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## **The Corruption of Popular Sovereignty**

Samuel Issacharoff<sup>1</sup>

### **I.**

For much of the 20<sup>th</sup> century, the existential threat to democracy was authoritarian rule. Whether wielded by totalitarian ideologues or military despots, the prevalent images were of the tank, the machine gun, and the detention cell. The modern language of human rights was born to thwart the use of state authority to bend the population to the will of the rulers. Human rights defined the inalienability of an irreducible core of human dignity. The rights holder was the individual at risk. And, as Dieter Grimm stressed to me years ago, rights discourse became the lingua franca of the empowered judiciary that took hold in Europe after WWII and then across so much of the world in the post-1989 third wave of democratization.

The 20<sup>th</sup> century closed with a certain vision of market-based liberal democracy triumphant against its ideological rivals of fascism and communism. The imprecise contours of ascendant democracy included generally robust markets, welfarist protections for citizens, a broad commitment to secularism (even in countries with an established church), and liberal tolerance of dissent and rival political organizations. All of this was packaged in robust constitutional protections of civil liberties and the integrity of the political order. And, characteristic of the era, all was under the supervision of increasingly commanding constitutional courts or other apex tribunals.

These features were sufficiently widespread that a great deal of imprecision could be accepted in the exact pedigree of this new world order. It was both the ascendancy of democracy and of constitutionalism. It represented the triumph of liberalism and the realization of the enlightenment project. It was both the vindication of capitalism and the realization of the state of social welfare. Precisely because it seemed to be all at once, the conflict between majoritarian politics and constitutional restraint, between the creative destruction of markets and social guarantees, between liberty and security against anti-modern threats, all could be pushed aside.

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<sup>1</sup> Reiss Professor of Constitutional Law, New York University School of Law. I benefitted from feedback in earlier presentations at NYU Law School, the Bonavero Institute of Human Rights at Mansfield College, Oxford, the Central European University, and the ICON annual conference in Santiago. Invaluable research assistance came from Elaine Andersen and Colin Bradley.

The fall of the Soviet empire was the crowning achievement of the postwar democratic order. Yet, the triumphant era of what Samuel Huntington termed the third wave of democracy would not last much into the new millennium. The democratic euphoria following the fall of the Berlin Wall barely ran its course before it confronted a new virulent reaction to the new modern imperium. In short order, Islamic-inspired terror introduced a malevolent new international actor. The Arab Spring collapsed into familiar patterns of tyranny or, as in Syria, violent communal strife. By the early 2000s, a number of newly minted democracies were retreating to customary forms of autocratic rule.

But the biggest shocks came not from the periphery, but from within the established democratic order. Populist upsurges from right and left reveal the disrepair of the post-WW II general consensus of politics in the democratic world. From France to India, the historic parties such as Congress, the Socialists, and the Gaullists were discredited and effectively pushed outside the political order. Brexit prevailed over strenuous opposition from within both the Tories and Labour. The American presidential election featured a determined Democratic run by Bernie Sanders, not even a member of that party, and the eventual victory by President Trump, a candidate with only fleeting relations to the Republican Party. The new political challenge saw democracy not as the culmination of the postwar era, but as a failed elite endeavor that had left the laboring classes vulnerable. Populist leaders, from left and right, learned to bypass institutionalized forms of politics in favor of direct and frequent communications with the population, from Hugo Chavez's frequent multi-hour television appearances to Donald Trump's infatuation with Twitter.

Ascendant populism rejects the foundations of modern democratic governance. The secret to democratic stability is repeat play, which requires an extended time horizon. Time allows the losers of today the prospect of reorganizing and emerging as the winners of tomorrow. An election may yield a bad result, the tenor of the era may prompt poor legislation, but what remains critical is the capacity to recover. The American experiment in democratic self-rule was consolidated in the election of 1800, which represented the first time a head of state had been removed through electoral means. In his wide-eyed review of American democracy, de Tocqueville thought that the key to non-aristocratic rule was the capacity to make what he termed retrievable mistakes.<sup>2</sup> At the time, he assumed that the challenge to successful democratic governance would be military intercession, as with the disastrous War of 1812, that would shorten the time horizon needed for republican prospects.

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The constricting force today is not external but internal, notwithstanding the continuing threats of terrorism and the reorganization of international relations in light of Chinese ascendancy. Populist impulses shorten the time frame, turn everything into a bimodal choice, a political life defined by existential issues. Us or them, success or perfidy, the people or the oligarchs, our nation or foreigners. There can be no spirit of partial victory, of legitimate disagreement, or even of mutual gain through engagement. The effects of compressed time horizons can be seen in the willingness to discard longstanding institutional rules that protect the minority, such as the Senate filibuster in the U.S., in favor of immediate political gain. Efforts to alter even election rules themselves or the powers held by elected governments, such as shown in the American context in North Carolina or Wisconsin, are perhaps the most combustible manifestation of the current challenge to the necessary long horizon of stable democratic governance. The stable democracies pass from being a challenge among adversaries to an unyielding battle against enemies, to borrow from Michael Ignatieff.<sup>3</sup>

Democratic politics under the sway of populism loses the sense of collective enterprise among all political actors. Populism, noted Isaiah Berlin a half century ago,

is not principally interested in political institutions, although it is prepared to use the State as an instrument for the purpose of producing its ends. But a State organisation is not its aim and the State is not its ideal human association. It believes in society rather than in the State. The State is an instrument ....

Moreover all these movements believe in some kind of moral regeneration. I am sure that that is common to them all. In some sense they are dedicated to producing spontaneous, natural men who have in some way at some time become perverted by something. There must have been a spiritual fall somewhere. Either the fall is in the past or it is threatening – one of the two. Either innocence has been lost and some kind of perversion of men's nature has occurred, or enemies are breeding within or attacking from without.<sup>4</sup>

Democratic institutional arrangements are particularly vulnerable. Populist elections claim a mandate from the people beyond choosing

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<sup>3</sup> Michael Ignatieff, 2013, NY Times.

<sup>4</sup> Berlin, 1967, at 8.

officeholders. Elections over mandates risk the same repudiation of institutional accommodation of divisions as do plebiscites. It is not that populism is plebiscitary as such; rather, neither is well suited to institutionalized politics that presume deliberation, procedural order, and compromise. For both plebiscites and populism, the immediate election defines the agenda. Both populism and plebiscites look to the maximal leader rather than the legislature as the source of deliverance. In turn, the ensuing *caudillo* politics yields a web of cronyism, corruption and clientelism all turning on relations to the commander.

In my monograph on *Fragile Democracies*, I devote considerable attention to the distinct frailties of new democracies as they emerge from conflict or an autocratic past.<sup>5</sup> One of the defining characteristics is that the complete package of democratic institutions rarely mature together, or quickly. Democracy proves to be a complicated interaction between popular sovereignty, political competition, stable institutions of state, vibrant organs of civil society, meaningful political intermediaries and a commitment to the idea that the losers of today have a credible chance to reorganize and perhaps emerge as the winners of tomorrow. Few if any of these criteria are likely to be satisfied amid the birth pangs of a new democratic order.

What is striking in the current era is that the mature democracies encounter the same forms of institutional failure as do the necessarily weak nascent democracies, even if the time clock seems to be running in reverse. In virtually all democracies, the populist onslaught is accompanied by the increased command of a hypertrophic executive. There are the odd exceptions as in Poland, where power is effectively wielded from outside the formal command structure of the state, but populist governance yields strongman rule, regardless of the national setting. As a result, any explanation of the weakness of democratic politics in the face of populism cannot rest on the merely conjunctural. The weak recovery from the financial crisis of 2008 certainly provides fuel to the fire. But the seemingly overnight rise of populist challenges and the failures of conventional postwar political institutions to channel the political upsurge requires greater explanation.

It is also possible to root particular populist impulses in domestic national settings. No doubt reforms in American laws governing political parties and campaign finance have weakened the parties as institutions. Similarly, persistent weak government in Britain under an unstable coalition contributed to the Brexit upheaval. And Italy had Berlusconi, Spain had the housing bust, France had untenably high unemployment, and so on. But the persistence of this pattern across stable democracies prompts an inquiry beyond the national level. Unlike the populist wave that swept Latin

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<sup>5</sup> SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES* (Cambridge Univ. Press, 2015).

America in the early 2000s, populism in the U.S and Europe is not aspirational in terms of national policy, but angry at a sense of loss and betrayal. As expressed by Cas Mudde & Cristóbal Rovira Kaltwasser,

[W]hereas in Latin America the emphasis is on establishing the conditions for a good life for ‘the people’, in Europe populists primarily focus on protecting these conditions, which they consider increasingly threatened by outside forces (notably immigrants). Hence, their prime focus is on the exclusion of the outgroups rather than on the inclusion of (parts of) the in group.<sup>6</sup>

The sense of loss provides the combustible material for a charismatic leader organizing on the basis of rejection of customary politics and the institutional order. Here Brexit serves as the disturbing outlier, a counterexample that indicates that sufficient anger and the eased forms of communication through social media can substitute for the demagogic leader, whatever Nigel Farage’s or Boris Johnson’s ambitions might be. Nonetheless, the standard mix is familiar across the democratic world. As Cas Mudde elaborates:

[T]he populist heartland becomes active only when there are special circumstances: most notably, the combination of persisting political resentment, a (perceived) serious challenge to ‘our way of life’, and the presence of an attractive populist leader. However, what sets the populist heartland apart from other protest-prone groups is their *reactiveness*; they generally have to be mobilized by a populist actor, rather than taking the initiative themselves.<sup>7</sup>

Behind the momentary events in any particular country stands the perception of democratic rule serving as cover for the failure of elites to address the security and prosperity of citizens of the advanced democratic societies. Much as the topic at hand opens the door to all sorts of failings of modern democracy, the immediate task must remain narrower. To return to the opening theme, the challenge to democracy is not primarily state repression but institutional failure. The language of human rights poorly captures the tension when the electoral choice of the voting public is impulsive, demagogic, unconstrained by the language or norms of

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<sup>6</sup> Mudde & Kaltwasser, 2012, at 159.

<sup>7</sup> Mudde, 2003, at 547-48.

governance, and oftentimes publicly committed to unwinding the very institutional arrangements that allowed electoral success in the first place. The mark of the authoritarian regimes of the 20<sup>th</sup> century was the ready recourse to *extralegal* means of oppression to reinforce brute power. By contrast, the current populist leaders rely heavily on their electoral mandate and choose the means of *intralegal* mechanisms to wear their opponents down. Rather than tyranny wielded by a state-enabled minority, populism risks the tyranny of the majority threatening to break through institutional constraints.

In turn, the altered nature of the threat to democratic integrity requires a different metric for legal intervention, one separated from the customary protection of individual autonomy that characterizes the primary human rights domain. It is important to emphasize, as do Levitsky and Way, that these regimes are dependent on electoral approbation as the foundation of political legitimacy, and that the combination of “meaningful democratic institutions and authoritarian incumbents creates distinctive opportunities and constraints...”<sup>8</sup> Following their definition, these are “civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining political power, but they are not democratic because the playing field is heavily skewed in favor of incumbents. Competition is thus real but unfair.”<sup>9</sup> To the extent that opponents of current populist demagogues engage in facile comparisons of such elected authoritarians to Nazis or Fascists or Communists, they are wide of the mark. Whatever the autocratic inclinations of the rulers,<sup>10</sup> these are not the authoritarian regimes of yesteryear.

In this essay, I suggest two forms of legal intervention that preserve democratic accountability by frustrating the populist claim to permanence. These respond to two different problems of corruption under populist pressures. The first is the corruption of the electoral process by undermining electoral accountability and the range of authority enjoyed by those who prevail electorally. The second is the corruption of democratic governance by using the power of incumbency to thwart institutional divisions of authority and to force increasing domains of state decisionmaking into the hands of unilateral executive authority.

Each of these suggests different forms of potential legal response. The first problem of efforts to compromise electoral accountability invites responses that are court-focused and look to mechanisms that maintain the political responsibility and electoral engagement of alternative sources of government power outside the dominant executive. This is fairly well understood, even if difficult in practice and largely turns on the increasingly

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<sup>8</sup> Levitsky & Way, 2010, at 27.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> Muller, 2016

robust constitutional law entrenching protections of the democratic process. The second domain of the use of discretionary political power to disable institutional checks is more complicated. Here the search is for legal responses to check powers that attach to prolonged executive power without stable institutional checks and competitive electoral accountability. In short, the ability to dispense patronage, to let government contracts, to command media attention through the powers of the office, and to allocate social benefits in the electoral period yield a controlling authority that often dovetails with populist political claims. In turn, the ability to turn on and off the spigot of government largesse invites corruption of public institutions. The question is whether the ensuing propensity toward corruption highlights the importance of challenging *intralegal* abuse through the mechanisms of ordinary law rather than extraordinary constitutional claims.

## II.

A number of democratic defects have placed under stress the nominal allocation of separate spheres of power that frame constitutional democracies. The fractures of governance can be seen in dominant party democracies, in illiberal regimes that increasingly rely on concentrated executive power, in mature democracies in which legislative dysfunction hampers governmental effectiveness, or in direct populist assaults on institutional boundaries that frustrate immediate political gain. In each, the pressure on formal divisions of governmental authority define the modern political era. In many such instances, courts may play a checking function if for no other reason than the fact that courts tend to be non-synchronic with election cycles and may lag in efforts to cohere unilateral power. In time, as Rosalind Dixon and David Landau show, courts may well succumb to power and become active agents of executive consolidation, as in Nicaragua and Ecuador.<sup>11</sup> Nonetheless there remains the possibility for court intervention to restrain the impulse to circumvent institutional constraints on consolidated power.

It is difficult to catalogue the myriad ways in which incumbent authority can compromise electoral choice. Changes in voter eligibility by restrictive voter registration schemes (as in the U.S.) or sudden expansions of the franchise to include 16-year olds or resident aliens (as in Argentina) can serve to manipulate likely electorate preferences. Districting configurations can be gerrymandered. Times and mechanisms of voting can be altered. Opponents can be harassed through legal and extralegal tactics. The list is long, and I loosely join these as a form of corruption of the democratic enterprise, defining corruption here as a structural compromise of the

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<sup>11</sup> Dixon & Landau, 2019.

workings of a complex system.<sup>12</sup> These examples point to the long-term need of independence of election administration and intermediary institutions to buffer political expediency.

Instead of attempting a collection of the many ways in which incumbent power might compromise democracy, I will focus here only on key changes that limit electoral accountability altogether or that remove power from electoral contestation altogether. In a recent paper, Mila Versteeg and co-authors chronicle how about 1/3 of electoral regimes nationwide attempted to evade limits on re-election of heads of state, using formal constitutional amendment in about 2/3 of the cases.<sup>13</sup> The key is the use of incumbent power either to eliminate electoral challenge altogether or create a condition of dependence on the established government as to raise the barrier to challenge to foreboding heights. The key is not just entrenchment by which political change is made more difficult as a result of the powers of incumbency,<sup>14</sup> but that which occurs when politics is fought out at the level of irreversibility. In turn, this “implies not just the absence of political change but some kind of special *constraint* on the usual processes of political change.”<sup>15</sup>

Perhaps the simplest form of judicial intervention is to defend the primacy of rotation in office as the key to democratic governance.<sup>16</sup> There are categories of constitutional change that are so fundamental as to be “incompatible with the existing framework of the constitution and instead seek[] to unmake one of its constitutive parts.”<sup>17</sup> Such “dismemberments ... aim to unmake a constitution without breaking legal continuity.”<sup>18</sup> In the United States, for example, an increasingly radicalized Republican party has deemed governance by Democrats illegitimate. In North Carolina and Wisconsin, the loss of the governorship to the Democrats led the outgoing Republicans to attempt to neuter the power of the executive. This is a classic one-and-done strategy (a term from American college basketball) in which all that matters is the immediate. The alterations included limiting the staffing of the governor, limiting the number of executive appointments, and a variety of technical changes that all shifted power from the executive to the

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<sup>12</sup> See Merriam-Webster (“to cause disintegration or ruin”);

<sup>13</sup> Mila Versteeg et al., *The Law and Politics of Presidential Term Limit Evasion* (Univ. Va. Sch. Law, Public Law & Legal Theory Paper Series 2019-14), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3359960](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359960).

<sup>14</sup> See Paul Starr, *Entrenchment* 187 (2019).

<sup>15</sup> Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L.J.* 400, 409 (2015).

<sup>16</sup> Przeworski et al, 2000.

<sup>17</sup> Richard Albert, *Constitutional Amendment and Dismemberment*, 43 *YALE J. INT’L L.* 1, 5 (2016).

<sup>18</sup> *Id.*

legislature – which in turn was controlled by Republican gerrymanders, at least for the next two years.

The extreme form, and the one that has proved most amenable to judicial intervention, is the use of legislative majorities to push through “abusive” constitutional amendment aimed at eroding electoral accountability.<sup>19</sup> As framed by Rosalind Dixon and David Landau, these are the structural alterations that have the effect of “mak[ing] it harder to dislodge the incumbent leader or party, and to weaken checks on their exercise of power.”<sup>20</sup> In response, national constitutional courts have used a number of doctrines to draw a line around core democratic features that cannot be transgressed, even through procedurally proper forms of constitutional amendment. In effect, these courts have written unamendability provisions based on the inviolability provisions of postwar German constitutionalism<sup>21</sup> into national constitutions where such eternity clauses were textually absent.<sup>22</sup>

Critical to the doctrinal development of this area is the series of cases from India that protected the “basic structures” of democratic governance from constitutional amendment. These cases took hold in response to the declaration of emergency powers by Prime Minister Indira Gandhi, culminating in the 1973 ruling in *Kesavananda Bharati v. Kerala*.<sup>23</sup> More directly significant here, the Indian Supreme Court used the doctrines to void amendments giving Parliament rather than an independent electoral commission and the courts the power to regulate and void elections.<sup>24</sup> Under the Indian court’s approach, the role of judicial review was to determine as a practical matter, “whether or not [the challenged act] destroys the basic structure”<sup>25</sup> of democratic governance, and for these purposes, “the form of

<sup>19</sup> David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 237 (2013).

<sup>20</sup> Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606, 613 (2015).

<sup>21</sup> GRUNDGESETZ [GG] [BASIC LAW], arts. 1, 20, translation at [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/).

<sup>22</sup> See generally Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 333 (2011) (discussing judicial interpretation of unamendable provisions); Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 676 (2013).

<sup>23</sup> *Kesavananda Bharati v. Kerala*, (1973) 4 SCC 225 (India). For exposition of the doctrine, see SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA* 24-26 (2009).

<sup>24</sup> *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299 (India); *IR Coelho v. Tamil Nadu*, AIR 2007 SC 861 (India). see Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance*, 49 J. INDIAN L. INST. 365, 390-91 (2007).

<sup>25</sup> *IR Coelho v. Tamil Nadu*, AIR 2007 SC 861, paras. 151(ii) (India).

an amendment is not relevant, its consequence would be [the] determinative factor.”<sup>26</sup>

As subsequently framed by the Italian Constitutional Court, a constitutional commitment to democracy “contains some supreme principles that cannot be subverted or modified in their essential content either by laws of constitutional amendment or other constitutional laws. [including principles not expressly mentioned in the Constitution, but nonetheless form] part of the supreme values on which the Italian Constitution is based.<sup>27</sup> Courts have used this power of protecting such core “supreme values” to strike down even procedurally proper amendments with astonishing frequency in recent years.<sup>28</sup> At bottom, these decisions invoke a democratic commitment so fundamental as not reducible to simple textual commands. In the words of the Czech Constitutional Court commenting on the post-1989 political structure, “Our new constitution is not established on neutrality of values, it is not merely a definition of institutions and processes, but incorporates in its text certain regulatory ideas, expressing the basic untouchable values of a democratic society.”<sup>29</sup> The catalogue of such decisions is by now quite extensive, but two brief examples will have to suffice to set out the breadth of the basic structures doctrines that have emerged.

Among the growing canon of democracy-reinforcing constitutional interventions, no case is as widely heralded as the decision of the Colombian Constitutional Court in 2010 denying the popular incumbent president Álvaro Uribe a third term in office.<sup>30</sup> Uribe had already amended the constitution to allow a second term, something accepted by the Court as a necessary accommodation to the reality of Uribe’s soaring popularity in the wake of a successful re-imposition of order against a persistent guerrilla insurgency.<sup>31</sup> By contrast, the Constitutional Court ruled that a third term would disrupt the electoral accountability of the president and also compromise separation of powers by allowing a prolonged stretch of

<sup>26</sup> IR Coelho v. Tamil Nadu, AIR 2007 SC 861, para. 149 (India).

<sup>27</sup> Corte Cost., 15 dicembre 1988, n. 1146, Gazz. uff. 1989, 2, 627 (It.), *translated in* Lois F. del Duca & Patrick del Duca, *An Italian Federalism? The State, its Institutions and National Culture as Rule of Law Guarantor*, 54 AM. J. COMP. L. 799, 800-01 (2006).

<sup>28</sup> See YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017).

<sup>29</sup> Nález Ústavního soudu ze dne 10.09.2009 (ÚS) [Decision of the Constitutional Court of September 9, 2009], ÚS 27/09 (Czech), *available in English at* <https://www.usoud.cz/en/decisions/20090910-pl-us-2709-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-de-1/>.

<sup>30</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10 (Colom.), *translated in* COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 354-55 (Manuel José Cepeda Espinosa & David Landau eds., 2017).

<sup>31</sup> FRAGILE DEMOCRACIES, at 146-47.

executive appointments by the same head of state.<sup>32</sup> In order to enjoin a procedurally proper constitutional amendment to take hold, the Court had to rely on broader democratic principles that both preserved the centrality of competitive elections and sought to limit the de facto power of a long incumbent president.<sup>33</sup> Stunningly, President Uribe deferred to the Court's decree, allowing competitive elections to go forward and thrusting the Constitutional Court into a central position the guarantor of constitutional democracy.<sup>34</sup>

Alternatively, incumbent political power may be used to thwart anticipated shifts in electoral preferences. Taiwan provides a useful example with the 1999 constitutional revisions that sought to entrench the dominant party, Kuomintang (KMT), in two main ways. First, all elections for the National Assembly, the constitutional chamber of the bicameral legislature, beginning in 2000 were to be delayed for two years.<sup>35</sup> Second, the seats in the National Assembly were to be guaranteed to the parties with representation in the lower chamber (the Legislative Yuan), without any direct election.<sup>36</sup> The legislators voted on these constitutional changes anonymously.<sup>37</sup>

The KMT had dominated Taiwan since its expulsion from the Chinese mainland in 1949, but it was losing ground electorally – hence the attempts to lock in the prior distribution of power. With the breakthrough 2010 election of Democratic Progressive Party (DPP) president Chen Shui-bian, the Taiwanese Constitutional Court emerged from dormancy to issue *Interpretation No. 499*, striking down the proposed constitutional revisions.<sup>38</sup>

<sup>32</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10 (Colom.), translated in COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 354-56 (Manuel José Cepeda Espinosa & David Landau eds., 2017).

<sup>33</sup> See Carlos Bernal-Pulido, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT. J. CON. LAW 339 (2013).

<sup>34</sup> Vicente F. Benítez-R, *We the People, They the Media: Judicial Review of Constitutional Amendments and Public Opinion in Colombia*, in CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA (R. Albert, C. Bernal Pulido, and J. Zaiden Benvindo, eds., Hart, 2019), at 143.

<sup>35</sup> ZHONGHUA MINGUO XIANFA ZENGXIU TIAOWEN [Additional Articles of the Constitution of Taiwan] 5th Revision (1999), available in English at <https://english.president.gov.tw/page/93>.

<sup>36</sup> ZHONGHUA MINGUO XIANFA ZENGXIU TIAOWEN [Additional Articles of the Constitution of Taiwan] 5th Revision (1999), available in English at <https://english.president.gov.tw/page/93>; See PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA 99 (2017).

<sup>37</sup> See Yen-Tu Su, *Political Antitrust: Rethinking the Constitutional Law of Competitive Democracy* 189-90 (2000) (unpublished Ph.D. dissertation, on file with author).

<sup>38</sup> J.Y. Interpretation No. 499 (Taiwan Const. Ct. Interp. March 24, 2000), [https://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=499](https://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=499)

The bottom line holding was that, “delegates must be directly elected by the people to exercise the powers and duties of the National Assembly,” and absent such election, “the amended provisions on the installation of National Assembly delegates violate the constitutional order of democracy.”<sup>39</sup> While the formulation is abstract, the court grounded its decision by reference to international norms of democratic accountability, a necessary substitute for any robust constitutional precedents in Taiwan.<sup>40</sup>

As compelling as these cases are for using constitutional authority to repel threats to democratic accountability, there are limits. Unleashing the power of constitutional courts unfortunately invites efforts to compromise these institutions and to subvert them into instruments of “abusive judicial review.”<sup>41</sup> The most notable example comes from Bolivia where President Evo Morales lost a referendum that would have amended the constitution to allow him to run for a fourth term as president. Having obtained a ruling from a compromised constitutional court that such a referendum was permissible, Morales placed the issue before the voters and – to his obvious surprise and dismay – proceeded to lose the election. Supporters of Morales then crafted a higher-level democratic claim that any constitutional limits on the terms that a president might serve would violate the fundamental right of the voters to decide, purportedly established by some vague international human rights commitments.<sup>42</sup> By the time the issue came to the court, four of the seven justices had already served as cabinet officials in the Morales governments and dutifully endorsed the claimed right of the people to have Morales run again in 2019.<sup>43</sup>

Bolivia exposes a deep paradox in looking to constitutional courts as a hopeful bastion of protection for political accountability. The capacity of courts to perform the function of insuring against,<sup>44</sup> or hedging against,<sup>45</sup> may

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[[https://web.archive.org/web/20171025024050/http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=499](https://web.archive.org/web/20171025024050/http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499)].

<sup>39</sup> *Id.*; see also Ming-Sung Kuo, *Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics*, 25 WASH. INT'L L. J. 597, 600 (2016) (arguing that Interpretation No. 499 is “the foremost example to constitutional politics” of Taiwan court).

<sup>40</sup> For arguments that courts buttress their domestic authority by invoking international norms, see Vicki Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism*, in DEMOKRATIE-PERSPEKTIVEN : FESTSCHRIFT FÜR BRUN-OTTO BRYDE ZUM 70, at 47 (Brun-Otto Bryde et al., eds. 2013); Dixon & Landau (2015), *supra* note \_\_\_\_, at \_\_\_\_.

<sup>41</sup> Rosalind Dixon & David Landau, *Abusive Judicial Review*, 53 U.C. DAVIS L. REV. \_\_\_\_ (2020).

<sup>42</sup> See Tom Ginsburg, *International Courts and Democratic Backsliding*, 37 BERKELEY J. INT'L L. 263 (2019)

<sup>43</sup> See Decision N. 84 of 2017, Nov. 28, 2017 (C.C. Bolivia).

<sup>44</sup> Ginsburg insurance theory.

in turn depend on the preexistence of political competition. Absent such competition, the constitutional courts can be captured through appointments by the executive or simply overwhelmed by the realities of centralized political power. As Sergio Verdugo well capture the problem, the claim that institutional checks will fail “is particularly convincing in countries that risk having an hegemonic regime in power indefinitely that is continuously capturing the institutions that are supposed to check or balance their power, especially if those countries have an hyper-presidential regime.”<sup>46</sup>

## II.

### *a. Abusive Democracy and Corrupt Bargains.*

More challenging than the formal constitutional alteration of institutional arrangements is the use of ordinary law and politics to cement the populist hold on power. Inescapably, “political actors intent on entrenching their preferred parties or policies need not resort to manipulating the formal rules of the Constitution, elections, or legislation.”<sup>47</sup> Rather, the imprecision and discretion of the ordinary law may provide ample fuel for entrenching political power without resort to constitutional amendment or even major legal overhauls.

This process of “intralegal” suppression takes two primary forms. The first is the use of common legal forms to oppress the political opposition. I refer to this as the “Chavez playbook,” because the populist set of intralegal abuses of the opposition seem to have been honed in Venezuela. Among the myriad techniques are constant defamation lawsuits, both civil and criminal, against opponents; the frequent claims of air time for public service broadcasting by the regime (Chavez’s famous “La Hora del Comandante,” which would frequently stretch for several hours of prime time broadcasting each night); the targeted use of state advertising to subsidize and subordinate the domesticated media; the selective withdrawal of eligibility for state contracts or employment for regime opponents; the denial of business licenses for opponents; the particularized grant of one-time exceptions from impossibly high regulatory burdens; and the list goes on. Each of these mechanisms has a formal foundation in law; only the discretionary application reveals its use as a political cudgel.<sup>48</sup> As the *Economist* writes

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<sup>45</sup> Issacharoff on hedging.

<sup>46</sup> Sergio Verdugo, *The Fall of the Constitution’s Political Insurance: How the Morales Regime Eliminated the Insurance of the 2009 Bolivian Constitution*, 17 INT’L J. CONST. L. \_\_\_ (2020).

<sup>47</sup> Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 402 (2015).

<sup>48</sup> Varol, 2014.

about Latin America, “[t]he region’s states are marked by heavy-handed regulatory overkill mixed, in practice, with wide discretionary power for officials.”<sup>49</sup> The concept of choking levels of regulatory overkill with large margins for discretionary application or exemption is key. This becomes the entry point for political consolidation through the punishment of those who run afoul of that consolidated power.

Formal legal resistance to this form of political retaliation is difficult. There are no entitlements to government contracts or employment, or to specific licenses, or even to be free from defamation actions. In countries with poorly realized norms of bureaucratic regularity, such state benefits tend to be dispensed on a one-off basis, depriving those shut out of process-based arguments to challenge retaliation. The American Administrative Procedures Act does not generalize, nor do the norms of the German civil service; Max Weber, it turns out, had limited reach. And the customary rights languages of an earlier era poorly captures the discretionary power of ill-defined boundaries of ordinary governmental authority to reward and punish and thereby to compel proximity to the incumbent regime.

The second mechanism is even more difficult to engage as a matter of law. Populism invariably plays to the sense of the real people having been burdened by the outsiders, either elites or foreigners or some combination thereof. The troubling issue becomes the use of governmental powers to realize electoral gain, especially when the dispensation of state largesse is consistent with the demands of the regime’s populist base. Consider the following example from Argentina,

In 2009, the Argentine government nationalized the cable television stations that broadcast football (soccer) matches in Argentina, the Fútbol Para Todos (Soccer for All) program, with the indisputable claim that soccer was the birthright of all Argentines. Following the death of Néstor Kirchner, the 2011 national championship matches (now free to all Argentine households) were renamed in honor of Néstor Kirchner, and each broadcast included a half-time tribute to Kirchner’s legacy as president. Needless to say, Néstor Kirchner was no longer a candidate for any office, but his wife was in the midst of a re-election campaign for president. A leading Argentine newspaper, *La Nación*, prompted a scandal by estimating that the Fútbol Para Todos program amounted to hundreds of millions of dollars of free publicity for the incumbent Peronist ticket of Cristina Fernández de Kirchner. Undeterred, the government then decreed that poorer Argentines may have need for new

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<sup>49</sup> The Economist, *The 40-year Itch, Briefing Latin America*, May 11, 2019, at 18.

digital televisions to take advantage of the largesse, and then—only months before the elections—decreed a new TVs for All program for subsidized purchases of new model televisions. One could go on to include the Beef for All subsidies during an election year, the Dairy Products for All, and the program which in translation captures it all, the Pork for All initiative.<sup>50</sup>

There is nothing distinctly Argentine in this account. The same story could be told of rice subsidies by the last Thaksin Shinawatra Red Shirt government in the run up to elections in Thailand or some of the social welfare pledges of the new Bolsonaro regime in Brazil and many others. In Poland, the PiS government used public handouts reaped from its predecessor's austerity reforms to bolster a thin electoral mandate, as with the "500+" program of subsidies for every child after the first.<sup>51</sup> There are real world boundaries to raiding the fisc to underwrite electoral support, as the economic collapse in Venezuela demonstrates. But the temptation to use economic discretion to cement political power is always present, even in healthy democracies. It is hard to overcome the paradox, as captured by Francis Fukuyama "that interest groups are corrupting democracy and harming economic growth, and that they are necessary conditions for a healthy democracy..."<sup>52</sup>

Nor is there any legal barrier that says that politicians cannot be attentive to their constituencies in setting a political agenda or using proper political forms for redistribution of resources. Franklin Roosevelt no doubt drew political support from providing social security benefits to a first generation of protected retirees, and that pattern continued through the expansion of prescription drug benefits under George W. Bush, or the expansion of health insurance under Barack Obama. Under any classic view of democracy as premised on interest group competition, all successful politicians must be attentive to the desires of their constituencies or face electoral defeat.

What may serve to distinguish the populist use of state resources could be the lack of generalizable programs, the failure to embed reforms within state institutions, and the play to the most short term interests of a voting constituency. What is troubling in other words is that populism offers a means to corrupt the polity, promising the sugar high of one-off gifts without any sustaining economic foundation. Even seemingly "kept promises", such as the PiS continuing to dole out government stipends even

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<sup>50</sup> Issacharoff, 2012.

<sup>51</sup> WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 20 (2019); *A Tale of Two Polands* (Oct. 11, 2019), <https://foreignpolicy.com/2019/10/11/pis-centuries-old-divides-polands-east-west-elections/>.

<sup>52</sup> FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY 482 (2014).

after their immediate election, have stemmed from short-sighted government budgeting that cause unsustainable side effects such as rising prices and increased cost of living.<sup>53</sup> Such undermining of governance structures is neither criminal nor antidemocratic in the sense of violating the primacy of electoral commands. Give-away politics creates a dependency of the electorate that cements incumbent rule in much the same fashion as does the use of state employment or contracts to reward electoral loyalty.

The question remains whether there are constraints on the populist use of the perquisites of state authority to cement political rule. When populist change is presented as a matter of constitutional reform, there is a galvanizing event that will prompt debate and may serve as the basis for legal intervention. For example, the fear of entrenchment of political dependence on the multi-term executive was central to the Colombian constitutional court's invalidation of the proposed third term for President Uribe. As the Court noted: "the advantage of having served as president for eight years" allows "the progressive increment in presidential periods [that] can allow a leader to perpetuate himself in power and potentially create a vicious cycle permitting the consolidating of only one person in power."<sup>54</sup> The Colombian court captures the problem of consolidated power exactly, but the terms of court intervention arose in Colombia because of the dramatic legal setting of a constitutional amendment that would expressly alter the powers of the executive.

Such direct confrontations with expansions of presidential power directly by thwarting a proposed constitutional amendment are necessarily rare. Much more common, and more difficult, is the incremental expansion of authority through the manipulative exercise of governmental power, as in the Argentine example. Among the manifestations of this form of populist state expansion, the percentage of the population dependent on state employment or transfer payments in whole or part rose from roughly 20 percent to over 40 percent in the period of the two Cristina Kirchner governments – an extraordinary statification of the economy, and one that was unsustainable as an economic matter.<sup>55</sup> At the same time, this expansion created a dependency relationship between huge sectors of the population and the munificence of the incumbent government, something that would

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<sup>53</sup> *How do Poland's ruling populists remain so popular? Follow the money*, The Washington Post (Oct. 11, 2019), [https://www.washingtonpost.com/world/europe/how-do-polands-ruling-populists-remain-so-popular-follow-the-money/2019/10/11/6ae9f886-eb73-11e9-a329-7378fbfa1b63\\_story.html](https://www.washingtonpost.com/world/europe/how-do-polands-ruling-populists-remain-so-popular-follow-the-money/2019/10/11/6ae9f886-eb73-11e9-a329-7378fbfa1b63_story.html)

<sup>54</sup> Cepeda & Landau, at 356.

<sup>55</sup> *The End of Kirchnerismo: And the Beginning of Saner Economic Policies, Perhaps*, Economist (Oct. 22, 2015), <https://www.economist.com/the-americas/2015/10/22/the-end-of-kirchnerismo>.

make electoral overhaul difficult and would render post-Kirchner economic reforms exceedingly politically volatile.

Many of the resulting economic distortions are beyond legal constraint when enacted through the populist-infused mechanisms of ordinary politics. But maybe not all. As I have noted elsewhere, the concentration of executive command fuels the emergence of the “three C’s” of cronyism, clientelism, and outright corruption. When I began turning my academic interests to the question of democratic fragility, my primary focus was the multiple layers of institutional arrangements necessary for democratic governance, both inside government and through the layers of civil society. I now believe that corruption turns out to play a larger role in this story than previously appreciated. In a recurring pattern, the fight over independent authority to investigate and prosecute corruption turns out to be a flashpoint in stemming the consolidation of executive rule.

b. *Ordinary Corruption.*

Corruption provides an unanticipated entry point for addressing the distortions of majoritarian populism. Populist governments show a propensity to fall prey to corruption scandals, as in South Korea and South Africa. Earlier examples of corruption of the electoral process, as with the Taiwanese confrontation with the KMT trying to hold itself in office, or with the North Carolina Republicans attempting to preserve power in the face of electoral defeat, were judicial efforts to preserve prospective electoral accountability of government. But the broad strokes of populism fit poorly into such a simple approach. Populist distortions are not centrally ones of state repression that might be addressed through rights jurisprudence, nor from minorities seeking to shield themselves from electoral challenge, what emerges as one of the central concerns from law of democracy review.

Put another way, much of the academic discussion about the emergence of strong courts starts from one of two premises. The first is that constitutional courts have served primarily as guardians of rights interests against governmental threat. This may be further refined along the axes of negative and positive liberties to account for the more venturesome spread of social rights jurisprudence in the hands of apex courts. As a matter of historical account, the primacy of rights jurisprudence no doubt best captures the means by which constitutional jurisprudence, including at the hands of the European Court of Human Rights, has commanded post-WW II democracies. Rights claims generally do not necessarily force a direct confrontation with political authority and allow an expanding domain of court responsibility.

Alternatively, a minority claim, to which I am partial, is to find in the courts a necessary brake on the propensity of fragile democracies toward

institutional failure, what is often termed a structural account of the role of constitutional courts. Especially in the formative period after the fall of the Soviet Union, new democracies embarked without consolidated political parties, with weak civil society institutions, and with a pronounced risk of executive action that would thwart future electoral accountability. The point of departure here is the role of competition for election and rotation in office among political contenders as constraining state authority. On this view, review of claims of electoral access, minority party protection, party financing, and other institutional details of democratic politics form a critical foundation of the role of modern constitutional courts. Even proponents of this view understand the difficulty of courts' invoking higher notions of democratic legitimacy as against the elected political branches.

The challenge of current populism is that, in its current manifestation, it is not defined by either overwhelming human rights violations or threats to undo elections as such. Certainly, there are the inflammatory appeals of the need to rise against outsiders or other enemies, accompanied by the loose rhetoric of violence. But, by and large, the opposition is able to organize and to air its claims in regimes such as Hungary and Poland; even Turkey manages contested elections. Neither the jurisprudence of rights nor democratic reinforcement quite captures the aggrandizement of discretionary state authority and the increased integration of incumbent political power into economic privilege. If the question of corruption is not epiphenomenal but rather systemic under such regimes, the question becomes whether corruption might provide an important element for challenging populist excess. Moreover, protections against corruption generally infuse both the criminal and administrative law, allowing rather ordinary legal mechanisms to be utilized against populist claims on economic power.

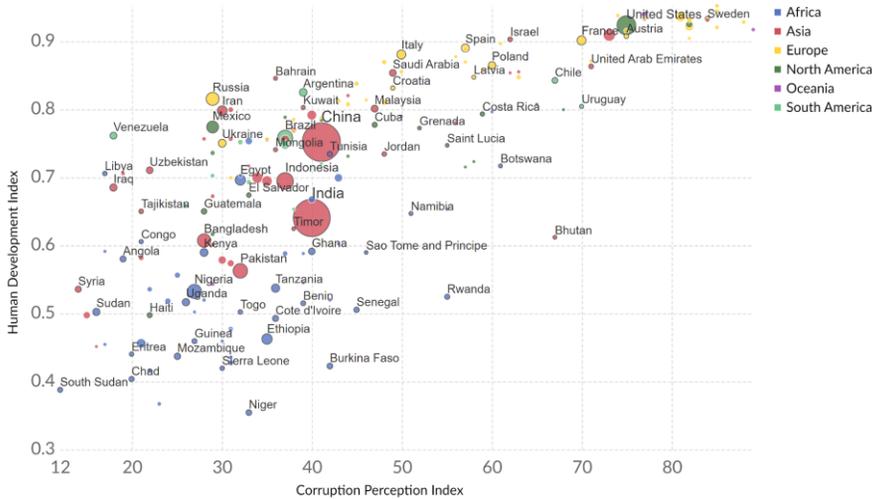
Rather there may be something in the genetics of populist governance that invites corruption. The transactional relations with constituents provides the first step: "clientelism often evolves into pure corruption because politicians have the power to distribute public resources as they wish; money that could go to clients often ends up in their own pockets."<sup>56</sup> The claim that follows is that the anti-institutionalism of populist rule breaks down the governmental structures that should brake corruption as democratic societies mature. As the Table shows, there is a predicted decline in corruption as governing institutions mature and as the society becomes wealthier:

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<sup>56</sup> *Id.* at 148.

## Human Development Index vs. Corruption Perception Index, 2017

The vertical axis shows scores in the UN Human Development Index (lower values reflect lower development). The horizontal axis shows scores in Transparency International's Corruption Perception Index (lower values reflect higher perceived corruption).



Source: UNDP (2018), Transparency International (2018)

OurWorldInData.org/corruption/ • CC BY

My contention is that there is a link between several features of populist rule that may pave the way to outright corruption, as will be developed in the final section. These features include the anti-institutionalism of populist governance, the propensity for cronyist relations to the regime as a way around stifling bureaucratic legalism, and the short-term seductions of clientelism. If the Argentine or Polish or Thai governments offer blandishments to the voters on the eve of an election, and the voters respond positively, there is little that law can do to thwart this persistent vulnerability of democracy. Hobbes warned that citizens in a democracy would be vulnerable “to evil counsel, and to be seduced by orators,”<sup>57</sup> as indeed had Thucydides in his accounts of the ultimate fall of Athens in the Peloponnesian Wars.<sup>58</sup> The very nature of democracy is to mobilize self-interest in the aim of societal advancement, a process that cannot escape the appeal to what voters want.

Consequently, defining the parameters of corruption is difficult. In the United States, the introduction of the concern for corruption or the perceived risk of corruption in campaign finance law unleashed two generations of debate over what exactly constitutes such corruption. Inspired by divisions on the Supreme Court, corruption can be as narrow as a furtive quid pro quo exchange between a state patron and an incumbent official, or

<sup>57</sup> Leviathan, Book 19.

<sup>58</sup> History of Peloponnesian Wars at \_\_\_\_.

as broad as the inequality of income in a market society, or as functional as the “dependence corruption” of politicians pursuing money for election.<sup>59</sup> Public perceptions of corruption are no less contested. A study of American politics found that campaign finance rules had little impact on perceived corruption of the political process and that support for a losing candidate was among the best predictors of a perception that corruption had infected the process.<sup>60</sup> If corruption becomes a euphemism for political loss, then corruption is a definitional attribute of electoral choice.

Certainly, the mere offer of material rewards as a condition for electoral support cannot be a sufficient definition of corruption. At a certain level of abstraction, electoral politics is often about promising returns to political supporters. Rome had its bread and circuses. George McGovern promised to give every American \$1,000. Ronald Reagan ran on a promise of dramatic tax relief, something that once victorious translated into an immediate economic benefit to over 80 percent of Reagan voters.<sup>61</sup> If one of the attributes of the modern state is to redistribute wealth from the most advantaged to the most vulnerable, then democratic politics will have predictable redistributive elements, which alone cannot condemn electoral choice.

The U.S. Supreme Court addressed this issue in rejecting an attempt to prosecute a victorious candidate under the Kentucky Corrupt Practices Act, which prohibited candidates from making an “expenditure, loan, promise, agreement, or contract as to action when elected, in consideration for a vote.”<sup>62</sup> The candidate under indictment had openly pledged performance once in office that would reward materially the voters he was courting. As the Court ruled, “so long as the hoped for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one’s ballot.”<sup>63</sup> Clearly elements of generalizability, publicity, and diffusion of benefits provide some safe harbor in electoral politics, even if a candidate appeals to voter self-interest, no matter how crassly defined.

A continuum suggests itself. At one extreme is the pocketing of state money or ownership of state-affiliated enterprises by the powers that be. That comes closest to theft. At the other extreme is a generalized program of redistribution, whether as tax relief, agricultural subsidies, or any of the myriad ways in which revenues raised through taxation support one or another political claim to state support. More difficult is the use of state

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<sup>59</sup> Lessig, 2014.

<sup>60</sup> Persily, 2004.

<sup>61</sup> Edsall & Edsall, 1984.

<sup>62</sup> *Brown v. Hartlage*, 456 U.S. 45 (1982).

<sup>63</sup> *Id.* at 57.

resources for immediate political gain, as with the Argentine example of extraordinary one-time expenditures on the eve of an election. Such expenditures can be distinguished from a generalized state program that has clear redistributive effects, including the expansion of health and prescription benefits under Presidents Obama and Bush, or the Reagan tax cuts. The ongoing and generalized quality of these programs place them within the continuum of being legitimate if contestable public policy aims of either the right or left in a system of democratic choice.

What may distinguish populist regimes is the propensity for power over policy, particularized grievances over broader commitments. In the American context, for example, although the tax code is replete with special interest benefits, the design of the more recent tax cuts to punish parts of the country deemed politically antagonistic to the current administration has the feel of a change in the form of government action. There is an underlying empirical claim that I cannot substantiate here that the use of particularized benefits and punishment is endemic to populist regimes. This follows from the nature of not being adversaries but enemies, and from the claim to represent the authentic people against the illegitimate other. If accepted, this explains the propensity of populist regimes to act as gatekeepers for the selective conferral of benefits and punishments. Needless to add, corruption may exist in authoritarian regimes, and under well-functioning democracies. But the claim is that the antagonism of populist regimes toward institutionalized norms fosters the use of state resources to reward and punish in more direct and notorious forms than in normal politics.

From this follows the likelihood of descent into outright corruption. I like to tell law students that one of the few behavioral certainties is the propensity for gatekeepers to become toll-collectors. Those that confer favors from state coffers are sorely tempted to dole out rewards to themselves, and frequently succumb. The concept of corruption, as in the lead definition from the Oxford English Dictionary, conveys the sense of degradation. That which exists as part of a normal or healthy ordering becomes corrupted when the core functions are compromised even if the appearance remains recognizable. Any definition that follows this approach risks just pushing the inquiry up one level. Thus, Dennis Thompson notes, "[i]n the tradition of political theory, corruption is a disease of the body politic."<sup>64</sup> But Deborah Hellman rightly responds, [i]f corruption is a disease of the body politic, it depends on an antecedent idea of the healthy state of the political system."<sup>65</sup> Alternatively, Laura Underkuffler pushes the metaphysical boundary by

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<sup>64</sup> Dennis Thompson, *Ethics in Congress* 28 (1995).

<sup>65</sup> Hellman, 2013, at 1392.

looking to the core of corruption at the individual level as “*the capture by evil of one’s soul*.”<sup>66</sup>

Some definitions are easy, as when an elected government that cements its power and wealth by redirecting benefits to itself and its cronies through bribes, illicit contributions, or compelled ownership of profitable enterprises must be deemed to be on the corrupt side of the ledger. As Sarah Chayes set out, these regimes tend to sit atop an upward flowing form of corruption in which even the traffic police secure positions from bribes paid to higher-ups, which in turn continue to flow up to the very top of the regime.<sup>67</sup> Thus, in Uzbekistan, to take but one example, “the purchase of office is a key vehicle for the transfer of money from subordinate to superior.”<sup>68</sup> In turn, citizen engagement with state officials is largely a matter of exploitation by government officials, either in the form of demands for payment for bureaucratic favors, or bribes at the point of enforcement. As a result, the Uzbek populace’s “most frequent contact with their kleptocracy is through everyday shakedowns, especially at the hands of the police.”<sup>69</sup>

The concern for corruption offered here is not a categorically distinct species of politics, but one that is a consequence of a lost connection with the broader claim of politics being public regarding. An elected government that pledges and carries through redistribution that benefits its supporters is not corrupt. Political virtue cannot require that the “private-regarding” demands of ordinary concerns be replaced by “public-regarding citizens and thus members of a people.”<sup>70</sup>

But elements of surreptitious bargains and non-generalizability of benefits inform the definition. The propensity of populist regimes to reject established institutional forms of governance and the personalization of political discretion in the hands of an executive claiming unilateral authority to speak for the people provides a political environment rife with the prospects for corruption.

In prior writing, I have offered two concepts of corruption: the first a classic quid pro quo in which public officials obtain benefits in exchange for public grace; the second is the distortion of public policy as a consequence of the influence of wealth.<sup>71</sup> Hellman expands this to include

<sup>66</sup> LAURA S. UNDERKUFFLER, CAPTURED BY EVIL: THE IDEA OF CORRUPTION IN LAW 54 (2013).

<sup>67</sup> SARAH CHAYES, THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY 54-57 (2015).

<sup>68</sup> *Id.* at 112.

<sup>69</sup> *Id.* at 111.

<sup>70</sup> Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1502 (1988) (discussing the “jurisgenerative” effects of deliberative politics).

<sup>71</sup> Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 127-30 (2010).

corruption as the deformation of judgment.<sup>72</sup> And Zephyr Teachout pushes even further to add the loss of citizen equal treatment, either through “drowned voices” or a “dispirited public.”<sup>73</sup> In the present context, I reduce corruption to the more mundane concern for the violation of well-established prohibitions for the personal enrichment of public officials as a result of trading power for money. This is not a broad theory of equality in either political inputs or outputs. It is purely an instrumental account that seeks to enlist well-established prohibitions to limit certain political liabilities. This definition attempts neither to give a full account of proper functioning of democratic institutions nor a comprehensive view of improper motives that might compromise democracy. In this sense, the limited definition of corruption is once again “derivative” from other concerns about the political process.<sup>74</sup> But the objective is to focus on corruption standing on its own as a “policing concept,”<sup>75</sup> allowing the normal operation of the law to check the degradation of democracy in circumstances where rights and structural approaches might not reach.

### *c. Combatting Corruption.*

Three propositions then come together. The first is that the lack of institutional constraints in populist governance will create the sort of clientelist politics evidenced in the run up to the 2012 presidential elections in Argentina. The second is that this form of populist governance will yield a distinct form of personalized decisionmaking. The third is the likelihood that this will result in corruption as a result of weakened institutional constraints. If these propositions are true, corruption may provide a legal check on populist excess, and may provide a means of reaching this conduct through the ordinary mechanisms of administrative and criminal law, rather than the human rights or broader democracy agendas. I return here to older concerns on corruption that focus not on how candidates get elected – the input side of the ledger – but on the discharge of public office: “the inquiry on officeholding asks whether the electoral system leads the political class to offer private gain from public action to distinct, tightly organized constituencies, which in turn may be mobilized to keep compliant public officials in office.”<sup>76</sup> At the same time, there is little experience with legal constraints on the directed use of public resources to buttress electoral support, whether in Argentina or in any other electoral democracy. The aim

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<sup>72</sup> Deborah Hellman, *Defining Corruption*, 111 MICH. L. REV. 1385, 1395 (2013).

<sup>73</sup> (Teachout, 2014).

<sup>74</sup> David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994).

<sup>75</sup> Hellman, *supra* note \_\_\_\_, at 1421.

<sup>76</sup> Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 126 (2010).

is rather to shore up the protections against the more direct forms of corruption that are likely to emerge from this form of populism.

South Africa is the most salient example of corruption becoming a central axis of legal challenge to populist unilateralism. Although South Africa serves as the hope for negotiated transitions to democracy with strong constitutional oversight, the legacy is more complicated. The South African constitution vests too much power in the President, who serves as head of government, head of state, and head of the military. The President is selected by the National Assembly, which means the chief executive is also the head of the largest political party and is able to command a legislative majority. The initial hope was that this would be tempered by political competition at the legislative level and by the protections of federalism. This approach fared poorly as the African National Congress leveraged its role as the repository of inherited authority from the antiapartheid struggle to become a hegemonic political force, at the national and provincial levels. In the absence of meaningful political challenge, South Africa followed the path of Mexico under the Partido Revolucionario Institucional, a state with elections for office but under the control of only one party. As the revolutionary ethos ebbed from Mandela to Mbeki to Zuma, an era of repeated corruption scandals came to define state authority, again following the trajectory of PRI-dominated Mexico after Lázaro Cárdenas.

Extractive economies, like South Africa's, are rife with the potential for corruption. The state tends to play an oversized role in owning and regulating economic activity. South Africa had a further mandate to redistribute ownership away from the whites-only apartheid economy under the burgeoning black political power of post-apartheid rule. Privileged members of the civil service and other politically-connected entrepreneurs became the new owners of important shares of central businesses and the beneficiaries of high government employment and lucrative contracts. These "tenderpreneurs" became a new governing class, but one whose existence and protection depended on relations to governmental power.

The programs designed to stimulate the creation of a black entrepreneurial class were fraught with the risk of misuse in the hands of a populist government able to expand an unaccountable economic role. The redistributive programs were rhetorically forceful as a repudiation of apartheid, unobjectionable in principle as necessary to black economic empowerment, yet selective and non-transparent in their application. The driving consideration is invariably proximity to political power, thereby cementing the relationship between politics and economic returns. Not surprisingly, the culture of dispensing patronage wealth in this fashion translates readily to outright corruption, all the way to the highest levels of government.

While corruption emerged as a problem from the founding of the post-apartheid state, it was only under President Jacob Zuma that it seemed

to lose all sense of boundaries. The embedded power of the executive made Parliament passive, if not complicit in the relation between the ANC and governmental largesse. This left the Constitutional Court as the primary situs for confronting the dominant power of the executive, as evident in a series of rulings whose cumulative effect was to prod parliamentary action. These decisions were noteworthy not for predetermining the outcome of claims against Zuma but for enabling the legislative branch to exercise its countervailing authority.<sup>77</sup> As evidence of the extent of corruption mounted, and as the Parliament remained unable to resist the entrenched executive and the commands of the ANC, the Constitutional Court issued. Over the course of several years, courts repeatedly confronted Administration efforts found itself repeatedly confronting Zuma's efforts to compromise prosecutorial independence and official resistance to repaying the staggering sums that Zuma had spent on his personal estate.<sup>78</sup> When Zuma finally forced the resignation of yet another public prosecutor, the courts reacted. In due course the matter ended up before the High Court, Gauteng Division,<sup>79</sup> which wasted no time rejecting Zuma's claim of unilateral presidential authority: "In a rights-based order it is fundamental that a conflicted person cannot act; to act despite a conflict is self-evidently to pervert the rights being exercised as well as the rights of those affected."<sup>80</sup> Of more immediate interest is the decree that followed. The court reversed all the efforts of President Zuma to control anticorruption efforts and ordered that "as long as the incumbent President is in office, the Deputy President is responsible for decisions relating to the appointment, suspension or removal of the National Director of Public Prosecutions..."<sup>81</sup> Further, the court declared the unconstitutionality of the National Prosecuting Authority Act and offered a rewritten Act that would cure the constitutional defect of allowing presidential authority over an investigation of the President. But the court suspended the statutory revision for 18 months and referred the entire matter to Parliament to cure the constitutional defect on its own. The effect was to

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<sup>77</sup> See, e.g., *United Democratic Movement v. Speaker of the National Assembly and Others* 2017 ZACC 21 at para. 97 (S. Afr.) (requiring secret ballots on no confidence motions); *Oriani-Ambrosini, MP v. Sisulu, MP Speaker of the National Assembly* 2012 ZACC 27 at para. 51 (S. Afr.) (protection of rights of legislative participation and speech by minority parties); *Mazibuko v. Sisulu and Another* 2013 ZACC 28 at para. 45 (S. Afr.); *Democratic Alliance v. Speaker of the National Assembly and Others* 2016 ZACC 8 at para. 45 (S. Afr.) (same).

<sup>78</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, para. 105.

<sup>79</sup> *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* (62470/2015) [2017] ZAGPPHC 743

<sup>80</sup> Para 112.

<sup>81</sup> Para 115.

weaken Zuma, force Parliament to act, and ultimately set the stage for Zuma's compelled and long-overdue resignation.

#### IV.

It is difficult to formulate the exact legal response to the emergence of populism. The European institutions have done little, with the partial exception of the Venice Commission, to address the challenges to democratic norms in Poland, Hungary and the other countries increasingly falling under the sway of the Putin-Erdogan school of political and economic domination. Anti-corruption vigilance has two features that suggest potential points of limitation on some of the free-wheeling, anti-institutional features of populism.

First, unlike broad human rights claims or claims based on the integrity of democracy, anticorruption efforts tend to engage a broader swath of the ordinary state enforcement apparatus. In the wake of 1989, virtually all new democracies created specialized apex courts to address fundamental questions of state conduct. These courts were invariably modeled on the German constitutional court and seemed to respond to multiple concerns in the transition period. These courts stood apart from the ordinary judiciary and their judges were typically recruited through distinct mechanisms that bypassed the career track. In countries that had been compromised under autocratic rule, this allowed a retention of the career judges (who had been Nazi judges, apartheid judges, communist judges, etc.) while creating a new oversight body devoted to new constitutional values. The brute reality is that no country has a reserve body of judges capable of taking up the ordinary fare of contracts and torts in case of a complete lustration of those associated with the past.

These courts could also claim fraternity with other apex courts in developing a broadscale liberal agenda of rights, and even social rights.<sup>82</sup> These courts faced down the first Ukrainian power grab, the lack of entrenchment of individual rights in the first South African Constitution, repeated efforts by Presidents to extend their terms of office,<sup>83</sup> the failure of corrupt or incompetent governments to deliver on social promises, and the list goes on at some length. Unfortunately, students of comparative constitutional law were not the only ones observing this phenomenon. From Yeltsin and Putin in Russia, to developments in Poland and Hungary, to the

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<sup>82</sup> See Anne-Marie Slaughter, \_\_\_\_\_

<sup>83</sup> See Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim & Marilyn Guirguis: *The Law and Politics of Presidential Term Limit Evasion* \_\_\_\_\_ (2019) (finding that half of elected heads of state attempt to overstay term limitations).

repeated efforts in South Africa, illiberal democracies discovered that constitutional courts could be made and unmade, and the same elements of administrative independence could well serve regimes if these courts could be captured. A heroic decision such as denying President Uribe a third term in Colombia could quickly become a servile decision to strike down as antidemocratic a constitutional limitation on multiple terms for President Morales in Bolivia.<sup>84</sup>

Writing before the current populist wave, I speculated about how long courts could hold out against challenges from within democracy, as opposed to from the autocratic past:

Courts are in a more precarious situation because their claim to authority is not the importance of constitutional democracy against vestiges of an autocratic past, but of a superior set of constitutional values against democratic claims to power. Courts are not simply a central part of the transition to democracy, but are the enforcers of limits on majoritarian prerogatives, of what in contemporary European debates is referred to as “constrained democracy.”<sup>85</sup> The difficulty inheres in that these cases pit the branch with the least democratic authority against the popularly elected political branches, generally over matters within the confines of formal legality.<sup>86</sup>

A recent trip to Poland presented this issue in a different light. Post-communist Poland has two apex courts, a constitutional court modeled after the German court, and a Supreme Court that operates as the equivalent of the French Cour de Cassation. The former is a stand-alone institution and wielded its power broadly in the period of transition to democracy. The latter is an integrated part of the national judiciary, with deeply embedded institutional pathways. The former is comprised of justices selected by the legislature; the latter has a bureaucratic system of nomination leading to final choice by the president. The current PiS government viewed both as impediments to its political agenda. Yet, the government easily dominated

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<sup>84</sup> See Dixon & Landau, *supra* note \_\_; Tom Ginsburg, Colombia Const Court volume.

<sup>85</sup> Jan Werner-Müller, *Beyond Militant Democracy?*, 73 NEW LEFT REV. 39, 44 (2012) (speaking of the “post-war European understanding of constrained democracies”); see also Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766 (2001). For a broader application of the importance of constraints on democratic prerogatives, see DARON ACEMOGLU & JAMES A. ROBINSON, *ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY* 33-34 (2006).

<sup>86</sup> FRAGILE DEMOCRACIES, *supra* note \_\_, at \_\_ (2015).

the constitutional court, while finding the bureaucratic mechanisms of the supreme court more of an obstacle.

This then leads to the second observation. Prohibitions on corruption engage a broader domain of law than either human rights or the entrenchment of democracy. Centralized capture may prove more difficult where authority is diffuse and integrates more easily with the ordinary administration of law. The United States provides a ready example. Checks on presidential misbehavior are difficult in the face of the presidential pardon power and the centralized command structure of the Department of Justice. Impeachment requires the president's power to abandon political alignment in favor of institutional loyalty, a difficult process in an era of heightened polarization. By contrast, the current confrontations with President Trump show that the ordinary mechanisms of criminal and administrative review allow dozens of investigations to go forward outside the direct control of the President or the Attorney General. Some of these are being handled by local federal prosecutors whose independence could be attacked. But many are at the hands of state investigators and through ordinary civil lawsuits yielding discovery of bank records and similar potential evidence of misconduct. It may well be that fiscal inducements on the eve of an election are difficult to prohibit. Yet the political processes that yield to the ready use of the state coffers to reward or to selectively punish may also provide a basis for legal accountability for populist excesses.

For this to be true, there needs to be evidence that the anti-institutionalism of populism is likely to yield greater levels of corruption than is found in ordinary democratic politics. As a general matter, social science examinations find that political accountability – or more precisely political competition – is central “in generating good governance practices and, particularly, in reducing corruption...”<sup>87</sup> Simply put, electoral vulnerability keeps incumbents in check.<sup>88</sup> But if populism does tend toward corruption, the answer cannot be simply the relative level of political competition. Britain suspended wartime elections with Churchill as Prime Minister, and FDR won sweeping elections on the same period. Neither stood at the head of a government particularly known for its corruption scandals.

Rather, it is the anti-institutionalism of populist politics that provides the link. Established political parties represent long-term commitments to policy objectives that “allow them to recruit new members and place those

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<sup>87</sup> Daniel Lederman, Norman V. Loayza & Rodrigo R Soares, *Accountability and Corruption: Political Institutions Matter*, 17 J. ECON. & POL. 1, 4 (2005) (reviewing empirical literature).

<sup>88</sup> SUSAN ROSE-ACKERMAN, *CORRUPTION & GOVERNMENT: CASES, CONSEQUENCES AND REFORM* (Cambridge Uni. Press 1999).

members into office, even as existing members of the coalition may exit political life due to, say, an electoral loss, term-limits or death.”<sup>89</sup> These long-lived parties aspire to perpetual life, as with corporations, and must temper the short-termed demands of incumbent officials for the immediate perquisites of office. As a result, the intergenerational demands will force attention “to time periods beyond the present and the immediate future precisely because members who would otherwise care very little about the future are forced to bargain with their cadres who do care about the future since they have reasonable expectations of being politically active for many years to come.”<sup>90</sup> In turn, the demand for a time orientation beyond the present creates vigilance against outright theft by leaders for their own gain, the future be damned.<sup>91</sup>

The compressed time frame of populist governance exacerbates what may be thought of as the “last period” problem in democratic accountability. All robust theories of democracy return in one form or another to the role of elections in keeping the governors responsive to the needs of the governed. At bottom, the ability to “throw the rascals out” is the hallmark of popular sovereignty. Presumably, elected politicians should not stray too far from the will of the people or risk voting retaliation. But for any politician at the end of her tenure, or facing term limits, the last stage problem remains. Lame ducks face no personal electoral retribution, unless their time horizon extends beyond themselves. Leadership with a short time horizon mobilizes its partisans with the claim that to lose electorally is the end of their control over the levers of power. In the throes of all or nothing contests, populist leader “intensely politicize all areas of organized collective existence” and stoke the sectional divisions they rode to power.<sup>92</sup>

On this account, populist governance compromises accountability in two ways. First, as set out in the introduction, populism narrows the time horizon to the present and offers its constituents a political program of immediate gratification. Second, populism tends to be deeply anti-institutionalist and resists submerging the leader into a political party which will develop longer-term institutional aims. Notably, elected populists such as Peron in Argentina or Fujimori in Peru formed and quickly disbanded electoral alliances repeatedly in order to maintain the primacy of the *caudillo*

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<sup>89</sup> JOEL SIMMONS, *THE POLITICS OF TECHNOLOGICAL PROGRESS: PARTIES, TIME HORIZONS AND LONG-TERM ECONOMIC DEVELOPMENT* 36 (Cambridge Univ. Press, 2016).

<sup>90</sup> *Id.* at 5.

<sup>91</sup> Scott Gelbach & Philip Keefer, *Private Investment and Institutionalization of Collective Action in Autocracies: Ruling Parties and Legislatures*, 74 J. OF POLIT. 621 (2012).

<sup>92</sup> PRATAP BHANU MEHTA, *THE BURDEN OF DEMOCRACY* 6 (New Delhi: Penguin Books, 2003).

at the top, rather than any political organization that might make independent demands.

The absence of a long-horizon institutional form and the unilateral authority of the populist leader come together to create a fertile environment for increasingly discretionary use of governmental power. In turn, the central argument is that this is a powerful breeding arena for outright corruption. If so, ordinary mechanisms of law may provide a check on the ability of unilateral rule to compromise democratic integrity in much the same fashion that constitutional law may protect against the compromise of electoral accountability.

### Conclusion

Writing in the democratizing England of the late 19<sup>th</sup> century, William Gladstone noted that wise governance ultimately depends heavily on “the good faith of those who work it.”<sup>93</sup> The current period of democratic disrepair tests the institutional fortitude of elected governments in an era conspicuously lacking in such good faith. The question presented here is whether law may serve as a credible backstop in cases of democratic erosion along two principal dimensions that characterize the era. The first is the propensity of certain regimes to pull up the drawbridge behind them and limit their electoral accountability or the ability of their political rivals to exercise power. The second is the temptation in executive dominated governments toward the dispensation of discretionary favors, ultimately leading to outright enrichment of the head of state. I term both of these corruption. The first is the corruption of the process of electoral accountability. The second is the more classic corruption of the illicit quid pro quo in which payment of tribute becomes a necessary feature of life under a regime that commandeers state power.

As to the first “corrupt” efforts to unwind the democratic bargain, the tools of constitutional law have thus far been substantially effective. Emerging constitutional principles cordoning off the “basic structures” of democratic governance have prevented significant democratic erosion in a surprising number of countries. Unfortunately, the lesson of enabled constitutional courts has not been lost on populists bent on consolidating power. The example of Evo Morales in Bolivia shows how a captured constitutional court can use the same argument about enabling democracy to remove constitutional barriers to multiple elections of the same head of state, and the accompanying constriction of competitive accountability.

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<sup>93</sup> Quoted in, *The Economist*, *The referendums and the damage done*, June 1, 2019, at 17.

The most intriguing argument, and the most untested, is whether the ordinary instrumentalities of law can harness some of the illicit bargains that typically accompany populist rule. Can the ordinary judicial system and vigilance against common forms of corruption rein in the anti-institutionalist form of governance associated with populism? Perhaps. Anticorruption tends to engage a broader cross-section of the judiciary than just the structurally isolated constitutional courts that have dominated the post-1989 legal environment. While these judicial institutions can in turn be captured, the process may prove more laborious than replacing the five or six justices needed to neuter a constitutional court.

Ultimately, however, the corruption of politics under populism is the corruption of popular sovereignty. Populism tends to pitch itself to base impulses, to desires for immediate reward, to disregard for the future, whether there it is the destruction of the rain forest, the prorogation of Parliament, or the momentary inflation of the currency. For the past several centuries, democracies have balanced the need for majority rule with the institutionalization of democratic politics in a way that tempers demands for immediate rewards. Law can only go so far in restraining these tendencies toward the here and now, toward the us or them, in the absence of institutional frameworks that moderate the popular will into sustainable forms of governance.