to U.K. taxpayers?”<sup>136</sup>

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<sup>133</sup> TIM SHIPMAN, *ALL OUT WAR: THE FULL STORY OF HOW BREXIT SANK BRITAIN’S POLITICAL CLASS* 83–92 (2016).

<sup>134</sup> BREXIT: THE OPTIONS FOR TRADE, EUR. UNION COMM., HOUSE OF LORDS (2016), <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/72/72.pdf> [<https://perma.cc/QZ5V-BXXL>]. However, Michel Barnier, the chief EU Brexit negotiator, later presented his infamous slide of the “steps of doom,” showing six different possible post Brexit deal scenarios with the European Union, with the Switzerland and Ukraine deal added to the previous four. See Michel Barnier, *Future Relationship*, EUR. COMM’N (Dec. 19, 2017), [https://ec.europa.eu/info/sites/info/files/slide\\_presented\\_by\\_barnier\\_at\\_euco\\_15-12-2017.pdf](https://ec.europa.eu/info/sites/info/files/slide_presented_by_barnier_at_euco_15-12-2017.pdf) [<https://perma.cc/RL7P-V3YB>].

<sup>135</sup> Pavlos Eleftheriadis, *Constitutional Legitimacy over Brexit*, 88 POL. Q. 182, 185 (2017).

<sup>136</sup> Liubomir Topaloff, *Elite Strategy or Populist Weapon?*, 28 J. OF DEMOCRACY 137 (2017).

The referendum provided a mandate for the ultimate goal—leaving the EU—but not for how that would be achieved. Kevin O’Rourke argues that the electoral logic of the referendum “seemed to imply that the government should pursue what soon became known as a ‘soft Brexit,’ that is to say a Brexit that involved the United Kingdom remaining inside the EU’s Single Market, or a customs union with the EU, or both.”<sup>137</sup> However, quite soon a number of other things were said to be mandated by the results of the referendum. When Theresa May became Prime Minister, she imposed her “red lines” which were understood to follow from the referendum result: the result was taken to mean that the UK would take control of its money, laws, and borders. These “red lines” meant that the UK could not be a member of the single market or the customs union and entailed ending the jurisdiction of the Court of Justice of the European Union.<sup>138</sup>

The Brexit referendum led to a protracted period of political events that eventually ended the Brexit drama with the formal exit of the United Kingdom from the European Union on January 31, 2020. However, as it became clear after Boris Johnson became a new Prime Minister in July 2019, the process of creative “reinterpretation” of the Brexit referendum is likely to continue in the future. After declaring that his government intends to “get Brexit done,” it became clear that his understanding of the Brexit referendum favors the “hard Brexit” option. And that indeed is what happened.

#### B. *Miller/Cherry (No. 2): Populism vs Judicial Supremacy?*

In its “historic” judgment in *Miller/Cherry (No. 2)*,<sup>139</sup> the UK Supreme Court unanimously held that the prorogation<sup>140</sup> of Parliament for a period of five weeks was unlawful, void, and without legal effect. The case concerned whether the advice given by Prime Minister Boris Johnson to Queen Elizabeth II that Parliament should be prorogued for five weeks during the closing stages of the Brexit process was lawful. As the Supreme Court explained in the key passage of its judgment:

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<sup>137</sup> KEVIN O’ROURKE, A SHORT HISTORY OF BREXIT: FROM BRENTRY TO BACKSTOP 206 (2018).

<sup>138</sup> BACHE ET AL., *supra* note 126, at 14.

<sup>139</sup> R v. Prime Minister, [2019] UKSC 41 (appeal taken from UK).

<sup>140</sup> Prorogation is a political process in which the UK Parliament is suspended after the closure of one parliamentary session until a State Opening of Parliament several days later. On September 9, 2019, after the advice of the Government, the Queen, following the constitutional convention, prorogued the Parliament for five weeks, less than two months before the scheduled Brexit date of October 31, 2019.

[A] decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.<sup>141</sup>

The decision was celebrated by some as “the most significant judicial statement on the constitution in over 200 years,” to be “discussed centuries from now,”<sup>142</sup> and criticized, by others, as “a historic mistake”<sup>143</sup> to be reversed by the next Parliament.

Prorogation took effect at a delicate time for the UK Brexit political saga. While Johnson rejected claims that his decision was designed to block MPs from considering ways to thwart his Brexit plans after he was accused of mounting a “coup” against parliament, it was quite clear from the outset that that was Johnson’s covert aim behind the prorogation, officially justified by Johnson as the move that would allow him to “bring forward an ambitious new legislative programme for MPs’ approval.” For prorogation to last more than a month is unprecedented in recent times: Since the 1980s prorogation has typically lasted less than a week. The length of the prorogation would clearly have the effect of narrowing rebel MPs’ options—they would have several weeks fewer in parliament to pass any anti-no-deal legislation.

Taking prorogation to be an example of a populist action,<sup>144</sup> we think that *Miller/Cherry* poses two questions: (1) Was it appropriate for the Supreme Court to rule on the merits (or should the problem have been left to political constitutionalism)? (2) Was the Supreme Court correct on the merits?

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<sup>141</sup> R v. Prime Minister, [2019] UKSC 41, 50 (appeal taken from UK).

<sup>142</sup> Thomas Poole, *Understanding What Makes “Miller & Cherry” the Most Significant Judicial Statement on the Constitution in over 200 Years*, PROSPECT (Sept. 25, 2019), <https://www.prospectmagazine.co.uk/politics/understanding-what-makes-miller-2-the-most-significant-judicial-statement-on-the-constitution-in-over-200-years> [https://perma.cc/BZ5M-DKXA].

<sup>143</sup> JOHN FINNIS, POL’Y EXCH., THE UNCONSTITUTIONALITY OF THE SUPREME COURT’S PROROGATION JUDGEMENT (2019), <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf> [https://perma.cc/TYD3-7N5F].

<sup>144</sup> Nick Barber considers the Prime Minister’s request for prorogation to fall within the realm of “constitutional hardball,” as defined by one of us in his previous work. See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004). As he explains, prorogation belong to examples of hardball “because though constitutionally obnoxious they might be legally sound.” Nick Barber, *Playing Hardball with the Queen*, OXFORD HUM. RTS. HUB (Aug. 31, 2019), <https://ohrh.law.ox.ac.uk/playing-hardball-with-the-queen> [https://perma.cc/3QSK-HMBG].

The court spent most time asking whether prorogation is reviewable by the courts. Under British constitutional law, the executive branch of government enjoys a number of prerogative powers, such as declaring war and making treaties, which are sometimes, but not always,<sup>145</sup> exempted from judicial review. Many considered prorogation to be among the political matters exempted from judicial scrutiny. The court, on the other hand, made it quite clear that the fact that a question before it “is political in tone or context”<sup>146</sup> cannot render the matter non-justiciable.<sup>147</sup> As Mark Elliott explains, the crucial issue for the court was “whether the scope of that power had been exceeded” and whether “the power had been used for an improper purpose—such as avoiding accountability to Parliament—then this would render the issue justiciable.”<sup>148</sup>

The court then explained the standard that determines the limits of the prerogative power. The court invoked two fundamental constitutional principles, parliamentary sovereignty and parliamentary accountability, to justify its ruling. The first principle limits the executive “to have legally unfettered authority to prorogue Parliament.” As Mark Elliott explains:

This does not mean that the Court could or should rule, at the level of detail, on what is and is not an acceptable period of prorogation. What it does mean, however, is that it would be incompatible with parliamentary sovereignty for the executive to have legally unfettered authority to prorogue Parliament.<sup>149</sup>

The second principle of parliamentary accountability was, according to the court, “no less fundamental to our constitution than Parliamentary sovereignty.”<sup>150</sup> Citing Lord Bingham, the court gave the following definition to this principle: “the conduct of government by a

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<sup>145</sup> As summarized by Mark Elliott and Robert Thomas, “there is no such a thing as a non-justiciable prerogative; rather, there are merely issues arising from the exercise of a prerogative- or any other kind power, including statutory power-upon which the courts may consider themselves unable to adjudicate.” MARK ELLIOTT & ROBERT THOMAS, *PUBLIC LAW* 561–62 (3d ed. 2018).

<sup>146</sup> *R v. Prime Minister*, [2019] UKSC 41, 39 (appeal taken from UK).

<sup>147</sup> The court offers two examples from the seventeenth and eighteenth centuries: the *Case of Proclamations* [1610] 12 Co Rep 74, and *Entick v. Carrington* [1765] 19 State Tr 1029, showing how the court limited the power of the Crown to alter the law of the land by the use of the Crown’s prerogative powers.

<sup>148</sup> Mark Elliott, *A New Approach to Constitutional Adjudication? Miller II in the Supreme Court*, *PUBLIC LAW FOR EVERYONE* (Sept. 24, 2019), <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication> [<https://perma.cc/AP5X-22LW>].

<sup>149</sup> *Id.*

<sup>150</sup> *R v. Prime Minister*, [2019] UKSC 41, 46 (appeal taken from UK).

Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy.”<sup>151</sup> The principle means that:

Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.<sup>152</sup>

Finally, applying the principle to the case, the court concluded:

That principle is not placed in jeopardy if Parliament stands prorogued for the short period which is customary, and as we have explained, Parliament does not in any event expect to be in permanent session. But the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model.<sup>153</sup>

For some, the court’s decision signals “the dissolution of the old political constitution.”<sup>154</sup> John Finnis goes even further and argues that “the Judgement itself undercuts the genuine sovereignty of Parliament by evading a statutory prohibition—art. 9 of the Bill of Rights 1689—on judicial questioning of proceedings in Parliament.”<sup>155</sup> The court dismissed that argument, saying, “The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a ‘proceeding in Parliament.’ It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote.”<sup>156</sup>

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<sup>151</sup> *Id.* at 46.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 48.

<sup>154</sup> Mike Gordon, *The Prorogation Case and the Political Constitution*, U.K. CONST. L. (Sept. 30, 2019), <https://ukconstitutionallaw.org/2019/09/30/mike-gordon-the-prorogation-case-and-the-political-constitution> [<https://perma.cc/3LA9-EW5J>] (quoting Colm O’Cinneide (@colmocinneide), TWITTER (Sept. 24, 2019, 8:53 AM), <https://twitter.com/colmocinneide/status/1176479668343648259?s=20> [<https://perma.cc/2G6Z-3ML8>]).

<sup>155</sup> Finnis, *supra* note 143 (Article 9 of the Bill of Rights 1689 provides, “proceedings in Parliament ought not to be impeached or questioned in any court or place of Parliament”).

<sup>156</sup> *R v. Prime Minister*, [2019] UKSC 41, 68 (appeal taken from UK).

We agree with Elliott’s argument that “the case amounts to a significant restatement of a range of key matters, but cannot justifiably be criticized as having cast aside established principle or as an instance of improper judicial overreach.”<sup>157</sup> At the same time, as Richard Bellamy, a prominent proponent of political constitutionalism, argues, “there is ‘nothing in the substance of the judgment with which a political constitutionalist could disagree.’”<sup>158</sup> The prorogation was undoubtedly an act of constitutional hardball, departing from prior practices but arguably within the scope of the prerogative power as previously understood. As we have shown, some scholars believe that the action was within constitutional bounds and that the UK Supreme Court was mistaken. Others, including one of us, are inclined to think that the prorogation was an abuse of power.

What are we to make of a case where there appear to be plausible arguments supporting both sides when some seemingly detached observers find one or the other side’s argument *more* plausible? Here too the idea that there can be reasonable alternative specifications of agreed-upon legal principles seems helpful. The UK Supreme Court chose one of several available reasonable specifications of the scope of the prerogative power. Were Parliament to respond by “reining in” the Supreme Court, thereby making it clear that it believes that a different specification was “more” reasonable, it would not thereby undermine constitutionalism in our barebones definition. More generally, the populist-favoring positions—that the question should be left to political constitutionalism, and that the prorogation was constitutionally permissible—fall within the range of reasonable specifications of the content of British constitutionalism.

#### CONCLUSION

There is a tendency in current constitutional thinking to reduce populism to a single set of universal elements. These theories juxtapose populism with constitutionalism and argue that populism is by definition antithetical to constitutionalism. As we saw in Part II, this view defines populism in a way that makes populism inconsistent with the very substance of constitutional (liberal) democracy. It attacks the core elements of constitutional democracy, such as independent courts, free media, civil rights, and fair electoral rules, and so pushes

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<sup>157</sup> Elliott, *supra* note 148.

<sup>158</sup> Richard Bellamy (@rpbellamy1), TWITTER (Sep. 24, 2019; 6:51 PM), <https://twitter.com/rpbellamy1/status/1176645479976919040> [<https://perma.cc/YQ5C-WWRG>] (cited in Gordon, *supra* note 154).

democracies into some form of non-democratic and authoritarian order.

We have argued that such an approach is both historically inaccurate and normatively flawed. Some forms of populism, exemplified by the New Deal in the United States, did not degenerate into authoritarianism and, in that case, actually helped American democracy to survive the Great Depression of the 1930s. If the combination between populism and constitutionalism “sounds odd especially to a European ear,”<sup>159</sup> populist constitutionalism has a strong resonance among many prominent American constitutional scholars. Looking at the current populist map, we can find examples of similar democratic populists, who seek to protect and defend democracy by making it more responsive, equitable and inclusive. We have argued that it is wrong to argue that there is something intrinsic to populism that makes it incompatible with constitutionalism.<sup>160</sup>

Rather, we have argued, populism is Janus-faced. It does not take a single form, but a variety of different forms, each with different political consequences. Populism always co-exists with a variety of different host ideologies, which significantly determine how populism affects democracy. As more recent empirical studies of effects of populism on constitutional democracy show, the picture is mixed: populism has both negative and positive consequences for democracy. While it is clear that certain instances of authoritarian nationalist populism lead to democratic backsliding and breakdown, at other times democratic populism can foster democratization. As a result, “despite the fact that there are good reasons for worrying about the rise of populism, scholars are probably putting too much emphasis on the downsides and thus not considering potential positive effects of populist forces.”<sup>161</sup> The dominant approach fails to analyze the impact of host ideologies on the electoral appeal of various populist forces. Once we couple populist discourse with (host) ideology, we see a much

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<sup>159</sup> Lucia Corso, *What Does Populism Have to Do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions*, 3 RIVISTA DI FILOSOFIA DEI DIRRITO (2004).

<sup>160</sup> Joseph Fishkin and William Forbath argue, for example, that many populist movements in the United States contributed to the creation of an “anti-oligarchy” concept of constitutionalism, which sought to empower and protect the democratic nature of the American constitution. Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014). To similar effect, Bruce Ackerman has argued that the key founding moments of American constitutionalism are best defined as episodes of what we regard as democratic populist constitutionalism. BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* (1991). For application of his theory in comparative context, see BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* (2019).

<sup>161</sup> Kirk A. Hawkins & Cristóbal Rovira Kaltwasser, *What the (Ideational) Study of Populism Can Teach Us, and What It Can't*, 23(4) SWISS POL. SCI. REV. 526, 531 (2017).



more complicated pattern of interrelationship between populism and constitutional democracy: Populism comes in different versions, with different effects on constitutionalism and the rule of law.

We must therefore distinguish among forms of populisms: agrarian, socio-economic, xenophobic, reactionary, authoritarian and progressive populism, not all of which, of course, we have attempted to describe in this Essay. While some forms contradict the key principles of modern democratic constitutionalism, others seek to resuscitate the same principles from the grip of the unaccountable “moneyed elites.” As described by James Miller, in Hannah Arendt’s view, “these episodes of collective self-assertion are invariably fleeting and stand in tension with the need for a more stable constitution of collective freedom, embodied in the rule of law, and representative institutions”; for her they represent “a constitutive feature of the modern democratic project.”<sup>162</sup> To label them “populist” in a pejorative sense is to misunderstand the inherent instability of the democratic project. As James Miller argues, populist “outbursts are essential to the continued vitality, and viability, of modern democracy—even as (and precisely because) they challenge the status quo, destructive though that challenge may be.”<sup>163</sup> A specific instance of populism might be incompatible with a widely accepted ideal of constitutionalism. Another instance of populism might be not only compatible with that ideal but, as Miller suggests, an important or even essential support for it. To reiterate: context matters.

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<sup>162</sup> MILLER, *supra* note 97, at 11.

<sup>163</sup> *Id.* at 11.