

3-2018

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## Recommended Citation

David Landau, *Populist Constitutions*, 85 *U. CHI. L. REV.* 521 (2018),

Available at: <https://ir.law.fsu.edu/articles/545>

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# Populist Constitutions

David Landau†

*This Essay draws on recent academic definitions of populism and recent examples of its use in order to show that there is an affinity between populism and widespread constitutional change. It argues that populists use constitutional change to carry out three functions: deconstructing the old institutional order, developing a substantive project rooted in a critique of that order, and consolidating power in the hands of populists. Thus, access to the tools of constitutional change may accentuate both the promise of populism as a corrective to stagnating liberal democracies and the threat that it poses to those constitutional orders. I also argue that there is a trajectory to populist constitutionalism: populist constitutions begin by emphasizing their promise to improve on existing liberal-democratic constitutional orders and obscuring their underlying consolidation of power, but if populists are able to maintain power for long periods of time, they will likely become overtly illiberal, arguing that their substantive goals cannot be met within the confines of liberal democracy. This suggests at least two separate agendas: one that prevents the forms of constitutional change that allow populists to mold the constitutional order so that they become difficult to dislodge and a second that makes a stronger affirmative case for the virtues of liberal democracy.*

## INTRODUCTION

With the rise of populist political leaders in the West, such as President Donald Trump and Marine Le Pen, the study of populism has become a central concern. The rising importance of populism in the West follows a period in which it has seen a resurgence in other regions, particularly Latin America—former Presidents Hugo Chávez in Venezuela and Rafael Correa in Ecuador are leading examples—and Eastern Europe, where political parties in Hungary and Poland won power while wielding populist discourses. A large body of scholarship analyzes the definition of populism, its complex causes, and its ambiguous impact on liberal democracy. Some emphasize a promise for rejuvenation, others the threat of erosion.<sup>1</sup>

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<sup>1</sup> See, for example, Paul Taggart, *Populism* 112–14 (Open University 2000) (noting both the dangers and opportunities of populist movements); John B. Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* 158

This Essay explores the ways in which populist leaders use the tools of constitutional change when they gain power. A number of recent populist leaders and parties have either replaced their existing constitutions entirely or adopted sweeping packages of amendments. President Alberto Fujimori in Peru (1995),<sup>2</sup> Chávez in Venezuela (1999),<sup>3</sup> Correa in Ecuador (2008),<sup>4</sup> President Evo Morales in Bolivia (2009),<sup>5</sup> and the Fidesz Party in Hungary (2011)<sup>6</sup> all replaced their existing constitutions once they came to power. Many of these leaders, as well as President Recep Tayyip Erdoğan in Turkey (2017),<sup>7</sup> pursued major packages of amendments to the constitution that made deep structural changes to the constitutional texts. If populism is defined as an ideology that divides the world into two antagonistic groups, a “pure people” represented by the populist leaders and a “corrupt elite” against whom they struggle,<sup>8</sup> then there is a relationship between populist ideology and large-scale constitutional change that will refound the political and social order.

I argue that constitutional change under populism carries out three core functions: deconstructing the existing political regime, serving as an ideological critique that promises to overcome flaws in the prior constitutional order, and consolidating power in the hands of the populist leadership. These tendencies appear inherent in nearly all populist projects, and thus studying populist constitutional change is helpful in understanding populism in

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(Columbia Global Reports 2016) (arguing that populist movements do “point to tears in the fabric of accepted political wisdom”); Jan-Werner Müller, *What Is Populism?* 44–48 (Pennsylvania 2016) (describing the dangerous tendencies of populist parties once they take power); Frank M. Walsh, *The Legal Death of the Latin American Democracy: Bolivarian Populism’s Model for Centralizing Power, Eliminating Political Opposition, and Undermining the Rule of Law*, 16 *L & Bus Rev Americas* 241, 242 (2010) (detailing how Chávez and his movement eroded Venezuela’s liberal democracy).

<sup>2</sup> Philip Mauceri, *Return of the Caudillo: Autocratic Democracy in Peru*, 18 *Third World Q* 899, 899 (1997).

<sup>3</sup> Joshua Braver, *Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez over the Creation of the 1999 Constitution*, 14 *Intl J Const L* 555, 565–68 (2016).

<sup>4</sup> Catherine M. Conaghan, *Ecuador under Correa*, 27 *J Democracy* 109, 110 (July 2016).

<sup>5</sup> Ignacio Arana Araya, *What Drives Evo’s Attempts to Remain in Power? A Psychological Explanation*, 22 *Bolivian Stud J* 191, 192 (2016).

<sup>6</sup> Chris Bryant, *Hungary Approves New Constitution* (Fin Times, Apr 17, 2011), archived at <http://perma.cc/5KWL-M47U>.

<sup>7</sup> Patrick Kingsley, *Erdogan Claims Vast Powers in Turkey after Narrow Victory in Referendum* (NY Times, Apr 16, 2017), online at [http://www.nytimes.com/2017/04/16/world/europe/turkey-referendum-polls-erdogan.html?\\_r=0](http://www.nytimes.com/2017/04/16/world/europe/turkey-referendum-polls-erdogan.html?_r=0) (visited Dec 24, 2017) (Perma archive unavailable).

<sup>8</sup> Cas Mudde, *The Populist Zeitgeist*, 39 *Govt & Opposition* 541, 543 (2004).

general. Access to tools of large-scale constitutional change accentuates both the threat of populism to liberal democracy and its promise as a corrective. Large-scale constitutional change allows populist leaders to wipe away the existing institutional order and consolidate power in a particularly rapid and durable way while also permitting experimentation with constitutional forms that might rejuvenate ossified or failing constitutional orders. But I also argue that there is a likely trajectory to populist constitutional projects: if populists are successfully able to centralize power and retain it for long periods of time, the regime will become increasingly and overtly opposed to liberal democracy.

The rest of this Essay is organized as follows. Part I briefly defines populism and describes the broader debate about its impact on liberal democracy. Parts II, III, and IV outline the three major functions of populist constitutions: undermining the existing institutional order, constructing a new order built on a critical vision of the old one, and consolidating power in the hands of populist leaders, respectively. Part V asks whether there is a trajectory to populist regimes, tentatively finding that if populists are able to remain in office, the consolidation of power becomes an increasingly overt part of the regime's ideology over time, effectively merging with the critical function. This Essay concludes by suggesting two possible responses to the challenge of populism for liberal-democratic constitutionalism. The first seeks to block forms of constitutional change that allow populists to remain in power for long periods of time and thus have a particularly corrosive effect. The second response is deeper—it suggests that populism spurs us to confront and respond to the weaknesses in liberal democracy that give legitimacy to populist constitutional projects.

#### I. DEFINING POPULISM AND ITS RELATIONSHIP WITH LIBERAL DEMOCRACY

Populism is a fiercely contested concept. Nonetheless, recent work has suggested relative consensus about some core elements of its definition. This work has tended to reject definitions that are based on a particular set of economic policies<sup>9</sup> or that identify populism with a particular configuration of socioeconomic class

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<sup>9</sup> See, for example, Kurt Weyland, *Clarifying a Contested Concept: Populism in the Study of Latin American Politics*, 34 *Comp Polit* 1, 9–11 (2001) (showing that populism in Latin American is compatible with both neoliberal and statist economic policies).

support,<sup>10</sup> because these definitions identify only given instances of populism rather than the broader phenomenon. Instead, populism is seen as an ideology, strategy, discourse, style of political mobilization, or political practice based primarily on antagonism between “the people,” represented by the populist leader, and a “corrupt elite.”<sup>11</sup> Professor Cas Mudde, for example, influentially defines populism as a “thin-centred ideology” that “considers society to be ultimately separated into two homogenous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite,’ and which argues that politics should be an expression of the *volonté générale* (general will) of the people.”<sup>12</sup> Because the ideology is “thin,” it can accommodate a number of different substantive political projects.<sup>13</sup>

The nature of the “pure people” and “corrupt elite” differ widely across these different variants of populism. Scholars of Latin America, for example, have noted a number of different waves or varieties of populism: traditional populist projects focused on political incorporation and economic equality against an oligarchical elite, neoliberal populists who passed privatizations and structural economic reforms by arguing against corrupt state elites, and radical populists who have emphasized political participation, socioeconomic justice, and inclusion of traditionally excluded political groups against an elite of privileged insiders who have controlled economic and political power.<sup>14</sup> Historians of the United States have likewise identified both right-wing and left-wing variants of populism over time, with a very different set of

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<sup>10</sup> See, for example, Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism and (Liberal) Democracy: A Framework for Analysis*, in Cas Mudde and Cristóbal Rovira Kaltwasser, eds., *Populism in Europe and the Americas: Threat or Corrective for Democracy?* 1, 5 (Cambridge 2012).

<sup>11</sup> See Mudde, 39 *Govt & Opposition* at 543 (cited in note 8) (ideology); Weyland, 34 *Comp Polit* at 14 (cited in note 9) (strategy); Kirk A. Hawkins, *Is Chávez Populist? Measuring Populist Discourse in Comparative Perspective*, 42 *Comp Polit Stud* 1040, 1043–45 (2009) (discourse); Carlos de la Torre, *Populist Seduction in Latin America* 4 (Ohio 2d ed 2010) (“style of political mobilization”); Benjamin Moffitt, *The Global Rise of Populism: Performance, Political Style, and Representation* 28 (Stanford 2016) (“political style”).

<sup>12</sup> Mudde, 39 *Govt & Opposition* at 543–44 (cited in note 8).

<sup>13</sup> See, for example, Taggart, *Populism* at 2 (cited in note 1) (referring to populism as a “chameleon”); Mudde and Kaltwasser, *Populism and (Liberal) Democracy* at 9 (cited in note 10) (noting that populism can be “attached to other ideologies, be they thick (e.g. liberalism, socialism) or thin (e.g. ecologism, nationalism)”).

<sup>14</sup> See de la Torre, *Populist Seduction* at xiii–xiv (cited in note 11).

“elite” opponents.<sup>15</sup> Some variants of populism are defined in opposition to racial or ethnic outsiders and their supposed enablers within domestic elite groups. But other variants lack this ethnic dimension and instead define outsiders along socioeconomic class lines or with dichotomies between privileged governmental elites and the ordinary people.<sup>16</sup> Populism can also spring up in more or less consolidated democracies in both developed and developing contexts.<sup>17</sup> Take, for example, Presidents Trump and Chávez, who, for all of their ideological differences, have both been widely identified as populists.

Most work sees an “uneasy” relationship between populist political movements and liberal-democratic constitutionalism.<sup>18</sup> Some academics argue that populist leadership can highlight deficiencies in existing liberal democracies or help to bring in new political forces that were previously marginalized.<sup>19</sup> In this sense, populism can help to transition an authoritarian regime into a more democratic one or might help to rejuvenate a stagnating liberal democracy by raising pressure to ameliorate its defects or to increase inclusion or legitimacy.

But in many contexts, populism poses a threat to liberal democracy. This threat was captured succinctly by Professor Jan-Werner Müller: the ideology defined by Mudde tends to simplify the world into Manichean terms. Thus, this leads populists to argue not only that they represent the popular will but that they are the *only legitimate carriers* of this will.<sup>20</sup> Those against whom populists define their projects—the corrupt elite and their allies—have no legitimate standing to act as full citizens of the state or to compete in the electoral sphere. Under this conception, the threat is that populists will seek to make themselves harder to dislodge, weaken checks on their own power, and undermine

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<sup>15</sup> See Michael Kazin, *The Populist Persuasion: An American History* 3–4 (Basic Books 1995) (comparing the populism of reformers on the left in the late nineteenth century to the populism employed by the Cold War right in the mid-twentieth century).

<sup>16</sup> See Cas Mudde, *Conclusion: Some Further Thoughts on Populism*, in Carlos de la Torre, ed., *The Promise and Perils of Populism: Global Perspectives* 431, 442 (Kentucky 2015).

<sup>17</sup> See Carlos de la Torre and Cynthia J. Arnson, *Introduction: The Evolution of Latin American Populism and the Debates over Its Meaning*, in Carlos de la Torre and Cynthia J. Arnson, eds., *Latin American Populism in the Twenty-First Century* 1, 8 (Johns Hopkins 2013).

<sup>18</sup> See de la Torre, *Populist Seduction* at 201 (cited in note 11).

<sup>19</sup> See Mudde and Kaltwasser, *Populism and (Liberal) Democracy* at 20–21 (cited in note 10).

<sup>20</sup> See Müller, *What Is Populism?* at 3 (cited in note 1) (“Populists claim that they, and they alone, represent the people.”).

protections for minority groups who are left outside of their definition of the “people.”<sup>21</sup> They will not abolish courts and constitutions, but they will bend those institutions in ways that make the regime both less liberal and less democratic. Populist constitutional projects can be read as supporting both sides of this dichotomy. As the following parts show, they are multifaceted: they often act both as critiques of preexisting constitutional orders and as instruments used by populist leaders to consolidate power and undermine checks on their authority.

## II. DECONSTRUCTING THE EXISTING INSTITUTIONAL ORDER

Populists are often harshly critical of core aspects of the existing institutional order and rely on tools of constitutional and legal change to undermine it. This follows from identification of the existing institutional order with the corrupt elite who populists define as the enemy. Of course, the range of tools for taking aim at these institutions is very wide. Discourse, for example, can be effective at undermining existing institutions, as can legislative or administrative measures. The case of President Trump in the United States is an example. He has launched a series of rhetorical attacks on the judiciary and the media while also using appointments and administrative measures to place leaders in charge of agencies, such as the Environmental Protection Agency and the Department of State, who would partially or wholly undermine the mission of those agencies.<sup>22</sup> The goal of the “[d]econstruction of the [a]dministrative [s]tate” is highly likely to be attempted in the United States without recourse to formal constitutional change.<sup>23</sup> Symbolism may also be a powerful tool.

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<sup>21</sup> See Mudde and Kaltwasser, *Populism and (Liberal) Democracy* at 21–22 (cited in note 10).

<sup>22</sup> See Kristine Phillips, *All the Times Trump Personally Attacked Judges—and Why His Tirades Are ‘Worse Than Wrong’* (Wash Post, Apr 26, 2017), archived at <http://perma.cc/V9HU-QCH5>; Coral Davenport, *E.P.A. Head Stacks Agency with Climate Change Skeptics* (NY Times, Mar 7, 2017), online at [http://www.nytimes.com/2017/03/07/us/politics/scott-pruitt-environmental-protection-agency.html?\\_r=0](http://www.nytimes.com/2017/03/07/us/politics/scott-pruitt-environmental-protection-agency.html?_r=0) (visited Dec 24, 2017) (Perma archive unavailable); Eliana Johnson and Michael Crowley, *The Bottleneck in Rex Tillerson’s State Department* (Politico, June 4, 2017), archived at <http://perma.cc/SLH2-MR9M>. This discourse is typical of populists. See, for example, Allan R. Brewer-Carías, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment* 177–81 (Cambridge 2010).

<sup>23</sup> Jeremy W. Peters, *Bannon’s Worldview: Dissecting the Message of “The Fourth Turning”* (NY Times, Apr 8, 2017), online at <http://www.nytimes.com/2017/04/08/us/politics/bannon-fourth-turning.html> (visited Dec 24, 2017) (Perma archive unavailable).

That said, replacement of the existing constitution is a paradigmatic way to deconstruct the existing institutional order. A sense of deep crisis due to the actions of corrupt elites is both a triggering condition for populist leaders to gain support and a construct they use to advance their projects.<sup>24</sup> Events like the deinstitutionalization of the party system, a perception of pervasive state corruption, and deep economic downturn feed populist movements and put them in positions in which they can win power.<sup>25</sup> The constitution-making moment allows populist leaders to give a dramatic response to this environment of crisis. At the same time, it also helps them to deepen and shape the meaning of crisis by creating a context in which the foundational institutions of state are up for grabs and the old order can be swept away. Related to this is a preference for sweeping or far-reaching change. As Professor Ernesto Laclau has argued, populists operate off of a political logic that seeks to aggregate a large number of social and political demands and resolve them through the popular–elite dichotomy.<sup>26</sup> The aggregation of many demands from different social sectors points toward a more systemic response, such as constitution-making rather than the mechanisms of ordinary politics.

When major constitutional changes have been carried out by populists, they often monopolize control if the political context allows them to do so rather than adopt a consensual process that compromises with elements of the existing political regime. In Venezuela and Ecuador, for example, the forces of Presidents Chávez and Correa rewrote their respective constitutions unilaterally. They took steps, such as the design of electoral laws, the removal of potentially hostile justices, and the closing of legislatures, to ensure that Constituent Assemblies were controlled by their allies and could not be constrained by other institutions controlled by different political forces.<sup>27</sup> In Hungary, likewise, the Fidesz Party used its two-thirds supermajority of parliamentary seats to adopt a new constitution quickly and without opposition

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<sup>24</sup> See Moffitt, *The Global Rise of Populism* at 118 (cited in note 11) (arguing that crisis is both an external trigger for populism and constructed by populists to further their agendas).

<sup>25</sup> See *id.* at 113–16.

<sup>26</sup> See Ernesto Laclau, *On Populist Reason* 77–78 (Verso 2005).

<sup>27</sup> See de la Torre, *Populist Seduction* at 187–88 (cited in note 11); Kenneth M. Roberts, *Populism and Democracy in Venezuela under Hugo Chávez*, in Mudde and Kaltwasser, eds, *Populism in Europe and the Americas* 136, 148–49 (cited in note 10).



input.<sup>28</sup> In Turkey, President Erdoğan and his ruling Justice and Development Party initially tried to negotiate constitutional change in a pluralistic way. When that process broke down, he bided his time and imposed reforms that switched the governing structure to a strong presidential system (almost) unilaterally when he gained sufficient seats to do so.<sup>29</sup> Unilateral, rather than negotiated, constitution-making or constitutional change fits populist ideology because it avoids negotiation with members of a corrupted elite. Furthermore, majoritarian demonstrations of popular will—such as referenda—may serve in the populist worldview as a superior alternative to engagement with opposition political groups.<sup>30</sup>

The replacement of Venezuela's constitution in 1999 offers a good example of this logic. Chávez ran for office in a context of a deep political crisis: the two-party pact that had governed the country had lost much of its legitimacy by the late 1990s, and the political system was widely viewed as corrupt and elitist.<sup>31</sup> Chávez was in a prime position to exploit this crisis: he was not only an outsider to the traditional system, but as a colonel in the army, he had actually led a failed coup against it. Ironically, that event launched his political career when he appeared on television in its aftermath.<sup>32</sup> Chávez explicitly ran against the existing institutional order and promised to deliver a new constitution to wipe it away.<sup>33</sup> Once elected, he delivered on this promise by calling a Constituent Assembly dominated by his supporters that was constituted outside of the existing institutional framework.<sup>34</sup> This assembly rewrote the constitution in a span of several months.<sup>35</sup> The Constituent Assembly, dominated by Chávez's supporters, used

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<sup>28</sup> See Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppelle, *Disabling the Constitution*, 23 *J Democracy* 138, 141–42 (July 2012).

<sup>29</sup> The ruling Justice and Development Party did need to negotiate in order to gain the support of the minor Turkish Nationalist Party. See İlayda Gunes, *What's at Stake in the Turkish Constitutional Amendment Proposal* (I-CONnect, Apr 14, 2017), archived at <http://perma.cc/35RZ-D7NG>.

<sup>30</sup> See William Partlett, *The Dangers of Popular Constitution-Making*, 38 *Brooklyn J Intl L* 193, 234 (2012).

<sup>31</sup> See Roberts, *Populism and Democracy in Venezuela under Hugo Chávez* at 138–43 (cited in note 27).

<sup>32</sup> See Kirk A. Hawkins, *Venezuela's Chavismo and Populism in Comparative Perspective* 17 (Cambridge 2010).

<sup>33</sup> See Roberts, *Populism and Democracy in Venezuela under Hugo Chávez* at 148 (cited in note 27).

<sup>34</sup> *Id.* at 148–49.

<sup>35</sup> *Id.* at 149.

its power to close down and replace existing state institutions.<sup>36</sup> It closed state assemblies and reduced the opposition-held congress to a rump, stripping it of most of its members and powers.<sup>37</sup> It closed down the supreme court, which had alternated between empowering the process and trying to set limits on it.<sup>38</sup> And it replaced key local leaders and labor union heads.<sup>39</sup> As a result, the constitution-making process played a key role in sweeping away the remnants of the old order.

Thus, populists are not only distinguished by a preference for widespread constitutional change, but change in an anti-Burkean sense. They seek to remake or refound the existing institutional order rather than building off it. The goal is to create a revolutionary mindset of systemic change in which the basic rules of the game are themselves up for grabs.<sup>40</sup>

### III. CRITIQUING THE OLD ORDER

Populist projects of constitutional change are not just projects to deconstruct the old order. At least when populists are able to write their own constitutions, they also instantiate a substantive project. The exact nature of the political project implicit in populist constitutions varies widely across countries and regions. But they tend to share a critical attitude toward the prior regime, which reflects as a harsh judgment on liberal democracy as practiced historically in that country. Thus, populist constitutions can be read as projects born out of a critique of past national experiences with liberal democracy.

In the Andes, populist constitutional discourse responded to historic patterns of socioeconomic inequality, elitism, and exclusion. The Venezuelan constitution of 1999, for example, put a heavy emphasis on participation—it created new mechanisms, such as a recall that could be used even against the president and

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<sup>36</sup> See David Landau, *Constitution-Making Gone Wrong*, 64 *Ala L Rev* 923, 945–49 (2013).

<sup>37</sup> *Id.* at 947.

<sup>38</sup> *Id.* at 946–48.

<sup>39</sup> *Id.* at 948.

<sup>40</sup> See Hawkins, *Venezuela's Chavismo* at 35–36 (cited in note 32) (describing how populism advocates for systemic change by painting the existing institutions as “[e]vil”); Oliver W. Lembcke and Christian Boulanger, *Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court*, in Gábor Attila Tóth, ed., *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* 269, 290–93 (CEU 2012) (noting the Fidesz Party's references to the 2011 constitution as a “revolution”).

a civil-society commission for judicial appointments.<sup>41</sup> Through the latter, individuals would be able to give input on political decisions and hold political leaders to account.<sup>42</sup> This responded to the widespread perception that the old regime, which was based on a two-party pact, was elitist, exclusionary, and corrupt. The Ecuadorian constitution written under the Correa regime is extraordinarily rich in rights, containing, in particular, innovative and generous environmental and socioeconomic rights.<sup>43</sup> The Bolivian constitution creates new forms of popular participation, defines the Bolivian state as “plurinational,” and grants an extensive set of rights and autonomy to indigenous groups, in contrast to their historic exclusion and repression.<sup>44</sup> In all of these contexts, the constitution responded to the patterns of socioeconomic inequality and exclusion that had historically marked the countries’ troubled constitutional histories. Neither participation, inclusion, nor thickened rights discourses, of course, are inherently populist in nature. But, in these cases, they were wielded by leaders with populist discourses in order to critique existing practices of constitutionalism in their respective countries.

In Hungary, a more nationalist strain of populism acted to fill a void arguably left in the prior constitutional order. Upon transitioning to democracy in 1989, Hungary did not adopt a new constitution but, instead, amended its Communist-era constitution of 1949, an arrangement that was meant to be temporary.<sup>45</sup> However, efforts to adopt a new permanent constitution in the 1990s did not come to fruition, leaving the transition, in Professor Andrew Arato’s words, “incomplete.”<sup>46</sup> The long preamble or “national avowal” to the 2011 constitution engages with this notion of an incomplete transition from Communist rule; it refers to a

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<sup>41</sup> See Landau, 64 Ala L Rev at 946–48 (cited in note 36).

<sup>42</sup> See Roberts, *Populism and Democracy in Venezuela* at 149–50 (cited in note 27). The Chávez regime also experimented with a number of participation mechanisms at the subconstitutional level. For an overview, see Hawkins, *Venezuela’s Chavismo* at 166–94 (cited in note 32).

<sup>43</sup> See Ximena Sosa, *Populism in Ecuador: From José M. Velasco Ibarra to Rafael Correa*, in Michael L. Conniff, ed, *Populism in Latin America* 159, 177 (Alabama 2d ed 2012).

<sup>44</sup> See John Crabtree, *From the MNR to the MAS: Populism, Parties, the State, and Social Movements in Bolivia since 1952*, in de la Torre and Arnson, eds, *Latin American Populism in the Twenty-First Century* 269, 285, 288 (cited in note 17).

<sup>45</sup> János Kis, *Introduction: From the 1989 Constitution to the 2011 Fundamental Law*, in Tóth, ed, *Constitution for a Disunited Nation* 1, 5–8 (cited in note 40).

<sup>46</sup> Andrew Arato, *Post-sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?*, 26 S Afr J Hum Rts 19, 19 (2010).

“historical constitution” that was broken by the “foreign occupations” of both the Nazi and communist dictatorships and states explicitly that the 1949 constitution was the “basis for tyrannical rule” and thus “invalid.”<sup>47</sup> The new constitution also adopts a more historical and nationalist basis for the state, in contrast to the thinner and more universalist valence of the postcommunist legal order. For example, the new constitution, working alongside legal changes at around the same time, moves the state toward a more ethnically based conception of citizenship,<sup>48</sup> and it emphasizes the role of Christianity in building the Hungarian state and nation.<sup>49</sup> Because the old Hungarian constitution was fairly thin, much of its meaning had been constructed in a universalist mode by the Constitutional Court.<sup>50</sup> An amendment to the new constitution explicitly rejects this legacy by providing that court decisions under the old constitution were all “repealed.”<sup>51</sup>

In all of these cases, then, the new constitutions allowed populist leaders to signal ways in which the state would now follow new directions and break from perceived failures or weaknesses of past regimes. A key notion that seems to unite many of these contexts is the populist claim to have recovered the authentic constitutional tradition of a country. In Venezuela, Chávez used the symbolism of the national independence hero, Simón Bolívar, to suggest ways in which his project would rejuvenate Venezuelan constitutionalism.<sup>52</sup> In Hungary, as noted above, the constitutional drafters used a selective reading of history to suggest that a historical, authentic Hungarian constitutional heritage was

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<sup>47</sup> See Hungary Const Preamble. The Polish regime has also justified many of its actions, such as its purges of the judiciary, with an idea that Communists were never properly removed from these institutions. Michał Broniatowski, *Polish Government Moves to Take Control of Top Court* (Politico, July 14, 2017), archived at <http://perma.cc/D5CH-4ANJ>.

<sup>48</sup> See Zsolt Körtvélyesi, *From “We the People” to “We the Nation,”* in Toth, ed., *Constitution for a Disunited Nation* 111, 113–17 (cited in note 40) (analyzing how the language of the Hungarian constitution subtly defines the people of Hungary by ethnicity, not political affiliation).

<sup>49</sup> See Renáta Uitz, *Freedom of Religion and Churches: Archaeology in a Constitution-Making Assembly*, in Toth, ed., *Constitution for a Disunited Nation* 197, 199–202 (cited in note 40) (discussing how the Hungarian constitution makes churches autonomous from the state and allows the government to privilege certain churches).

<sup>50</sup> See Arato, 26 S Afr J Hum Rts at 31 (cited in note 46) (describing how the Hungarian Constitutional Court enforced Hungary’s “patch-work” constitution).

<sup>51</sup> See Hungary Const Amend IV, Art XIX.

<sup>52</sup> The Venezuelan Constitution of 1999 in fact names the state the “Bolivarian Republic of Venezuela,” and the first sentence of the preamble refers to the “historic example of our liberator Simón Bolívar” as a basis to “refound the state.” Venezuela Const Preamble.

broken by communism and a tainted transition away from it.<sup>53</sup> The point, of course, is not to defend the normative desirability of any of these particular projects. It is rather to highlight the experimental space that populist constitutional change can potentially inhabit.

#### IV. CONSOLIDATING POWER

Populist projects of constitutional change tend to consolidate the power of incumbents, erode the separation of powers, and weaken protections for minority or opposition groups. New constitutions written by populist leaders (or packages of constitutional amendments) have often centralized power in the executive branch and lengthened the amount of time that incumbents could serve in power. They have also tended to rework the rules for appointment and jurisdiction of bodies like constitutional courts (thus making these institutions easier to control) and to strengthen the control of the state over the media and other key aspects of civil society, such as unions and religious organizations. In a sense, the project is to replace the existing institutional order with a new one in which populists control their own institutions.<sup>54</sup>

For example, the new constitutions of Venezuela and Ecuador both greatly increased presidential power and the length of time for which incumbents could serve; they also replaced opposition-held institutions, such as courts, with redesigned institutions that were more easily controlled by Presidents Chávez and Correa.<sup>55</sup> The Hungarian constitution similarly made it harder to dislodge the populist Fidesz Party from power and greatly reduced the power and autonomy of institutions designed to check its power.<sup>56</sup> In Turkey, constitutional amendments weakened the

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<sup>53</sup> See Catherine Dupré, *Human Dignity: Rhetoric, Protection, and Instrumentalisation*, in Toth, ed., *Constitution for a Disunited Nation* 143, 166 (cited in note 40) (noting how the new Hungary Constitution rejects the communist constitution on “the basis of a tyrannical rule”), citing Hungary Const Preamble.

<sup>54</sup> See Müller, *What Is Populism?* at 62 (cited in note 1) (“Populists in power are fine with institutions—which is to say, *their* institutions.”).

<sup>55</sup> See César Montúfar, *Rafael Correa and His Plebiscitary Citizens’ Revolution*, in de la Torre and Arnson, eds., *Latin American Populism in the Twenty-First Century* 295, 313–14 (cited in note 17); Landau, 64 *Ala L Rev* at 948–49 (cited in note 36) (describing how Venezuelan governing bodies across various levels of government, including the Venezuelan supreme court, were replaced with new institutions that were loyal to Chávez).

<sup>56</sup> See Bánkuti, Halmai, and Scheppele, 23 *J Democracy* at 143 (cited in note 28) (“The old constitution had many checks. The new constitution has substantially weakened all of them.”).

independence of the constitutional court and shifted the parliamentary system to a presidential system with a very strong president, thus centralizing power in the person of President Erdoğan.<sup>57</sup>

To some degree, populist projects emphasize the majoritarian aspects of democracy while showing hostility toward liberal checks on majority power.<sup>58</sup> But populist constitutional projects cannot simply be read as pitting “democracy” against “liberalism.” They also often target the electoral machinery, using institutions like electoral commissions, courts, and the media to tilt the playing field, making it more difficult for the opposition to win power.<sup>59</sup> As Professor Müller notes, populist movements not only seek to win majorities and unfetter them but also tend to believe that their political opponents are illegitimate and do not deserve to hold power.<sup>60</sup> In this sense, liberalism and democracy tend to erode together.<sup>61</sup>

Once again, formal constitutional change is not the only level at which these projects operate, and some have operated without replacing or amending the constitution at all. A very important tool is packing institutions that are designed to check majority power, such as constitutional courts, ombudspersons, human-rights commissions, and regulatory commissions overseeing the media with pro-government people. Courts and other actors controlled by incumbents are useful for harassing and undermining the opposition through what Professor Ozan Varol has called “stealth authoritarianism”: the selective use of existing legal tools, such as defamation and electoral registration, to undermine

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<sup>57</sup> See Ozan O. Varol, Lucia Della Pellegrina, and Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 Am J Comp L 187, 197–99 (2017) (describing the process through which the ruling party gained control over the constitutional court); Gunes, *What's at Stake in the Turkish Constitutional Amendment Proposal* (cited in note 29).

<sup>58</sup> See Mudde and Kaltwasser, *Populism and (Liberal) Democracy* at 21 (cited in note 10) (“Populism can use the notion and praxis of popular sovereignty to contravene the ‘checks and balances’ and separation of powers of liberal democracy.”).

<sup>59</sup> See Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* 6 (Cambridge 2010) (describing how parties can maintain control by skewing the electoral playing field in their favor without resorting to “overt fraud or civil-liberties violations”).

<sup>60</sup> See Müller, *What Is Populism?* at 56–57 (cited in note 1).

<sup>61</sup> See *id.* (calling on scholars to stop the “thoughtless invocation of ‘illiberal democracy’”); Levitsky and Way, *Competitive Authoritarianism* at 9 (cited in note 59) (noting how the selective use of “legal” repression against political opponents can stymie a truly competitive democracy).

the opposition.<sup>62</sup> They can also adopt informal forms of constitutional change by adopting incumbent-friendly interpretations of the constitution that entrench the power of incumbents and weaken the opposition.<sup>63</sup> In Poland, while the ruling Law and Justice Party, to date, has lacked the votes to engage in formal constitutional amendment or replacement, it has nonetheless carried out substantial change by packing the constitutional court through dubious legal means before passing statutes of questionable constitutionality that the packed court has upheld.<sup>64</sup>

Using constitutional change to tilt the electoral playing field is not the exclusive province of populists. Many would-be authoritarian actors now rely on tools of legal change to undermine constitutional orders that superficially look like liberal democracies. Not all of these actors adopt populist discourse or political practices.<sup>65</sup> Likewise, the reshaping or use of law for partisan advantage seems to be a fairly common tool by actors that are viewed as “normal” or “pluralist” within more or less consolidated liberal democracies. Two arguable recent examples are the use of impeachment and anticorruption law as an instrument by elites to weaken the Labor Party in Brazil, and the use of gerrymandering and other tools, such as voter identification laws, to gain a durable advantage in elections in the United States.<sup>66</sup>

What may be characteristic of populism, then, is not merely the aim of tilting the playing field, but that aim in combination with the preference for the destabilizing and widespread constitutional change noted above. Populists target the existing institutional order, not just a set of political opponents. Because of that characteristic, populist changes may produce greater and more lasting

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<sup>62</sup> Ozan O. Varol, *Stealth Authoritarianism*, 100 Iowa L Rev 1673, 1678–79 (2015).

<sup>63</sup> See Rosalind Dixon, David Landau, and Yaniv Roznai, *Doctrinal Capture and the Unconstitutional Constitutional Amendment Doctrine* \*19–22 (unpublished manuscript, 2016) (on file with author).

<sup>64</sup> See Tomasz Tadeusz Koncewicz, *Farewell to the Separation of Powers—on the Judicial Purge and the Capture in the Heart of Europe* (VerfassungsBlog, July 19, 2017), archived at <http://perma.cc/LU7V-Q6UW> (noting that the constitutional court was targeted first by the regime so that other measures could be upheld without a need for constitutional amendment).

<sup>65</sup> See Hawkins, *Venezuela’s Chavismo* at 42 (cited in note 32) (giving examples of authoritarian actors, such as President Vladimir Putin, who do not adopt populist discourse).

<sup>66</sup> I am grateful to Professor Mark Tushnet for noting these examples while serving as a commentator for the Panel on Constitution-Making as Transnational Legal Order II at the Law and Society Annual Meeting in Mexico City, Mexico, June 22, 2017. See also Arthur Schott Lopes, *The Hermeneutics of Brazil’s Impeachment*, 37 Harv Intl Rev 11, 11 (2016) (discussing corruption and the impeachment in Brazil); Varol, 100 Iowa L Rev at 1702–03 (cited in note 62) (discussing voter identification laws and gerrymandering).

effects, and those effects may reach beyond the political sphere to also change the relationship between the government and civil society or the media. In this sense, formal constitutional change—especially constitution-making—is a particularly efficient way to entrench incumbent control and undermine the separation of powers. As compared to other mechanisms, it may allow populists to destabilize the existing constitutional order more rapidly and thoroughly and to impose a new political order in a more durable way.<sup>67</sup>

Consider, for example, how processes of constitutional change or replacement interact with the technique of packing an institution. Populist leaders have often ascended to power while facing institutions, such as courts, that were still controlled by independent or opposition actors. Constitutional amendment or replacement allowed them to speed up the clock dramatically in order to quickly take control of these institutions. In Turkey, for example, the ruling party used a set of constitutional amendments in 2010 to expand the size of the Supreme Council of Judges and Prosecutors as well as its constitutional court, allowing the government to rapidly pack both institutions.<sup>68</sup> A similar dynamic occurred with the Fidesz regime in Hungary, where a constitutional amendment and a new constitution expanded the size of the court.<sup>69</sup> And in Venezuela, as already noted, Chávez's constitution-making process in 1999 allowed him to purge and replace members of opposition-held institutions very quickly.<sup>70</sup>

Furthermore, formal constitutional change may prove more durable than other forms of change, making populist incumbents more difficult to dislodge from power and increasing the long-term harm done to the liberal-democratic order. An example is

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<sup>67</sup> See David Landau, *Abusive Constitutionalism*, 47 UC Davis L Rev 189, 212–14 (2013) (highlighting how constitutional reforms supported the rise and entrenchment of powerful executives in Colombia, Ecuador, Venezuela, and Hungary).

<sup>68</sup> See Varol, Pellegrina, and Garoupa, 65 Am J Comp L at 197–99 (cited in note 57) (discussing how amending the constitution allowed the ruling party to formally subject the judiciary “to the elected branches,” which would curb its ability to check the party's subsequent actions).

<sup>69</sup> See Bánkuti, Halmai, and Scheppele, 23 J Democracy at 139–40 (cited in note 28).

<sup>70</sup> See text accompanying notes 36–39. Formal constitutional change, and especially constitution-making, may also allow for a particularly destabilizing scope of change. A replacement or major constitutional reform allows incumbents to alter the composition or functioning of many institutions at the same time. As Professor Kim Lane Scheppele has argued with respect to Hungary, the various changes can interact to produce a particularly strong effect. See Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 Governance 559, 561 (2013) (describing Hungary as an example of a government taking actions that were technically constitutional or had European constitutional analogues but in combination created an authoritarian state).



the recent proposed constitutional reforms in Turkey, which aim to replace the country's current political system with a pure presidential one that has a very strong president. The ruling AKP and Erdoğan have had considerable success in changing the Turkish constitutional system without relying heavily on the tools of formal constitutional change.<sup>71</sup> Nonetheless, the formal amendments may make these changes more resistant to shifts in political context. The amendments strongly tie the electoral fortunes of the parliament to the president by holding both sets of elections at the same time, which should make it harder for the opposition to gain a political foothold.<sup>72</sup> The amendments also sharply increase presidential power during both emergencies and ordinary periods, eliminate the office of the prime minister, and reduce the ability of the parliament to investigate or control the president.<sup>73</sup> These changes mean that even if opposition parties managed to gain a parliamentary majority, they would have more difficulty undoing the shift in balance of power. In Hungary, similarly, the new constitution instantiated key institutional changes that would allow Fidesz to exert a strong influence over—and even destabilize—the country's democratic order even if they lose a parliamentary election. For example, the constitution created a budgetary commission, and the government stacked it with Fidesz supporters serving long terms.<sup>74</sup> This commission has the ability to prevent enactment of the budget under certain conditions, which may set in motion a process leading to dissolution of parliament and the calling of new elections.<sup>75</sup>

Populists do not always engage in constitution-making or large-scale formal constitutional change when they take power. In both Poland and the United States, governing populists have not yet carried out changes at this level, either because of insufficient representation in the legislature or other bodies charged with carrying out constitutional change (both countries) or because of cultural constraints (the United States). But populists

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<sup>71</sup> See Ozan Varol, *Presidentialism in Turkey: Is It Already Here?* (ConstitutionNet, Nov 24, 2015), archived at <http://perma.cc/3UMK-VXVL>.

<sup>72</sup> See Gunes, *What's at Stake in the Turkish Constitutional Amendment Proposal* (cited in note 29).

<sup>73</sup> *Id.*

<sup>74</sup> See Kim Lane Scheppele, *Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratorship" in Plain Sight)* \*37–38, archived at <http://perma.cc/52HG-PPYE>.

<sup>75</sup> *Id.* at \*38.

tend to have a preference for large-scale constitutional change,<sup>76</sup> and this mode of change may be an especially effective way to destabilize the old regime and to consolidate power. Access to the tools of formal constitutional change may thus heighten the threat posed by populism to liberal democracy. At the same time, the previous Part showed that populist constitution-making could conceivably enhance the critical function played by populists, perhaps allowing them to develop richer alternatives to the existing political order.

## V. THE TRAJECTORY OF POPULIST CONSTITUTIONS

One way to make sense of these competing effects is to consider how the two major functions of populist constitution-making—the critical function and the consolidation of power—interact over time. Initially, populist constitutions present themselves as “improved” versions of the prior liberal-democratic constitutional order while disguising the undermining of checks on the power of populist leaders.

Populist constitutions do not abandon the trappings of key liberal institutions, such as constitutional courts, and go to great lengths to justify their choices as acceptable within liberal democracies—or even as improved versions of constitutional design. Professor Kim Lane Scheppele notes the “frankenstate” approach that was important in Hungary, where constitution-makers carefully selected a configuration of institutional designs likely to maximize Fidesz’s power, but also were able to justify individual design choices to the Council of Europe and European Union as being present in some other “mature” liberal democracy.<sup>77</sup> Drafters can have a dramatic effect on institutions like courts simply by changing the calendar or rules for their members’ appointment.

Conflicting pressures toward critique and consolidation can also be accommodated through different levels of change. A common pattern is for the text of the new constitutions to proclaim a shift or advance in liberal-democratic constitutionalism while more covert formal and informal tools are used to make the regime less liberal and less democratic. Such tools work by packing courts and other institutions and by allowing the incumbents to exercise more power over the media and other aspects of civil society. In Hungary, for example, the governing party passed a set

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<sup>76</sup> See text accompanying notes 2–8.

<sup>77</sup> See Scheppele, 26 *Governance* at 561 (cited in note 70).

of temporary constitutional provisions<sup>78</sup> and the constitution also delegated a very substantial amount of the work in constructing a legal framework on sensitive issues to “cardinal laws.”<sup>79</sup> Together these two aspects of design did much of the work in strengthening the power of the governing majority over other aspects of the state and civil society. In Venezuela, likewise, the 1999 constitution included an innovative method for selecting the supreme court by giving a significant role to a commission staffed largely by representatives of civil society, a change that Chávez could present as part of a new participatory mode of government that would be superior to the closed and elitist nature of the old constitutional regime.<sup>80</sup> Yet Venezuela’s National Assembly avoided setting up this commission, opting instead to rely on a temporary constitutional amendment (and later other devices) to centralize appointment power in the executive branch.<sup>81</sup>

In this phase, as Scheppele notes, populist constitutional projects could be read as posing more of a detection-and-enforcement challenge for liberal-democratic constitutionalism rather than an ideological challenge.<sup>82</sup> That is, populist constitutionalism tends to masquerade as liberal democracy even when it is not, and the problem is figuring out how to use tools of domestic or international law to combat the covert moves that entrench the power of populist leaders and undermine checks on their authority. But in the long run, populism may pose a more ideological and thus fundamental challenge: a search for an alternative form of government that is clearly illiberal and increasingly undemocratic.

This is shown most clearly through a trajectory that I would identify as empirically likely—if not certain—with populist constitutions: when leaders are able to remain in power for long periods of time, the consolidation of power and undermining of

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<sup>78</sup> These included provisions allowing entities close to the government to transfer judicial cases, early retirement of judges and prosecutors, limitations on judicial power, more state power over recognition of churches, and special procedures allowing the government to control appointments to constitutionally independent institutions. See, for example, Tamas Boros, *Constitutional Amendments in Hungary: The Government’s Struggle against the Constitutional Court* \*2–3 (Friedrich Ebert Foundation Working Paper, Feb 2013), archived at <http://perma.cc/HC84-GZPA>.

<sup>79</sup> As an example, the Cardinal Law on Freedom of Religion and the Legal Status of Churches gave the parliament power to approve the registration of churches by a two-thirds majority and threatened those not approved with loss of their status. See Uitz, *Freedom of Religion and Churches* at 208–12 (cited in note 49).

<sup>80</sup> See Brewer-Carías, *Dismantling Democracy in Venezuela* at 227 (cited in note 22).

<sup>81</sup> See *id.* at 226–30.

<sup>82</sup> See Kim Lane Scheppele, *Autocratic Legalism*, 85 U Chi L Rev 545, 582–83 (2018).

checks will tend to become an increasingly overt part of their ideology, merging with the critique of past liberal-democratic regimes. Over time, the argument will no longer be about a deepening or shift in liberal-democratic practices, but rather the constraints of liberal constitutionalism may come to be viewed as dangerous hindrances to the projects that populist leaders pursue. Leaders will become increasingly willing to define their projects in other terms, as the Hungarian Prime Minister Viktor Orbán did recently when he referred to his aim as the construction of an “illiberal” regime and pointed to Turkey and Russia, rather than the West, as models for that regime.<sup>83</sup>

In the Andes, the new constitutions written in Venezuela, Ecuador, and Bolivia initially maintained presidential term limits, although they tended to lengthen them.<sup>84</sup> But after a while, Presidents Chávez, Correa, and Morales all sought changes to their own constitutions in order to remain in power indefinitely, and in each case, courts allowed these maneuvers to proceed despite constitutional texts that seemingly protected against sensitive constitutional changes of this kind.<sup>85</sup> The logic in each case was that the leaders were indispensable to the fulfillment of the political and economic projects being pursued: the goals of greater participation, inclusion, and socioeconomic equality could not be carried out without the leaders themselves staying in power.<sup>86</sup> This reflects, of course, a personalization of power that is often characteristic of populist regimes.<sup>87</sup> But beyond that, it shows a heightened tension between the imperative of liberal governance to limit power and the constitutional projects being carried out—liberalism in the framing of the regime becomes an obstacle to achievement of greater socioeconomic justice and inclusion. Venezuela is perhaps the most interesting case of such a framing. A major package of amendments proposed in 2007 by

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<sup>83</sup> Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp (Hungarian Government, July 26, 2014), archived at <http://perma.cc/T574-WE9Z>.

<sup>84</sup> David Landau, *Presidential Term Limits in Latin America and the Limits of Transnational Constitutional Dialogue*, 12 L & Ethics Hum Rts \*2 (forthcoming 2018), archived at <http://perma.cc/8LEF-MYF8>.

<sup>85</sup> See id at \*2; David Landau, *Term Limits Manipulation across Latin America—and What Constitutional Design Could Do about It* (ConstitutionNet, July 21, 2015), archived at <http://perma.cc/ZLZ4-5SHS>.

<sup>86</sup> See Landau, 12 L & Ethics Hum Rts at \*8 (cited in note 84).

<sup>87</sup> See Moffitt, *The Global Rise of Populism* at 52–55 (cited in note 11).

Chávez to his own 1999 constitution not only lengthened presidential terms to seven years and abolished presidential term limits; it also greatly increased emergency powers and weakened the remaining independence of the judiciary and other mechanisms of accountability, for example by making the recall procedures in the constitution harder to activate.<sup>88</sup> At the same time, it proposed to create new social transfers and labor protections and new institutions for public participation in the state. The campaign for a “yes” vote argued that the referendum would deepen the transition to socialism and give more power to the people.<sup>89</sup>

In Turkey, likewise, a set of constitutional reforms sponsored by the ruling party in 2010 combined a set of measures that increased individual rights with other changes that expanded the size of the constitutional court and, in other relatively subtle ways, allowed the government to pack the judiciary.<sup>90</sup> The debate occurred within the context of Turkey’s possible accession to the European Union, and a key argument of the “yes” vote was that the changes would facilitate this accession.<sup>91</sup> The overall thrust of the changes thus appeared to be liberalizing while the illiberal efforts to establish control over the judiciary were more covert.<sup>92</sup> In 2017, the party sponsored another referendum to shift Turkey from a parliamentary to a presidential system with a very strong president who would hold the power to dissolve parliament and a high degree of control over judicial appointments.<sup>93</sup> The referendum occurred during a state of emergency following a 2016 attempted coup, in the aftermath of which many dissidents were being jailed and removed from their positions for alleged collaboration with coup plotters or terrorists.<sup>94</sup> The arguments in favor

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<sup>88</sup> This referendum narrowly failed, but a reworked proposal that focused only on abolishing term limits passed in 2009. Many of the proposals defeated in the referendum were nonetheless later passed as statutes. Margarita López Maya and Alexandra Panzarelli, *Populism, Rentierism, and Socialism in the Twenty-First Century: The Case of Venezuela*, in de la Torre and Arnson, eds, *Latin American Populism in the Twenty-First Century* 239, 264 (cited in note 17).

<sup>89</sup> See *Chávez Urges Reform for Venezuela* (BBC News Dec 1, 2007), archived at <http://perma.cc/G8HK-2YYE> (describing Chávez’s promise of power to the people); Allan R. Brewer-Carías, *The Principle of Separation of Powers and Authoritarian Government in Venezuela*, 47 *Duquesne L Rev* 813, 834 (2009) (explaining how the proposed reform intended to deepen the transition to socialism).

<sup>90</sup> Varol, Pellegrina, and Garoupa, 65 *Am J Comp L* at 197–98 (cited in note 57).

<sup>91</sup> *Id.* at 198.

<sup>92</sup> See *id.* at 198–99.

<sup>93</sup> See Gunes, *What’s at Stake in the Turkish Constitutional Amendment Proposal* (cited in note 29).

<sup>94</sup> See Kingsley, *Erdogan Claims Vast Powers* (cited in note 7).

of the referendum this time focused explicitly on the incumbent President Erdoğan and the need to preserve order against the threats posed both by Kurdish secessionists and by the forces behind the coup.<sup>95</sup> Again, liberal limitations on power were increasingly viewed as an explicit hindrance to the constitutional project of the populist leader.

Populists may begin as critics promising to deepen liberal democracy or reinforce an underemphasized aspect of it, but they end up viewing liberal democracy as an obstacle to attaining their goals. The nature of the project becomes increasingly clear: not an improved liberal democracy, but a different kind of constitutional project altogether. Thus, populist constitutional regimes should be viewed as at least incipient challenges to liberal democracy, not just as disguised attempts to undermine them.

This trajectory is, again, a tendency, not an inevitability. Populist leaders can lose or leave power, as Correa did in Ecuador.<sup>96</sup> And even for projects that continue to deepen, there is almost certainly a stopping point short of pure authoritarianism. Populists will likely continue to hold relatively clean elections, in part because a claim to represent popular will is at the core of their legitimacy. This means that they can still lose referenda, as happened with term limit referenda in Venezuela (although a second attempt succeeded) and Bolivia.<sup>97</sup> But, as recent events in Turkey and Venezuela remind us, countries can go quite far down the road to authoritarianism while avoiding massive electoral fraud on the day of the election.

## CONCLUSION

This Essay has sought to clarify the functions that constitutions play in populist regimes with an eye toward better understanding the challenge that populists pose to liberal-democratic constitutionalism. It has argued that constitutional change under populism plays three key functions: deconstructing the old regime, consolidating power, and serving as an ideological critique

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<sup>95</sup> See Patrick Kingsley, *Turkey's Erdogan: Democracy's Savior or Saboteur?* (NY Times, Apr 14, 2017), online at <http://www.nytimes.com/2017/04/14/world/europe/turkey-erdogan-democracy-referendum.html> (visited Dec 24, 2017) (Perma archive unavailable) (noting that “supporters view the constitutional referendum as a necessary response to the chaos in Turkey”).

<sup>96</sup> Correa agreed to a proposal that lifted presidential term limits but did not go into effect until after the 2017 election. See Landau, 12 L & Ethics Hum Rts at \*15 (cited in note 84).

<sup>97</sup> Id.

of existing experiences with liberal-democratic constitutionalism. The ambiguity inherent in populist constitutional projects is inescapable; they stand both as promises to improve liberal democracy and as attempts to move away from it. Over time, however, the latter dimension may become increasingly overt, with populists casting liberal-democratic constitutionalism as an obstacle to their political projects.

For those interested in responding to the challenge posed by populism, the analysis here suggests two avenues of inquiry. The first seeks to stop the most durable negative effects of populism on liberal democracy by putting boundaries on forms of change. In this sense, the goal is to prevent populists from using the tools of constitutional change to entrench themselves in power for long periods of time. Restraints on constitutional amendment (and even replacement), such as the unconstitutional-constitutional-amendment doctrine, in some circumstances can act as a speed bump.<sup>98</sup> Internationally, the cases of Hungary and Poland have created a wave of scholarship and policymaking on ways in which international and regional actors like the European Union and the Council of Europe could restrain domestic moves toward authoritarianism.<sup>99</sup> The difficulty, of course, is in identifying the forms of change that pose a particularly salient threat and in figuring out how to make these interventions effective without

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<sup>98</sup> The unconstitutional-constitutional-amendment doctrine posits that proposed constitutional amendments may be “substantively unconstitutional because they undermine core principles in the existing constitutional order,” providing a justification for democratic institutions like courts to deny the amendments. Rosalind Dixon and David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 Intl J Const L 606, 607–08, 611–14 (2015) (surveying how existing scholarship justifies the doctrine). See also David Landau and Rosalind Dixon, *Constraining Constitutional Change*, 50 Wake Forest L Rev 859, 862–70 (2015) (challenging distinction drawn by some scholars that recognizes the constraint of constitutional amendment but not of constitutional replacement); Catherine Dupré, *The Unconstitutional Constitution: A Timely Concept*, in Armin von Bogdandy and Pál Sonnevend, eds., *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* 351, 359–61 (Hart 2015) (recounting the standards of democratic constitutionalism in the European Union as articulated by the Lisbon Treaty of 2009).

<sup>99</sup> See, for example, Joakim Nergelius, *The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania*, in Bogdandy and Sonnevend, eds., *Constitutional Crisis in the European Constitutional Area* 291, 296–307 (cited in note 98) (discussing how the Venice Commission has deployed its “soft” power in its advisory capacity to contest the authoritarian rise in Hungary and Romania); Jan Werner-Müller, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, 21 Eur L J 141, 149–51 (2015) (proposing a new European commission tasked with deciding whether member states’ actions depart from the democratic benchmarks of the European Union and empowered to levy economic sanctions against violators).

(ideally) ossifying tools of change that might also be used to renew liberal-democratic orders. A disquieting possibility is that performing both functions at once might be impossible; a successful project that limits problematic forms of constitutional change may inevitably limit experimentation that could rejuvenate liberal-democratic constitutionalism.

A second response runs deeper—rather than seeking to block populists from carrying out antidemocratic change, it seeks to respond to the political forces that empower them. Within the domain of constitutionalism, one key goal would be to construct a stronger affirmative case for liberal-democratic constitutionalism. Populist constitutionalism is (or at least tends to become) a challenge to liberal democracy. It exploits the real or perceived weaknesses of liberal-democratic constitutionalism to make the case that illiberal forms of governance are better able to respond to popular needs. It is not enough to merely detect and stamp out illiberal practices; the best defense against the potentially corrosive effect of populism is likely to be a strong constitutional culture that protects against erosion of this type. And such a culture must be founded on a liberal-democratic constitutionalism that works—that delivers stability, socioeconomic equality, and inclusion to its citizens. In this sense, at least, populism must be a mirror.<sup>100</sup> It must spur us to confront and respond to the weaknesses of liberal democracy.

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<sup>100</sup> See Francisco Panizza, *Introduction: Populism and the Mirror of Democracy*, in Francisco Panizza, ed., *Populism and the Mirror of Democracy* 1, 30 (Verso 2005):

By raising awkward questions about modern forms of democracy, and often representing the ugly face of the people, populism is neither the highest form of democracy nor its enemy, but a mirror in which democracy can contemplate itself, warts and all, and find out what it is about and what it is lacking.