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The Mix of Latin American Populist Constitutionalism

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Abstract: In this article, we study Latin American populist constitutions and their uses, seeking to analytically understand whether populist constitutionalism is, indeed, a thing. We posit that Latin American populist constitutionalism is a particular form of mixed constitutionalism in three senses: first, as a specific combination of substantive traits that includes both empowering and (some) constraining devices; second, as a peculiar politics of constitutional change that incorporates popular mobilization against pre-existing institutions as a key trait; and third, as a particular practice of constitutional enforcement that involves weak and selective implementation, often through institutional capture. By considering not only the texts of constitutions but also the ways in which they are changed and implemented, we hope to complement legal perspectives of mixed constitutions with a sociopolitical analysis of practices and contexts. By capturing the distinctive contribution of Latin American populism to the discussion of mixed constitutions, we seek to challenge both legal conceptions of constitutionalism that reduce it to negative or constraining features, and political conceptions of populism that simply equate it to authoritarian rule.

Keywords: populist constitutionalism, Latin America, mixed constitutions, positive constitutionalism, popular mobilization, selective implementation

Introduction

Recent literature on populism is transitioning from the viewpoint that populism is necessarily at odds with constitutionalism to one according to which there is a much more complex relationship between the two phenomena. The transition is a direct consequence of reality surpassing theory: instead of ignoring or denying the authority of constitutions, populist leaders resort to them extensively. Populists

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commonly use existing constitutional provisions and interpretations as the grounds for their discourse and practice,¹ and they further criticize competing constitutional provisions and interpretations. More importantly, populists often promote new constitutions or far-reaching amendments and portray them as the cornerstone of their movement for change.² In Latin America, constitutions are so crucial for populism that the image of populist presidents with the constitution in their pocket is frequently invoked.

Existing analyses have attempted to deal with the use of constitutions by populists labeling it “populist constitutionalism.”³ However, the term is still far from univocal, and many attempts at definition point to characteristics that are akin to, or recognizable within, mainstream constitutionalism. The lack of a compelling distinctiveness of populist constitutionalism is not only analytically problematic; it may also challenge the notion that populist governments meaningfully differ from other (liberal democratic or authoritarian) forms of rule. This could entail an involution in the long and rich discussion on the definition of populism, which is finally reaching a consensus on the latter as a distinct form of government. The failure to grasp the way that constitutions are used and understood by populists (in contrast with liberal democratic or authoritarian leaders) could also risk overestimating or underestimating the normative challenges that populism poses to constitutionalism.

In this article, we study Latin American populist constitutions and their uses, seeking to analytically understand whether populist constitutionalism is, indeed, a thing. We posit that Latin American populist constitutionalism is a particular form of mixed constitutionalism in three senses: first, as a specific combination of substantive traits that includes both empowering and (some) constraining devices; second, as a peculiar politics of constitutional change that incorporates popular mobilization against pre-existing institutions as a key trait; and third, as a particular practice of constitutional enforcement that involves weak and selective implementation, often through institutional capture.

By considering not only the texts of constitutions but also the ways in which they are changed and implemented, we hope to complement legal perspectives of mixed constitutions with a sociopolitical analysis of practices and contexts. By

1 Cristóbal Rovira Kaltwasser, *Populism versus Constitutionalism? Comparative Perspectives on Contemporary Western Europe, Latin America & The United States* (POLICY BRIEF, THE FOUNDATION FOR LAW, JUSTICE AND SOCIETY, 2013).

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

3 Paul Blokker, *Varieties of Populist Constitutionalism: The Transnational Dimension*, 3 GER. L.J. 332, 333 (2019); *Populist Constitutionalism? (4): The Populist Threat to Democratic Constitutionalism*, CONST. & POL. (Nov. 14, 2017), <https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-4-populist-threat-democratic-constitutionalism/>.

capturing the distinctive contribution of Latin American populism to the discussion of mixed constitutions, we seek to challenge both legal conceptions of constitutionalism that reduce it to negative or constraining features, and political conceptions of populism that simply equate it to authoritarian rule.

Latin America is a key source of inductive theorizing on populist constitutionalism because it can be considered the first, and main, laboratory of populist politics in the world, given its extensive experience with populist governments since the 1940s.⁴ Furthermore, the Latin American laboratory contains the most interesting and challenging normative features of populism for egalitarian democrats and constitutionalists, namely, the aim to politically incorporate poor and excluded sectors of the population and to redistribute socioeconomic resources in their favor. Latin American populists have tended to claim that the political system is biased in favor of oligarchic elites and that populist representation and reforms seek to deepen—rather than subvert—democracy by equalizing access to power and resources.

The populist argument that the concentration of power in the executive and the relaxation of checks and balances are necessary to curtail the power of the establishment is nowhere more worthy of examination than in Latin America. In the most unequal region in the world, electoral rule in the last decades has stabilized with some exceptions. Yet, representative democracy has not entailed critical challenges to the status quo of power and resource distribution. Populists have diagnosed that the problem lies in constitutional constraints to rule, which elites use in an oligarchic fashion. And they have defended constitutional reform as a crucial instrument not only to dismount or replace some such constraints but also to bring about, both materially and symbolically, the inclusion of the poor, a majority or near majority of the population in most countries.

To do so, Latin American populists have promoted innovative constitutional arrangements to enhance democratic mechanisms of direct popular participation and vertical accountability and to adopt or entrench redistributive policies. They have further used the process of constitution-making as a crucial vehicle for popular incorporation and for founding “new orders.” This has allowed populists to ground their legitimacy on direct popular support much more than on indirect or mediating institutions. In that way, Latin American populism espouses an alternative approach to constitutionalism, which relaxes (without fully denying) the negative dimension of constraints to power while in principle expanding the positive enabling dimension of popular power.

4 Federico Finchelstein, *Fascism and Populism*, in *ROUTLEDGE HANDBOOK OF GLOBAL POPULISM* 307 (Carlos de la Torre ed., 2019).

To develop our argument, in the first part we summarize the rich discussion on the definition of populism, showing that there is currently wide consensus on a minimalist definition that stresses its anti-elitist and anti-pluralist traits, and critically analyzing recent U.S. legal scholars' contributions which, omitting such consensus, restrict the definition to democratic majoritarianism. In the second part, we focus on the mix of populist constitutionalism, reviewing the recent literature on populist constitutions and discussing the elements that scholars consider to be distinctive to the phenomenon, and identifying the traits that, in our view, most clearly characterize it—the combination of empowering and constraining constitutional clauses, the importance of popular mobilization through constitutional change, and the uneven implementation of constitutions through institutional capture. In the third part, we elaborate on the ways in which those traits appear in Latin American populist constitutionalism. Our concluding remarks summarize the argument and suggest a possible avenue for future research on the normative evaluation of populist constitutionalism.

I Populism

A The Consensus on a Minimalist Definition

After years of conceptual vagueness and disagreement, analysts of populism have recently begun to agree on a minimum definition. Many of the characteristics that often had been employed to identify populist leaders or governments—their social base, their ideological orientation, their substantive policies—have generally been abandoned as useful identifiers.⁵ Aware of the wide ideological spectrum across which populists can be found, as well as of the ideological flexibility that they often exhibit, many current definitions allude to it as a political style or strategy.⁶ Laclau's canonical definition referred to populist ideology as an empty void to be filled with different content.⁷ Even ideology-centered definitions explicitly point to populism's thinness.⁸

5 For an exception, see María Victoria Murillo, *La historicidad del pueblo y los límites del populismo* [*The Historicity of the People and the Limits of Populism*], 274 NÚEVA SOCIEDAD [NUEVA SOC.] 165 (2018).

6 See Alan Knight, *Populism and Neo-Populism in Latin America, especially Mexico*, 30 J. LATIN AM. STUD. 223 (1998); Kurt Weyland, *Clarifying a Contested Concept: Populism in the Study of Latin American Politics*, 34 COMPAR. POL. 1 (2001); NADIA URBINATI, *DEMOCRACY DISFIGURED* (2014).

7 ERNESTO LACLAU, *ON POPULIST REASON* (2005); Ernesto Laclau, *Populism: What is in a Name? in POPULISM AND THE MIRROR OF DEMOCRACY* 32 (Francisco Panizza ed., 2005).

8 Cas Mudde & Cristóbal Rovira, *Populism and (Liberal) Democracy: A Framework for Analysis, in POPULISM IN EUROPE AND THE AMERICAS. THREAT OR CORRECTIVE FOR DEMOCRACY?* 1 (Cas Mudde & Cristóbal Rovira eds., 2011).

The minimal traits of populism on which analysts tend to agree are: (i) the insistence on a sharp divide between the people and the elite, (ii) the claim that only the will of the former should be promoted through politics, and (iii) the notion that such will can (and should) be ascertained and put into practice without mediation by a leader or movement that credibly portrays herself (or itself) as belonging to the people instead of the elite.⁹ The divide between the people and its antagonist elite can be grounded in different criteria—i.e., class, ethnicity, nationhood—but it tends to be a moralized divide,¹⁰ with the minority elite being depicted as corrupt and illegitimately capturing politics and the majority or “true people” having a homogenous will that can (and should) be identified by political leaders.¹¹ Once such popular will is identified, it must be thoroughly materialized, and all interests and preferences contradicting it can be criticized or negated.

It follows from this that populism is anti-elitist and anti-pluralist.¹² It advocates for a form of representation that is different from indirect democratic representation,¹³ since it defends the existence of a unique and superior interpretation of the popular will, which is not the result of preference aggregation or compromise, but of discovery or unveiling. This form of representation entails a more frequent recurrence to popular mobilization than is usual under indirect representation, especially of sectors that are depicted as previously excluded or unrepresented. Popular mobilization is crucial both for asserting the divide between the people and the elites and for ensuring the former that the populist leader is one of them and will not become part of the elite while she rules.¹⁴ More importantly, the expression of popular support beyond periodic elections becomes the main source of legitimacy for populist leaders, given their critique of pre-existing institutions of representation.

Even though the former traits are narrow enough to exclude many if not most forms of government,¹⁵ the net they cast improperly covers political leaders and movements in the opposition. Many opposition parties and leaders are likely to recur to a populist rhetoric or style at some point, both by criticizing incumbents as corrupt elites and by appealing to voters as the unrepresented people whose will

⁹ See URBINATI, *supra* note 6. See also Cas Mudde, *The Populist Zeitgeist*, 39 *Gov't & Opp'n* 542 (2004).

¹⁰ JAN WERNER MÜLLER, *WHAT IS POPULISM?* (2016).

¹¹ See Mudde, *supra* note 9.

¹² See *id.*; URBINATI, *supra* note 6; MÜLLER, *supra* note 10.

¹³ Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, The Bulwark of Equal Liberty*, 4 *POL. THEORY* 441 (2013).

¹⁴ See Mudde, *supra* note 9; URBINATI, *supra* note 6.

¹⁵ As Mudde notes, these traits exclude all governments before democratization (monarchies and other conservative or oligarchic forms of rule) as well as those that endorse liberalism. See Mudde, *supra* note 9.

has finally been discovered and shall predominate if they reach power. That does not mean, however, that once in power populist candidates will rule as populists. Hence, following Urbinati, we consider that the minimalist definition of populism should be restricted to populist *governments*.¹⁶ Only when in power can populism be considered a sufficiently distinct political phenomenon.

B Toward Populism's Institutional Traits

The focus on populist governments entails a discussion about their nature as a form of rule or regime. Different visions on the matter coexist, with defenders of populism claiming it consists in a radical version of democracy that seeks to deepen it¹⁷ and critics arguing that it inevitably weakens and distorts democracy, and risks becoming authoritarian.¹⁸ It seems difficult to arbitrate among these visions unless the concrete institutional features of populist governments are apprehended. Recent studies have attempted to do so by focusing on populist institutions of representation and mediation like movements and parties.¹⁹ This article seeks to contribute to that endeavor by reflecting on the traits of Latin American populist constitutions and constitutionalism.

The focus on institutions is likely to offer nuanced visions of populism as a form of rule that combines both democratic and authoritarian traits. Indeed, populist governments rely heavily on elections and other forms of popular mobilization and participation to show that they embody the popular will. But they also often restrict expressive and minority rights, claiming that they hinder the

16 See URBINATI, *supra* note 6; Maria Paula Saffon & Juan Gonzalez Bertomeu, *Latin American Populism: An Admissible Trade-off between Procedural Democracy and Equality?* 24 CONSTELLATIONS 416 (2017).

17 See Benjamín Ardití, *Insurgencies Don't Have a Plan. They Are the Plan: Political Performers and Vanishing Mediators*, in THE PROMISE AND PERILS OF POPULISM: GLOBAL PERSPECTIVES 113 (Carlos de la Torre ed., 2014); Margaret Canovan, *Trust the People! Populism and the Two Faces of Democracy*, 47 POL. STUD. 2 (1999); MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* (1995); ERNESTO LACLAU, *POLITICS AND IDEOLOGY IN MARXIST THEORY: CAPITALISM-FASCISM-POPULISM* (1979); LACLAU, *supra* note 7; Mudde, *supra* note 9.

18 Andrew Arato, *Political Theology and Populism*, in THE PROMISE AND PERILS OF POPULISM: GLOBAL PERSPECTIVES 113 (Carlos de la Torre ed., 2014); PIERRE ROSANVALLON, *LA CONTRE-DÉMOCRATIE. LA POLITIQUE À L'ÂGE DE LA DÉFIANCE [THE COUNTER-DEMOCRACY. POLITICS IN THE AGE OF MISTRUST]* (2006); URBINATI, *supra* note 6.

19 Kenneth M. Roberts, *Populism, Political Conflict, and Grass-Roots Organization in Latin America*, 38 COMPAR. POL. 127 (2006); Saffon & Urbinati, *supra* note 13; Saffon & Urbinati, *Populist Anti-Party Parties* (unpublished manuscript).

materialization of such will. This can lead to a depiction of populism either as a hybrid or mixed regime,²⁰ or as a third way between democracy and dictatorship.²¹

Now, there is significant variation across populist governments' mix of democratic and authoritarian traits. Of course, the mix varies across contexts, but it also interestingly seems to vary across time. Populism as a form of government appears to be transient.²² It is rare to find long-lasting populist governments that maintain the combination of democratic and authoritarian features rather than becoming one or the other through the passage of time. In some cases, they lose their populist edge and become yet another democratic government that loses elections and cedes power, or enters coalitions with non-populist parties that pursue the ordinary electoral politics of negotiation and compromise.²³ In other cases, populist governments transform into simply authoritarian ones by eliminating or altogether distorting constraints to rule, term limits and competitive elections.²⁴ That is why it seems crucial to identify the institutional traits that make populism a distinctive form of government in the period between being an opposition or contestation movement and becoming either fully democratic or authoritarian.²⁵

20 For decades now, some scholars have defended the desirability of transcending the classic binary classifications of political regimes that pit democracy against dictatorship. See, e.g., Ariel C. Armoni & Hector E. Schamis, *Babel in Democratization Studies*, 16(4) J. DEM. 113 (2005). Scholars have been inclined to offer additional categories, including hybrid regimes (with electoral credentials but certain authoritarian features) and regimes with adjectives (such as “delegative democracy” and “competitive authoritarianism”). See STEVEN LEVITSKY & LUCAN WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* (2000); David Collier & Steven Levitsky, *Democracy with Adjectives. Conceptual Innovation in Comparative Research*, 49(3) WORLD POL. 430 (1997); Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEM. 55 (1994). Others have argued for more continuous measures along the democracy-authoritarianism axis. See David Collier & Robert Adcock, *Democracy and Dichotomies: A Pragmatic Approach to Choices about Concepts*, 2 ANN. REV. POL. SCI. 537 (1999). Thus, for example, some works have classified the first Peronism (1946–1955) as either a semi-democratic or authoritarian regime, especially in its last years. See Scott Mainwaring, Daniel Brinks, & Anibal Pérez-Liñán, *Classifying Political Regimes in Latin America, 1945–1999*, at 280 (Kellogg Institute Working Paper, 2000).

21 Perón claimed precisely that populism was a third way between capitalist democracy and a communist dictatorship. See *infra* discussion preceding note 92.

22 See Knight, *supra* note 6; Saffon & Urbinati, *supra* note 13.

23 Recent examples include *Podemos* in Spain, the *Five Star Movement* in Italy, and *Syriza* in Greece.

24 Many classical and recent Latin American cases offer examples, such as Mexico under post-Cárdenas PRI, Venezuela under Maduro, and Nicaragua under Ortega.

25 See Saffon & Urbinati, *supra* note 13.

C The Countercurrent in U.S. Legal Academia

The minimal definition of populism and the recent efforts to pin down its institutional traits are challenged by legal scholars in the United States, who increased their attention on the topic in recent years. Offering a more encompassing and less precise definition of populism, which is derived from the peculiar historical trajectory that the term has followed in U.S. politics, these contributions risk bringing confusion back to the discussion.

For authors like Howse,²⁶ Tushnet, and Bugarcic,²⁷ U.S. Senators and presidential candidates Bernie Sanders and Elizabeth Warren and representative Alexandria Ocasio-Cortez are populists, since for them, it is not only executive leaders who criticize the establishment who can be considered populists. Although they do not mention him explicitly, these authors probably also consider former president Barack Obama a populist.²⁸ Indeed, Howse criticizes Urbinati and Müller for labeling “efforts against establishment” as populist only when they are inconsistent “with protecting minority rights, constitutional democracy, and pluralism.”²⁹ Tushnet and Bugarcic agree with this criticism.³⁰ This is not a coincidence—since the populist opposition movements and local governments of the 19th century onwards, U.S. populism has been mainly identified with progressive anti-establishment politics,³¹ not with anti-pluralism. U.S. scholars therefore seem to believe that the latter characteristic unnecessarily restricts the term.

Stretching the term populism so that it encompasses all anti-establishment politics entails a conceptual distortion with relevant normative consequences.³² The conflation makes it more difficult to single out what is distinctive and

²⁶ Robert Howse, *Epilogue: In Defense of Disruptive Democracy—A Critique of Anti-Populism*, 17 INT'L J. CONST L. 441 (2019).

²⁷ Mark Tushnet & Bojan Bugarcic, *Populism and Constitutionalism: An Essay on Definitions and Their Implications*, DASH.HARVARD.EDU (2020), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:42660123>.

²⁸ Obama claimed the label for himself and objected to it being applied to Trump.

²⁹ See Howse, *supra* note 26, at 645.

³⁰ See Tushnet & Bugarcic, *supra* note 27, at 11–12.

³¹ J.B. Allcock, ‘Populism’: *A Brief Biography*, 5 SOCIO. 371, 372 (1971).

³² Conceptual stretching entails increasing the number of cases included in the concept (its extension) and reducing the set of attributes that define it (its intension) to the point that the category is no longer appropriate in its original form because the new set of cases only marginally fit it and are sufficiently different from the original ones. In such a situation, it is better to climb up the ladder of generality to adapt the concept, such that, for instance, both populism and majoritarian democracy are considered forms of anti-establishment democratic politics, with each preserving its traits. See Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 AM. POL. SCI. REV. 1033, 1041 (1970); David Collier & James Mahoney, *Conceptual “Stretching” Revisited: Adapting Categories in Comparative Analysis*, 87 AM. POL. SCI. REV. 845, 846 (1993).

normatively problematic about populist regimes in comparison with liberal or social democratic ones. Under Howse's and Tushnet and Bugarcic's view, both Hugo Chávez and Elizabeth Warren would be populist since they agree on a minimum denominator of progressive redistributive politics. However, these politicians diverge in almost everything else, especially in the way they view and treat institutions, including the separation of powers, term limits, horizontal accountability, and minority rights.

Indeed, Tushnet and Bugarcic's definition of populism is almost indistinguishable from Tushnet's definition of democracy. In both, a key element is that citizens are entitled to "displace" the choices made by representative bodies on an unrestricted range of matters and without much encumbrance.³³ The difference is that populism emphasizes "the role of 'ordinary' people in forming majorities, as against 'elites'."³⁴ Perhaps this type of majoritarian democracy can be adjectivized³⁵ to recognize its appeal to the people. But majoritarian democracy does not cease to be so just because of that trait or secondary category.³⁶ The difference is not meaningful enough to suggest the need for a new label, let alone a new discussion. Instead, changing the definition of populism just so it fits those cases leads to a significant extension of the concept, which generates a mismatch between it and most of the cases that scholars around the world have labeled populist and been concerned with.³⁷

U.S. revisionist authors seem to both reclaim and resist the populist label—reclaim for pluralist-respecting projects and resist for pluralist-restricting ones. This entails defending majoritarian democratic politics while criticizing populism, which is what many critics of populism who defend egalitarian democracy have been doing for decades. The problem is that U.S. revisionist authors are attempting to redefine populism so that it fits majoritarian politics and, in doing so, they are getting rid of one of populism's most central features—anti-pluralism—in most cases. This does not only seem at odds with the widespread use of the concept around the world; it also neglects the conceptual efforts that the democratic literature on populism has made to distinguish it from (and identify its problematic features for) a "healthier" majoritarian democracy.

In line with such efforts, we attempt to bring light to the institutional features that anti-establishment and anti-pluralism populist governments tend to adopt concerning constitutions and constitutionalism.

³³ See Mark Tushnet, *Against Judicial Review* (Harvard L. Sch. Pub. L. & L. Working Paper, Paper No. 09-20, 2009); Tushnet & Bugarcic, *supra* note 27.

³⁴ Tushnet & Bugarcic, *supra* note 27, at 12–3.

³⁵ Collier & Levitsky, *supra* note 20.

³⁶ Collier & Mahoney, *supra* note 32, at 852.

³⁷ See *id.* at 846; Sartori, *supra* note 32, at 1040.

II Populist Constitutionalism

A Populists and Constitutions

A populist (i.e., anti-establishment and anti-pluralist) ruling strategy or style is likely to have both symbolic or discursive manifestations and institutional ones.³⁸ Delivering on a populist agenda entails taking on the representation and materialization of the people's will against the hindrances of elites. Quite likely, this involves diminishing the role in the political system of liberal institutions of indirect representation, checks and balances, judicial independence, and the enforcement of some personal freedoms, all of which are usually portrayed as improper vetoes to the people's will.³⁹

Since these institutions are both frequently included in constitutional texts and considered the core of constitutionalism in its at times uneasy combination of demos-constraining and demos-enabling traits,⁴⁰ populism has expectedly tended to be viewed as antagonistic to it.⁴¹ Liberal constitutionalism purposely dampens majority will by placing institutional and substantive constraints to its exercise and by giving these constraints a supra-legal status. Hence the proverbial discussion around the counter-majoritarian connotations of some such constraints.

However, populists are not always (or even frequently) openly opposed to the authority of constitutions or to every constraint they impose. In fact, the recent literature has attempted to show that populist constitutionalism is not an oxymoron and that, despite seeming paradoxical, rulers who relax constitutional constraints to rule at times may be advocates of constitutions. Studies have noted that some populists do not criticize constitutions but rather invoke them or their underlying values for defending their political projects, claiming that they are better interpreters of the constitution than their judicial counterparts.⁴²

38 And at times also material ones. As we argue here, material redistribution is not a necessary trait of populism, but it has been often associated with it in Latin America. For its mixed results, see Kurt Weyland, *Populism and Social Policy in Latin America*, in *LATIN AMERICAN POPULISM IN THE 21ST CENTURY* 117 (Carlos de la Torre & Cynthia J. Arnson eds., 2013); Saffon & Gonzalez Bertomeu, *supra* note 16.

39 See Blokker, *supra* note 3; Mudde, *supra* note 9.

40 The language is from Alfred C. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 *J. DEM.* 19 (1999). Another presentation of liberal constitutionalism is available: Constraints are meant to limit the *agent*, the government, to protect the *principal*, the people. But some constitutional constraints limit what the people themselves can do.

41 See Müller, *supra* note 10; Rovira Kaltwasser, *supra* note 1, at 2–3.

42 According to Rovira Kaltwasser, this tends to be the case of Western European leaders who seek to exclude (usually ethnic) minorities from “the pure people” and therefore offer chauvinistic

Further, when populists do criticize discrete clauses or entire constitutional texts, they do not often deny their supra-legal status but instead promote their democratic change, hence accepting the possibility of failure, even if they have strong incumbent advantages and often influence electoral institutions. In 2007, for example, a referendum to amend the constitution in Venezuela was narrowly defeated, and the same happened in Bolivia in 2016. While constant reformism may subvert the authority and stability of constitutions, reform is predicated upon acknowledgment, instead of denial, of that authority.⁴³

Even if they often promote or enact new constitutions through unforeseen mechanisms of constitutional change, populists replace old constitutions with new ones that preserve a supra-legal status and that still contain what *ex ante* look like constraints to rule.⁴⁴ As we will see, in the Latin American case, such constraints to rule have tended to change in nature from horizontal to vertical ones, but they can be considered substantively robust, at least in the books.

Moreover, populists do not always challenge liberal-democratic constitutionalism. Rather, they often claim to be offering “deeper” or “improved” versions of democracy and constitutional design.⁴⁵ At times they even go to great lengths to justify the institutional changes they make as compatible with liberal democratic constitutionalism.⁴⁶ Nevertheless, this does not prevent populists from unsettling core constitutional institutions or constraints to rule.

B Populism’s Temporality

Populists’ relation to institutions often exhibits a particular temporality, which is related to the transient nature of populist rule.⁴⁷ Being born inside

interpretations of the constitution, rather than criticizing the latter as created by corrupt elites to embed their privileges. See Rovira Kaltwasser, *supra* note 1, at 2–3. But European leaders of the sort have also often used constitutional reform to get rid of constraints to rule (Orbán in Hungary is an example). Also, there are examples of Latin American leaders who have strategically used the constitution that they criticize to validate their viewpoints. For example, Perón conducted an impeachment of Supreme Court justices viewed as hostile for his project on the grounds of the constitution whose reform he subsequently promoted.

⁴³ Also, reformism is emphatically not the exclusive province of populists—Mexico is the regional leader in the number of constitutional reforms in the last decades without featuring until recently a populist leader.

⁴⁴ Müller, *supra* note 10.

⁴⁵ Landau, *supra* note 2.

⁴⁶ See Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559 (2013) (discussing a similar logic under authoritarianism).

⁴⁷ See Knight, *supra* note 6, at 231; Weyland, *supra* note 6, at 14; Saffon & Gonzalez Bertomeu, *supra* note 16, at 418.

democracy,⁴⁸ populism begins and manifests itself as a very confrontational form of majoritarian government, but it eventually either starts to fade into ordinary electoral democracy or becomes authoritarian. It is in the in-between period when populism shows its most distinctive institutional features as a form of rule.⁴⁹

Concerning constitutionalism, this temporality has often implied that, in the very early stages of their rule, populists pay lip service to checks and balances, pluralism, and minority rights.⁵⁰ However, as they accumulate power and consolidate their rule, populists often see themselves as increasingly constrained by liberal institutions, and hence begin to criticize them in their discourse and to attack them in the books.⁵¹ This change is grounded on the defense of the populist project as an alternative form of political rule, which is critical of liberalism while attempting to deepen democracy, conceived as distinct and separable from liberalism.⁵² Populists openly claim that the constraints imposed by liberal democracy hinder their political project, which they explicitly defend as a form of rule that is different from (if not antagonistic to⁵³) liberal democracy—with some, like V. Orbán, even explicitly bragging of being illiberal.⁵⁴

The move toward the overt criticism of liberal democracy quickly turns into the promotion of constitutional reform or wholesale replacement. Populists reform constitutions to increase their power—especially by weakening or eliminating term limits, reducing the ability of other branches or monitoring organs to control them, and/or packing those institutions. Such power increase is claimed as necessary to adopt or implement the populist substantive agenda, and therefore intended to bolster popular support.

How long each of these periods lasts varies from case to case. The first attempts at constitution making by prominent populist leaders in Latin America took place at an early stage of their tenure, including the 1999 Venezuelan Constitution (the very year Hugo Chávez took power), the 2008 Ecuadorian Constitution (the year after Rafael Correa was sworn in), and the 2009 Bolivian Constitution (in the

48 Nadia Urbinati, *The Populist Phenomenon*, 3 *RAISONS POLITIQUES* [RAISONS POL.] 137 (2013).

49 See Saffon & Urbinati, *supra* note 13. A crucial question for future research is what explains that populism goes one route or the other, and whether it depends on the prior strength of democracy, parties, or other key institutions.

50 See Landau, *supra* note 2.

51 *Id.*

52 For arguments against the plausibility of this separation, claiming that freedom is intrinsic to democracy and, thus, that illiberal democracy is an oxymoron, see JOSIAH OBER, *DEMOCRACY BEFORE LIBERALISM IN THEORY AND PRACTICE* (2017); NADIA URBINATI, *ME THE PEOPLE: HOW POPULISM TRANSFORMS DEMOCRACY* (2019); MÜLLER, *supra* note 10.

53 Blokker even refers to “resentment” against liberal constitutionalism as a key trait of populism. Blokker, *supra* note 3.

54 MÜLLER, *supra* note 10, at 3.

making since 2006, the year Evo Morales took power). As Landau describes, however, these early texts proved constraining years later as leaders coveted a still banned presidential reelection (or indefinite consecutive reelection). Populist leaders thus attempted to enact constitutional changes to the texts they had promoted and/or sought an endorsement from friendly courts by employing a more combative personalistic rhetoric.⁵⁵

However, at the various stages of their rule, populists publicly endorse the authority of constitutions. Indeed, rarely if at all do populist constitutions and amendments get rid of all pre-existent liberal institutions. Rather, they limit or render them increasingly toothless in practice. And, when they do so altogether, populists veer into authoritarian politics, with few analysts still labeling them populists.⁵⁶

C The Literature on Populist Constitutionalism

Can we identify common traits of populist constitutionalism that at the same time set it apart from other forms of rule? Some analysts—like Müller and Rovira—consider that a key feature is *opportunism*: populists defend (even revere) both the constitution and constitutional judges' decisions only insofar as they offer grounds to uphold their views, and criticize and attempt to change or pack them otherwise.⁵⁷ For analogous reasons, Negretto and others use the label “constitutional populism,” namely, populism by constitutional means, instead of the reverse.⁵⁸

Now, a degree of opportunistic behavior is characteristic of any politician. Constitutions are typically multilayered and versatile texts, portions of which can be interpreted in numerous ways. Vague or ambiguous portions thus afford

⁵⁵ Landau, *supra* note 2. See also Micaela Alterio, *Reactive versus Structural Approach: A Public Law Response to Populism*, 8(2) GLOBAL CONSTITUTIONALISM 270, 277 (2019).

⁵⁶ The criteria on the grounds of which we can assert that a populist government has become authoritarian (when the “Rubicon” can be considered crossed) should be discussed more extensively, as they can be elusive. Most regime classifications label them as authoritarian once they exceed term limits, but in most cases such terms are changed in the constitution with popular support, and the transition into authoritarianism seems to be a cumulative, aggregative, or interactive issue rather than an instantly recognizable switch. See Scheppele, *supra* note 46, for an examination of a closely related issue.

⁵⁷ See Mudde & Rovira, *supra* note 8, at 4; MÜLLER, *supra* note 10; Alterio, *supra* note 55, at 276.

⁵⁸ Gabriel Negretto, *El populismo constitucional en América Latina. Análisis crítico de la Constitución Argentina de 1949* [Constitutional Populism in Latin America. Critical Analysis of the Argentine Constitution of 1949], in DE CÁDIZ AL SIGLO XXI. DOSCIENTOS AÑOS DE CONSTITUCIONALISMO EN MÉXICO E HISPANOAMÉRICA, 1812–2012 [FROM CADIZ TO THE 21ST CENTURY: TWO HUNDRED YEARS OF CONSTITUTIONALISM IN MEXICO AND LATIN AMERICA, 1812–2012] (2012).

opportunities for resourceful appropriation for political purposes by any actor—be it a populist or not. One of the keys to prevent, or at least minimize, such strategies of partisan appropriation is the existence of a judiciary that is not co-opted by the government or other powerful interests. When interpretation is not enough of a tool to achieve the desired policy outcomes, politicians will likely attempt to promote formal constitutional change to the extent they have sustained support.

A difference between populists and non-populists is—as we will see—that the former tend to exert a greater influence and control over judges (and other public officials) in charge of interpretation and adjudication. As Negretto has pointed out, however, populists frequently recur to constitutional change.⁵⁹ This seems to show that the enterprise of constitutional stretch and change through interpretation has limitations, perhaps in cases where a large or structural change is sought. It may also be that, as we discuss below, part of the value of formal constitutional change for populists revolves around the process itself, thus transcending the specific language of the constitution.

Other analysts have attempted to grasp the special traits of populist constitutionalism by focusing on the *content* of the texts that populists defend or promote. Müller argues that populist constitutions tend to do three things; they: (i) institutionalize a particular image of the virtuous people; (ii) entrench substantive policies that conform to that image but that also make the promotion of other policies (and hence of pluralism) harder; and (iii) facilitate the permanence in power of populist rulers.

We believe that most constitutions do the first two things to some extent. Even very curt or minimalist constitutions, like that in the United States, contain a notion of what the people are and offer some grounds about the scope of admissible substantive policy. An example of the latter is the amendment introduced by the (hardly populist) Spanish conservative government in 2011 embedding the principle of budget stability,⁶⁰ which the right-wing populist Uribe government in Colombia attempted to emulate. Moreover, generous rights and programmatic redistributive clauses are characteristic not only of populist constitutions but also of non-populist ones—like the Brazilian and Colombian constitutions in Latin America, and the South African and Indian constitutions beyond.

Though Müller considers them mundane traits, reforms (or judicial interpretations) allowing for power perpetuation through the possibility of continuous reelection and the relaxation of checks and balances including judicial independence

⁵⁹ *Id.*

⁶⁰ Rosalind Dixon, *Populist Constitutionalism & The Democratic Minimum Core*, BLOG INT'L J. CONST. L. (Apr. 26, 2017), <http://www.iconnectblog.com/2017/04/populist-constitutionalism-the-democratic-minimum-core/>; Saffon & González Bertomeu, *supra* note 16.

seem to represent the most distinctive content of populist constitutions identified by the author.⁶¹ This is particularly important in Latin America since all countries in the region have presidential systems where the executive has undeniable incumbent advantages. Such relaxation allows the government to avoid “inconvenient” controls and to populate overseeing bodies with its cronies.

On their own, these features are not exclusive to populist constitutions, since they can also be present in non-populist delegative democracies,⁶² hybrid regimes,⁶³ and, of course, outright authoritarian ones. What does seem peculiar of populist democratic constitutions is their combination of power concentration with majority-empowering clauses—a reason for thinking of them as an illustration of mixed constitutionalism worthy of discussion.⁶⁴ Nowhere is such a combination more evident or inviting for egalitarian democratic politics than in Latin America, a region where, as we will see next, populist constitutionalism has entailed significant popular incorporation and redistribution.

III Populist Constitutionalism in Latin America

A Latin American Redistributive Populism⁶⁵

Once the lens is placed on Latin America, the relation between populism and constitutionalism becomes richer than the preceding allows. Since its inception in the 1930s, Latin American populism has been strongly associated with popular incorporation and material redistribution in both discourse and practice. Redistribution through the state’s intervention in the economy is so central in populists’ rhetoric and agenda that many analysts have claimed it should be considered a necessary trait of populism writ large.⁶⁶

⁶¹ See also Alterio, *supra* note 55, at 278.

⁶² See O’Donnell, *supra* note 20.

⁶³ Steven Levitsky & Lucan A. Way, *Elections without Democracy. The Rise of Competitive Authoritarianism*, 13 J. DEM. 51 (2002).

⁶⁴ Alterio also refers to this combination as an institutional mix. Alterio, *supra* note 55, at 295 (asserting that “while there is an agreement regarding the idea that in their *political practice* the countries in question are populist, *institutionally* they mix an intention to realise the goals of popular constitutionalism, participation and citizen empowerment with constitutional populism’s provisions such as the concentration and centralisation of power, both of which are contradictory”).

⁶⁵ This section is based on Saffon & González Bertomeu, *supra* note 16.

⁶⁶ Latin American analysts of the early or classical period of populism in the region (1930s–1960s) claimed that it was the product of specific historical conditions, including the transition to modernity, the rise of mass politics, or the early period of state interventionism in the economy;

We believe that this entails a conceptual mistake opposite to that of US academics, since it excessively restricts the concept.⁶⁷ It excludes many clear instantiations of populism in other parts of the world that are not redistributive and yet are still anti-establishment and anti-pluralist, as European and US right-wing populisms; it also excludes a few Latin American cases—such as 1990s neoliberal populists like Carlos Menem in Argentina and Carlos Andrés Pérez in Venezuela.⁶⁸ In fact, redistribution is not considered to be a definitional trait of populism even by Ernesto Laclau—the classical proponent of the concept, who is also a fervent defender of Latin American redistributive populist governments.⁶⁹

that it was characterized by the support of a multi-class coalition in which workers were protagonists; and that it espoused a redistributive and state interventionist ideology and set of policies. See Torcuato Di Tella, *Populism and Reform in Latin America*, in *OBSTACLES TO CHANGE IN LATIN AMERICA* 47 (Claudio Véliz ed., 1965); GINO GERMANI, *POLÍTICA Y SOCIEDAD EN UNA ÉPOCA DE TRANSICIÓN* [POLITICS AND SOCIETY IN A TIME OF TRANSITION] (1962); RUTH BERINS COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* 161–168 (1991); HELIO JAGUARIBE, *SOCIEDADE E POLÍTICA: UM ESTUDO SOBRE A ATUALIDADE BRASILEIRA* [SOCIETY AND POLITICS: A STUDY ON BRAZILIAN CURRENT AFFAIRS] 7–17 (1985); FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* 127–48 (1979); GUILLERMO O'DONNELL, *MODERNIZATION AND BUREAUCRATIC-AUTHORITARIANISM* 53–57 (1973); PAUL W. DRAKE, *SOCIALISM AND POPULISM IN CHILE* 2–13 (1978); OCTAVIO IANNI, *LA FORMACIÓN DEL ESTADO POPULISTA EN AMÉRICA LATINA* [THE FORMATION OF THE POPULIST STATE IN LATIN AMERICA] 121–22 (1975); Michael Conniff, *Towards a Comparative Definition of Populism*, in *LATIN AMERICAN POPULISM IN COMPARATIVE PERSPECTIVE* 13 (Michael Conniff ed., 1981). For a summary, see Weyland *supra* note 6, at 5–10. For those reasons, some contemporary authors denied that the concept could be used for describing the 1990s neoliberal populist governments, even though they complied with the minimalist definition above. See Nicolás Lynch, *Neopopulismo: Un concepto vacío* [*Neopopulism: An Empty Concept*], 86 *SOCIALISMO Y PARTICIPACIÓN* [SOCIALISM & PARTICIP.] 63 (1999); José Nun, *Populismo, representación y Menemismo* [Populism, Representation & Menemism], 5 *SOCIEDAD* [SOC.] 93 (1994); Carlos M. Vilas, *Latin American Populism: A Structural Approach*, 56 *SCI. & SOC'Y* 389 (1992).

67 Opposite to conceptual stretching, conceptual restriction entails reducing the extension of the concept (i.e., the number of cases it covers) and extending its intention (i.e., the attributes that define it and determine membership in it) to the point that it excludes cases that fit the original category well and that are sufficiently similar to the other cases in relevant attributes. See Sartori, *supra* note 32; Collier & Mahoney, *supra* note 32.

68 See Kurt Weyland, *Neopopulism and Neoliberalism in Latin America: Unexpected Affinities*, 31 *STUD. COMPAR. INT'L DEV.* 3 (1996).

69 For Laclau, populism is mainly characterized by its capacity to create an antagonistic division within society, which can eventually be overcome by a hegemonic government. Ideological and programmatic vagueness are intrinsic to populism: “[b]etween left-wing and right-wing populism, there is a nebulous no-man’s-land which can be crossed—and has been crossed—in many directions.” Laclau, *supra* note 7, at 87. Hence, the definition of populism cannot be dependent on the substantive contents of the policies that a leader or government promotes. See Enrique Peruzzotti, *Populism in Democratic Times: Populism, Representative Democracy, and the Debate on*

Still, it is undeniable that most populist governments in Latin America have been redistributive—and that the latter can hence be considered a subtype of populism. Latin American populists have prominently featured a bundle of outsiders to mainstream politics who mobilize excluded sectors of the population through an inflammatory rhetoric against economic and political elites, including promises of political and social incorporation as well as state-led material redistribution. They have used typical populist strategies to concentrate and extend executive power, relax checks and balances, and weaken minority rights. And they have explicitly justified them as necessary to overcome elite vetoes to popular incorporation and redistribution, to ensure that entrenched elites do not block or dismount such advances. The sacrifice of pluralism and horizontal accountability is hence portrayed as a toll required to ensure redistribution.

Thus, in the first or classical wave of populism (1930s–1960s), iconic populist leaders like Perón in Argentina, Cárdenas in Mexico, and Vargas in Brazil mobilized the still fully or partially politically excluded working class (and in the case of Mexico and other countries also the peasants), incorporated it into the state through corporatist arrangements, and promoted state interventionist and redistributive policies such as protectionism of national industries, nationalization of foreign ones, expansive labor and social security reforms, and in some cases land reform.⁷⁰ At the same time, they concentrated power in the executive, weakened or lessened the independence of the other branches and of organs of control, and disciplined and repressed the opposition even when coming from their own bases.⁷¹ They further promoted or protected the interests of certain elites (especially the military, but also landowners, industrialists, and the church), at times even including them in corporatist arrangements.⁷²

Classical populists never defined themselves as leftists or socialists; in fact, they often criticized communism and expressed admiration for fascist leaders.⁷³ But, in contrast with fascists, populists never made violence a key component in their rule and they generally maintained elections even if they became increasingly unlikely to be defeated in them.⁷⁴ Populists hence introduced an innovative way of

Democratic Deepening, in *LATIN AMERICAN POPULISM IN THE 21ST CENTURY* 61 (Carlos de la Torre & Cynthia J. Arnson eds., 2013).

⁷⁰ See CARDOSO & FALETTI, *supra* note 66; DRAKE, *supra* note 66, at 2–4; Knight, *supra* note 6, at 227; O'DONNELL, *supra* note 66, at 53–57.

⁷¹ Conniff, *supra* note 66, at 41; Knight, *supra* note 6, at 244; THOMAS E. SKIDMORE, PETER H. SMITH, & JAMES N. GREEN, *MODERN LATIN AMERICA* 250–51, 319 (2014).

⁷² Knight, *supra* note 6, at 241–42; SKIDMORE ET AL., *supra* note 71, at 61, 251–53, 315, 321; Weyland, *supra* note 6, at 10.

⁷³ Finchelstein, *supra* note 4, at 308–16.

⁷⁴ *Id.*

governing, which seemed like a third way between dictatorship and democracy—or between capitalist democracy and communism, according to Perón.⁷⁵ In the third way, populist strategies of power concentration, weakening of horizontal controls and competition were seen as necessary to ensure the continuity of the inclusionary project. However, such strategies were not stable; they led either to the progressive institutionalization of strong executive power without alternation under simple dictatorships or one-party rule (as in Brazil and Mexico, respectively), or to strong elite backlash through military coups (as in Argentina), which dismantled the populist form of rule though not necessarily or immediately social reforms.

The second wave of redistributive populism that emerged at the turn of the century (2000s–2010s), which has mostly subsided, used a similar discourse and strategy, though it felt more comfortable self-identifying as a leftist or radical movement with a global scope. Featuring idiosyncratic figures like Chávez in Venezuela, Correa in Ecuador, Morales in Bolivia, and Ortega in Nicaragua, recent Latin American populists claimed to promote the interests of the majority of the population against the rapacious sway of foreign corporations and national oligarchies. They hence mobilized into social movements or parties the poor majorities who are often unorganized because not formally employed, as well as other excluded or marginalized sectors of the population including indigenous groups and peasants. They promoted interventionist redistributive policies like the expansion of public health and education, the nationalization of foreign businesses, taxation of the rich, and land reform, as well as targeted subsidies and social benefits, which brought against them allegations of clientelism.

Most recent Latin American populists also claimed that redistributive measures required the reform or replacement of liberal constraints to rule such that elites do not use them to stall change. They therefore promoted entirely new constitutions and important constitutional amendments, which, as we see next, strengthened what already were quite strong executives and weakened and packed oversight institutions, but also introduced innovative redistributive clauses and mechanisms of popular participation and accountability. While in some cases they claimed that such changes were steps toward a new form of socialism (like Venezuela's so-called "21st century socialism"), in others they simply defended them as means to deepen or fully materialize democracy rather than subverting it. Recent populists hence gave significant importance to elections. In times of crises, they did not suspend or eliminate elections, but rather attempted to reinvigorate their popular support through the promotion of reforms seeking to

75 *Id.*

extend their incumbent advantages, while exercising influence on co-opted institutions of control.

However, much as in the first wave, the recent populist form of rule has been transient. While some leaders accepted defeat or stepped down (as Rafael Correa did in 2017), others have pushed institutional reform and cooptation to the extreme to remain in power, often combining it with extensive repression against the opposition and the disavowal of the most basic constraints to rule, which has turned them into autocrats (as Ortega in Nicaragua and Maduro in Venezuela).

B Substantive and Procedural Traits

Partly because of their materially redistributive bent, constitution-making experiences in the region have yielded instances of both positive and negative constitutionalism, which entail potentially stimulating institutional innovations for social democracy.

Substantively, these have included the affirmation of the state's authority to ensure a fair distribution of wealth, resources, and/or the benefits of development;⁷⁶ the proclamation of the social (and at times also the environmental) function of property;⁷⁷ the authorization of expropriations based on public utility;⁷⁸ the prohibition of latifundia, land concentration, or idle possession;⁷⁹ the entrenchment of land reform policies;⁸⁰ and the recognition of robust land, environmental, socio-economic, multiethnic, and/or consumer rights.⁸¹

Procedurally, recent Latin American constitutions also feature multiple mechanisms to expand popular incorporation and/or participation—notably referenda, plebiscites, and popular consultations⁸²—as well as vertical accountability measures like the recall of elected officials' mandates.⁸³ In the definition of its system of government, the Bolivian Constitution goes as far as to establish that the exercise of

76 Constitución de la República Bolivariana de Venezuela [CRBV] Dec. 30, 1999, §§ 112, 299 (Ven.); Constitución Política de la Republica de Ecuador [CPE], Oct. 20, 2008, §§ 3(5), 85(3), 276(2), 284(1), 285(2), 334(1) (Ec.); Constitución Política del Estado Plurinacional de Bolivia [CPE-Bolivia] Feb. 7, 2009, §§ 8(II), 55, 306(III, V), 312(III-2), 316(7).

77 CPE §§ 66(6), 282, 321 (Ec.); CPE-Bolivia §§ 56, I, 393, 397, I–II.

78 CRBV § 115 (Ven.); CPE § 323 (Ec.); CPE-Bolivia § 57.

79 CRBV § 307 (Ven.); CPE § 282 (Ec.); CPE-Bolivia § 398.

80 CPE-Bolivia § 404.

81 CRBV §§ 75–129 (Ven.); CPE-Bolivia §§ 30.II, 30.III, 31, 32–55, 58–72, 77–97, among others; CPE §§ 12–60 (Ec.).

82 CRBV §§ 70, 71, 73, 74 (Ven.); CPE-Bolivia §§ 11.II, 241, 242, 257, 259, 260, 274, 275, 280, 294, 295, 411, among others; CPE §§ 103–07 (Ec.).

83 CRBV § 72 (Ven.); CPE-Bolivia § 240; CPE § 105 (Ec.).

democracy proceeds in three different ways: “(1) Direct and participatory,” through referenda and other avenues, “(2) Representative,” and “(3) Communitarian,” through the election of indigenous authorities.⁸⁴

Although some of these procedural innovations can be used to bolster the plebiscitary nature of the ruling coalition and to perpetuate it in power—which we discuss shortly—they might also impose non-negligible constraints. One example is the strong vertical accountability exercised by indigenous and peasant groups inside Bolivia’s MAS, which according to Anria allowed the latter to avoid Michels’ “iron law of oligarchy,”⁸⁵ and which was likely channeled by the constitution. The recall referendum has also been in the agenda of the opposition, though it failed in Venezuela against Chávez in 2004 when formally organized.⁸⁶

Also, substantive clauses that incorporate redistributive goals and/or generous social and economic rights can be used to force rulers to respect and develop this democratizing project which is crucial in unequal contexts. However, the more populist constitutions concentrate power in the executive, the more it will be up to the latter to decide whether and how constitutional constraints are lived up to. That is why, as we see below, we take selective enforcement to be an additional important characteristic of populist constitutionalism in Latin America.

The affirmation of the people’s capacities, an expression of positive constitutionalism that is normatively laudable, also poses the risk of further diminishing constraints. This interaction exhibits the well-known ambiguity of the populist project as a democratic enterprise: the claim to be the true representatives of the people and champions of democracy constrains populists to maintain and even further foster political incorporation and popular participation in political decision-making. At the same time, however, populists argue that it is only them who can deliver (and later preserve) what the people want or need, and hence that it is indispensable for *them* to remain in power. Thus, they tend to erode political competition and most instances of control, but not necessarily at the expense of popular incorporation or participation.

As Landau claims, one of the central goals of populist constitutionalism is to vociferously criticize the existing institutional order and justify the need to deconstruct and re-found it. Since the criticism tends to target the exclusionary and pro-status quo nature of liberal constraints, it offers wide grounds for the introduction of institutions to overcome elite vetoes. However, for both the leader’s

84 CPE-Bolivia § 11.II.1.

85 SANTIAGO ANRIA, *WHEN MOVEMENTS BECOME PARTIES: THE BOLIVIAN MAS IN COMPARATIVE PERSPECTIVE* (2018).

86 In 2016, opposition parties filed a petition for a recall against Maduro, but the government moved slowly (while also arresting its promoters) until a constituent assembly took over, thus diluting it.

claim to be part of the (genuine) demos and her promise to enhance social inclusion to be credible, such institutions cannot just concentrate power in her hands but must also foresee popular participation or empowerment, at least nominally. Populists seem to be aware of constitutions' potential for odd combinations or mixtures,⁸⁷ and hence recur to them as a tool to deliver on the people's claims or needs *and* to enhance their power. The populist constitutional mix seems aimed both at signaling and mobilizing internal audiences about the seriousness of the redistributive project and at structuring the political game in their favor—allegedly to make such redistribution possible.⁸⁸

C Constitution-Making Processes

In Latin America, though probably elsewhere as well, populists seem to recur to constitutions and constitution-making processes not only because of sought-after substantive outcomes that are seen as necessary steps to deliver on the populist project. They also use them because of their potential to promote popular mobilization and thereby obtain, consolidate, or recover the support of the people on which their legitimacy is almost uniquely based.

Once populists embrace the notion that indirect representation and other preexisting institutions must be reined in, the latter cease to be the main source of legitimacy on which they can rely. Promoting a process of far-reaching constitutional change as re-foundational allows populist leaders to obtain the support of wide and divergent sectors of the population, especially when exclusion and dissatisfaction abound. The perceived popular inconformity with the status quo can be used to frame the situation as one of political crisis in which institutions are “up for grabs,”⁸⁹ to reassert the divide between the people and the establishment, and to restress that only the populist leader understands and looks after the popular will. Though the proposed constitution may be complex in content as well as sources, like Latin American constitutions are, the message that a new constitution or amendment is necessary to rid of elite domination is quite simple and

87 As Gargarella, Dixon, and others have argued, constitutions often include internally contradictory sections and clauses, which find their source in competing (and even incompatible) traditions of political thought as well as a degree of bargaining, concession, or even “bribing.” See ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM 1810–2010. THE ENGINE ROOM OF THE CONSTITUTION* (2013); Rosalind Dixon, *Constitutional Rights as Bribes*, 50 *CONN. L. REV.* 767 (2018). See also Alterio, *supra* note 55, at 295.

88 We thank Dan Brinks for this observation.

89 Landau, *supra* note 2, at 527, 529.

catchy and can hence become a powerful symbol or focal point for diverse popular sectors to coalesce around.

The processes of promoting and drafting the constitution can become, in themselves, crucial mobilizing vehicles. That is particularly the case when constitutional change is conducted by convoking constituent assemblies, as happened in Venezuela (1999), Bolivia (2006–7),⁹⁰ and Ecuador (2008). Assemblies often allow for wide-ranging change, and this may lead to the weakening of representative and monitoring bodies but also to the incorporation of excluded sectors in the selection of delegates and even in the formation of constitution-making bodies.⁹¹ With this, the allegiance of those sectors can be obtained or consolidated, and their subsequent organization can be influenced.

A participatory constitution-making process also allows populist leaders to advance the idea that they are not only putting the people's will into effect in that concrete instance but also recovering the people's constituent power, which from then on can (and should) be exercised without constraints. This point significantly reinforces the populist claim that the people's will must prevail over elite vetoes and that populist leaders are sheer vessels or enforcers of that will.

But this type of process accomplishes far more than that: it endorses a conception of constitutionalism that focuses on the enhancement of popular power in a much stronger way than that allowed by traditional constitutional conceptions, which present constitutions as both constraining and enabling power.⁹² The notion that the people's constituent power is unbounded implies not only that constitutions can be modified at any time but also that there cannot be preexistent criteria for establishing who embodies the constituent power or how it is expressed. In the absence of such criteria, the populist leader will likely answer those questions every time that she identifies the need for reform. And she will be able to accomplish her goals insofar as she is able to garner enough popular support, something that, for example, Chávez was able to achieve in Venezuela in 2009 but not in 2007, and that Maduro has not been able to achieve so far.

In other words, in reclaiming constituent power notions in the tradition of the early Sieyès and Schmitt, populist leaders can assert that the genuine people, who only they can identify and represent, can always transcend the strictures imposed

90 In Bolivia, after the assembly approved a text, a round of new negotiations started, which led to some further change.

91 Gabriel Negretto, *Democratic Constitution-Making Bodies: The Perils of a Partisan Convention*, 16 *INT'L J. L.* 254 (2018).

92 Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988).

by the constitution to reform the text,⁹³ as happened in Venezuela in 1999 and in Ecuador a decade later.⁹⁴ Any restriction to the people becomes an illegitimate constraint to their (naturally limitless) constituent power. In the extreme, this is true even independently of the new constitutional text an assembly produces, since the mere assumption of constituent power may suffice to rein in existing institutions. The clearest illustration is Maduro's three-year constitutional convention (2017–2020), which did not produce a new text but was able to overcome the legislature throughout.

Constitutional processes therefore allow populists to “re-found” political orders. Indeed, recovering popular support through the promotion of constitutional change becomes a crucial survival strategy for populist leaders. Rather than operating as constraining devices, constitutions become a tool for garnering popular support, which is essential when leaders are attempting to consolidate their power, but also when they are experiencing legitimacy crises that may put their continuity at risk.

D The Redistributive Justification of Constitutional Change

Though the process of constitution-making can help populists of all drapes to consolidate or recover their power, it is a particularly credible and potent tool when redistributive agendas are involved. Indeed, the idea that the concentration of power facilitates the enactment and implementation of progressive social policies seems to have received a degree of empirical support, though the durability of the policies thus adopted is a matter of debate. As Albertus has argued, following Huntington, redistributive policies that affect elites—such as land reforms—are more likely to be carried out by governments that face fewer institutional veto points.⁹⁵ Moreover, as Weyland claims, sustained redistribution under liberal and social democratic systems only takes place gradually and in the presence of strong labor movements and parties capable of exercising bottom-up accountability.⁹⁶

⁹³ See Landau, *supra* note 2; Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 *CONSTELLATIONS* 365 (2011); Joel Colón-Ríos, *Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America*, 44(3) *VICT. U. WELLINGTON L. REV.* 521 (2013).

⁹⁴ It bears mentioning that other efforts like the Colombian convention in 1991 (clearly not a populist enterprise) also did not follow the procedure established in the previous (1886) constitution. While this is not exclusive to populism, the quasi-revolutionary accompanying rhetoric seems to be.

⁹⁵ See MICHAEL ALBERTUS, *AUTOCRACY AND REDISTRIBUTION: THE POLITICS OF LAND REFORM* (2015); SAMUEL HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (2006).

⁹⁶ Weyland, *supra* note 38.

Consequently, the strategy of concentrating and extending executive power can receive popular support if it promises to deliver notable benefits for excluded majorities. As Acemoglu, Robinson, and Torvik argue, when politicians do not face strong checks and balances, they can capture plenty of rents for themselves and their allies, and still leave enough to carry out redistribution. When the poor are the majority of the polity, it may seem rational for them to support the weakening of checks and balances and tolerate executive rent-seeking in exchange for redistribution.⁹⁷

However, this calculation can easily backfire, and the relaxation of checks and balances that it allows may be costly not only for democracy and personal freedoms but also for the redistributive agenda. Indeed, as the Venezuelan case has painfully showed, as populists grab onto power and make the perpetuation of the latter their principal goal, redistribution may not only fade from the agenda, but early achievements may be severely weakened or altogether lost because of economic crises produced by (or not adequately addressed due to) political ones. At the same time, organized labor sectors and grassroots who initially mobilized in support of the government may have less institutional grounds and autonomy to insist on redistribution or oppose authoritarianism.

In contrast, there are a few recent and notable examples of non-populist leftist governments which have achieved an (admittedly modest) measure of inequality alleviation within a short span and have less devastating institutional results to show—especially Lula’s administration in Brazil, Mujica’s administration in Uruguay, and Lagos’s and Bachelet’s administrations in Chile. Though these governments are the exception and (in the case of Brazil) they have unleashed strong reactionary forces that also seem to have reversed the process, they do suggest that redistribution may not be a sufficiently strong justification for populism to be defended considering the stakes involved in terms of democracy and personal freedoms.⁹⁸

E Cooptation and Selective Enforcement

As discussed, populist leaders advocate for empowering the state to enforce the people’s will, which in Latin America has often entailed the enactment of a redistributive project. They do so by favoring majoritarian or plebiscitarian participation

⁹⁷ Daron Acemoglu, James A. Robinson, & Ragnar Torvik, *Why Do Voters Dismantle Checks and Balances?* 3 (Working Papers, Paper 17293, 2011) See also the discussion in Saffon & Gonzalez Bertomeu, *supra* note 16.

⁹⁸ See Saffon & Gonzalez Bertomeu, *supra* note 16, for the development of this claim.

while disfavoring pluralism, not least in constitution-making processes. This often results in constitutional texts that concentrate power and relax checks and balances. This dynamic thus translates into an additional feature of populism beyond both content and mobilization—namely, institutional capture and selective implementation.

On the one hand, pure majoritarianism allows to dismantle or rein in supervisory bodies, often by the appointment of cronies, either at the constitution making process or at the legislative stage. This further deepens power concentration and the government's discretion, since a packed or weak judiciary and/or electoral organ will fail to find a constitutional violation even if one takes place and will, if politically possible, “adapt” the constitution via interpretation when the government finds it necessary.⁹⁹ Examples of this include momentous reelection cases from Nicaragua (2009) and Bolivia (2017), where the strictures of the constitution negated reelection but friendly judges concluded otherwise.¹⁰⁰

On the other hand, the weakening of checks and balances will give the government free rein to decide on the meaning of constitutional commitments at the policy stage and to select which policies (and in relation to which groups or individuals) to implement.¹⁰¹ This discretion and selectivity threaten to undermine the potentially promising features of the new constitutions, since those features may remain underenforced not necessarily because of political incapacity but due to the lack of political will.¹⁰² In the extreme, those features may operate as legitimizing tools of the otherwise indefensible power concentration.

99 Such an organ would be characterized by what Brinks and Blass have called high authority and low autonomy. Daniel Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15(2) INT'L J. CONST. L. 296, 299 (2017), (“[A] court with high authority but little autonomy is well equipped to shape politics and policy, but it is unlikely to speak with a different voice than its legislative and executive counterparts (either because the judges are hand-picked ideological allies of the regime or because they fear the consequences of challenging powerful interests”).

100 The 2009 Constitution of Bolivia, enacted under Evo Morales (2006–2019), still allows for one immediate reelection. Morales was reelected in the first general election after the enactment of the constitution, but he soon sought the possibility of a second reelection. In 2013, the Plurinational Constitutional Court endorsed this, claiming that the period served before the new constitution was enacted should not be considered. Morales won such reelection in 2014. In 2016, he attempted to reform the constitution via referendum to allow for a third reelection, but he lost. In 2017, the Constitutional Court declared a third attempt at reelection lawful, under the notion that a ban would violate Morales' political rights. In 2019, Morales won the election but was forced to resign one month after in what almost everyone rightly viewed as an indefensible coup.

101 We also thank Dan Brinks for this suggestion.

102 DANIEL BRINKS, STEVEN LEVITSKY, & MARIA VICTORIA MURRILLO, *THE POLITICS OF INSTITUTIONAL WEAKNESS IN LATIN AMERICA* (2020).

One conspicuous example is environmental and indigenous rights in Latin America. The inclusion in the constitutions of Ecuador and Bolivia of robust clauses to protect those rights as well as references to nature (*Pacha mama*) and “good living”¹⁰³ did not stop the respective governments from pursuing an aggressive policy of natural resource extraction, with a reportedly heavy toll in both the environment and the autonomy of indigenous communities.¹⁰⁴ Domestic institutions including judges did little to prevent this development. While other countries in the region also hopped on the bandwagon of extractivism to seize the opportunities afforded by a commodities boom, they did not nominally defend so strongly the preceding rights and principles.¹⁰⁵

Hence, populist constitutions can be characterized as being quite robust in the books yet selective in implementation and enforcement.¹⁰⁶ The affirmation of the people’s capacities, an expression of positive constitutionalism that is normatively laudable, also poses the risk of further diminishing constraints. Since direct popular support can be cited as justification to circumvent ordinary institutions, the combination of power concentration in the executive and a resort to popular or plebiscitarian ratification may exemplify the type of “Frankenstate” interaction described by Scheppele.¹⁰⁷

The weakening of institutional vetoes justified on the basis of popular will give the state the power to implement an ambitious constitutional redistributive agenda. Yet, the state’s authority derived from such an agenda is so large that the executive can pick and choose what and how to implement from it. And, without independent monitoring bodies or a robust autonomous civil society, the power to exercise popular accountability may become too little to be meaningful.

Conclusion

Populist regimes have frequently resorted to constitution making. In many cases, the resulting output doubtless jeopardizes liberal and social democratic

103 CPE-Bolivia §§ Preamble, 8, 10, 33–34, among others; CPE §§ Preamble, 3, 12–15, 71, 74, among others (Ec.).

104 María Paula Saffon, *Property and Land*, in OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA ch. 32 (Conrado Hubner Mendes, Roberto Gargarella & Sebastián Guidi eds., 2022); Mari-stella Svampa, ‘*Consenso de los Commodities*’ y lenguajes de valoración en América Latina [Commodity Consensus & Valuation Languages in Latin America], NUEVA SOCIEDAD [NUEVA SOC.] (2013), <https://nuso.org/articulo/consenso-de-los-commodities-y-lenguajes-de-valoracion-en-america-latina/>

105 Svampa, *supra* note 104.

106 BRINKS ET AL., *supra* note 102.

107 Scheppele, *supra* note 46. See also Alterio, *supra* note 55, at 295.

constitutionalism, particularly through the relaxation of several types of checks on power. Yet this is not all there is to populist constitutionalism, and one must also be aware that several non-populist regimes have also impaired checks and balances and the rule of law.

Populism's constitutional legacy is far more complex, particularly in its Latin American version. For one, it has often been the case that the texts that result from populist constitution-making feature institutional innovations with the potential both to bolster inclusion and participation and to function as sites of vertical accountability. These innovations come with the corresponding peril that their use deepens the plebiscitary nature of democracy, and they may be the product of strategic concessions to secure the enactment of rules concentrating power, as Dixon and Gargarella have claimed.¹⁰⁸ But the point remains—populist constitutionalism is not just power concentration.

On the other hand, what takes place outside a new constitution's text—though in direct relation to it—has been as important in Latin America as the resulting text itself. Enforcement and implementation of the constitution are key, and multiple factors may weigh in at this stage. As importantly as this, the political salience of constitution-making for the ruling coalition has largely transcended the text ultimately enacted. That process has tended to be used strategically to mobilize the population, as a renewed source of legitimacy, and to overcome existing institutions. Because of this, any attempt to grasp Latin American populist constitutionalism by zooming in on the traits of new constitutions will not only provide a nuanced picture of it, but also an incomplete one.

A final and fruitful topic for further exploration concerns the advantages and disadvantages of populists' recourse to constitutionalism. Despite some of its positive traits, populist constitutionalism (including its Latin American variant) is likely to have a detrimental impact on liberal and social democratic constitutionalism. A natural inclination may thus be to object to the populist leaders' embrace of the language and practice of constitutionalism, seen as a strategy of co-optation of constitutions to destroy what is valuable to them from within. The question, of course, is what the options are. Once a populist regime is in power, it may be more acceptable—from a liberal and/or social constitutionalist standpoint—that it employs that language and practice than that it all but openly ignores the constitution in place.

Maintaining the language (some would say the façade) of constitutionalism may pay off for a populist leader or regime in terms of symbolic legitimation. Also, as noted, a constitution-making event can be a tool to mobilize the people and to attempt to rein in “hostile” political institutions. Nonetheless, the democratic

108 See Dixon, *supra* note 87; GARGARELLA, *supra* note 87.

system as a whole—including its core political institutions and the respect for rights—might benefit when populists have stakes in the constitution, even when it is *their* constitution that they have stakes in, as Müller has argued. The matter is anything but obvious and partly depends on the way the new constitution has seen the light, but here are some (admittedly rough) speculations.

First, even a constitution designed to be quite subservient to the incumbent coalition may help preserve a culture of legality or an image of institutional continuity. This may or may not be beneficial.¹⁰⁹ Second, when the populist leader does not replace but (more or less) openly ignores the preexisting constitution, it may be easy to discover noncompliance. Yet, remember that populist leaders often have qualms—either sincere or manufactured—against the “old” regime that many people, even a majority, may share. This can make mobilization to defend the preexisting constitution less likely by citizens that are not already in the opposition. Unlike this, a government that does not take seriously the very constitution it has enacted may be in a way adding insult to injury. Indeed, a paradoxical role for the opposition in these cases is to become the guardians of the populist constitution.¹¹⁰ It is unlikely that crony judges interpreting the populist constitution will turn against their leader by finding constitutional violations too often. But clear and serious violations may be relatively easy to notice and may provide a focal point for mobilization,¹¹¹ perhaps not only by recalcitrant opponents.

Third, a populist constitution can become more constraining as the government loses command of the majorities needed to reform it. Mechanisms of vertical accountability created by populists to incorporate their supporters may begin to be used against them. If so, such mechanisms are likely to render those (initial) supporters stronger and less dependent, and hence more willing to challenge the government.

In sum, it is far from obvious that populists’ resort to constitutional language is pure loss. But the conditions under which the previous may or may not take place are still open to analytical and empirical inquiry.

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109 Such continuity may make future efforts at reinstating constraints to rule easier to achieve, although, as just noted, one may emphasize the detrimental character of the legitimization that the new constitution lends a regime that is in practice hardly constrained.

110 See Müller, *supra* note 10.

111 Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions with an Application to Democratic Stability in America’s First Century*, 29 J. L. ECON. & ORG. 278 (2013).

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