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ORIGINAL ARTICLE

Political constitutionalism and populism

RICHARD BELLAMY

Department of Political Science, The School of Public Policy, University College London, The Rubin Building, 29/31 Tavistock Square, London, WC1H 9QU, England

Correspondence
Richard Bellamy, Department of Political Science, The School of Public Policy, University College London, The Rubin Building, 29/31 Tavistock Square, London, WC1H 9QU, England
Email: r.bellamy@ucl.ac.uk

Abstract

Criticisms of political constitutionalism's relationship to populism point in two opposed directions. Legal constitutionalists consider it too open to, and even as legitimating, populist politics, whereas radical democrats consider it too closed to popular participation, prompting an anti-system politics of a populist character. I dispute both these views. Underlying these contrasting assessments are differing conceptions of populism and constitutionalism. This article distinguishes right- from left-wing populism, and limited government from non-arbitrary rule, as constitutional ideals. Legal constitutionalism typically embraces the first ideal. However, that can be a driver of both right- and left-wing populism, and allow types of arbitrary rule that democratic backsliding and illiberal regimes can (and do) exploit. By contrast, political constitutionalism involves the second ideal and is antithetical to right-wing populism while potentially friendly to the legitimate demands of left-wing populism. Nevertheless, the practical reality of political constitutionalism in the United Kingdom (and elsewhere) often falls short of its ideal theoretical potential. Addressing these shortcomings, however, requires strengthening democracy rather than the legal constitution, not least through electoral reform.

1 | INTRODUCTION

The legal and political system in the United Kingdom (UK) is often characterized as being grounded in a political rather than a legal constitution. According to this political account of constitutionalism, the constitution consists not of an entrenched legal document upheld by an independent constitutional court, but resides in the democratic character of the political system and the modus operandi of its component institutions and processes.[1] On this political conception, the normal electoral and legislative processes possess appropriate constitutional qualities, so that there can be no higher law to the duly made constitutive laws that emanate from them. To the extent there is a written legal constitution, therefore, it results from the rights conferred by, and the procedures stipulated in, ordinary legislation – only some of which are expressly constitutional in character. Consequently, the central component of the UK's political constitutional system, itself a matter of legislation as well as convention, is the doctrine of the sovereignty of Parliament.[2] Courts play an important role within this arrangement in upholding due process and equality under the law. However, judicial review is at best 'weak' in that supremacy lies with Parliament. Although executives can be bound by courts to abide by existing laws, they are ultimately (and, in this arrangement, most legitimately) checked and balanced politically rather than legally – either indirectly, through elections, or directly, by elected parliaments and the need for the government to govern and legislate with the support of a plurality of the population and a majority of Members of Parliament (MPs).[3]

The effectiveness of this model in upholding constitutional values has been disputed since at least Thomas Paine's critique in his *Rights of Man*.[4] The contemporary debate goes back to the late 1970s, when Conservative critics of the then Labour administrations of Harold Wilson and James Callaghan contended it offered little more than a recipe for 'elective dictatorship'.[5] Liberal and some Labour opponents of the subsequent Thatcher administration repeated this charge once these erstwhile critics assumed power and left the political constitution largely unreformed and arguably even more centralized, with the executive more dominant than ever.[6] The referendum on the UK's membership of the European Union (EU) and the decision to leave (Brexit) has reignited these debates, with a number of commentators regarding the referendum and its result as symptomatic of the rise of populism within established democracies – a development they see political constitutionalism as ill suited to preventing and possibly even as fomenting.[7]

Criticisms of political constitutionalism's relationship to populism point in two apparently contradictory directions. On the one hand, political constitutionalism is charged with legitimating – or at least as being unable to curb – populist politics. These critics point to the appeal to the popular will via a referendum with regard to Brexit, and attempts by the executive to bypass Parliament

[1] R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007); G. Gee and G. Webber, 'What Is a Political Constitution?' (2010) 30 *Oxford J. of Legal Studies* 273.

[2] K. D. Ewing, 'The Resilience of the Political Constitution' (2013) 14 *German Law J.* 2111, at 2118; M. Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30 *King's Law J.* 125, at 133–137.

[3] J. A. G. Griffith, 'The Political Constitution' (1979) 42 *Modern Law Rev.* 1; A. Tomkins, *Our Republican Constitution* (2005).

[4] T. Paine, *Rights of Man, Common Sense, and Other Political Writings*, ed. M. Philp (1995) 122–124, 248–254.

[5] Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (1978) 127.

[6] For an overview and critique, see R. Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (1999) 180–189.

[7] I have addressed these debates in R. Bellamy, 'Political Constitutionalism and Referendums: The Case of Brexit' in *Handbook on the European Union and Brexit*, eds J. E. Fossum and C. Lord (2023) 486.

and avoid scrutiny of its proposals for exiting the EU. They contend the executive was only hampered by appeal to the courts and the UK's common law legal constitution, and often claim that had the referendum been regulated by what they assume (not necessarily correctly) would be the norms inscribed in any legal constitution, most notably a supermajority threshold, the Leave vote would not have been successful.[8] Such critics also note how supporters of democratic backsliding regimes in Hungary and Poland have appealed to political constitutionalism.[9] On the other hand, though, other critics censure political constitutionalism for being insufficiently open to popular participation. A doctrine focused on the constitutional qualities of representative democracy and the role of parliament, political constitutionalism is seen by these critics as involving an essentially elite model of politics. Notwithstanding its political character, they contend it lacks adequate popular responsiveness and thereby encourages an anti-system politics of a populist character.[10]

Underlying these contrasting assessments are differing conceptions of the nature of populism and its relationship to both democracy and constitutionalism, and hence to political constitutionalism. Accordingly, this article begins by exploring these terms. Section 2 starts by defining populism as a form of anti-system politics. However, political scientists differ as to whether populism should be seen as the product of a socio-cultural or an economic backlash. Right-wing populism tends to align with the former, and opposes those aspects of constitutionalism designed to protect the minority rights of cultural and ethnic groups and allow for pluralism. By contrast, despite involving some similar tropes, left-wing populism is largely associated with the latter. It generally favours pluralism on socio-cultural issues and instead opposes forms of constitutionalism linked to limited government as a socio-economic doctrine. Therefore, how far – and how justifiably – populism clashes with constitutionalism depends to some degree on which type of populism and what aspect of constitutionalism one has in mind.

Consequently, Section 3 turns to exploring two varieties of constitutionalism, each informed by a different regulative ideal – namely, that of limited government and of non-arbitrary rule, respectively. Whereas both ideals and the related forms of constitutionalism provide resources for resisting the socio-cultural backlash of right-wing populism, the latter ideal is more receptive to the economic demands of left-wing populists than the former ideal. To the extent populism results from a lack of political responsiveness to legitimate democratic demands for greater socio-economic equality, for which those constitutional arrangements favouring limited government can be blamed, it may be more appropriate to criticize the related form of constitutionalism rather than populism.

Section 4 turns to political constitutionalism. Its advocates claim that in resting on the ideal of non-arbitrary rule, it favours – and, to a degree, draws upon – socio-cultural pluralism, while allowing the democratic critique of forms of economic liberalism associated with the ideal of limited government. Moreover, it does so more reliably than any form of legal constitutionalism is likely to achieve. An assessment of political constitutionalism's relationship to populism must turn on how far these claims can be sustained.

Section 5 argues that – at the level of normative theory – political constitutionalism proves incompatible with right-wing populism while capable of addressing the legitimate demands of left-wing populism. Yet, what may be true in theory need not prove so in practice. The reality of political constitutionalism as currently practised in the UK often falls short of the theoretical

[8] See for example A. C. Grayling, *Democracy and Its Crisis* (2017) 189–197.

[9] T. Drinóczi and A. Bień-Kacala, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 *German Law J*. 1140, at 1161–1162.

[10] S. Tierney, 'Whose Political Constitution? Citizens and Referendums' (2013) 14 *German Law J*. 2185.

ideal. To some degree, it falls foul of the first criticism noted above, that of providing insufficient safeguards against the rise of populism, with regard to right-wing populism, and of the second criticism, that of being insufficiently popular, with regard to left-wing populism.

Section 6 asks whether legal constitutionalism might do better, or act as an important supplement to political constitutionalism when it fails. This section offers reasons for doubting it will do so, especially when the legal constitution – as tends to be the case – is informed by the ideal of limited government. Indeed, as the recent experience of the United States (US) suggests, there are reasons for considering political constitutionalism as more apt to combat populism than legal constitutionalism. However, to do so may require democratic reforms to further strengthen the constitutional credentials of the political system, leading to questions as to how capable of, and suitable for, reforming itself the political constitution may be.

2 | VARIETIES OF POPULISM

As Mark Tushnet and Bojan Bugarič have recently remarked, populism is typically defined so as to be 'by definition antithetical to constitutionalism'.[11] However, as they have also noted, both populism and constitutionalism cover respectively a wide range of very different types of political movement and legal and political system. Drawing on the work of both political scientists and theorists, they have contended that populism cannot be simply characterized as a particular style of politics; it also needs to be linked to a specific ideology and local circumstances that together determine the character of its various forms. Broadly speaking, they have distinguished a predominantly right-wing authoritarian populism that deploys populist rhetoric – often of a nationalist, anti-libertarian, and xenophobic nature – to legitimize democratic backsliding and entrench the rule of the movement's leadership, from a more left-wing democratic populism that challenges the lack of responsiveness of the main centre parties to the needs of ordinary citizens on egalitarian grounds, and calls for greater redistribution and a more participatory form of political engagement.[12] Both types of populism come in a number of variations. Indeed, to some extent, there is a gamut of populisms extending between these two types and in certain cases combining elements of each.

Despite these differences, there are certain common features that tend to be found in all these varieties of populism. Typically, they are anti-system and anti-elite.[13] That is, they criticize the main centre parties of established liberal democratic systems as forming a cartel, offering a restricted range of policy options consistent with a free market economy. Consequently, their aim is to break this cartel and offer an alternative that appeals to the collective interests of the 'people', characterized as the 'many' not the elite 'few'.[14]

The appeal to a 'popular will' has been seen by many commentators as anti-pluralist and inherently illiberal, justifying the tyranny of the majority over minority rights.[15] This depiction

[11] M. Tushnet and B. Bugarič, *Power to the People: Constitutionalism in the Age of Populism* (2021) 36.

[12] For right-wing populism, see P. Norris and R. Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (2019). For left-wing populism, see J. Hopkin, *Anti-System Politics: The Crisis of Market Liberalism in Rich Democracies* (2020) 64–67.

[13] C. Mudde and C. R. Kaltwasser, *Populism: A Very Short Introduction* (2017).

[14] Hopkin, op. cit., n. 12, ch. 2.

[15] J. W. Müller, *What Is Populism?* (2016).

of populism informs the argument that populism is inherently anti-democratic and anti-constitutional.[16] These features certainly characterize aspects of the more authoritarian uses of populist tropes by politicians such as Donald Trump and Viktor Orbán.[17] Such figures do tend to invoke an exclusionary conception of the 'people' not only as members of an ethnic and culturally homogeneous 'nation' but also as possessing a commitment to certain narrowly defined traditional values. Moreover, these leaders contend that they and their parties are the sole authentic voice of this homogeneous 'people' and their collective interests. This contention allows them to demonize all political opposition as reflecting the concerns of an elite group whose interests or values diverge from those of the 'nation' or 'people' and their supposed traditions. The rights of ethnic, religious, and other minorities and of immigrant groups are likewise treated as 'foreign' and sinister, as are often those of the lesbian, gay, bisexual, trans, and queer (LGBTQ+) community. As we shall see, these arguments do provide a spurious justification for undermining certain core features of constitutionalism.

However, placed in a different ideological framework, appeals to the 'people' can be regarded as reflecting an egalitarian concern with the public interest consistent with minority rights. As Jonathan Hopkin, Jane Mansbridge, and Stephen Macedo, among other analysts, have noted, there are also populist movements that combine a condemnation of the corruption and self-interest of the ruling elite and their ties to global financial markets and multinational corporations, with socially liberal attitudes and a demand for redistributive polices and investment in public services and infrastructure that will serve the interests of the 'people'.[18] To various degrees, Podemos, Syriza, Bernie Sanders, and Jeremy Corbyn are examples of this type of socially inclusive populism.[19] Like the US Populist party of the nineteenth century, such movements and political leaders are not anti-pluralist in the same way as the nationalist populists are, with their appeal to traditional values. Indeed, their view of the 'people' tends to consist of an alliance of groups and classes, albeit united in having interests ignored by – and, in some respects, opposed to – those of certain economic and social elites.[20]

Local circumstances are likely to determine which of these types of populism are liable to predominate. As I noted above, scholars divide as to whether they attribute the rise of populism to a socio-cultural or an economic backlash. However, these are clearly not exclusive categories. As Hopkin has observed, both forms can be broadly related to a convergence of the main centre parties of left and right on a broader role for competitive markets, including with regard to what had hitherto been considered as non-market public institutions and services, and a consequent narrowing of electoral choice.[21] These policies also brought with them a disinclination to increase progressive taxation to fund welfare measures, and growing income inequality. For example, in the UK, the Gini co-efficient for inequality shifted in little more than a decade in the Thatcher years from being comparable to Germany to converging with the US. Even under New Labour, the share of pre-tax income of the top 10 per cent – and especially the top 1 per cent – increased dramatically from 28.4 per cent to 42.6 per cent. While median income also grew consistently in

[16] J. W. Müller, 'Populism and Constitutionalism' in *The Oxford Handbook of Populism*, eds C. R. Kaltwasser et al. (2017) 591.

[17] Norris and Inglehart, op. cit., n. 12.

[18] Hopkin, op. cit., n. 12; J. Mansbridge and S. Macedo, 'Populism and Democratic Theory' (2019) 15 *Annual Rev. of Law & Social Science* 59.

[19] Hopkin, id., pp. 65–66.

[20] Mansbridge and Macedo, op. cit., n. 18, pp. 67, 70–73.

[21] Hopkin, op. cit., n. 12, pp. 58–60.

this period, that all changed with the financial crisis of 2008. The alleged trade-off between income growth and greater inequality and insecurity no longer looked remotely plausible as average real wages fell.[22]

Against the background of this general political and economic context, a distinction can be drawn between the responses of different social groups and – most important here – the way differences in social, economic, and political institutions determined the extent and nature of populist support and impact. By and large, right-wing xenophobic rhetoric has appealed most to older, less educated, white male voters in declining industrial areas, whereas left-wing populism has proved more attractive to younger voters in more economically dynamic urban areas.[23] Meanwhile, as Hopkin has shown, a key conditioning factor has been the way institutions managed the crisis in terms of the distribution of economic risks, costs, and benefits.[24] Those political systems where even left-wing parties were inclined to act 'responsibly' in the wake of the crisis, and supported bailing out the banks and financial institutions, and disinclined to act 'responsively' to the resulting economic hardship of many voters, offering instead austerity policies that cut social benefits, have proven to be the most likely to witness increased support for anti-system, populist parties. Indeed, Hopkin has described how the UK – which, next to the US, has been the biggest supporter of global and domestic marketization, is likewise prone to trade deficits, and has similarly weakened welfare support – has been one of the European countries most open to populism of both right and left among different social groups, with Brexit a predictable result of this disaffection.[25]

There is a tendency in much writing on populism and constitutionalism to describe populism in purely conceptual terms, as a defective form of democracy,[26] without reference either to the particular social, economic, and institutional drivers that might promote it, or to variations in its ideological colouring. It is thereby portrayed as an ever-present potential risk of mass politics that the constitutional constraints placed on popular democracy exist to curtail. Yet, once populism gets related to certain social and economic demands that the prevailing system has failed to respond to, that presentation becomes more problematic. If these demands can be justified in terms of democratic norms, then the legitimacy of certain constitutional mechanisms can themselves be called into question. This possibility suggests we need a more complex view not only of populism but also of constitutionalism, to which we now turn.

3 | VARIETIES OF CONSTITUTIONALISM

Within the literature on populism and constitutionalism, it has become standard to employ a 'minimal' account of constitutional democracy.[27] This strategy attempts to avoid assessing the constitutionality of populism by potentially controversial standards, which might fail to accommodate a reasonable range of variations in the constitutional systems of different states. In a bid to further reduce controversy, these accounts are presented as descriptive rather than normative, reflecting the core constitutional mechanisms rather than the main elements of constitutionalism

[22] Id., pp. 119–121.

[23] Id., pp. 11–12.

[24] Id., pp. 67–76.

[25] Id., pp. 74, 118.

[26] Müller, op. cit., n. 15; N. Urbinati, *Me the People: How Populism Transforms Democracy* (2019).

[27] T. Ginsburg and A. Huq, *How to Save a Constitutional Democracy* (2018) 10; Tushnet and Bugarič, op. cit., n. 11, pp. 9–12.

as a regulative ideal. Yet, this approach risks reifying certain mechanisms that may themselves be at least partly responsible for populist forms of politics because they reduce the responsiveness of the system to reasonable popular demands. To avoid this risk, this section adopts the reverse approach and starts by considering a range of regulative ideals constitutional systems might adopt. That leads to a variety of types of constitutionalism to match the varieties of populism, and allows a discussion in later sections as to which types of constitutionalism might be likely to encourage or discourage what kind of populism.

Constitutionalism in the most abstract and generic sense simply refers to any political system with rules or conventions establishing who exercises power, through what processes, and in which circumstances.[28] All political systems of any complexity will have constitutions in this sense, including absolute monarchies and authoritarian dictatorships. That fact merits bearing in mind given one feature of right-wing populist regimes in Hungary, Poland, and Turkey, as well as Donald Trump's neo-populist presidency in the US, has been to seek to buttress their hold on power by re-interpreting constitutional conventions, packing the judiciary and even altering the constitution itself so as to favour their party.[29] While the entrenchment of certain written legal constitutional rules as a higher law to be upheld by a similarly entrenched judiciary has often been regarded as a bulwark against populism, recent right-wing populists have shown how these same mechanisms can be deployed to entrench populist regimes in power. Indeed, such entrenchment may even have supported their rise to office to the extent those mechanisms rendered the political system unresponsive to the concerns of significant groups of citizens.

To distinguish authoritarian populist constitutionalism from more genuinely democratic forms, it is necessary to look less at the presence or absence of certain supposedly core features and institutions – such as a written, entrenched, and judicially protected constitution that operates as a higher law – and more at the regulative ideals motivating their design and deployment, and their prospects of success within given social and political conditions. Here I shall consider two regulative ideals – that of limited government and that of non-arbitrary rule. While the liberal ideal of freedom from interference informs the first, the republican ideal of freedom from domination animates the second. The first is predominantly a negative, or government-constraining, conception of constitutionalism, whereas the second incorporates a more circumscribed set of government-restraining, negative, features into a more positive, or citizen-empowering, conception.[30] My claim – elaborated in later sections – shall be that whereas right-wing populism proves incompatible at a theoretical level with either ideal, and is best characterized as seeking to constitutionalize arbitrary rule through those self-same mechanisms of legal constitutionalism many consider as the best way of limiting their capacity to do so, certain instances of left-wing populism might involve legitimate criticisms of the liberal ideal while being compatible with the republican.

Constitutionalism is most commonly characterized as a negative regulative ideal of limited government. As Wil Waluchow and Dimitrios Kyritsis have defined the term in their entry for the authoritative *Stanford Encyclopedia of Philosophy*,

> [c]onstitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should

[28] J. Gardner, 'Can There Be a Written Constitution?' in *Law as a Leap of Faith: Essays on Law in General* (2012) 89.

[29] Ginsburg and Huq, op. cit., n. 27, ch. 4.

[30] R. Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 *International J. of Constitutional Law* 86.

> be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations.[31]

However, as Jeremy Waldron has noted, a number of analytically distinct concepts have been associated with the idea of limitations, some more restrictive of the scope and exercise of governmental authority than others.[32] At the most restrictive end of the scale, constitutional limitations are associated with a minimal view of the state and hence less government, with constitutional protection given to property rights, freedom of contract, and the laxly regulated laissez-faire workings of an allegedly free market. These are economic liberal constraints designed to reduce state interference with an individual's negative liberty, especially the economic liberty to produce and trade goods and services. They potentially constrain many democratic demands for state intervention to improve working conditions, including the right to strike to secure such improvements; to provide better public services, such as more extensive welfare, health, and education systems; to enhance environmental protections; or to upgrade and expand public infrastructure. These demands become liable to challenge not only as misguided from a given neoliberal economic standpoint, but also – and more significantly – as legally and politically illegitimate. Less restrictive is the idea of restraint, as in prohibitions on torture, detention without trial, or interference with religious belief. These might be regarded as ethical liberal limitations, concerned to ensure relations of equal respect among citizens and individuals more generally. Finally, at the least restrictive end of the scale, limitation can mean control. As Waldron has noted, this need not be a purely negative notion. A driver controls a car not only in the sense that she can prevent it leaving the road and crashing, but also in being able to direct it towards certain destinations by a given route and at a given speed. Government regulation to implement the democratic demands mentioned earlier could be consistent with control in this sense, with citizens being placed in the driving seat through the electoral process.

This last notion of limitation connects to the second, more positive, regulative ideal – that of avoiding arbitrary rule through citizen empowerment to prevent domination. Unlike the liberal notion of freedom as non-interference, freedom as non-domination does not require less government but rather controlled government.[33] On this account, rulers dominate to the extent they can wilfully alter the available choice set for autonomous agents subject to their rule without being obliged to consult those agents or interests. The possibility for domination arises when there is a power imbalance between rulers and ruled, a dependency of the ruled on the ruler, and rulers can exercise personal rule.[34] These circumstances can be overcome within a democratic system that gives the governed equal power and authority in the authorization and holding to account of the government, so politicians and administrators are incentivized to address the commonly avowable interests of those in whose name they govern. A government controlled in this way need not be limited in its social and economic policies in order to be non-dominating. On the contrary, it may need to extensively and effectively regulate the basic economic and social structures precisely to ensure they operate in an equitable and non-dominating way.

[31] W. Waluchow and D. Kyritsis, 'Constitutionalism' in *The Stanford Encyclopedia of Philosophy,* ed. E. Zalta (2022), at <https://plato.stanford.edu/archives/sum2022/entries/constitutionalism/>.

[32] J. Waldron, 'Constitutionalism: A Skeptical View' in *Contemporary Debates in Political Philosophy*, eds T. Christiano and J. Christman (2009) 267, at 271–272.

[33] P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997) 22–23.

[34] F. Lovett, *A General Theory of Domination and Justice* (2010) 119–120.

This ideal places citizens in control of the government. Constitutions so conceived are concerned with due process. In Waldron's words, they 'lay down procedures … limiting not so much what can be done but *how* it is done'.[35] In so doing, federalism and electoral systems, on the one hand, and bicameral arrangements and the separation of powers, on the other, need not be seen simply as ways of dispersing and diluting power that constrain potentially oppressive legislation or acts. Rather, and more importantly, they can be designed as ways of empowering citizens by bringing a variety of voices into play, enabling them to act in concert and to inform as well as to hold accountable their political representatives, and ensuring public policies are adequately deliberated and scrutinized.[36] As we shall see, political constitutionalism aspires to operate in just such a way, not least by seeing the core of constitutionalism as the equal democratic empowerment of all citizens.

The fault line between the limiting and the empowering regulative ideals of constitutionalism is often located in their views of majority rule.[37] The limiting ideal is more inclined towards a legal constitutionalism that is designed in its minimal state version in large part to curb democratic demands for more active and redistributive government on the grounds that they reflect the 'tyranny of the majority'. As such, it is usually happy to deploy non-majoritarian institutions (NMIs) – such as central banks, international organizations, and constitutional courts – to lock in liberal values and policies. However, as Michael Zürn has recently argued, the increasing deployment of such institutions, combined with the cartelization of parties noted above, offers a political explanation of the rise of populism that can combine aspects of the cultural and economic explanations.[38] As he has observed, both these developments have over time decreased the responsiveness of the political system and pushed the narrative of a permanent, discrete, and insular silent majority that has been increasingly marginalized by unrepresentative elites. Zürn has associated the rise of catch-all parties, on the one side, and NMIs, on the other, to the bargain between capital and labour whereby the institutionalization of international free trade after the Second World War went hand in hand with the establishment of national welfare states capable of absorbing economic shocks and uncertainties. He has charted how, as that bargain came under increased strain from the 1980s onwards, trust shifted away from the majoritarian processes of electoral democracy. As parties lost their mass base and even electoral support, power (and blame) shifted to trustworthy independent institutions. Consequently, NMIs grew in number and prominence and became more politicized, while parties themselves became more professionalized parts of the state, as per the cartelization thesis. Zürn has contended that a new political cleavage developed between the liberal cosmopolitan elite represented within both NMIs and the cartel running the established centrist parties, on the one hand, and the silent majority who became increasingly attracted to populism, on the other.[39]

By contrast, the empowering ideal is more inclined towards a political constitutionalism that is designed to prevent arbitrary rule by controlling and to some degree restraining government by making it responsive to democratic majorities.[40] On this account, majority rule is seen as a fair

[35] Waldron, op. cit., n. 32, p. 273, emphasis in original.

[36] J. Waldron, *Political Political Theory* (2016) chs 3–5.

[37] Waldron, op. cit., n. 32, p. 275.

[38] M. Zürn, 'How Non-Majoritarian Institutions Make Silent Majorities Vocal: A Popular Explanation of Authoritarian Populism' (2022) 20 *Perspectives on Politics* 788.

[39] Id., pp. 789–791.

[40] Bellamy, op. cit., n. 1, ch. 6.

process for citizens to reconcile their disagreements on the moral norms governing their society – one that motivates politicians to appeal to those norms most people can share as in their common interest. Within a pluralist society, in which majorities need to be constructed from various fluctuating minorities, majority rule encourages political parties to attempt to settle on both processes and policies likely to treat all with equal concern and respect. As a result, it not only reflects the egalitarian norms of the democratic process but also supports those of a democratic society more generally.

However, the political constitution can itself be deformed by the same trends traced by Hopkin, Zürn, and others. It relies on parties being genuinely competitive and representing and responding to the plurality of society. It is sometimes argued that a democratic system and society presupposes certain norms and practices related to ensuring political equality but cannot be assumed to create or sustain them.[41] As such, they are pre-political and need to be enshrined in a legal constitution and judicially protected from challenge – including by the democratic process itself. At best, they can gain direct democratic legitimacy through being enacted in exceptional moments of political solidarity, such as after a war or some other crisis, in a singular constitutive act of the 'people' as a whole.[42]

Yet, these accounts leave the power of the judiciary itself unchecked and assume that these norms reflect either objective moral principles or, in the absence of a popular constitutional amendment, views the current 'people' can be regarded as acquiescing in – even if the constitutive act took place several generations ago. Both the 'objective' and the 'popular' view of constitutional norms underestimate the significance of moral disagreement and the moral capacities of citizens.[43] Meanwhile, each gives rise to a paradox. On the one hand, the 'objective' view seems to justify the establishment of the very NMIs that on some accounts have led to the development of populism. On the other hand, 'popular' methods, such as a referendum, for changing the constitution risk being themselves populist. By contrast, the reasonableness of moral disagreements among citizens forms the starting point of political constitutionalism, which seeks to provide a mechanism for their fair and equitable resolution in ways that recognize the ontological status of the competing values and judgments while being popular without being populist.

4 | POLITICAL CONSTITUTIONALISM, DISAGREEMENT, AND REPRESENTATIVE DEMOCRACY

Political constitutionalism proceeds from the argument that the laws determining the terms of social and political co-existence, including the basis and interpretation of fundamental rights, are matters of reasonable disagreement among those who are subject to them.[44] Political constitutionalists claim that the most appropriate way of recognizing the contested nature of these terms and rights is to subject them to a collective decision-making process as to their content and implementation that treats all involved impartially and promotes reciprocity among them, so all are regarded with equal respect and concern.[45] Representative democracy linked to parliamentarism

[41] R. Dworkin, 'Introduction: The Moral Reading and the Majoritarian Premise' in *Freedom's Law: The Moral Reading of the American Constitution* (1996) 1; J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

[42] B. Ackerman, *We the People: Foundations* (1991).

[43] Waldron, op. cit., n. 32, pp. 275–276.

[44] Bellamy, op. cit., n. 1, pp. 4–5; J. Waldron, *Law and Disagreement* (1999) 107–118.

[45] Bellamy, id., ch. 4; Waldron, id., ch. 11.

is held to satisfy these desiderata in a manner that deploys certain qualities standardly associated with constitutionalism.[46]

As I noted above, these constitutional qualities are achieved not through legal mechanisms that hold politicians and the administration to the norms of a codified and entrenched constitution that acts as a higher law, but through the electoral and legislative operations of a democratic political system.[47] Such systems incorporate two key constitutional devices – those of checks and balances, reflecting respectively the negative, or constraining, and the positive, or empowering, aspects of constitutionalism outlined in the previous section.[48] On the one hand, governments are checked through requiring authorization by, and being held regularly accountable to, citizens through the electoral process. These mechanisms provide checks on arbitrary rule and the protection of individual rights. They can also be supplemented by weak-form judicial review, which highlights the adverse impact of general legislation on the rights of particular individuals.[49] On the other hand, governments, and indirectly those citizens supporting them, are balanced by having to compete against opposition parties – both in elections and in the legislature – and hence must 'hear the other side'. These balances promote the participation in decision making by citizens so as to support the need for politicians to appeal to their commonly avowable reasoning and interests and enhance identification with the public good. As I noted, bicameralism, federalism, and a proportional electoral system can all, where appropriate, provide further sources of balance that foster deliberation and the need to address all sections of the community.[50]

All these mechanisms can be seen as sharing a lineage with the ancient notion of the mixed constitution, which aimed at achieving a degree of mutual checks and balances between the different classes of a society.[51] Although in their modern incarnation they involve democracy, their virtues lie not as means for collective self-rule or popular will formation, as in certain theories of deliberative and direct democracy. Rather, as per the neo-Roman republican tradition, their core concern is with the promotion of freedom as non-domination and relatedly of equality.[52] From this perspective, what matters is that public authorities cannot act arbitrarily – that is, simply as they will, without consulting the views and interests of those subject to their rule.

By advocating an institutional framework for a non-dominating system of democratic government, political constitutionalism seeks to achieve a form of rule that treats all with equal respect and concern.[53] The securing of equal respect can be regarded as an intrinsic feature of political constitutionalism. Elections based on one person, one vote and majority rule treat all citizens as possessing equal status, and provide a mechanism that gives equal weight to their views and interests and that is neutral and impartial with regard to their worth for any collective decision.[54]

This intrinsic aspect of the democratic process also proves instrumental to securing equal concern and the negative and positive constitutional purposes of protecting rights and fostering

[46] Griffith, op. cit., n. 3; Tomkins, op. cit., n. 3, pp. 1–10; Bellamy, id., pp. 12, 259, 260; Gordon, op. cit., n. 2, pp. 131–133.

[47] Bellamy, id., ch. 6.

[48] Bellamy, id., ch. 5; N. W. Barber, *The Principles of Constitutionalism* (2018) 2–9.

[49] Waldron, op. cit., n. 36; Bellamy, op. cit., n. 30.

[50] Waldron, id., chs 3–5.

[51] R. Bellamy, 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy' (1996) 14 *Political Studies* 436.

[52] Tomkins, op. cit., n. 3, ch. 2; Bellamy, op. cit., n. 1, ch. 4.

[53] Bellamy, id.

[54] T. Christiano, *The Constitution of Equality* (2008).

participation and the public interest respectively.[55] The balancing features of the political constitution encourage reciprocity among citizens and a willingness to compromise to create viable party programmes with broad popular appeal. For example, competition between different parties incentivizes politicians to fish for votes and construct programmes that build coalitions between different groups of citizens that appeal to the median voter – usually that set of preferences that represents the Condorcet winner across the electorate.[56] As Robert A. Dahl famously observed, within pluralist societies, majority rule tends to be the rule of an alliance of various minorities.[57] Given many minorities could swap allegiance, this motivates both a regard for minority rights and the need to frame policies in terms of their benefit to the public interest rather than to particular sectional interests.

Meanwhile, the prospect of future elections constrains arbitrariness by governments, which will be held accountable for their failings when they next seek authorization to rule. That parties may alternate in power also creates a reason to wish the rules of the game to remain fair and for the judiciary to be independent and ensure all are equal under the law. As noted above, bicameralism – especially where the second chamber is selected by different electoral rules to the first – may likewise provide a spur to inclusive deliberation and a regard for the public interest. The precise nature of these institutional arrangements will tend to reflect the social characteristics of the polity concerned.[58]

As will be argued in the next section, a well-functioning political constitution ought in principle to be capable of meeting the respective challenges posed by right- and left-wing populism. On the one hand, minority rights should be protected through the pivotal role of minorities in the formation of majority coalitions. On the other hand, governments should be responsive to policies promotive of economic equality. After all, as we remarked in the last section, political constitutionalism is informed by the regulative ideal of non-arbitrary rule rather than limited government, while its openness to majority rule favours policies likely to be promotive of the interests of the many rather than the few. Yet, what happens in circumstances when the political constitution is not well functioning? Is the political constitution capable of defending and reforming itself, or must it rely on the protection offered by a legal constitution? We shall turn to these questions in the section after next.

5 | POLITICAL CONSTITUTIONALISM AND POPULISM

As a form of government, populism – even in its right-wing variant – differs from authoritarianism in claiming, and to some degree possessing, democratic support and credentials. Although populists seek to reform certain democratic structures and constitutional checks, they do so on the basis of an alleged democratic mandate to enhance more direct popular influence and control, replacing rule by and for a minority/ies with rule by and for the majority, defined as the 'people' as a whole, and thereby supposedly rendering policy making more responsive and less elitist.[59]

[55] A. J. McGann, 'The Tyranny of the Supermajority: How Majority Rule Protects Minorities' (2004) 16 *J. of Theoretical Politics* 53, at 56, 71.

[56] P. C. Ordeshook, *Game Theory and Political Theory* (1986) 245–257.

[57] R. A. Dahl, *Democracy and Its Critics* (1989) 218.

[58] Id., pp. 251 ff.

[59] Ginsburg and Huq, op. cit., n. 27, pp. 77–78.

This appeal to democracy produces a certain superficial similarity with political constitutionalism. That resemblance proves potentially justified in the case of left-wing populism. By contrast, right-wing populism proves opposed to the very features of democracy that provide it with the constitutional features political constitutionalists admire and advocate.

5.1 | Right-wing populism and political constitutionalism

There are five interrelated core features of right-wing populism that render its advocacy of democracy unconstitutional in a manner inimical to political constitutionalism. First, it is anti-pluralist.[60] Its advocates appeal to a unitary conception of the 'people' – based on nationality, ethnicity, or class – with those not sharing the preferred markers being not part of the 'people'. Second, and as a consequence, majority rule is not a construct of a certain form of political system that equally weighs the different preferences of all individuals. Rather, it reflects the supposed pre-existing will of a putatitive already existing collective agent.[61] Third, as a result, complex electoral systems are denigrated by comparison with exercises of direct democracy, such as referendums, that can be portrayed as allowing the collective expression of a supposed popular will.[62] Fourth, for parallel reasons, intermediaries between the 'people' and the executive, such as parties and representatives, are deemed elitist. Populist political leaders claim a direct, intuitive, connection to the 'people'.[63] Fifth, since there is only one 'true' 'people', who speak with one voice, there is no requirement to 'hear the other side'. Political competition, scrutiny, and critical debate are delegitimized. There is no notion of 'loyal' opposition. Rather, alternative proposals and criticism are by definition 'against' the 'people'.[64]

These five features serve to legitimize the centralization of power under the executive and the transformation of the legislature into a rubber stamp of executive decrees within right-wing populist regimes. They also pave the way for the politicization of the bureaucracy and judiciary. Most relevantly here, they challenge the validity of the checks and balances of the political constitution, particularly those designed to prevent arbitrary rule by the executive, on the one hand, and to secure a voice for minority groups and the opposition, on the other. Both become unjustified constraints on the will of the 'people'.[65] These arguments also go hand in hand with the advocacy of national self-interest and the related opposition to liberal cosmopolitan elites. Yet, the appeal to national popular solidarity tends to be turned outwards – against immigration, foreign imports, and international agreements and institutions – rather than inwards – in favour of redistribution and social equality among national citizens. Domestically, right-wing populists have tended to remain advocates of market economies.[66] By contrast, demands for redistribution and social equality inform left-wing populism.

[60] Müller, op. cit., n. 15, pp. 32, 69.

[61] A. Weale, *The Will of the People: A Modern Myth* (2018).

[62] Ginsburg and Huq, op. cit., n. 27, p. 81.

[63] Id., pp. 79–80.

[64] Id., pp. 81–82.

[65] Id., pp. 80–81.

[66] Hopkin, op. cit., p. 12, pp. 61–62.

5.2 | Left-wing populism and political constitutionalism

As was noted earlier, left-wing populism can be regarded as involving a critique of neoliberal economic policies and the constitutional doctrine of limited government that has often been employed to legitimize and uphold them.[67] In the international sphere, such limitations have been defended and imposed by bodies such as the International Monetary Fund, the World Trade Organization, and the Court of Justice of the European Union through their emphasis on free trade and the consequent pressures to remove tariff barriers, to privatize public utilities and services and open them up to competition, including by foreign providers, and to maintain low inflation and balanced budgets. Domestically, these limits have been endorsed, implemented, and extended by central banks, regulatory agencies, and constitutional courts – particularly with regard to the limits placed on trade unions and wage bargaining on the grounds of upholding freedom of contract, and the adoption of strict public spending targets, with a consequent reduction of welfare programmes, sometimes accompanied by tax cuts.[68] However, as important has been the parallel critique of the lack of responsiveness of actually existing democratic systems.[69] Here, the complaint has been that the main parties of left and right have converged in ways that have effectively depoliticized and removed or blocked the established democratic channels whereby such policies might be challenged. Instead, these parties have prioritized economic responsibility over political responsiveness, leading – in the wake of the Euro crisis – to their providing massive bank bailouts while implementing austerity policies to tackle the associated sovereign debt.[70]

This latter complaint can be seen as a criticism of the political constitution for failing to perform its constitutional task of preventing arbitrary rule. Following Zürn and Hopkin, I remarked above how the emergence of catch-all parties of the centre right and left as a result of the post-war consensus on a model of embedded liberalism led to a more professionalized and technocratic, non-ideological form of politics that produced a growing sense of disaffection between parliamentary representatives and party members and voters.[71] This development has coincided with a steady decline in electoral turn-out across almost all established democracies. The resulting cartelization of the party system undermines the political constitution, exacerbating certain generic criticisms levelled at representative democracy.[72]

Critics focus on the elite character of representative systems, the lack of responsiveness of parties and the ways collusion between them can keep key issues off the electoral agenda, and the resulting disempowered nature of citizen participation, limited as it is to a periodic vote on the (often overlapping) programmes offered by politicians.[73] These failings are held to largely depoliticize democracy and limit both its checking and balancing capacities, thereby weakening its negative and positive constitutional qualities, respectively. If parties fail to adequately contest each other and offer clear alternatives, then it becomes harder to check governments and hold

[67] Id., pp. 65–67.

[68] R. Bellamy and A. Weale, 'Political Legitimacy and European Monetary Union: Contracts, Constitutionalism and the Normative Logic of Two-Level Games' (2015) 22 *J. of European Public Policy* 257.

[69] Zürn, op. cit., n. 38, pp. 792, 794; Hopkin, op. cit., n. 12, p. 72.

[70] P. Mair, *Ruling the Void: The Hollowing Out of Western Democracy* (2013).

[71] Zürn, op. cit., n. 38, pp. 5–7; Hopkin, op. cit., n. 12, pp. 37–39.

[72] R. Katz and P. Mair, 'Changing Models of Party Organisation and Party Democracy: The Emergence of the Cartel Party' (1995) 1 *Party Politics* 5.

[73] Tierney, op. cit., n. 10, pp. 2187–2188; S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (2012) 3–4.

them to account or to incentivize them to pursue policies that address the commonly avowable interests of the public as a whole. Likewise, if the main parties ignore the preferences of certain groups of citizens and take them off the electoral agenda, then these preferences will carry no weight in the balance of political priorities within any of the party programmes.

All these potential failings have been held to increasingly characterize democratic systems.[74] The resulting danger is less that of the tyranny of the majority as of a tyranny of a minority – a feature exacerbated in plurality electoral systems, such as that of the UK, which reduce the number of viable parties in play and result in parliamentary majorities that rarely represent a majority of voters. Meanwhile, these same features arguably allow for the capture of government by right-wing populists who have standardly sought to further reduce the responsiveness of the political system through electoral gerrymandering. In these circumstances, a natural question has been whether the political constitution is capable of renewing itself, or if legal constitutionalism must come to the rescue – an issue to which we now turn.

6 | CAN LEGAL CONSTITUTIONALISM DO BETTER?

Recent instances of democratic backsliding by populist politicians in not only comparatively recent democracies, such as Hungary and Poland, but also established democracies, such as the US under President Trump and, more recently, in the UK under the Johnson administration, has led to a revived interest in militant democracy and the use of legal constitutional measures to defend democracy.[75] The rationale behind this revival derives from the fact, remarked on earlier, that populist politicians have come to power through winning elections and then deployed formally legal means to entrench their power. The alleged advantages of legal constitutionalism in this regard are held to derive from two features of this arrangement: the entrenchment of constitutional rights and processes, including the rules of the democratic game, and the supposed independence of the judiciary. Its proponents claim that these two features make it harder for populists to subvert the democratic process and abrogate core rights. They contend that even if certain substantive issues should arguably be left to the democratic process, that process itself requires protection to ensure it operates in a free, equitable, and open way.[76]

Some have argued that the need for the shift from political to legal constitutionalism within the UK was confirmed by the intervention of the courts to uphold the statutory right of Parliament to trigger Article 50 to leave the EU[77] and even more in the decision of the Supreme Court to counter the use by the executive of the prerogative power to prorogue Parliament to stymie parliamentary discussion of the government's Withdrawal Bill.[78] Commentators differ on how far either judgment – but especially the second – can be deemed compatible with political constitutionalism.[79]

[74] Mair, op. cit., n. 70.

[75] J. W. Müller, 'Militant Democracy' in *The Oxford Handbook of Comparative Constitutional Law*, eds M. Rosenfeld and A. Sajó (2012) 1253, at 1254.

[76] See for example R. Dixon, *Democracy and Dysfunction: Towards a Responsive Theory of Judicial Review* (2022).

[77] *R (Miller)* v. *Secretary of State for Exiting the European Union* [2017] UKSC 5.

[78] *R (Miller)* v. *The Prime Minister/Cherry and others* v. *Advocate General for Scotland* [2019] UKSC 41; M. Gordon, 'The Prorogation Case and the Political Constitution' *UK Constitutional Law Blog*, 30 September 2019, at <https://ukconstitutionallaw.org/2019/09/30/mike-gordon-the-prorogation-case-and-the-political-constitution/>.

[79] See N. Barber and J. King, 'Responding to *Miller*' *UK Constitutional Law Blog*, 7 November 2016, at <https://ukconstitutionallaw.org/2016/11/07/nick-barber-and-jeff-king-responding-to-miller/>; P. Craig, 'Proro-

Personally, I see both judgments as defending parliamentary sovereignty and, as such, entirely at one with political constitutionalism. After all, as Giovanni Sartori remarked some time ago, if the principle of parliamentary sovereignty means anything, it surely entails that the prerogatives of the Crown, and the executive that acts in its name, have 'no power *outside* of Parliament' and 'could only be exercised according to the formula of the King *in* Parliament'.[80] However, here I want to bracket the rights and wrongs of either judgment as a matter of UK public law, and instead ask whether a political constitution would benefit from clearer and more radical legal constitutional support – be it in the UK (regardless of whether either of the *Miller* cases indicated this to already exist or not) or elsewhere.

A lot of evidence suggests it is doubtful that stronger legal mechanisms of the kind outlined above could or would address either the democratic backsliding of right-wing populists or the democratic disappointments of left-wing populists. In the case of right-wing populists, they have typically used the following six techniques to subvert the legal constitution.[81] First, they exploit the fact that even written constitutions often function on the basis of good will and conventions, which they either ignore or interpret in tendentious and partisan ways. For example, Republicans in the US exploited filibuster conventions in the Senate to block some confirmations of Barack Obama's nominations to the federal judiciary and, most importantly, refused to consider any nominee to replace Antonin Scalia on the Supreme Court in 2016 on the spurious grounds that it would be illegitimate to allow an appointment given the upcoming presidential election – a position they reversed when it came to Donald Trump's nomination of Amy Coney Barrett in 2020, only days before the election. Second, they pack the judiciary with supporters or seek to make them more susceptible to political pressure. Third, they attempt to change the constitution to increase or even abolish term lengths for the executive and enact changes to fundamental values that favour their programme. Fourth, they seek to alter electoral rules and constituencies to gain advantages over opposition parties. Fifth, they use libel and funding regulations to limit freedom of speech and association and to criminalize opposition. Finally, they regulate the media in ways that shrink the public sphere.

Theoretically, an independent judiciary upholding a constitution enshrining fair democratic standards could block such moves. Practically, however, they may prove hesitant or unwilling to do so.[82] First, a lack of democratic legitimacy may make the judiciary reluctant to intervene unless an explicit constitutional provision applies to the case at hand. That often is not the case. Second, greater activism by the courts risks politicizing the constitution and judiciary, prompting attempts to change the former and capture the latter. As a result, such measures may only provide a temporary buffer. Indeed, third, if these attempts prove successful, they can work to entrench the position of the right-wing populist regime. Fourth, even if the constitution is unchanged, constitutional norms tend to be sufficiently abstract to allow for a variety of different interpretations with

gation: Constitutional Principle and Law, Fact and Causation' *UK Constitutional Law Blog*, 2 September 2019, at <https://ukconstitutionallaw.org/2019/09/02/paul-craig-prorogation-constitutional-principle-and-law-fact-and-causation/>; T. Endicott, 'Don't Panic' *UK Constitutional Law Blog*, 13 September 2019, at <https://ukconstitutionallaw.org/2019/09/02/paul-craig-prorogation-constitutional-principle-and-law-fact-and-causation/>.

[80] G. Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *Am. Political Science Rev*. 853, at 854, emphasis in original.

[81] Ginsburg and Huq, op. cit., n. 27, pp. 90–119; M. Tushnet, *Taking Back the Constitution: Activist Judges and the Next Age of American Law* (2020) Parts 1 and 2.

[82] R. D. Doerfler and S. Moyn, 'Democratizing the Supreme Court' (2021) 109 *California Law Rev*. 1703; R. D. Doerfler and S. Moyn, 'The Ghost of John Hart Ely' (2022) 75 *Vanderbilt Law Rev*. 769.

quite divergent policy consequences. Consider majority-minority districts in the US, for example. At one level, these can be seen as a progressive measure, akin to special representation rights for certain groups in a number of countries, that promotes the representation of minorities in Congress. Yet, they can also indirectly support gerrymandering that favours white-majority districts. Or consider how in *Citizens United* v. *Federal Election Commission*, the Supreme Court ruled that political spending was a form of free speech and hence protected by the First Amendment, thereby deeming campaign finance reform unconstitutional.[83] Finally, these different interpretations often reflect reasonable disagreements as to how certain principles should be understood. Taking such controversies out of politics risks at best fuelling disillusionment with democracy and at worst rendering political debate ever more unprincipled and anti-constitutional, given interpreting and upholding the constitution will no longer be the responsibility of citizens or politicians.

As we saw, it is precisely such limitations on democracy that drive the rise of left-wing populism. Much of the liberal legal constitutionalist case rests on the assumption that the key danger to individual rights stems from the tyranny of the majority, and that strong-form review by an independent constitutional court on the basis of an entrenched bill of rights performs better. However, no such empirical correlation exists. If one looks at standard indices for the protection of civil and political liberties, such as the Freedom House Reports, then a majority of the highest-performing countries – many ranked far higher than the US – do not have strong-form judicial review. These include the four Scandinavian countries, which have a very weak form of review; the Netherlands and Australia, which do not permit judicial review of statutes in rights cases; the UK and New Zealand, which have declaratory powers but leave the law in force; and the Canadian constitution, which permits parliament a legislative override.[84] By contrast, majoritarian democracy has more than a contingent link to human rights protection because in sharing power equally, at least in formal terms, it favours the promotion of public policies that foster the equal rights of voters.[85] As the traditional utilitarian criticism of natural rights contended, there is a danger that appeals to rights that are unrelated to, and even deployed against, the public welfare serve merely to protect the unwarranted privileges of privileged minorities. That danger risks being exacerbated by the narrower and less accessible forum of a court – not least if that court has been captured by the privileged minority, as seems to have been the case in *Citizens United*. Indeed, a Washington Post–ABC News poll at the time showed a majority of both Republicans and Democrats opposed the Supreme Court's judgment, while 72 per cent thought Congress should act to restore some limits to political spending.

Counter-majoritarian mechanisms, including entrenched constitutions and judicial review, form part of the problem rather than a solution. A key role in this regard is played by the nature of the electoral system itself. Plurality systems tend to promote anti-system politics more than proportional systems. True, the latter make it easier for populist parties of right and left to gain representation, yet that can act as a safety valve against total disillusionment with the democratic system. Instead, the former can magnify and foster a build-up of voter discontent, eventually leading to more dramatic breakthroughs, as in the UK and the US.[86] More importantly, proportional representation tends to favour greater social equality because it results in a broader range of social

[83] *Citizens United* v. *Federal Election Commission* 558 US 310 (2010).

[84] J. King, 'The Democratic Case for a Written Constitution' (2019) 72 *Current Legal Problems* 1, at 13 and n. 30.

[85] T. Christiano, 'An Instrumental Argument for a Human Right to Democracy' (2011) 39 *Philosophy & Public Affairs* 142.

[86] Hopkin, op. cit., n. 12, p. 74.

interests being involved in the policy-making process.[87] In other words, we need to strengthen rather than weaken political constitutionalism, by enhancing those democratic features on which its constitutional qualities depend.

That raises the issue of whether the political constitution can renew itself. A standard critique of it even attempting to do so is that this would involve politicians and those they represent being 'judge in their own cause'. Yet, those raising this objection tend not to complain of courts ruling on their own competence to adjudicate on a given issue. To a degree, this will be an unavoidable feature of whatever body has the final say on constitutional questions in a given system. Even so, there are democratic mechanisms that can be deployed to reduce the likelihood of self-interested, rushed, or poorly conceived proposals being adopted. For example, proposals could be drafted by a body of experts nominated and approved by all parties and involving the input of randomly selected citizens' juries; the resulting legislation might require endorsement by parliaments either side of an election or need approval in a referendum.[88] These seem more legitimate ways of making and approving changes to the rules of the democratic game than a decision by a court as to what it believes is mandated by certain constitutional norms. Moreover, that need not mean these democratic deliberations are unconstitutional. On the contrary, broad agreement is likelier the more proposals can be shown to align with commonly avowable principles of a constitutional nature, such as political equality.

Of course, nothing is guaranteed. People have to be convinced change is needed – that the system of governance requires fixing and not just individual politicians.[89] And that perceived need has to be sufficiently broad as to be to some degree cross-party, so the public rather than just sectional interests will prevail. To an extent, the same can be said with regard to constitutional change by judges. Courts tend to reflect sustained trends of national public opinion, with judges often feeling most confident to act when they consider their judgments will meet with broad popular support.[90] But the potential for the tyranny of the minority is much greater, especially if courts involve a small membership with lengthy terms of office, as is the case in the US. In these circumstances, entrenchment and independence become disadvantages rather than advantages precisely because there is a lack of popular responsiveness.[91]

7 | CONCLUSION

Populism tends to be regarded as a latent potential within democracy that a legal constitution provides protection against. Political constitutionalism thereby becomes suspect as enabling the emergence of populism. This article disputes that view. It distinguishes right- from left-wing populism, arguing only the former seeks a deformation of democracy inconsistent with its constitutional qualities. It also distinguishes a form of constitutionalism linked to the ideal of limited government from one linked to the ideal of non-arbitrary rule. Legal constitutionalism typically embraces the first ideal. However, this ideal can be seen as a driver both of right- and (even more)

[87] Id.; T. Iversen and D. Soskice, 'Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More than Others' (2006) 100 *Am. Political Science Rev*. 165.

[88] King, op. cit., n. 84.

[89] A. Renwick, *The Politics of Electoral Reform: Changing the Rules of Democracy* (2011).

[90] R. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy Maker' (1957) 6 *J. of Public Law* 279.

[91] M. Tushnet, *Taking the Constitution Away from the Courts* (1999); Doerfler and Moyn, op. cit. (2021), n. 82.

of left-wing populism. It may also produce certain kinds of arbitrary rule that can be exploited by democratic backsliding and illiberal regimes. By contrast, political constitutionalism involves the second ideal and is inherently at odds with right-wing populism. Although this ideal can potentially address certain of the concerns driving left-wing populism, it has not always done so. Indeed, left-wing populism can be seen as related to failings in contemporary democratic systems to secure political responsiveness and equality, and thereby to perform their constitutional role to prevent arbitrary rule. Yet, as we have seen, strengthening legal constitutionalism is unlikely to remedy these shortcomings. Instead, the solution lies in exploring how democratic politics might be deployed to enable the political constitution to renew itself.

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