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

Neil Walker

### **Populism and Constitutional Tension**

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## **Populism and Constitutional Tension**

**Neil Walker**

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ABSTRACT. The recent resurgence of populism poses a significant challenge to constitutional law today and to the deeper tradition of modern constitutionalism. Despite resisting formal limitations on their power to represent the ‘true’ popular will, populist regimes nevertheless find instrumental and ideological reasons to endorse their own version of constitutionalism. And despite their nativist commitments, populist leaders across the globe find common constitutional cause and mutual encouragement in their critique of cosmopolitan institutions and values. The distinctiveness of populism’s constitutional orientation rests on its occupation of a space between authoritarian and popular versions of constitutionalism, overlapping both but not reducible to either. There situated, populism involves a reaction against what it condemns as the neglect of the *unitary collective particular* in the liberal version of modern constitutionalism. Many critical of the inflated narratives and methods of populism nevertheless share some its underlying anxieties. For in an age in which an expanding commitment to the democratic pedigree of our constitutional arrangements has unfolded alongside the increasing transnationalisation and fragmentation of political authority, the very instability of the balance between various constitutional goods - between individualism and collectivism, universal and particular rationalities, and plurality and unity – that fuels populists’ ire, deepens the defining tension of modern constitutionalism and poses a challenge to all who continue to endorse it.

### **1. The Populist Vogue**

The latest intellectual fashions in making sense of polity and society, like the latest fashions in any area of life, often both reveal and distort. They are revealing in that

any convergence of preferences amongst subjects about how to account for something is instructive both about the object to be accounted for and about the subjects doing the accounting. By examining academic trends, we gain insight not only into how and why things change in the world, but also into how and why we might develop common preoccupations in making sense of how and why things change. Equally, however, fashions can be distorting, as they typically involve a self-reinforcing inflation. The new fashion become ever more fashionable just because it is already fashionable.

The idea of 'populism' is intensely fashionable, and like most intensely fashionable things, its meaning is in a constant state of evolution and contestation. Over the last decade or so, however, an 'ideational approach'<sup>1</sup> that treats populism as a discourse and worldview has become increasingly influential. It has overshadowed but also largely subsumed earlier approaches focusing variously on the nurturing of a deep culture of popular engagement in politics,<sup>2</sup> on governmental regimes whose broad appeal is based on a strongly interventionist and redistributive programme fueled by sustained deficit financing, or on a charismatic or demotic style of political leadership.<sup>3</sup> Jan Werner Muller deftly captures the common or overlapping core of this new approach when he describes populism as 'a particular *moralistic imagination of politics*, a way of perceiving the political world that sets a morally pure and unified - but...ultimately fictional - people against elites who are deemed corrupt or in some other way morally inferior'.<sup>4</sup> It follows that 'populist constitutionalism', to the extent that this is at all a coherent notion,<sup>5</sup> should refer to a type of constitutional practice or discourse that pursues, defends or encourages just that kind of moralistic imagination of politics as involving a binary opposition between 'two homogenous and antagonistic camps.'<sup>6</sup>

Armed with this capsule definition, we can appreciate how the general truth about the revelatory and distortive qualities of fashion applies with special emphasis to the case of 'populism', and to its constitutional offshoot. Populism, like other central

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<sup>1</sup> CASS MUDDE & CRISTOBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 5 (2017)

<sup>2</sup> See e.g. ERNESTO LACLAU, ON POPULIST REASON (2005)

<sup>3</sup> Mudde & Kaltwasser, above n1, 2-5.

<sup>4</sup> JAN-WERNER MULLER, WHAT IS POPULISM? 19-20 (2016)

<sup>5</sup> See section 2(a) below

<sup>6</sup> Mudde & Kaltwasser, above n1,

terms in our political vocabulary such as ‘sovereignty’ or even ‘constitutionalism’ itself, possesses a double signification. It registers not only in our analytical ‘meta language’ but also in our political ‘object language’.<sup>7</sup> If populism, as Muller’s definition suggests, should be understood as one contemporary expression of our political imaginary – a way of thinking about and framing the political world that is current *within* the political world itself, then the use of the term ‘populist’ (and its proxies) is the very object or thing, or at least one part of the thing, that we are studying in the political domain – nowhere more intensely than in the news and social media discourse that surrounds and bleeds into the political domain. Certainly, this is not to downplay populism’s analytical credentials – as also supplying the tool with which we explain the very thing we are studying. Populism, as already noted, is a term that boasts a considerable academic pedigree as a meta-concept – one that significantly predates the current political wave.<sup>8</sup> But its contemporary invocation in academic discourse – especially in the legal academy with little by way of a distinct populism-in-law pedigree – has undoubtedly been stimulated by the recent elevation of its political profile. The latest academic fashion in naming and framing populism has tracked the political fashion in naming and framing populism. And in so doing, the unavoidable spillage of meaning between the object level and the meta level – between engaged claim and detached understanding – that occurs in the case of all such two-level political concepts, and the consequent difficulty of the latter retaining critical distance from the former, is reinforced on account of the unusual intensity and volatility we have come to associate with this particular current political fashion.<sup>9</sup>

That intensity becomes clear from the most cursory glance at the political landscape. A search for ‘populism’ and ‘constitution’ in the same internet sentence in any month since the beginning of 2017, for example, would take the investigator to a diverse range and ever expanding cast of figures and movements – from Donald Trump,

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<sup>7</sup> On the application of this approach to the idea of sovereignty; see Neil Walker, ‘Late sovereignty in the European Union’ in NEIL WALKER (ed) *SOVEREIGNTY IN TRANSITION* 3-32 (2003)

<sup>8</sup> See e.g. CRISTÓBAL ROVIRA KALTWASSER, PAUL A. TAGGART, PAULINA OCHOA ESPEJO, AND PIERRE OSTIGUY (EDS), *THE OXFORD HANDBOOK OF POPULISM* (2017)

<sup>9</sup> A particular manifestation of this problem is the increased tendency at the everyday ‘object level’ for the populist label to be applied pejoratively to others rather than self-ascribed as a badge of pride; see Mudde & Kaltwasser, above n1, 2.

to Vladimir Putin, then to Nigel Farage, and increasingly, to Jeremy Corbyn in the UK, to Emmanuel Macron in France, to Victor Orban in Hungary, to Recep Erdogan in Turkey, to Rodrigo Duterte in the Philippines, to Nicolas Maduro in Venezuela, to Jaroslaw Kaczynski's shadow leadership in Poland; not to mention all the 'wannabees', from France's Le Pen and Mélenchon and Holland's Wilders to Italy's Beppe Grillo and the shifting cast of leaders of Germany's *Alternative für Deutschland* (AfD), Austria's Freedom Party, Finland's True Finns, Spain's Podemos, and even some leaders of sub-state nationalist movements in Scotland, Catalonia, Flanders, Lombardia and elsewhere. Academic interest, already primed in response to events such as the Arab Spring,<sup>10</sup> the longer trail of Central and Eastern Europe's uneven post-Communist transformation,<sup>11</sup> experiments in South American presidentialism,<sup>12</sup> and new forms of electoral authoritarianism in Asia,<sup>13</sup> has moved quickly to bring within the same wide contemplative frame these fresh outbreaks of populism from around the globe and across the Left/Right political spectrum.<sup>14</sup> In all this, however, the academic agenda is reactive rather than proactive. It is constantly being shaped and reshaped by political developments – playing a seemingly endless game of explanatory 'catch up' with events on the ground.

The twin possibilities of revelation and distortion, then, are thrown into particularly stark relief in the case of populism, and this indicates two opposite dangers to be avoided. On the one hand, against fashion's propensity to distortion and overindulgence, we should not overstate the importance of the new category. To the extent that 'populist constitutionalism' might supply a distinction that allows us fresh insight into the condition of the world, its contribution is surely to supplement rather

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<sup>10</sup> See e.g. NIMER SULTANEY, *LAW AND REVOLUTION: LEGITIMACY AND CONSTITUTIONALISM AFTER THE ARAB SPRING* (2017)

<sup>11</sup> See e.g. WOJCIECH SADURSKI *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (2nd ed. 2014)

<sup>12</sup> See e.g. Kathryn Hochstetler, 'Rethinking Presidentialism: Challenges and Presidential Falls in South America' 38 *COMPARATIVE POLITICS*, 401-418 (2006)

<sup>13</sup> See e.g. Grigorii Golosov 'Lipstick on a crocodile: electoral authoritarianism in Central Asia'. *OPEN DEMOCRACY* (2011); available at <https://www.opendemocracy.net/od-russia/grigorii-golosov/lipstick-on-crocodile-electoral-authoritarianism-in-central-asia>

<sup>14</sup> See e.g. Cristobal Rovira Kaltwasser, 'Populism, its opposites, and its contentious relationship to democracy' *OPEN DEMOCRACY* (2012); available at <https://www.opendemocracy.net/can-europe-make-it/crist%C3%B3bal-rovira-kaltwasser/populism-its-opposites-and-its-contentious-relationships>

than supplant our existing explanatory language and typological schemes. Populism may offer a relatively novel category of explanation and make a particularly urgent claim to relevance, but the seductive thrill of the new (or, at least, the newly recycled) should not lead us to mistake it for *the* master category. There are likely to remain various other important distinctions of constitutional type both within and beyond the category of populist constitutionalism. These older understandings should not be eclipsed by the new. Indeed, some more venerable distinctions will remain more fundamental, and, importantly, so also prerequisite to a proper appreciation of the new categorical distinction.

On the other hand, we should not be dismissive of the new. We should not make the reverse mistake of assuming that inflation renders the idea of populism and populist constitutionalism empty of content and meaning. If, through the immodesty of fashion, populism proclaims a presence in every nook and cranny of our global political architecture, then its currency becomes worthless. If populism is everywhere, then it is effectively nowhere, a superficial constant rather than a discerning variable. Yet to assume that conceptual bankruptcy is populism's inevitable fate would be an over-reaction to the danger of distortion. The preoccupation with populism, insofar as it reflects certain regularities of thought and expression, and of the framing effects of these regularities, can reveal something about what is happening in the world. We should not dismiss the new populist vogue, and its application to constitutional events and processes, as nothing more than a trendy labelling for dissimilar and unassociated events and regimes, since the very fact of its widespread invocation by those at the centre of these events and regimes suggests that it speaks, in however unrefined a manner, to something importantly 'in common' in the development of the contemporary political world.

What is more, like any intellectual fashion, our common fascination with populism – to repeat – is worthy of investigation in its own right. For our very preoccupation with this particular way of understanding the social and political world may also tell us something of additional importance about the concerns that we hold in common as we seek to do so.

## **2. Populism in the Modern Constitutional Tradition**

With these guiding thoughts to the fore, I want to argue that both the development of populism as an important strain of our political and constitutional imaginary, and the analyst's preoccupation with this trend, have to do with the relationship of populism to an underlying tension within the long tradition of modern constitutionalism. Populism is neither a surface distraction from other deeper trends, nor is it wholly anomalous within our political tradition - an aberrant or extraordinary departure from modern constitutionally embedded politics. Rather it can be seen as a product of and response to a series of stress factors that are intrinsic to the modern constitutional condition. And however we might judge the appropriateness of the populist response, our very attentiveness to that response betrays a wider concern with the underlying tension in question, and an awareness that populism exposes modern constitutional method to searching questions to which there are no easy answers.

This argument will be developed through the elaboration of a number of propositions:

*First*, that the constitutional dimension of populism's engagement, contrary to certain expectations, is one of its central features.

*Secondly*, that populist constitutionalism, again contrary to certain expectations, encourages and is encouraged by a negative transnational solidarity – an affinity born of the construction of a generic common enemy, and notwithstanding the particularity of each response to that common enemy.

*Thirdly*, that populist constitutionalism operates in a space which overlaps authoritarian and popular constitutionalism, and stands in a complex relationship to both – the terms of which allow us to identify important variations on the populist type

*Fourthly* and, supplying a deepest and unifying tier of explanation, that populist constitutionalism, like the popular and authoritarian forms of constitutionalism from which it draws, involves a reaction against what its proponents view as the neglect of



the *unitary collective particular* in influential strands of modern constitutionalism. Many critical of populist constitutionalism nevertheless share a sense that an unstable balance between various antinomic goods – an instability that feeds the reactionary narrative of the populists - supplies the defining tension of modern constitutionalism

### **(a)The Centrality of the Constitutional Dimension**

If the focus of populism is on an undifferentiated people as the ultimate reference point of political morality and source of authority, we might surmise that such a perspective can at best only allow a secondary place for constitutionalism's independent reference point of positive morality and its claim as to the ultimate authority of law. In other words, as populism 'entails a strong preference for the rule of men over the rule of law'<sup>15</sup>, perhaps we should not expect constitutional law to figure prominently on the populist playlist. Yet that would be too quick a conclusion. Matters constitutional are, in fact, closely attended to by populists. And while, as Paul Blokker has argued, much of that attention is negative, a kind of 'legal resentment'<sup>16</sup> against existing structures of constitutional democracy, as he also insists, this is not the whole story. Rather, the populist attitude towards constitutionalism involves a wide-ranging ambivalence, and can be seen as comprising three elements – critical, instrumental and expressive. As we shall explore later,<sup>17</sup> beyond an immediate impulse to escape the shackles of any independent normative authority, populists find themselves out of sympathy with deeper features of the modern constitutional inheritance, but that does not deter them from a high level of engagement with the 'here and now' of constitutional politics.

To begin with, the critical attitude channels resentment against the constitutional *status quo ante*. The focus of critique may be the elites – 'the enemies of the people'. One obvious elite target is the judges, as the legal specialists who occupy the commanding heights of the system of constitutional interpretation and adjudication.

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<sup>15</sup> Luigi Corrias , 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional identity' 12 EUROPEAN CONSTITUTIONAL LAW REVIEW 6-26, 10(2012)

<sup>16</sup> 'Populist Constitutionalism' I-CONNECT/VERFASSUNGSBLOG (2017); available at <http://www.iconnectblog.com/2017/05/populist-constitutionalism/>. See also his 'The Imaginary Constitution of Constitutions' 3 SOCIAL IMAGINARIES 1 (2017)

<sup>17</sup> See section 2(d) below.

But critique may also be levelled against the broader ‘Establishment’<sup>18</sup> of constitutional roles and institutions of a political or administrative nature that mediates the relationship between ‘the people’ and political power. Or it may be against a ‘deep state’<sup>19</sup> of clandestine power, of shadow elites – political, military and economic – that stands behind and both sustains and is enabled by the formal constitutional framework. Resentment can also be more diffuse, targeted against the constitutional framework as a whole. Populist scepticism towards all forms of intermediation between power and their conception of a pure and unified popular will can often register as hostility before structures and rules that provide for individual protections against collective power or the pluralist distribution of that collective power against its unitary articulation.<sup>20</sup>

Populist ambivalence towards constitutionalism is sharply reflected in the approach that populists take towards the constitution once in power. The attitude of critique towards the constraints upon popular power imposed by the constitution and towards the supposedly vested interests who work to sustain these constraints remains. Open hostility may in some measure give way to suspicion and frustration, but there is a significant sense in which, at the level of symbolic politics, populist governments affect to govern *against* the state, including its inherited constitutional edifice. Yet the attitudes of suspicion and frustration, and their public display, also fuel attempts to instrumentalise the constitution in the service of the new populist regime.

There are two different approaches to this instrumentalisation, although these are typically complementary and also shade into one another. On the one hand, there is the strategy of *circumvention*, of working round or outside of constitutional norms in the conduct of government. On the other hand, there is the strategy of *commandeering*, of gaining control of the means to shape the normative framework of the constitution itself. Strategies of circumvention include ruling by executive decree,<sup>21</sup> packing or

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<sup>18</sup> See e.g. Jonathan Matthew Smucker, ‘The Establishment is Not a Viable Candidate,’ NEW INTERNATIONALIST (2017); available at <https://newint.org/features/2017/04/01/the-establishment-is-not-a-viable-candidate>

<sup>19</sup> See e.g. Michael Crowley ‘The Deep State is Real’ POLITICO (September/October 2017); available at <https://www.politico.com/magazine/story/2017/09/05/deep-state-real-cia-fbi-intelligence-215537>

<sup>20</sup> On populism’s critique of pluralism, see e.g. Kaltwasser, above n14

<sup>21</sup> See, e.g., The Trump Presidency’s early use of executive orders instead of legislative initiative in matters as diverse as immigration control, the ban of trans-sexuals in the armed forces and the

disempowering legislatures, ignoring judgments, influencing the electoral commission, denial of freedom of information, partisan exploitation of media ownership rules, use of emergency powers, and clientelism and cronyism in political and administrative appointments.<sup>22</sup>

Commandeering, or what has elsewhere (and more judgmentally) been called ‘abusive constitutionalism’<sup>23</sup> is the more ambitious approach, and is more likely to occur where strategies of circumvention have failed or exhausted their potential. In functional terms, a constitution typically involves a ‘triple lock’ control of the political system. The first and most fundamental lock involves the entrenchment of the basic constitutional rules of the game against amendment or replacement, or at least a requirement of special majorities. The second lock concerns the independence of the constitutional court or other apex courts in interpreting the constitution and the laws made under it. The third lock involves the basic ‘rule of law’ requirement that government be conducted according to laws that have been duly passed under the widely-endorsed foundational constitutional pact and interpreted by a judiciary insulated from executive or other partial interference. Whereas circumvention involves slipping the third lock and reverting to extra- or sub-constitutional means, commandeering involves either seizing the key to the first constitution-making lock, typically to devise a new constitutional scheme to consolidate executive power (as in Hungary,<sup>24</sup> Turkey<sup>25</sup> or Venezuela<sup>26</sup>) or breaking the second lock in terms of the

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withdrawal of financial support for the Affordable Care Act; ‘Trump is On Pace To Sign More Executive Orders than any President in the past 50 Years, THE POINT )October 13, 2017); available at <http://edition.cnn.com/2017/10/13/politics/donald-trump-executive-orders/index.html>

<sup>22</sup> On the Slovenian example of circumvention, and its contrast with Hungary’s more commandeering approach, see Bojan Bugarcic, ‘A Crisis of Constitutional Democracy in post-Communist Europe: ‘Lands in-between democracy and authoritarianism’ 13 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 219-245 (2015).

<sup>23</sup> David Landau, ‘Abusive Constitutionalism’ 47 UC DAVIS LAW REVIEW 189 (2013)

<sup>24</sup> Hungary Constitution of 2011; available at

[https://www.constituteproject.org/constitution/Hungary\\_2011.pdf](https://www.constituteproject.org/constitution/Hungary_2011.pdf); see also Bugarcic, above n22; ANDREW ARATO, POST-SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY, ch.4 (2016)

<sup>25</sup> A procedurally disputed referendum took place in April 2017 and approved eighteen amendments to the 1982 Constitution; see A. Acir, ‘The Constitutional Referendum in Turkey’ VERFASSUNGSBLOG <http://verfassungsblog.de/the-constitutional-referendum-in-turkey-a-far-stretch-from-right-to-free-elections-to-referenda/> <http://verfassungsblog.de/the-constitutional-referendum-in-turkey-a-far-stretch-from-right-to-free-elections-to-referenda/>; See also, Turku Isiksel, ‘Between Text and context: Turkey’s

appointment, tenure and independent functioning of the apex courts (as in the recent Polish case<sup>27</sup>).

The various instrumental strategies, those associated with commandeering in particular, also point towards what is of expressive value to populists in their engagement with constitutionalism. The populist taps into that part of the modern constitutional imaginary and its accompanying jurisgenerative method that speaks to the idea of popular sovereignty; concerned with the constituent power of the people and the constitutional text as the articulation of that power and the purest crystallization of collective political will. Sometimes this is backward looking, involving a claimed recovery in the constitutional heritage of a broken promise of original collective intent; indeed, this is often a supportive side-commentary to a strategy of circumvention in the here and now – ‘We the people, lately but no longer to be thwarted’. More often, however, and sometimes in conjunction with a nostalgic rhetoric of recovery, the constitutive constitutional politics will be forward-looking, the replacement of constitutional text and refashioning of constitutional institutions pursued not just as a commandeering strategy but also in symbolic affirmation of the renewal of political unity.<sup>28</sup>

That is why populists today tend to be supportive not just of large-scale constitutional change or regime succession, but also of all the paraphernalia of constitutional events and moments – including referendums, constituent assemblies and other ceremonies of endorsement. The populist constitutional solution really is *of* the moment in focus. The agenda of these demotic constitutional events is often

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tradition of Authoritarian Constitutionalism’ 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 702-726, 710 (2013)

<sup>26</sup> On President Maduro’s controversial decision in July 2017 to establish a constituent assembly to draft a new constitution, see ‘Venezuela’s getting a new constitution whether the people want it or not’ THE CONVERSATION; available at <http://theconversation.com/venezuelas-getting-a-new-constitution-whether-the-people-want-it-or-not-80242>

<sup>27</sup> A new law significantly increasing party political influence over the appointment of senior judges was eventually passed in December 2017 after a two year struggle; see

<https://www.nytimes.com/2017/12/20/world/europe/eu-poland-law.html>. See further, below n37.

<sup>28</sup> On these two sides of Trump’s populism, see, for example, Michael Kazin, ‘Trump and American populism’ 95 (6) *Foreign Affairs* (2016)

‘partisan’.<sup>29</sup> They have typically been pre-empted and prefixed by the populist insurgency, and a particular version of the constitutional expression of the popular will is pursued with such zeal, certainty and claim to unity that, even though it is also fundamental to the populist claim that they take ‘the people’ seriously as a concrete socio-political entity against the artificially representative claims of elites, there is scant recognition of the dangers of freezing this particular expression of popular sovereignty against later reconsideration. Yet, for all the latent tensions in their position, for the reasons given above many contemporary populists are increasingly comfortable in the public clothes of constitutional rectitude.

### **(b) Populist Connections**

Interest in contemporary populism, and populist constitutionalism, has been reinforced by the scale and reach of its occurrence. Commentators note how widely populist politics have taken hold, and casually use words like ‘spread’<sup>30</sup> to suggest a connection between its occurrence in one place and its appearance somewhere else. Yet, typically, little attention is paid to the factors and forces producing that spread. The focus tends to be more on what different instances of populism have in common, both in terms of superficial appearances and connections and through deep and shared structural roots,<sup>31</sup> than on how they influence each other – on affinity rather than mutual causality. The stress on affinity is reinforced by a preoccupation with the personalities of the leaders – one encouraged by the charismatic self-projection of populist figureheads – and with their interpersonal relations. Implicit in all this is a sense that the strength of populism as a global movement is tied up with the chemistry of Trump-Farage, Trump –Putin, Putin –Erdogan, LePen-Wilders, Orban-Kacsynski etc.

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<sup>29</sup> Jan Werner Muller, ‘Populist Constitutions: A Contradiction in Terms’ VERFASSUNGSBLOG (2017) available at” <http://verfassungsblog.de/populist-constitutions-a-contradiction-in-terms/>

<sup>30</sup> See e.g. Luigi Guiso, Helios Herrera, Massimo Morelli, Tommaso Sonno ‘The spread of populism in Western countries’ VOX (October, 2017) available at: <http://voxeu.org/article/spread-populism-western-countries>

<sup>31</sup> See sections 2(d) below

It is worth exploring, however, some of the less contingent supports across populist movements, and how these, too, connect to populism's constitutional dimension. We might assume that populism would have little transnational resonance. After all, populism is always concerned with a particular populace and with certain core propensities plausibly attributable to that populace. It tends therefore, to be nativist in outlook, fronted by slogans such as 'America First' or 'putting the Great back into Britain'. The 'other' against whom the authentic people is defined includes not only elites and self-identifying internal minorities who disturb the sense of a unified whole, but also migrants and foreign influences more generally, not least those taking institutional form as international organisations mandated to 'interfere' in national affairs.

Yet while, for the most part, nativism offers fallow ground on which to build cross-border alliances, there are some fertile connecting channels. In the first place, nativists across national contexts might be opposed to the same types of internal or migrant minorities, and so find affinity, and even a sense of international or pan-regional identity, in the possession of certain racial or cultural attributes that distinguish them from these local minorities. Certain explicitly racist nativist movements, for example, increasingly assert and articulate a transnational solidarity in the name of a white Christian Europe.<sup>32</sup>

Secondly, and more broadly, opposition to forces that would deny the moral force of nativism is also a common thread across various strands of populism and provides the basis for a kind of negative solidarity. For nativist populists discover common cause *against* a generic category of roles, interests, sensibilities and practices; namely what they view as a cosmopolitanism – often itself deemed to be associated with elite 'frequent flyer', 'dotcom Web', epistocratic or other privileged communities

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<sup>32</sup> As demonstrated by the presence of right-wing nationalists from many European countries at Poland's 2017 Independence Day celebrations; See Paul Hockenos, 'Poland and the Uncontrollable Fury Of Europe's Far Right' *The Atlantic*, November 17, 2017, available at <https://www.theatlantic.com/international/archive/2017/11/europe-far-right-populist-nazi-poland/524559/>

who enjoy high mobility and communicability - in which national particularity does not figure as an important value.<sup>33</sup>

One particularly important unifying theme in this oppositional politics concerns the very notion of a disembedded universalism which, in the populist imaginary, is seen to underpin forces hostile to populism. And here the significance of legal and constitutional discourse again becomes clear. Nativist populists are hostile to all political values and interests that are 'foreign' to their peculiar conception of the national collective good, but they see a special and encompassing threat in those alien political values and interests that wear the cloak of universalism in so doing. As law itself, through many of its historical forms and narratives of justification,<sup>34</sup> is well adapted to the making of claims that transcend particular jurisdictions, so populists can often establish common cause against legal institutions that claim transnational normative force, as also against domestic legal institutions that recognize the legitimacy of such universally-coded claims of transnational validity. We find this, for example, in Trump and Putin's selective hostility towards cosmopolitan institutions, in particular the United Nations. More broadly, the international human rights regime provides the clearest example of a form of legal-institutional mobilization set against the claims of domestic particularity, as such drawing the particular ire of populists. Take, for instance, the habit of 'Strasbourg-bashing'<sup>35</sup> which provides a common and cumulative thread amongst those who see the European Convention on Human Rights as a threat to native morality.

The European Union, as a uniquely penetrative instance of contemporary transnational legal organization, has also been a special target of populist fire, and a particularly important context of transnational populist mobilization. When Poland's Kaczynski and Hungary's Orban joined forces in the autumn of 2016 to promise a 'cultural counter-revolution'<sup>36</sup> in the EU, they were not merely acknowledging common

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<sup>33</sup> On the significance of the nativist/cosmopolitan opposition within populist discourse, see Pierre Ostiguy, 'Populism: A Socio-Cultural Approach' in KALTWASSER et al (eds) above n8, chapter 4.

<sup>34</sup> See e.g. JEREMY WALDRON, 'PARTLY LAWS COMMON TO ALL MANKIND': FOREIGN LAW IN AMERICAN COURTS (2012)

<sup>35</sup> Barbara Oomen, 'A Serious Case of Strasbourg-Bashing?' 20 IJHR 407-425 (2016)

<sup>36</sup> See <https://www.ft.com/content/e825f7f4-74a3-11e6-bf48-b372cdb1043a>

opposition to the spectre of supranational encroachment on national sovereignty. They were also engaged in an exercise of mutual support and mobilization - including collaboration in resisting the continuing threat of sanctions by the EU under their 'rule of law' compliance mechanism;<sup>37</sup> and in treating the EU's eventual decision to initiate formal proceedings as itself exemplary of cosmopolitan overreach.<sup>38</sup> Or when key Brexiteer, Nigel Farage, made links with other nationalist movements seeking exit referenda after the success of the British leave campaign in June 2016, he was not simply celebrating affinity but promising common cause against the pan-European polity.<sup>39</sup>

### **(c) Between Authoritarian and Popular Constitutionalism**

Just as populism and its link with constitutional government has become a fashionable topic, so too, and somewhat earlier, there has been a renewal of interest in the connection between authoritarianism and constitutionalism.<sup>40</sup> On one view, indeed, populist constitutionalism and authoritarian constitutionalism tend to collapse into one another. But while there is certainly a strong overlap, and we discover much about populism by examining how authoritarian regimes operate (and vice-versa), a simple equation of populism with authoritarianism is unduly reductive. In particular, it understates the ways in which populism also overlaps with *popular* constitutionalism.

First, though, we examine the connection between populism and authoritarianism. Juan Linz's seminal analysis characterizes authoritarian political systems as possessing four key qualities.<sup>41</sup> First, there is limited political pluralism. Authoritarian regimes place constraints on political institutions and agencies other than the key executive power holder as contributory sources of political influence – entities

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<sup>37</sup> <https://euobserver.com/institutional/137346> See Article 7, Treaty on European Union

<sup>38</sup> Dimitry Kochenov, Laurence Pech and Kim Lane Scheppele 'The European Commission's Activation of Article 7; better late than never', VERFASSUNGSBLOG, available at <http://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/>

<sup>39</sup> See <https://www.ft.com/content/3cef5b22-4ec0-11e6-88c5-db83e98a590a>

<sup>40</sup> See e.g. M. Tushnet, 'Authoritarian Constitutionalism' 100 *Cornell Law Review* 391, 397 (2015), David Law and Mila Versteeg, 'Constitutional Variation Among Strains of Authoritarianism' in TOM GINSBURG AND ALICE SIMPSON, CONSTITUTIONS IN AUTHORITARIAN REGIMES 165-198 (2013)

<sup>41</sup> Juan J. Linz, 'Totalitarian and Authoritarian Regimes', in NELSON POLSBY AND FRED GREENSTEIN (EDS), HANDBOOK OF POLITICAL SCIENCE, VOL. 3, MACROPOLITICAL THEORY (1975).



such as legislatures, political parties and interest groups. Secondly, authoritarian regimes have a basis for legitimacy centred on emotional attachment. The authoritarian tendency of the regime is typically asserted as a necessity to combat or defend against ostensibly urgent societal problems, such as underdevelopment or insurgency. Thirdly, the scope for social mobilization in civil society is curtailed, typically through suppression of political opponents and anti-regime activity and aggressive or censorious attitudes towards oppositional media. And fourthly, authoritarianism enables informally defined executive authority, typically with vague and shifting powers.

In short, in authoritarian regimes there is a tendency towards the monopoly of power rather than its distribution, towards the emotional over the rational and expediency over design, in favour of suppressing dissent rather than encouraging a culture of debate - with dissenters treated as enemies rather than adversaries, and towards expanding rather than fettering executive discretion. Against this, the most minimal definition of constitutionalism considered as a normative (rather than a purely descriptive) concept involves quite contrasting imperatives.<sup>42</sup> Modern constitutionalism typically seeks to diversify power and provide countervailing checks; to provide a rationally legible projection of government; to protect the right to oppose – speech, assembly, conscience, voting rights etc.; and to cabin rather than unleash discretion.

Authoritarian *constitutionalism*, therefore, while it involves something less than a totalitarian or absolutist form of government,<sup>43</sup> nevertheless requires an uneasy

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<sup>42</sup> Constitutionalism as a 'thick' normative idea is best thought of as a *multi-tiered concept* that operates on more or less abstract planes. We consider the more abstract understanding in Section 2(d) below. At the more concrete and less ideologically contentious extreme, constitutionalism is sometimes expressed instead in terms of a checklist of institutional accomplishments - judicial independence, free political parties, regular elections, basic freedom rights, separation of powers, inter-institutional checks and balances. And between high principle and concrete institutional design there is an intermediate tier consisting of general juridical standards as applied to governmental forms. For example, for Isiksel, the essence of constitutionalism lies in its 'precluding arbitrary, absolute or unaccountable forms of power' (above n 25, 710) It is constitutionalism understood in terms of these relatively low levels of abstraction and contention that we are concerned with in the immediate discussion. For discussion of the different levels of constitutionalism, see Jeremy Waldron, 'Constitutionalism: A Skeptical View, in JEREMY WALDRON, POLITICAL POLITICAL THEORY 23-44 (2016).

<sup>43</sup> In contrast to authoritarianism, a totalitarian regime attempts to control virtually all aspects of social life, including economy, art, science and questions of private morality. North Korea offers a clear contemporary example. Certain other countries with dictatorships and authoritarian rule, such as Kazakhstan, Uzbekistan, Turkmenistan and Belarus, also display totalitarian tendencies. Other variations of authoritarianism, according to Tushnet (above n40) include, 'absolute constitutionalism' (415) (i.e.

reconciliation of contrasting tendencies.<sup>44</sup> This reconciliation takes quite different regime forms, and offers quite different trajectories. David Law and Mila Verstag identify three types of constitutional regime with authoritarian tendencies.<sup>45</sup> These are monarchical, military or, as the most common contemporary regime form, civilian – this last typically involving a dominant political party. All three variants (as well as their hybrid combinations) have mechanisms for monopolizing power and marginalizing opposition without involving the most egregious constitutional violations; such as ignoring term limits, cancelling elections, or usurping offices. In each case there is a modality and medium of power – army, family dynasty, party – that is cohesive and formidable, and which can secure both a sustainable internal order of government and the effective disempowerment of those outside the internal order. The constitutional strategy involved may be one of circumvention or commandeering, and typically is some combination of both. And in any case the general effect is to supply a narrow circuit of power to displace or overcome the wider circuit of power we associate with a more inclusive and pluralistic constitutional discipline.

If we turn from regime forms to trajectories of power, we can again discern three different patterns of development of authoritarian constitutionalism – which we might describe as *embedded*, *reversionist* and *emergent*. As the name suggests, embedded types of authoritarian constitutionalism enjoy long-term stability, and are often associated with military or monarchical regimes. Reversionist types are those, such as Turkey and Hungary, where a more pluralistic system has been introduced against an authoritarian historical backdrop, but there is a tendency towards reversion or

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monarch with full powers, but must be exercised through law), and basic ‘rule of law constitutionalism’ (416) (requirements of generality, prospectivity, and other classical Rule of Law goods). For Tushnet, these types sit further towards the authoritarian end of the spectrum than authoritarian constitutionalism itself.

<sup>44</sup> For Mark Tushnet, ‘the problem is how to conceptualize regimes where elections are held, opponents sometimes elected to office, the dominant party pays some attention to public opinion, and dissent is allowed, but there is little or no danger that the regime will be replaced, where there are no effective restraints on policy decisions, and the level of dissent is controlled selectively.’ ‘Authoritarian Constitutionalism: some conceptual issues’ in Ginsberg and Simpser, above n40, 36-52. Tushnet’s paradigm case is Singapore, but a longer list might include the following ‘electoral authoritarian’ regimes – Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Algeria, Egypt, Tunisia and Yemen, Burkina Faso, Cameroon, Tanzania, Togo, and Zambia, Cambodia, Malaysia, Singapore (see Tushnet, above n40 (415) citing ANDREAS SCHEDLER, THE LOGIC OF ELECTORAL AUTHORITARIANISM (2008)

<sup>45</sup> Above n40

‘backsliding’<sup>46</sup> in accordance with the reassertion of party, military or dynastic power. Emergent types, finally, are those where there is authoritarian drift away from non-authoritarian beginnings; movement in an authoritarian direction through circumvention or commandeering of a constitution boasting a more pluralistic pedigree.<sup>47</sup>

Clearly, populism and populist constitutionalism share many of the features of authoritarian constitutionalism. The stress on a unitary framework of authority and political project and the critique of pluralist structures, the emotionally charged claim to provide the only authentic leadership, the delegitimization of opposition and the emphasis on executive discretion within and beyond the constitutional text, all feature in the populist handbook as much as in the authoritarian handbook. Yet, as we have already seen in discussing populism’s rhetorical link to popular sovereignty, it is also an *essential* characteristic of populist constitutionalism, where it is not of authoritarian constitutionalism, *to claim to speak for and in the name of the people*; that people, moreover, are to be understood not simply as a juridical abstraction that enables their artificial representation, but as something ‘real’ or at least *realizable* - a concrete organic socio-political force.

It is in claiming as much that populist constitutionalism necessarily but problematically connects with a broader tradition of ‘popular constitutionalism’ – the idea that the people, considered as such a concrete socio-political force, should not only supply the constituent power but should also assume ‘active and ongoing control over the interpretation and enforcement of constitutional law’.<sup>48</sup> The connection is

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<sup>46</sup> See R. Dixon and D. Landau. ‘Tiered Constitutional Design’ 86 *George Washington Law Review* (2018) (forthcoming)

<sup>47</sup> There is terminological overlap but also a difference of emphasis between my reversionist-emergent distinction and Huq and Ginsberg’s distinction between ‘authoritarian reversion’ and ‘constitutional retrogression’. While their ‘constitutional retrogression’ type fits closely my ‘emergent’ type, their ‘authoritarian reversion’ type differs from my ‘reversionist’ type in its primary focus on output factors (the rapid and near complete collapse of democratic institutions) - rather than input factors (the significance of the authoritarian tradition in enabling reversionist tendencies; A. Huq and T. Ginsberg, ‘How to Lose a Constitutional Democracy’ 65 *UCLA L. REV.* (2018) (forthcoming)

<sup>48</sup> As famously defined by Larry Kramer “Popular Constitutionalism, circa 2004,” 92 *CALIF. L. REV.* 959, 959 (2004). See also his *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). Popular constitutionalism in an older European tradition has a more general

necessary because populism assumes the concrete people are an empirically continuous entity, and so should have their wishes taken account of beyond the constituent moment. But the connection is also problematic because even though the people are notionally considered in such concrete terms, the imagination of that people as a morally unified force that legitimates a morally dogmatic leadership in their name fails to entertain any genuine possibility of the people's moral message being recognized as internally heterogeneous even when first issued, still less as having become diversified or significantly modified over time.

This internally conflicted counter-attraction towards popular constitutionalism nonetheless complicates populism's relationship to authoritarian constitutionalism. On the one hand, those forms of authoritarian constitutionalism that are deeply embedded tend not to be populist. Their claim to provide the only authentic leadership, typically backed up by military power and/or dynastic privilege, is largely independent of any claim to represent and respond to the people as a concrete entity, nor does it rest on a democratic conception of original constituent power. On the other hand, the reversionist and emergent types do involve a populist approach, and their authoritarian trajectory can only be properly understood on account of that populist dimension.

In the reversionist approach, the new clothes of plural constitutionalism tend to be discarded in the name of a rediscovery of the true essence of the people by a leader and political movement (often articulated through the creation of a new vanguard party). Perhaps this is done through a recovery or re-emphasis of a particular constitutional heritage associated with a regime characterized by a greater concentration of power,<sup>49</sup> and perhaps also, or alternatively, through a process of constitutional renewal that involves a reconcentration of power.<sup>50</sup> In the emergent approach, the pluralist dimension within the constitution is recognized as a deeper and longer tradition, but also criticized as one that, supportive of and exploited by an elite establishment, is out of sympathy with the 'real' people. The (re)assertion of the

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resonance, focussing more on the foundational constituent power of the people. See e.g. Andreas Kalyvas, 'Popular Sovereignty, Democracy and the Constituent Power' 12 *CONSTELLATIONS* 223-244 (2005)

<sup>49</sup> On this aspect of the Turkish experience, see Isiksel, above n25.

<sup>50</sup> As in the case of the new Hungarian Constitution; above n24

interests of the populace is a trust assumed by the new populist leadership. It is a trust which, in the first instance at least, is likely to involve significant circumvention of the extant constitutional framework, but also with the prospect of a fuller commandeering and renewal. In either case, the populist moment contains an authoritarian impulse – a claim to renewed constitutional legitimacy in the name of a people and a popular project defined so as to ignore the plurality of popular sentiment and deny or restrict the future means of that people to reflect upon and adjust that popular project.

**(d) Populism and Constitutional Tension**

One of the ways in which contemporary fascination with populism threatens to distort is by seducing us into thinking that populist approaches, and populist versions of constitutionalism, are somehow bound to prevail. That is not the case. Populism is inherently fragile and unstable. The limited circuits of authoritarian power to which it attaches itself – military, dynastic, vanguard party or movement, are precarious resources. And where there is a more pluralist constitutional backdrop, even these resources may hardly be available. Additionally, populism may become trapped by its own contradictions. The repeated invocation of the people as a sacralized source of authority (the ‘real’ people) may disempower the people as a profane reality – (the *real* ‘real’ people) in a way that undermines the legitimacy of the populist leadership.

Yet the fascination with populism, and the attraction of populist solutions, have deeper roots. We noted in the introduction that intellectual fashions reveal as much about the mindset of the analyst as about the object analysed. In the case of populism, it is arguable that the preoccupation of the analyst betrays a wider and more longstanding anxiety with the condition of modern constitutionalism. On this view, populism is a symptom of a more profound difficulty, one that is apt to recur as long as that difficulty persists

Contemporary populist constitutionalism – to recall - may be seen, and often presents itself, as a reaction against a certain type of constitutional orthodoxy. More specifically, it may be argued that both populism’s reference to a popular tradition and its pull towards authoritarianism respond to a perceived tendency towards the neglect of

the *unitary collective particular* in our unfolding constitutional practice. This is more obviously so with the popular element, as it embodies a claim to represent the interests of the ‘real people’ – the ‘true’ unitary collective particular. But the authoritarian tradition more generally can also be seen as weighted towards representing what are claimed to be the interests of the polity as a whole against the undermining forces of excessive concern with individual interests or group pluralism.

This critique, in turn, resonates with a deeper series of stresses within the modern constitutional tradition. Earlier we discussed some relatively concrete ways of treating modern constitutionalism in normative terms, citing various institutional goods or juridical standards.<sup>51</sup> At a higher level of abstraction, however, modern constitutionalism as it crystallized from the late 18<sup>th</sup> century onwards embodies a more profound set of novel commitments. These are associated with the shift from a pre-modern social imaginary where the very order of things, including the structure of human morality, was regarded as holistic and preordained, to one where we understand ourselves as free and equal persons, individually and collectively capable of and entitled to make over the world in our own terms in the political communities of our choice. The realm of the political is one in which we organize these projects of self-determination, and the constitution the device and discipline through which we do so. Yet the various founding impulses of political modernity, and the tensions amongst these impulses, run through and continue to inform and complicate that constitutional project. At the deepest level, constitutional method becomes one of affirmation and balancing of the different general values and principles – or goods - implicated in the pursuit of political self-determination. These goods may be presented as a series of contrasting – and in some respects opposing – pairs. And it is through an examination of these pairs - both their internal relationships and the relationships amongst them - that we appreciate how the populist critique feeds off and responds to instabilities within the deep structure of constitutionalism.

In particular, three contrasting pairs provide the deep context for the populist complaint about the neglect of the unitary collective particular. First, and most basically,

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<sup>51</sup> Above n42

there is the individual-collective distinction. As envisaged by the modern constitutional project, political society must simultaneously valorize the collective expression of its self-determination – the people acting in concert to make and sustain that political society for their mutual benefit - while also protecting the individual's pursuit of her conception of the good from excessive collective encroachment.<sup>52</sup>

Secondly, there is the universal-particular distinction. On the one hand, the premise of popular sovereignty is a universal one.<sup>53</sup> The claim to a right to collective self-government is predicated upon notions of the equal worth of individual lives that in principle embrace each and every individual and community of individuals. So modern constitutional practice should track aspirations held in common across different collectivities, all drawing upon the same stock of principles of practical reason and institutional tools for their realization. On the other hand, in its community-specific focus, modern constitutional thought announces the distinctiveness of each constitutional entity in its historical origins and trajectory, institutional profile, political culture and community of attachment. The growing emphasis on democratic constitutionalism over the modern age – further explored below- both endorses and underlines this commitment to distinctive particularity. If the modern constitution is presented as an expression of popular sovereignty, and if its institutional provisions facilitate the democratic flourishing of its constituent community, then each constitution will perforce possess a distinctive pedigree and help nurture a distinctive political culture.<sup>54</sup>

Thirdly, there is the distinction between plurality and unity – the many and the one. The fabric of modern political life is 'communally pluralistic'.<sup>55</sup> As self-determining individuals our basic common membership of the polity is embellished and qualified by

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<sup>52</sup> See further Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship,' 39 RECHTSFILOSOFIE & RECHTSTHEORIE, 206-233 (2010); INTIMATIONS OF GLOBAL LAW 86-102 (2015)

<sup>53</sup> See, e.g. DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY (2007).

<sup>54</sup> See e.g. Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed world' in PETRA DOBNER AND MARTIN LOUGHLIN (eds) THE TWILIGHT OF CONSTITUTIONALISM 3-22 (2010)

<sup>55</sup> MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY 21(2009)

various other forms of collective identity or association predicated upon shared material interests, ethnicity, language, culture, religion, gender and so on. And contemporary constitutional technology contains many mechanisms, from federal and other structures of limited self-government and general equality and anti-discrimination clauses to the provision of distinctive group rights, designed to accommodate the diversity this brings. Yet unity – or singularity - is also implicit in the very idea of a constitutional order. The thing ‘constituted’ becomes ‘joined up’ in the very process of its constitution. The body politic, like the human body, is an organism defined in terms of the integrity of the whole, and also, it follows, its separability from and independence of other organisms. A single and discrete people is matched to a single and discrete legal and political structure; indeed, the very logic of the operation of external sovereignty as a meta-principle in the global ‘Westphalian’ order of states has traditionally rested on a notion of the mutual recognition and mutual exclusivity of all such discrete units.<sup>56</sup>

It is by running these binary distinctions together that we can identify a self-reinforcing tension within modern constitutionalism between individualism, universalism and plurality on the one side, and, on the other, the collectivism, particularism and unitary structure of whose neglect the populist complains.<sup>57</sup> Indeed, the grievance of today’s populist can in one sense be construed as an amplified contribution to a familiar repetitive syndrome of constitutional action and reaction, protestation and redress, balance and counter-balance. For the reconciliation of these contrasting orientations has always been much contested in detail as in broader constitutional vision. It lies at the heart of historical disputes over the relationship

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<sup>56</sup> See e.g. Neil Walker, ‘Beyond the Holistic Constitution?’ in Dobner and Loughlin (eds) above n 54, 291-308

<sup>57</sup> There are other contrasting pairs within the deep structure of constitutional modernity. The most fundamental juxtaposes autonomy with equality, the two founding anthropological assumptions of modern *homo politicus*. And, in turn, this generates an opposition between constitutionalism as a sponsor of negative freedom from governmental interference and constitutionalism as a vehicle for the pursuit of social rights and an expansive range of public goods. Yet while there is some general affinity between autonomy and the individualism/universalism/plurality axis, and between equality and the collectivism/particularism/singularity axis, to the extent that these two concepts speak not only to the terms of political justice but also to distributive justice - autonomy referring to a specifically economic conception of freedom from public interference and equality to equalization of allocation through public means, this describes a distinction which cuts across the fault line dividing populism from its ‘others’. That, indeed, is why, reflecting this divergence of economic philosophies, we find both Right and Left variants of contemporary populism; see Kaltwasser above, n14



between voice and rights, finality of legislation and judicial supremacy, the renewal of constituent power and the finality of constituted authority, and even in some measure between *gubernaculum* (legal generation of governmental authority) and *iurisdictio* (legal restraint on governmental power).<sup>58</sup> It is also implicated in questions over the relationship between constitutionalism as a culturally integrative or even assimilationist force and constitutionalism as an accommodation of multiple group identities.<sup>59</sup>

At the broader level of constitutional vision, the most common and politically resonant of these ‘nested oppositions’<sup>60</sup>, one that purports to absorb many of the others, is between so-labelled liberal constitutionalism,<sup>61</sup> with its preference for individual rights, judicial supremacy, constituted authority, *iurisdictio* and universal legal standards, and its various terminological others, including ‘republican constitutionalism’,<sup>62</sup> ‘political constitutionalism’<sup>63</sup> and even popular constitutionalism itself. Here, as with the other oppositions, there is a tendency for advocates of each side to accuse the other side of imbalance and to seek redress. And to the extent that populism has a preferred name for its constitutional ‘other’, it is certainly that of liberal constitutionalism.<sup>64</sup>

### 3. Populist Constitutionalism Today

But why now? If the seeds of populism are found in the deep subsoil of modern constitutionalism, why the contemporary flowering? The answer lies, at least in that part not attributable to conjunctural factors or leadership personalities, in the friction arising from the counterflow of two late modern trends.

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<sup>58</sup> See e.g. CHARLES HOWARD McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (revd. ed 1947); Martin Loughlin, ‘Constitutional Theory: A 25<sup>th</sup> Anniversary Essay’ 25 OJLS 183(2005). Though this opposition also resonates, arguably more strongly, with the equality/autonomy distinction; see above n57.

<sup>59</sup> See e.g. SUJIT CHOUDHRY (ED) *CONSTITUTIONAL DESIGN IN DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?*

<sup>60</sup> Jack Balkin, ‘Nested Oppositions’ 99 YALE L.J. 1699 (1990)

<sup>61</sup> See e.g., RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007)

<sup>62</sup> See e.g. ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005)

<sup>63</sup> See e.g., Bellamy, above n61

<sup>64</sup> See e.g. Muller, above n4; Blockker, ‘Populist Constitutionalism’ above n16

On the one hand, we live in an age in which global adherence to the democratic pedigree of constitutional arrangements becomes more widespread and insistent. In the post-Second World War years, while there have been repeated waves and troughs of democratic initiative and consolidation, the overall tendency has been sharply towards the championing of democracy as a ‘universal commitment’<sup>65</sup> and the normal template of government. Consistent with the underlying shift from a fate-centred to a choice-centred social imaginary, the proto-democratic impulse in the original modernist endorsement of constitutionalism as an act of collective self-authorship has matured into a more general attachment to democratic method in matters of governance. Yet, crucially, while this mature pro-democratic orthodoxy generates the many participatory or deliberative innovations in constitutional architecture that go under the banner of popular constitutionalism,<sup>66</sup> it also supplies an exacting critical standard against which the shortcomings of actually existing forms of government practice can be measured and highlighted.

And it is in this gap that populism can prosper. As Jan-Werner Muller puts it, populism threatens to be ‘the permanent shadow of representative politics’<sup>67</sup> – promising and promoting a severe reaction against all supposed compromises of democratic purity and distortions of the voice of ‘We, the People’. It offers a loud reminder that, just through the established constitutional repertoire of mechanisms for the representation and distribution of power that give weight or protection to certain individual rights and group interests and seek to provide a viable and accountable division of political and administrative labour in a mass society, all state authority systems are bound to become somewhat attenuated from the original or renewed

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<sup>65</sup> A. Sen, ‘Democracy as a Universal Value’ 10 JOURNAL OF DEMOCRACY 3-17 (1999). In 1941 only 13 countries could meet the most basic criteria of democratic self-government, but by the end of the century as many as 119 out of 192 countries could be described as electoral democracies – a figure that has stayed fairly constant since; see Freedom House Report, DEMOCRACY’S CENTURY: A SURVEY OF GLOBAL POLITICAL CHANGE IN THE 20<sup>TH</sup> CENTURY (1999)

<sup>66</sup> See e.g. A. Arato POST SOVEREIGN CONSTITUTION MAKING; LEARNING AND LEGITIMACY (2016)

<sup>67</sup> Muller, above n4 above, 101

constituent power of the unitary collective particular which is claimed to supply their democratic and cultural ‘prerequisite’.<sup>68</sup>

On the other hand, this gap between constituent authority and constituted power, however unavoidable a feature of any project of democratic constitutionalism and however more vulnerable to critical exposure in an increasingly democratically conscious age, is also exacerbated by certain objectively democracy-challenging trends. Constitutional detachment from ‘the people’ can run in different directions, and today the range of these directions and the counter-attraction of these distancing forces, as well as the visibility of that distancing process of distancing, is increasing. The two ‘constitutive borders’<sup>69</sup> of modern constitutional statehood have been somewhat eroded; those lying between the territorial inside and outside, and between the realm of general public power and private entitlement; indeed, the underlying forces of transnationalism and privatization responsible for these erosions are often mutually reinforcing.

And so the contemporary constitutional order becomes increasingly oriented towards the individual as an economic agent, or towards internal sub-national or other groups, or towards the ‘technocracy’<sup>70</sup> of administrative expertise, or towards private transnational enterprises, or international legal and political entities – all notable targets of populist ire. In these circumstances, populism is strengthened not only by its separate critique of these distancing factors, but also by the construction of narratives in which these alien forces are deemed to operate cumulatively and, under the supposed

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<sup>68</sup> On the inability of liberal constitutionalism to guarantee its own prerequisites, see famously, the work of Ernst-Wolfgang Bockenforde; in particular, ‘The Constituent Power of the People’ in *CONSTITUTIONAL THEORY: SELECTED WRITINGS* (Mirjam Kunkler and Tina Stein, eds, Thomas Dunlap Trans) ch 7 (2017); see also, Martin Loughlin, ‘The Concept of Constituent Power’ 13 *EUROPEAN JOURNAL OF POLITICAL THEORY* 218-237 (2014); PAUL KAHN, *PUTTING LIBERALISM IN ITS PLACE* (2009); Julian Schultes, ‘The Complacency of Legality: Constitutionalist Vulnerabilities to the populist conception of constituent power’ 19 *GERMAN LAW JOURNAL* (forthcoming, 2018)

<sup>69</sup> Grimm, above n54, 12

<sup>70</sup> See e.g. Christopher Bickerton & Carlo Invernizzi Accetti, ‘Populism and technocracy: opposites or complements?’ 20 *CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY* 186-206 (2017)

sign of the liberal establishment, even in *combination* against the unitary collective particular.<sup>71</sup>

#### 4. Conclusion

Faced with these tendencies, we are left with two cautionary thoughts. First, a feature of the basic constitutional antinomies set out above is that their relationship is one of mutual support as much as mutual conflict or trade-off. Each is not only a challenge and corrective to the other, but also its precondition. Under the developed modern constitutional order collective and individual interests are mutually constitutive as much as mutually limiting,<sup>72</sup> so too are universal and particular rationalities and sensibilities, as are the conditions of constitutional singularity and plurality. Therefore, to criticize the other side for imbalance without being mindful of one's own bias combines caricature with a lack of self-awareness, and with a failure to appreciate that all constitutional approaches founder if they do not respect constitutionalism's precarious internal balance. It follows that populists can be rightly and emphatically criticized for a one-sidedness about the nature of constitutional well-being in their own critique of the one-sidedness of the 'liberal establishment'. A strong intellectual case, then, can be made in critique of the contradictory impulses within the populist worldview, and an insistent pressing of that case provides a key element of any constitutional and political argument against populism.

Secondly, however, populism offers a standing reminder that, alongside criticism of the other side, the tension at the heart of modern constitutionalism must also be responded to in more constructive terms. That is so because the rise of populism reinforces the message that this tension, while ineradicable, is also treatable. On the one hand, the increased precariousness of the balancing act as the 'two constitutive borders' of state constitutionalism have become more porous under conditions of the

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<sup>71</sup> On the populist inclination towards conspiracy theories, see Bruno Catanho Silva, Federico Vegetti and Levente Littvay 'The Elite Is Up to Something: Exploring the Relation Between Populism and Belief in Conspiracy Theories' 23 SWISS POLITICAL SCIENCE REVIEW 423-443 (2017)

<sup>72</sup> See e.g. Jürgen Habermas, on the symbiosis of private and public right, in 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' 29 POLITICAL THEORY 766-81 (2001); see further, Walker, above n52.

transnationalisation and the fragmentation and privatization of political authority will inevitably draw renewed criticism from all who would attend to the claims of collective particularism. It will do so from those interested in the preservation, restoration or improvement of a plausible architecture of popular constitutionalism as much as from those impatient to impose more authoritarian solutions. The concerns from that side of the constitutional equation, therefore, can never be finally resolved, and ought never to be dismissed as passing or irrelevant by a myopic liberal constitutionalism. But, on the other hand, the sheer intensity of the populist reaction provoked over recent years and the scale and resonance of its transnational dissemination is *not* inevitable. Rather, we should beware the fatalism - and irresponsibility – of an attitude that, making the opposite mistake to that of complacent dismissal, sees in populist excess an elemental force beyond the influence of constitutional moderation. In the final analysis, any anti-populist approach needs to be informed by a recognition not only of the diverse roots and insistent nature of the perceptions of constitutional imbalance that fuel the discontents on which populism feeds, but also of the responsiveness of these perceptions to changes in the actual conditions of governance.

