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### **SYMPOSIUM: PUBLIC LAW AND THE NEW POPULISM**

Ming-Sung Kuo

### **Against Instantaneous Democracy**

NYU School of Law • New York, NY 10011  
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ISSN 2161-0320 (online)  
Copy Editor: Danielle Leeds Kim  
© Ming-Sung Kuo 2017  
New York University School of Law  
New York, NY 10011  
USA

Publications in the Series should be cited as:  
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

## Against Instantaneous Democracy

Ming-Sung Kuo\*

### Abstract

In this paper, I take a formal approach to recent populist movements, aiming to make a prognosis of a new strain of populism. I argue that new populism emerges from the communications technology-driven pursuit for unmediated politics, betraying a pathology of instantaneous democracy. As constitutional democracy is premised on a double structure of articulated politics—constitutional decision-making as a multistage process with individual stages articulated to each other; the structural articulation of the formal constitutionalized powers and the unformed public opinions—which assumes a temporal gap, first, between each stage of formal decision-making, and, second, between public opinions and policies, this assumed temporal gap is virtually obliterated amidst the wave of new populism. As a result, democracy becomes instantaneous at the expense of representation and deliberation. This is the fundamental challenge posed by new populism. In conclusion, I suggest that regenerating the learning function of democracy by deceleration is critical in combating new populism.

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Acknowledgment: This working paper is a partially revised version of my paper presented at the “Public Law and the New Populism” workshop held at NYU School of Law on September 15 & 16, 2017. I am grateful to Stephen Gardbaum, Oliver Gerstenberg, Christine Landfried, Peter Lindseth, Vlad Perju, and Neil Walker for their helpful comments and suggestions. All errors are mine.

## I. INTRODUCTION

“Populism talks” come and go. Since it first appeared in the nineteenth-century Russia, the world has seen waves of populism.<sup>1</sup> Subsumed under the fashionable label “new populism,” the political tides foregrounded by the Brexit referendum, Donald Trump’s election victory, and the surge of the radical parties in Europe from Greece to Poland heralded the latest round of populism talk. Yet, in view of the UK’s plunge into political disarray vis-à-vis a united EU in the ongoing Brexit negotiations and the electoral pushbacks against Geert Wilders’ *PVV* in the Netherlands and Marine Le Pen’s *Front national* in France, this new wave of populist politics appears to have crested.<sup>2</sup> Looked at through this lens, the latest surge of populism is mostly attributed to the right-wing politicians in liberal democracies and just part of the wax and wane of anti-establishment feeling in modern political history. To fight back against the tide of populist sentiments, what we need is to subscribe to the then Candidate Emmanuel Macron’s winning strategy to put a human face on globalization instead of turning away from it.<sup>3</sup> With a more even distribution of the benefits of globalization and the continuing reform of transnational institutions, people will come to senses and elect to live in democratic values, not populist sentiments. So say the triumphant and globalist Macronphiles.<sup>4</sup> Viewed thus, there is nothing new about the so-called new populism

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<sup>1</sup> PIERRE ROSANVALLON, *COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST* 265 (Arthur Goldhammer trans., 2008); JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 18 (2016).

<sup>2</sup> See, e.g., Rafael Behr, *From Brexit to Trump, on Both Sides of the Atlantic Populism Has Run Aground*, THE GUARDIAN, July 4, 2017, <https://www.theguardian.com/commentisfree/2017/jul/04/brexit-trump-atlantic-populism-g20>; Rogers Brubaker, *Populism’s Perfect Storm*, BOSTON REVIEW, July 11, 2017, <http://bostonreview.net/politics/rogers-brubaker-populisms-perfect-storm>.

<sup>3</sup> Mathieu Laine, *Now Macron Can Help Europe Win the War Against Populism*, THE GUARDIAN, May 8, 2017, <https://www.theguardian.com/commentisfree/2017/may/08/macron-help-europe-win-war-with-populism-presidential-election-le-pen>.

<sup>4</sup> Compare Laine, *supra* note 3, with David Bach, *Does Macron’s Victory Signal the Defeat of Populism? Not So Fast*, HUFFPOST, May 9, 2017, [http://www.huffingtonpost.com/entry/does-macrons-victory-signal-the-defeat-of-populism\\_us\\_5911e6d6e4b0e070cad70906](http://www.huffingtonpost.com/entry/does-macrons-victory-signal-the-defeat-of-populism_us_5911e6d6e4b0e070cad70906). Notably, Macron’s surge bears a resemblance to populism. Greg Sheridan, *French Election: Emmanuel Macron’s New Twist on Populism*, THE AUSTRALIAN, April 25, 2017, <http://www.theaustralian.com.au/opinion/columnists/greg-sheridan/french-election-emmanuel-macron-s-new-twist-on-populism/news-story/7802d3ee24730a4cb681392c09d92058>.

except that it is the most recent arrival in the ebb and flow of right-wing populist tides.<sup>5</sup> There seems to be not much to talk about in the latest round of populism talk.

It is not the lens through which I read new populism in this paper. My aim is not to engage in the debate as to whether the recent wave of populism has crested and whether the social condition for the thriving of populist politics remains unchanged.<sup>6</sup> Rather, my objective is limited and it is to find out what is new in the latest surge of populism and how it shakes up constitutional democracy as we know it. Taking a formal approach to recent populist movements and looking beyond their substance,<sup>7</sup> I aim to draw out the features shared by some of the recent populist movements, which suggest a new development in the history of populism. Though not all recent populist movements that are colloquially dubbed new populism point in a new direction of populism, the new development, as will be further discussed, deserves a closer look as it poses more fundamental challenges to constitutional democracy than the exclusionary form of identity politics in traditional populist movements does.<sup>8</sup> *New populism* is new because it brings the question of what I call the “structural articulation” in constitutional democracy into the limelight.

I aim to achieve two goals in this paper. The first is to bring the double structural articulation in constitutional democracy to the fore. The institution of constitutional democracy is premised on the structure of articulated politics in the sense that first, constitutional decision-making is a multistage process with individual stages articulated to each other. The second structure of articulated politics exists between the formal

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<sup>5</sup> Jan-Werner Müller’s influential book on populism takes this view. With the recent examples of populism in mind, he defines populism as an antielitist, antipluralist movement of exclusionary identity politics. MÜLLER, *supra* note 1, at 2-4.

<sup>6</sup> Compare MÜLLER, *supra* note 1, at 41, with Brubaker, *supra* note 2.

<sup>7</sup> For a substance-oriented observation of recent populist movements, see MÜLLER, *supra* note 1.

<sup>8</sup> Notably, the feature of exclusionary identity politics tends to make populism inseparable from right-wing political movements. Yet, as Müller rightly points out, left-wing populism as exemplified in several Latin American countries also evokes exclusionary identity politics, though the focus is on class, not race or ethnicity. See *Id.* at 31-34, 73-74. Centering on the substantive feature of exclusionary identity politics, however, Müller’s critique of recent populist movements merges into those that were directed against totalitarian ideologies. Cf. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (Schocken Books 2004) (1951).

constitutionalized powers and the people's unformed public opinions. Unformed opinions are that into which formal powers tap for political replenishment so much so that both are articulated to each other and integral to constitutional democracy. My second goal is to shed light on how structural articulation works and why new populism poses a fundamental challenge to constitutional democracy. To put it simply, both structures of articulation work on the assumption that there exists a temporal gap and distinction, first, between each stage of formal decision-making, and, second, between the incubation of opinions and the formation of policies. Yet this assumed temporal gap and distinction is virtually obliterated amidst the wave of new populism. As a result, democracy becomes instantaneous at the expense of representation and deliberation, shaking the structure of articulated politics to its foundations. This is the fundamental challenge that new populism poses to constitutional democracy.

My thesis is that new populism in the latest round of populist movements betrays the pathology of instantaneous democracy, which poses profound challenges to the structure of articulated politics at the heart of constitutional democracy. In conceiving responsive strategies to mitigate the effect of instantaneousness that threatens structural articulation, the idea of "deceleration" sheds light on the direction we can think further. By decelerating instantaneous democracy, the learning function of democracy can be revitalized and given a role in the battle against new populism. My argument is structured as follows: I first provide a diagnosis of the move towards instantaneous democracy as embodied in new populism and then discuss the premised structure of articulated politics in constitutional democracy with a focus on why it is endangered as democracy takes on the character of instantaneousness. To complete my prognosis of new populism, I finally explore the idea of judicial deceleration as a possible response to challenges from instantaneous democracy.

## **II. A (FOOL'S) DEMOCRATIC DREAM COME TRUE: AUTHENTICITY, INSTANTANEOUSNESS, AND NEW POPULISM**

Anti-establishment has long been recognized as the common feature of populist movements.<sup>9</sup> From Juan and Eva Peron's appeal to class-transcendent masses to Donald Trump's self-claimed voice of America's disaffected working class, from Brexiteers' defiance against mainstream economists' warning to European radical parties' disdain for the Brussels expertocracy, all the populist movements, past and present, tap into antiestablishment sentiments. It is not only true on both sides of the Atlantic. Both Recep Tayyip Erdogan's dethroning of the Kemalists in Turkey and Rodrigo Duterte's sneering at the human rights values established by the 1986 Filipino People Power also appeal to the popular distrust of established institutions and conventional opinion leaders. Yet antiestablishment passion alone does not bring about the political phenomenon of populism. Rather, populism takes a particular form of antiestablishment movement, which makes it a genuine threat to democracy. Populism becomes a special concern to constitutional democracy because on the face of it, populism looks no different from other democratic forces. For this reason, populism is a pathology of democracy.<sup>10</sup>

As indicated in all the previous examples of populist movements, broad dissatisfaction with the status quo of democracy is their shared symptom.<sup>11</sup> When the government fails to deliver what the people have hoped for, they naturally seek change. Yet what differentiates populist sentiments from the periodic disappointment at the performance of democratically elected governments is that the people turn to populist political movements when they are not only discontent with the policy result of democratic institutions but also feel disenchanting with the institutions themselves.<sup>12</sup> In other words, populist movements gather momentum when the people attribute a lost war, a miserable economy, or other difficulties in their lives to the democratic institutions.

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<sup>9</sup> MÜLLER, *supra* note 1, at 1; Robert R. Barr, Populists, *Outsiders and Anti-Establishment Politics*, 15 PARTY POL. 29, 31 (2009).

<sup>10</sup> ROSANVALLON, *supra* note 1, at 267.

<sup>11</sup> Barr, *supra* note 9, at 32.

<sup>12</sup> *Id.*

Notably, blaming the unhappy life condition on the democratic institutions alone does not give the full picture of populism. For example, antidemocratic forces such as ambitious coup plotters in the armed forces and enthusiasts of one-party rule may make pitches to those who have been devastated by a lost war, for example, and therefore lost faith in democracy. In those cases, elections are cancelled and democracy is displaced by military dictatorship or revolutionary one-party rule. The difference between democracy and dictatorship is conspicuous and plays out as a fundamental choice as to the political system.<sup>13</sup> Dictatorship poses an existential threat to democracy for sure and the latter may degenerate into the former if we are banal about democratic institutions but it is hard to mistake one for the other.

Juxtaposed against the conspicuousness of antidemocratic forces such as military coup plotters or one-party rule revolutionaries, the semblance of democracy in populism makes it deceptively enchanting. For this reason, the challenge populism poses towards constitutional democracy is subtle and even more fundamental.<sup>14</sup> Like coup plotters or revolutionaries, populists do blame democratic institutions for a lost war or a miserable economy. In contrast to those antidemocratic forces, however, populist movements fall short of challenging the core institution of democracy, i.e., election, existentially, at least when they are emerging from crowds.<sup>15</sup> Rather, they attack the institutional players in electoral democracy such as political parties and other democratic media for their intermediary role in the formation of the general will, if you will.<sup>16</sup> These democratic media filter out the authentic choices from the people, turning democracy into the instrumentality of the privileged sectors of society, allege populists. Assuming that election is a necessary condition for democracy,<sup>17</sup> populism does blame democratic institutions but falls short of assaulting democracy in the way dictatorship or totalitarianism does.<sup>18</sup> Compared to the conspicuously antidemocratic

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<sup>13</sup> Mike Alvarez et al., *Classifying Political Regimes*, 31 *STUD. COMP. INT'L DEV.* 3, 4 (1996).

<sup>14</sup> Cf. Paul Taggart, *Populism and the Pathology of Representative Politics*, in *DEMOCRACIES AND THE POPULIST CHALLENGE* 62, 79 (Yves Mény & Yves Surel eds., 2002).

<sup>15</sup> Jules Coleman, & John Ferejohn, *Democracy and Social Choice*, 97 *ETHICS* 6, 14 (1986).

<sup>16</sup> Taggart, *supra* note 14, at 71-75.

<sup>17</sup> ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 128-32 (1956).

<sup>18</sup> Müller discusses how populists rationalize their “failure” to win elections and the tendency among



forces, populism poses a different threat to constitutional democracy.

The foregoing discussion shows that populism appeals to anti-establishment feeling and attributes the miserable policy results of an elected government to its democratic institutions without rejecting the core institution of election in a constitutional democracy. Then, what are the targeted democratic institutions in the populist reaction to the status quo of democracy? In the eyes of populists, the problem with the status quo of democracy is its failure to give voice to the authentic opinions of the people. This is a restatement of the classical principal-agent question in political representation.<sup>19</sup> Yet what sets populism apart from other responses to the agency problem in democracy is its appeal to authenticity.<sup>20</sup> To see this point, let us take a closer look at how “representation” looks in the eyes of populists.<sup>21</sup>

As far as political representation is concerned, a populist politician does not claim to better represent the people in the sense that he interprets what the people say and think more faithfully and renders it in wiser policy choices. Rather, he professes his character to *re-present* (or rather “instantiate”) the authentic will of the people because the people are persuaded to identify themselves in his populist movement.<sup>22</sup> On this view, existing parties are not representative at all but part of the problem instead. In the place of these incorrigible political parties is not just another new party with an alternative platform to which constituents would subscribe. What replaces the old parties is the character-defined political movement in which his followers can identify

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populist movements to entrench their power by distorting the election processes and strengthening the executive after electoral victories. Yet, he falls short of explaining why populists choose to participate in the electoral mechanism in the first place instead of boycotting or even sabotaging it. See MÜLLER, *supra* note 1, at 27, 29-30, 66-69.

<sup>19</sup> See HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 47-48, 109-10, 121-25 (1972); see also Bruce A. Ackerman, *Neo-federalism?*, in *CONSTITUTIONALISM AND DEMOCRACY* 153, 166-74 (Jon Elster & Rune Slagstad eds., 1988).

<sup>20</sup> Ben Stanley, *The Thin Ideology of Populism*, 13 *J. POL. IDEOLOGIES* 95, 104 (2008); see also MÜLLER, *supra* note 1.

<sup>21</sup> ROSANVALLON, *supra* note 1, at 267; Taggart, *supra* note 14, at 71-75.

<sup>22</sup> This can be understood as a regression of representation back to instantiation in the constitution of political ordering. See PITKIN, *supra* note 19, at 241-42; PAUL W. KAHN, *THE REIGN OF LAW: MRBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 193-95 (1997).

themselves.<sup>23</sup> In terms of Hannah Pitkin's theory of political representation, a populist politician represents the people by "standing for" vis-à-vis "acting for" them.<sup>24</sup>

By virtue of authenticity, populism dissolves the agency problem. To make the authenticity appeal work, a populist politician will have to find a direct link between himself and the people.<sup>25</sup> Through this link, the populist politician can make the people believe that he is their messenger by publicizing his personal traits as evidence of authenticity so much so that the people will be able to find themselves in the character of the populist leader.<sup>26</sup>

This does not mean that what a populist politician says means little to his targeted audience. On the contrary, what he tells determines whether the populist passion will bring about a successful populist movement or just more empty populism talks. To succeed, what a populist politician says needs to fit into the genre of political narratives, i.e., a story about his personal character.<sup>27</sup> This politically constructed character needs to be both unique and familiar. It needs to be unique because only the populist leader is supposed to have the right balance of the various traits in his character.<sup>28</sup> At the same time, his character cannot be unfamiliar. The politically constructed character will fail to evoke resonance from the populist politician's followers if they are unable to see a bit of themselves reflected in at least one of his character traits. Thus, the key to the populist political representation lies in the "descriptive" correspondence between a populist leader and the followers.<sup>29</sup> Through the prism of the leader's politically

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<sup>23</sup> Seen in this light, Macron and his *En Marche!* are a phenomenon of populism, too. *But cf.* MÜLLER, *supra* note 1, at 36-37, 42-43.

<sup>24</sup> See PITKIN, *supra* note 19, at 60-111.

<sup>25</sup> MÜLLER, *supra* note 1, at 35-36.

<sup>26</sup> *Cf.* PAUL W. KAHN, *FINDING OURSELVES AT THE MOVIES: PHILOSOPHY FOR A NEW GENERATION* 67-70 (2013).

<sup>27</sup> This is why political biographies become a fad in election campaign. *See also* Rosa van Santen & Liesbet van Zoonen, *The Personal in Political Television Biographies*, 33 *BIOGRAPHY* 46 (2011).

<sup>28</sup> Müller fails to see the possibility of "right balance" when he vaguely notes the "charismatic," "extraordinary gifts" of Hugo Chávez. "MÜLLER, *supra* note 1, at 32-33.

<sup>29</sup> Pitkin points out two forms of representation by "standing for:" descriptive and symbolic. *See* PITKIN, *supra* note 19, at 60-111. Speaking of "the fascist theory of representation," she argues that it was an instance of symbolic representation. *Id.* at 107-11. *See also* MÜLLER, *supra* note 1, at 27-29. I shall come back to this distinction later.

constructed character, political ideas, policy proposals, and reform plans are read. Ideas, proposals, and plans all fade into his character traits as depicted in his personal story.<sup>30</sup>

From the perspective of authenticity, deliberation becomes the excuse for hesitation on decision or aversion of responsibility; representation turns out to be the grand scheme of screening out unwanted opinions; civilities reflected in the political protocols appear as hypocrisy. All of them are despised as signs of inauthenticity. As a result, both deliberative and representative democracy are seen as the forms of political diversion and thus the failure of authenticity. It is no accident that in contrast to the conventional wisdom that the charismatic populist leader stands as the authentic symbol of the people's moral impeccability,<sup>31</sup> a modicum of vulgarity usually comes with a new populist movement as it is presented as the evidence of the authenticity of its populist leader. In the shared, not so sophisticated, but unfiltered daily character traits the populist leader and his targeted people seem to find each other. The former is not just a symbol of political identity. Rather, both are descriptive of each other. This is the current form in which new populists stand for the people. Through the populist lens, making policies on the basis of authenticity unburdened by deliberation or reflection is the ultimate form of politics based on identity, the eternal democratic dream worth pursuing.<sup>32</sup>

I hasten to add that appealing to authenticity is not what is new about the latest round of populism talk. Rather, populist movements have long spoken the language of political identity, longing for authenticity.<sup>33</sup> Yet, to appeal to authenticity, a direct link

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<sup>30</sup> Cf. PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY* 199-200 (Arthur Goldhammer trans., 2011). Notably, race, language, and ethnicity are the most visible identifiers of political identity and populists tend to align themselves with nationalists, nativists, or even racists. CARL SCHMITT, *CONSTITUTIONAL THEORY* 247-48 (Jeffrey Seitzer trans., 2008). Yet populism does not necessarily build on racism, nationalism, or other culture-based nativist ideas. See *supra* note 8.

<sup>31</sup> See MÜLLER, *supra* note 1, at 27-29.

<sup>32</sup> Compare SCHMITT, *supra* note 30 at 239-49, with ROSANVALLON, *supra* note 30, at 187-88. Cf. ROSANVALLON, *supra* note 1, at 267.

<sup>33</sup> Francisco Panizza, *Introduction: Populism and the Mirror of Democracy*, in *POPULISM AND THE MIRROR OF DEMOCRACY* 1 (Francisco Panizza ed., 2005).

must be found between the populist leader and the targeted audience.<sup>34</sup> Needless to say, like all politicians, populists need means of communications and usually speak through a medium. So the central question for would-be populists is whether they can build such direct link through the means of communications. In the old days, they relied on pamphleteering or editorializing to make their views known. Later on, they turned to the radio and TV broadcasting to make appeals to the people. Of course, they also made appearances in mass political rallies from time to time. Yet, at most times, the politicians who appealed to authenticity only found their messages mediated through some medium. After making their authenticity appeals, populist politicians had to wait and rely on the media to spread the word. In the meantime, political dynamics did not stop for the word to spread out and some unexpected events might intervene. This is the structural constraint on appeals to authenticity. Situated in the mediated form of politics, the populist leader is denied the means to make the people identify themselves with him. The lack of direct links sets the populist leader and the people apart. This explains why populism talks abounded in history but only a few ended up in a successful political movement.

Yet, with the coming of the age of social media, the wait ends and the intermediary media becomes dispensable.<sup>35</sup> Now politicians find the missing direct link with the people through the Internet. In the real world, they may be distant and disconnected from each other. In the virtual space, politicians and the people can bond together by a simple finger touch thanks to the advance of communications technologies. This does not suggest that all politicians are turning themselves into populists, not to mention right-wing ones, in the age of social media. Nevertheless, the political landscape pervaded by social media is layered with the soil for the flowering of populism. It is also worth noting that the direct link between politicians and the people made possible by social media and other communications gadgets is not a one-way traffic. Not only do politicians appeal to the people directly but the people also press politicians and communicate among themselves unaided by traditional media. This is why new

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<sup>34</sup> See MÜLLER, *supra* note 1, at 35-36.

<sup>35</sup> CASS R. SUNSTEIN, #REPUBLIC: DIVIDED MOCRACY IN THE AGE OF SOCIAL MEDIA (2017).

populism presents political leaders who come closer to standing for the people in the descriptive sense as noted above, falling far short of the political symbols of moral integrity seen in traditional populist movements. In new populism, the link between politicians and the people becomes one of not only directness but also immediacy thanks to the innovation of social media. In other words, the age of social media redefines political temporality by accelerating the tempo of democratic processes, heralding the arrival of instantaneous democracy.<sup>36</sup>

The democracy of instantaneousness brings about a new political landscape. On the one hand, it releases the untapped political energy in democratic societies, suggesting a more responsive and unmediated form of politics. On the other hand, instantaneousness unleashes the spell of authenticity. In the eyes of populists, this appears to be a democratic dream come true. The feature of instantaneousness breathes new life to populism. New populism points in the direction of unmediated politics.

### **III. THE QUESTION OF STRUCTURAL ARTICULATION: GOVERNANCE UNDER INSTANTANEOUS DEMOCRACY**

Though instantaneousness is what accounts for *new* populism as it suggests the immediacy of communication and brings fresh impetus to the populist pursuit of authenticity, the central questions of new populism as a political phenomenon remain unanswered. To what extent does the instantaneousness of new populism impact on constitutional democracy? Is unmediated politics a problem at all? To assess the state of democratic institutions in the shadow of instantaneous democracy, we need to take a step back to look at the structure of constitutional governance more closely.

#### **A. *The Double Structure of Articulation***

One of the major achievements of modern constitutionalism is to tame political

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<sup>36</sup> See generally WILLIAM SCHEUERMAN, LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME (2004).

power through a constitutional framework. To cut the long story short, in the face of the autonomous political power unleashed by the progress from premodern feudalism to modern sovereignty, modern constitutions emerged as the solution to the issues arising from the dominant role of the government in steering social relations. Modern constitutionalism aims to maintain the state's political autonomy without reducing the energetic civil society to the government's subsidiary.<sup>37</sup> To this end, the political power is framed within a "constitutional form."<sup>38</sup> In this way, the scope of government power is delimited to allow for the free space of civil society in the re-founding of the political power on the constitutional ground.<sup>39</sup> Apart from the framing of the political power, citizens are expected to become part of the collective authorship of the laws that steer their lives through the representative government organization.<sup>40</sup> Thus, in the modern constitutional project, the exercise of government power is divided among three (or more) separate governmental departments aimed at "self-determination."<sup>41</sup> Constitutional democracy is the fruit of the constitutionalization of political ordering, while the separation of powers is at the core of the modern constitutional design.

Read in this light, the constitutional design of the separation of powers means that the government power is divided to prevent the emergence of the unlimited and uncontrollable state. Yet a closer look will reveal that such constitutional design pivots on a structure of articulation, not separation. Traditionally, the division (or separation) of powers into the three branches (or stages) of administration, legislation, and adjudication is considered essential to preventing tyranny and preserving liberty by setting up a limited government. Jeremy Waldron finds such explanations

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<sup>37</sup> See ERNST-WOLFGANG BÖCKENFÖRDE, *STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW* 26-46 (J.A. Underwood trans., 1991); N.W. BARBER, *THE CONSTITUTIONAL STATE* 17-33 (2010).

<sup>38</sup> See Martin Loughlin & Neil Walker, *Introduction, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 1, 1-3 (Martin Loughlin & Neil Walker eds., 2007).

<sup>39</sup> See Ulrich K. Preuss, *CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS* 2-4, 52-53 (Deborah Lucas Schneider trans., 1995).

<sup>40</sup> See Paul W Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 *WM. & MARY L. REV.* 115 (2014).

<sup>41</sup> See CHRISTOPH MÖLLERS, *THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS* 51-109 (2013).

unsatisfactory or incomplete.<sup>42</sup> Instead, he seeks to redefine the separation of powers as a constitutional design of “articulated governance” and explain its structure through the lens of how the political power is channelled into constitutional governance.<sup>43</sup>

To start with, as the tripartite separation of powers suggests, constitutional governance comprises the legislative, administrative, and judicial exercise of power.<sup>44</sup> Further along this line of thinking, Waldron looks beneath its surface and observes that the exercise of power under the tripartite separation of powers can be further divided into ten stages or so.<sup>45</sup> Specifically, to turn an idea into reality, the people must be able to envisage the desired political action (I), formulate the action plan as policy in legislative bills (II), and enact the policy into law through the legislative processes of deliberation and voting (III). Following its enactment, the law needs to be made known to the public so that the people can take the change resulting from the new legislation into consideration and adjust their life plans accordingly (IV). In the meantime, the law needs to be communicated to the administrative agencies administration, too, as they have to develop strategies for enforcement (V). Furthermore, disputes are expected to arise when the agencies actually implements its enforcement strategies (VI). Though the agencies may take initial decisions as to how to respond in such cases (VII), disputes are likely to end up in the court. The court has to adjudicate on disputes after a series of hearings (VIII & IX). Yet this is not the end of the multistage process of constitutional governance. After the court makes the ruling, to put the initial idea into action requires one more stage in the exercise of political power: compliance (X).<sup>46</sup> Taken as a whole, constitutional governance is a function of the foregoing constitutionally ordered multistage exercise of political power through which ideas can be turned into policy and laws are put into action.

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<sup>42</sup> JEREMY WALDRON, *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTION* 49-54 (2016).

<sup>43</sup> *Id.* at 45, 62-70.

<sup>44</sup> See MÖLLERS, *supra* note 41.

<sup>45</sup> It should be noted that Waldron is vague about how each stage is exactly defined and demarcated from others. He simply notes that “[t]his, by my account, is a ten-part process. But the numbers don’t matter.” WALDRON, *supra* note 42, at 64.

<sup>46</sup> *Id.* at 63-64.

Waldron's in-depth analysis not only illuminates the constitutional channelling of political power through a multistage process under the tripartite separation of powers. Moreover, it reveals the structural relationship between individual decisionmaking stages, which lies at the heart of constitutional governance. I have mentioned that the objective of constitutional governance is to turn political visions and ideas into reality through the constitutionally ordered exercise of power. Though an idea or a vision needs to be translated into norms in the first place through legislation, administrative acts, or judicial ruling, it needs to be acted out by the people in their daily lives in the final analysis. Thus, apart from norm translation, the peaceful and smooth compliance of the idea-turned norms is essential to constitutional governance. And, the peaceful and smooth compliance of new norms depends largely on whether they fit into the people's life plans through a reflective process of norm internalization, so to speak. To this end, each stage in the multistage decisionmaking process is distinctive in contributing to the "incorporation of new norms into the lives and agency of those who are to be subject to them."<sup>47</sup> That is the function of democratic learning embedded in the multistage process of constitutional governance.<sup>48</sup> On this view, each stage exists in its own right but is articulated to others at the same time as it paves the way for the next. An idea does not turn into reality until it passes most of the distinct but articulated stages of the multistage constitutional decision-making process.<sup>49</sup> The articulation of the multiple stages of decision-making within the constitutional design of separation of powers is the first underlying structural articulation of constitutional governance.

To allow the people to internalize the norms through the multistage process, each stage must last for a certain period of time instead of existing only at a fleeting moment, suggesting that a temporal gap and distinction exists between individual stages. This is why Waldron contends that apart from the reflective internalization of the norms, the multistage process also allows the norms themselves to "'settle in' and become a basis"

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<sup>47</sup> *Id.* at 64.

<sup>48</sup> *Cf.* ANDREW ARATO, *POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY* 11 (2016).

<sup>49</sup> Not all norm implementation results from administrative enforcement or judicial adjudication. The people may simply act in accordance with the new norm.



on which both the people and the government agencies plan their next step in life in the face of new norms.<sup>50</sup> The constitutional design of the separation of powers works on the assumption that democratic decisions are taken over a period of time, not at a transient moment. Only at this “stepwise” and deliberative tempo can individual stages of the multistage process be articulated to each other, thereby new norms being incorporated into the lives and agency of those who are to be subject to them. And, it is in this way that the “stepwise” realization of power in the constitutional structure of articulated governance “embodies the concerns about liberty, dignity, and respect that the rule of law represents.”<sup>51</sup> Viewed thus, the separation of powers is not only about the constitutional ordering of political power. It is the institutional kernel of constitutional democracy.

As suggested above, one of the stages in the extended process of constitutional governance is to communicate the idea-turned norms to the people so that they can adjust their life plans accordingly. Notably, such communication is anything but unilateral propaganda. Its success pivots on whether the norms can be effectively incorporated into the people’s daily lives and their agency through reflective self-internalization. The people are not merely the passive receivers of the legal precepts in the project of constitutional governance. Moreover, the post-enactment communication is not the only stage in which the people play a political role in constitutional governance. I am not referring to election. What I have in mind is the people’s input to the envisaging of a political action and their interaction with the institutional players through the multistage process. The people’s multifaceted intervention in the constitutional decision-making process is an integral part of constitutional governance. Seen in this light, constitutional democracy stands as a political project aimed at striking a right balance of democratic legitimacy and distrust of power.<sup>52</sup>

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<sup>50</sup> WALDRON, *supra* note 42, at 63-64.

<sup>51</sup> *Id.*

<sup>52</sup> See ROSANVALLON, *supra* note 1, at 3-4. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1981).

Historically the people became “politicized” beyond bestowing democratic legitimacy on the governing authorities. Early precedents include the “tribunal of ephors,” the residual right to resistance, and the Athenian political trials.<sup>53</sup> They do not completely disappear from the modern constitutional project. Instead, maintaining distrust of democratically legitimate power, which underlay those historical examples, has found its way into the modern constitutional design through the institutions such as independent auditing, opposition party, and recall election. All of them work on the principle of democratic distrust, which keeps vigilance about democracy, holds onto a variety of veto powers on democratic decisions, and reserves the final judgment to the people themselves.<sup>54</sup> More important, the people’s intervention does not necessarily take place through formal institutions. Rather, under the same principle of democratic distrust, the people can be politically active through their unformed opinions. That explains why “public opinion” has been variably associated with the concepts of “civic vigilance,” “critical sovereignty,” and the people’s “judgment” in political theory.<sup>55</sup> Those variations on the role of the public opinion in democratic societies are evocative of the people’s unformed intervention in the multistage process of constitutional governance as counterbalance to the democratically elected government.

Thus, the people’s multifaceted intervention, often in the name of the unformed public opinion, which Pierre Rosanvallon calls “counter-democracy” (vis-à-vis electoral democracy centering on the formal powers in constitutional governance),<sup>56</sup> is critical to constitutional democracy. The term “*counter*-democracy” may be misleading but is suggestive of the relationship between the formal powers and the people’s unformed public opinions in constitutional democracy. It is noteworthy that the people’s political intervention through unformed public opinions is not “*anti*-democratic” as it is not

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<sup>53</sup> For the forms of institutionalized counter-democracy in history, see ROSANVALLON, *supra* note 1, at 33-75, 133-47, 179-86, 195-202.

<sup>54</sup> *Id.* at 33, 179-80, 207-26.

<sup>55</sup> *Id.* at 39, 160, 201.

<sup>56</sup> *See id.* at 12-18.

antagonistic towards the formal constitutional powers.<sup>57</sup> For this reason, public opinions are neither a depoliticized expression of personal views nor an anti-political performance of collective cynicism. Rather, the formal powers and the people's unformed public opinions are effectively the twin pillars of governance under constitutional democracy. Though they are distinct and rub against each other from time to time, they are structurally articulated to ensure the functioning of constitutional democracy.<sup>58</sup> Alongside the articulation of the multiple stages of decision-making within the formal constitutional powers, this is the second underlying structural articulation of constitutional governance.

### **B. After Articulated Governance**

I have noted that the structural articulation in the multistage process of constitutional decision-making works on a stepwise and deliberative political tempo as democratic decisions are taken over a period of time. This assumption applies to the second structural articulation, too. To see why the articulated relationship between the formal powers and the people's unformed public opinions assumes a deliberative tempo, let us first take a close look at the current condition of the people's unformed political intervention instead.

As noted above, distrust underlies the people's intervention through unformed public opinions with an eye towards maintaining the balance between democratic legitimacy and distrust of power. Thus, regardless of whether they shape up as civic *vigilance*, *critical* sovereignty, or the people's *judgment*, the intervention is supervisory rather than initiatory. To put it differently, the people's intervention acts like an exercise of the negative sovereignty of veto power, which dovetails the employment of positive sovereignty through the formal powers' democratic decisions.<sup>59</sup> Apparently, the articulated relationship between negative and positive sovereignty is not

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<sup>57</sup> See Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RES. 745 (1999).

<sup>58</sup> See ROSANVALLON, *supra* note 1, at 3-8.

<sup>59</sup> See *id.* at 302.

frictionless.<sup>60</sup> As Rosanvallon observes, when public oversight, critical sovereignty, and the people's judgment became radicalized, the people's unformed public opinions would be divorced from the formal constitutional institutions. Vigilant oversight and public criticism would no longer be the ways of increasing citizen activity but rather become the rejectionists' means of institution heckling and wrath venting,<sup>61</sup> while judgment would only serve to avoid making decisions and dodging responsibility instead of enhancing the political responsibility of decision-making.<sup>62</sup> As a result, the people's unformed public opinions would turn into a disruptive force for the formal institutions of constitutional governance. In that scenario, the people's unformed public opinions would no longer be that into which the formal powers could tap for political replenishment but instead become "unpolitical," if not anti-political.<sup>63</sup> Not much to anyone's surprise, that scenario is not imaginary. It is the current condition of counter-democracy as diagnosed by Rosanvallon.<sup>64</sup>

It is beyond the scope of my paper to pinpoint the causes of the radicalization of counter-democracy or as I call it, the people's unformed public opinions. Yet it is obvious that empowered by social media, the people are now able to intervene in the positive exercise of political power at any stage in the multistage process of constitutional governance immediately to such an extent that the line becomes blurred between the formal powers and the unformed public opinions, the two sides of constitutional democracy.<sup>65</sup> Institutional decision and public reaction take place virtually synchronously. "[I]mprisoned in the immediate,"<sup>66</sup> the current interaction between the formal powers and the people's unformed opinions suggests an instantaneous decision-making style, displacing the stepwise and deliberative political

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<sup>60</sup> *See id.* at 299.

<sup>61</sup> *See id.* at 190.

<sup>62</sup> *See id.* at 271-72.

<sup>63</sup> *See d.* at 253-64.

<sup>64</sup> Alternatively, this can be seen as the "emergent property" of the continuous improvement of constitutional democracy by enhancing the responsiveness of the formal powers to the unformed opinion and the two-way communication between them. I am indebted to Peter Lindseth for this perceptive observation. For an accessible introduction to the concept of emergent property and its application to constitutional theory, see ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 3-9 (2011).

<sup>65</sup> ROSANVALLON, *supra* note 1, at 271.

<sup>66</sup> *Id.*

tempo that is critical to norm translation and internalization in constitutional governance. The distinction between the incubation of opinions and the formation of policies is virtually obliterated. Unformed public opinions stop serving as the safety valve of electoral democracy but become an end in itself. As a result, civic vigilance degenerates into the habitual derision of politics, the defensive veto points as the antidote of critical sovereignty to the government result in the perpetuation of political gridlocks, and democratic judgment is turned into a politics of accusation instead of deliberative judgment through adversarial processes.<sup>67</sup> Worse yet, the unending, rapid, mass flow of unformed opinions can easily flood the available sources of information with fake news, overpowering the filtering function of the public media.

If this is a pathology of democracy as Rosanvallon contends, we can infer reversely that in its healthy state, the structural articulation of the formal powers and the people's unformed public opinions works on a more deliberative political tempo. Corresponding to the articulation of the multiple stages of decision-making within the formal constitutional powers, the second structural articulation also works on the assumption that a certain period of time exists between the institutionalized exercise of political power and the unformed intervention from the people. Taken together, the double structural articulation, which comprises the first and second structural articulation, works on an assumed stepwise and deliberative political tempo.

If both the first and second structural articulation assume the same stepwise and deliberative political tempo, the disruption the emerging instantaneous decision-making style causes to the second structural articulation is likely to bear on the first. It is true that the multistage process of constitutional governance remains unchanged in form. We are still able to trace the steps a political idea takes towards its translation into reality through the multistage process. Yet the radicalization of the people's unformed public opinions also threatens to render the process of constitutional governance being multistage in name only. As noted above, the people's intervention in the multistage process of constitutional governance through unformed public opinions has found itself

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<sup>67</sup> See *id.* at 268-73.

“imprisoned in the immediate” so much so that the institutional decision and the public reaction seem to be synchronized. This does not only affect the structural articulation between the formal constitutional powers and the people’s unformed public opinions. Facing the same radicalized and incessant citizen surveillance and critical judgment, all the distinctive stages in the process of constitutional decision-making are at the risk of being merged into one subject to the hyperactive negative sovereignty of unformed public opinions. With the formal powers and the people’s unformed opinions becoming increasingly indistinct, individual stages of the multistage process of constitutional decision-making are seemingly converted into the real-world stages on which politics is being hyper-dramatized. Note, what is resulting from those political dramas is far from the theatricality-guided interpretation of politics to which Hannah Arendt alluded.<sup>68</sup> The exercise of political power is virtually turned into an endless careless reality show, only to find itself in the same unpolitical/ antipolitical genre as the radicalized unformed public opinions.<sup>69</sup>

I hasten to add that the formal powers are not always in thrall to the people in the instantaneous style of democratic governance. Rather, the people’s unformed public opinions can be instrumental for the institutional players of distinctive stages to free themselves of the institutional constraints imposed by the multistage process. By going directly to the people, for example, the government can bring external pressure to bear on the legislature and other institutional players to push through its preferred policy or to obstruct the deliberative processes. The Trumpian presidency shows how the administration-legislature interaction can be twisted by flowing Twitter tweets.<sup>70</sup>

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<sup>68</sup> See DANA R. VILLA, *POLITICS, PHILOSOPHY, TERROR: ESSAYS ON THE THOUGHT OF HANNAH ARENDT* 128-54 (1999).

<sup>69</sup> Brexit and the Trumpian presidency are good examples. In the lead-up to the Brexit referendum, it was reported that some prominent “Leave” leaders treated the Brexit Question as a great *game* to call other EU member states’ bluff. Nick Cohen, *There Are Liars and Then There’s Boris Johnson and Michael Gove*, THE GUARDIAN, June 25, 2016, <https://www.theguardian.com/commentisfree/2016/jun/25/boris-johnson-michael-gove-eu-liars>. As regards the Trumpian presidency, the inclusion of the president’s family members in the White House staff and the seemingly unending replacement of presidential advisers and other officers bears a bizarre resemblance to “The Apprentice” series hosted by the then showman Trump. Both illustrate the “unpolitical,” if not anti-political, character of dramatized politics. See also Brubaker, *supra* note 2.

<sup>70</sup> E.g., Alex Shephard, *The GOP Needs Trump’s Tweets*, NEW REPUBLIC, July 6, 2017,

As a result, the stepwise and deliberative political tempo embedded in the multistage process involving the formal constitutional institutions is disrupted, while the distinction between individual stages of the exercise of power is blurred. The expected “settle in” effect as a function of the designed multistage process of constitutional decision-making can be hardly maintained in this compressed and accelerated decision-making style. The separation of powers founders in the instantaneousness of the new political landscape.

In sum, the double structural articulation at the core of the functioning of constitutional governance is eroded by the rising tide of instantaneous democracy. The exercise of political power is thus unleashed from the multistage process of constitutional governance, while the balance between the formal powers and the people’s unformed public opinions is disrupted. As instantaneousness continues to displace representation and deliberation in constitutional democracy, the unmaking of articulated governance is afoot. This is the fundamental impact new populism is exerting on constitutional democracy.

#### **IV. DECELERATION, DEMOCRATIC LEARNING, AND THE RE-ARTICULATION OF POLITICAL POWER**

The technology-induced instantaneous democracy allows new populists to blur the formal powers and the people’s unformed opinions in the first place and thereby disrupt the multistage formal decision-making process. With the double structure of articulation dismantled, the claims from new populists, whether they are just fancy policy proposals or prejudiced views, go unchecked. This is why discussion of the current wave of populism has been focused on the populists’ unsubstantiated, fear-/hatred-arousing statements. If this is the direct challenge from new populism, dispelling the popular ignorance with correct information seems to be the natural response to it.<sup>71</sup> After all, the “marketplace of ideas” rationale has a long history in

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<https://newrepublic.com/article/143727/gop-needs-trumps-tweets>.

<sup>71</sup> Cf. ROSANVALLON, *supra* note 1, at 307-10.

justifying freedom of speech as the way towards truth.<sup>72</sup> More important, democracy has been regarded as a reflexive process of governance with the function of political learning.<sup>73</sup> Through the democratic processes, unknown social issues can be detected and policy errors can be learned and improved to address social needs.<sup>74</sup> From this perspective of epistemic democracy, the falsehoods created by new populists will eventually dissipate despite the drive for instantaneousness. Thus, what requires in response to new populism is not only to carry out fundamental reforms but also to make them intelligible.<sup>75</sup> Democratic learning appears to be the right answer to new populism.

Given that new populism is a function of the technology-induced instantaneous democracy, however, the answer of democratic learning is incomplete. The challenges posed by new populism and instantaneous democracy do not result from the lack of information or the people's loss of the desire for knowledge. The question is how the learning function of constitutional democracy can continue to work in the face of the relentless pursuit for instantaneousness. As discussed above, the fundamental challenge from new populism is its unmaking the structure of articulated politics in constitutional democracy as it rides the wave of instantaneous democracy to displace the deliberative political tempo. That suggests that the multistage process of constitutional governance and its embedded function of democratic learning operates on a special political temporality. If so, we need to consider how to restore the disrupted political temporality of constitutional governance so that the learning function of constitutional democracy can be revitalized to dispel the popular ignorance under the spell of new populism? "Deceleration" suggests the direction we can think further in conceiving of possible legal responses.

As suggested above, one of the consequences of the erosion of the multistage

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<sup>72</sup> Eugene Volokh, *In Defense of the Marketplace of Ideas / Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011).

<sup>73</sup> See generally Kevin Olsen, *Reflexive Democracy as Popular Sovereignty*, in *NEW WAVES IN POLITICAL PHILOSOPHY* 125 (Boudewijn de Bruin & Christopher F. Zurn eds., 2009).

<sup>74</sup> FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 54-60 (1999).

<sup>75</sup> ROSANVALLON, *supra* note 1, at 307-08.



process of constitutional governance is that a populist head of government can render the deliberative function of the legislative body ineffective by appealing directly to the people's unformed opinions. The populist pressure increases more when the populist head-initiated policy proceeds to the implementation stage. Will the same trick work with respect to the court when disputes arise and come before it? The answer lies in the judicial proceedings, which have been noted for their slow pace and invited criticism for this treason.<sup>76</sup> That institutional deficiency of the judicial proceedings can be a structural asset of the multistage process of constitutional governance in its pushback against new populism.

In contrast to the political branches, the court is not designed as a responsive institution vis-à-vis public opinions. This does not mean that the court is not expected to listen to the people but it does mean that the court does not carry out its function responsively.<sup>77</sup> This default institutional position puts the court in a special position to face the populist push. To be clear, the historical record shows that the court also bowed to populist pressure when push came to shove.<sup>78</sup> Nevertheless, my point is that the slowness of the court decision in and of itself is an asset to combat new populism. With the judicial proceedings unfolding stepwise, it allows the populist idea-turned legal norms to "settle in." This is critical. Specifically, the temporal gap and distinction between individual stages in the multistage decision-making process precondition the people's reflective internalization of the legal precept. The effect of the new policy enacted in the law does not transpire until the law settles in. Only when the effect of the new policy fully transpires can the people reflect on the legal precept. Along these lines, the people and the politicians can get a better sense of the real-world implications of the populist-driven policy and reconsider their attitude towards it accordingly when its effect unfolds with the progress of the judicial proceedings. In other words, judicial

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<sup>76</sup> Sam Issacharoff points in the same direction in his critique of recent populist movements. See Samuel Issacharoff, *Democracy's Deficits*, U. CHI. L. REV. (forthcoming).

<sup>77</sup> Paul W. Kahn, *Independence and Responsibility in the Judicial Role*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 73, 74-76 (Irwin P. Stotzkyed., 1993).

<sup>78</sup> See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1143-44 (2009); BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 60-64 (2006).

deceleration can help to restore the rushed process of democratic learning.

It is true that the court may still uphold the disputed law in the end of the case. Nevertheless, its slow pace can buy the democratic society time to reflect and reconsider. To put it bluntly, learning takes time even for the quick learners. Apart from its potential role in regenerating democratic learning, deceleration by judicial intervention has further implications to the idea of articulated governance in constitutional democracy. Taking advantage of judicial deceleration, counter forces can mobilize and regroup themselves, (re)opening frontiers for political contest. The contested policy may well re-enter the legislature for a new debate or further investigation, suggesting a re-articulation of political power. Take the pending travel ban case for example. Though it was reported that the US Supreme Court's decision to take up the case intimated its partial endorsement of the administration's view,<sup>79</sup> the litigation itself has allowed the wide range of implications of the controversial ban to be fully appreciated. Moreover, although the impugned executive order in the pending case still contains constitutionally suspicious contents, the fact that it resulted from the White House's reaction to a series of judicial injunctions on its original version suggests how judicial deceleration can help to put brakes on the populist push. The interaction among the administration, the people, and the injunction court can be a back-door substitution for the weakened deliberative function and open up new possibilities for articulated governance under the pressure of new populism.<sup>80</sup>

This does not mean that we can rest assured that constitutional democracy will be fine as the multistage process of constitutional governance has built in judicial deceleration for self-preservation. Rather, as the travel ban case suggests, the court must intervene in time instead of waiting for the case to become ripe. To play the role of the institutional decelerator effectively, the court will have to rebalance its core

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<sup>79</sup> Michael D. Shear & Adam Liptak, *Supreme Court Takes Up Travel Ban Case, and Allows Parts to Go Ahead*, N.Y. TIMES, June 27, 2017, at A1.

<sup>80</sup> As each decisionmaking stage has its intended function and the sequencing of the component stages in the multistage process of constitutional governance is deliberately arranged, the effect of the back-door substitution requires examination. WALDRON, *supra* note 42, at 70-71.

judicial function of judging cases on substance and the less noticed one of issuing early injunctions. Equity will become increasingly important in the judicial function alongside the traditional focus on legality.<sup>81</sup> Though both have long been the powers exercised by the court, ordering injunctions given the high degree of uncertainty and what is at stake may well implicate the court in more politically charged issues, intensifying the politicization of the judicial branch. This concern is fair and should not be taken lightly.

Yet it should be noted that by the exercise of its injunction power or its classical function of deciding the legality or constitutionality of the case, the court is not called upon to substitute its decision for that made through the political process. As noted above, what the court is expected to do under the guidance of judicial deceleration is not to set aside the contested policy or law but rather to make room for the learning function of constitutional democracy to play out and the re-articulation of politics by putting brakes on the populist feeling-driven decision. The new constitutional context that calls for institutional deceleration works against the traditional prudence-based proposition that the court had better not intervene in the early stage of the dispute to allow the political process run its course.<sup>82</sup> Instead, without the court's injunctive intervention, the disputed law that was rushed through the legislative process will come into force, compelling the people to comply. In addition, the intensifying effect of the court's intervention through early injunctions should be welcomed as it can be the catalyst for a new political dynamic vis-à-vis populist movements. Judicial deceleration is not a proposal for heroic courts but a plea for the judicial aid in fighting new populism with democratic learning.<sup>83</sup>

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<sup>81</sup> Cf. KIRSTEN STOLL-DEBELL ET AL., INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 125-47 (2009). For the equitable character of the law of remedy, see Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 329-33 (2016).

<sup>82</sup> Cf. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 143-56 (1962).

<sup>83</sup> Rosanvallon characterizes such exercise of judicial review as an instance of his concept of "reflexive democracy." ROSANVALLON, *supra* note 30, at 137-47.

## V. CONCLUSION

Populist movements around the globe in the twenty-first century are a complex political phenomenon that defies common definition. Their goals are diverse and causes are locally determined. It is also unclear whether all of them are new and to what extent they stand apart from the past waves of populism in modern history. For these reasons, *new populism* is hard to pin down and the responses that are needed to address the challenges it has posed towards constitutional democracy remain elusive. Through my lens, only some of the diverse populist movements subsumed under the rubric of new populism appear to be genuinely new to the extent that their political leaders relentlessly resort to social media and other communications technologies to embrace an unmediated politics at the expense of democratic representation and deliberation. Benefiting from the technology-induced instantaneous democracy, new populism shakes up the double structure of articulation and blunts the learning function of constitutional democracy. New populism is the pathology of instantaneous democracy.

In conceiving responsive strategies to mitigate the destructive effect of the instantaneous decision-making style that bolsters new populists, I have suggested that regenerating the learning function of democracy is critical in combating the disease of new populism. Deceleration suggests the direction we can think further in responding to new populism and judicial deceleration can be a possible cure for the pathology of instantaneous democracy. Granted, social media is only one of the means for new populists. Also, to fully address the challenges posed by the technology-induced instantaneous democracy requires a comprehensive strategy, including the restoration of “a vision of a common world” and the defragmentation of public opinions.<sup>84</sup> The law’s overall role in that comprehensive strategy remains to be seen.<sup>85</sup> Even so, democratic learning, aided by judicial deceleration, at least gives us some hope for the great battle against new populism.

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<sup>84</sup> ROSANVALLON, *supra* note 1, at 306; SUNSTEIN, *supra* note 35, at 213-33.

<sup>85</sup> SUNSTEIN, *supra* note 35, at 231, 233.

