# Articles

# The Counter-Playbook: Resisting the Populist Assault on Separation of Powers

STEPHEN GARDBAUM*

*This Article first distinguishes "political populist" regimes, like that of Trump's America, from "structural populist" ones, as in Hungary and Poland. It then shows how the major target of structural populism's determined assault on constitutional democracy has been the separation of powers rather than free and fair elections, political and civil rights, or the rule of law. Since neutralizing all sources of independent and dispersed political power has been the distinctive strategy of structural populism, the Article argues that the defense of constitutional democracy must develop a similar disciplined focus, in the form of an anti-concentration principle that makes dismantling separation of powers more difficult to accomplish. This anti-concentration principle has a number of components in practice, addressing the major structural elements of constitutional, institutional, and democratic design, and amounts to a counter-playbook for constitutional democrats on how to increase resistance to, or preemptively thwart, the moves that have proven so successful*

* Stephen Yeazell Endowed Chair in Law, UCLA School of Law. Thanks to participants and audience members at the 2019 Melbourne Institute of Comparative Constitutional Law, the International Forum on the Future of Constitutionalism's 2020 Works-in-Progress Summer Roundtable, and the 2020 Constitution Day Lecture at Drake University, especially Tom Ginsburg, Aileen Kavanagh, Tarun Khaitan, Stijn Smet, and Mark Tushnet, for helpful comments and questions on earlier versions of this Article.

*over the past few years. Of course, relying on constitutional, institutional, and democratic design to render the concentration of political power more difficult to achieve is not a panacea, and can only be part of any solution to the threats posed by authoritarian populism, but it is not irrelevant. In particular, the counter-playbook that is developed and presented in this Article may help to prevent political populist regimes from transitioning into the more dangerous second type, and frustrate or slow down the slightly less determined, ruthless, politically astute, or publicly supported structural populist.*

## INTRODUCTION

There are currently two types of populist regimes around the world. The first engages in populist politics, rhetoric, and (sometimes) policies, but essentially works within the basic structure of constitutional democracy it inherited and in which it was elected—even if it challenges, violates, or undermines many of the constitutional norms that support and supplement that structure. Think here of Trump's America and Bolsonaro's Brazil. By contrast, the second type of populist regime undertakes a determined assault on the basic structure of constitutional democracy, prioritizing systemic change that dismantles its essential elements and values. Here, the key examples are Orbán's Hungary, Chávez and Maduro's Venezuela, Erdoğan's Turkey, and Kaczyński's Poland.[1] In this sense, the first type may be thought of as political populism, and the second as structural populism.[2]

Fairly early on in its development, scholars astutely observed that the structural assault on constitutional democracy was being pursued by legalistic means, including procedurally valid constitutional amendments and replacements, as distinct from the more characteristic resort to extra-legal action, armed force, or military coups of earlier "national saviors." The various terms coined to characterize this feature—especially "abusive constitutionalism,"[3] "autocratic legalism,"[4] and "stealth authoritarianism"[5]—are now well-known and have been absorbed into the literature. As a result, it is frequently noted that constitutional democracy today is not so much in danger of collapse or

1. Prime Minister Narendra Modi's India has arguably transitioned from the first to the second type, especially since the political party he heads, the Bharatiya Janata Party (BJP), was reelected with an enlarged majority in May 2019. *See* Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, L. & ETHICS HUM. RTS. (forthcoming 2020) (manuscript at 53) (on file with author). The same may be said of President Rodrigo Duterte's Philippines, since his party's midterm victory in the Senate elections in the same month, giving his coalition supermajorities in both houses of Congress for the first time. *See* Jason Gutierrez, *Philippines Election: Duterte Allies Sweep Senate, Unofficial Results Indicate*, N.Y. TIMES (May 14, 2019), https://www.nytimes.com/2019/05/14/world/asia/philippines-election-results html [https://perma.cc/T9UR-MZ2P].

2. This distinction between political and structural populism turns on outcomes or results, not on intent or good/bad faith. Many, although not all, political populists are would-be structural populists who find themselves constrained. Accordingly, authoritarian populists can head either type of regime.

3. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 195–200 (2013).

4. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 (2018).

5. Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1684–86 (2015).

overthrow but of "recession,"[6] "erosion,"[7] "retrogression,"[8] "decay,"[9] "backsliding,"[10] or being hollowed out.[11]

As the populist moment has continued and spread over the past few years, three additional features have become increasingly apparent with respect to practitioners of its structural variety. First, and most importantly, the major essential ingredients of constitutional democracy—roughly speaking, free and fair elections, political and civil rights, rule of law, and separation of powers—have not been equally targeted. Rather, the primary and distinctive focus of attack has been on the separation of powers. Although to be sure, structural populists have tilted election rules in their favor, harassed critical journalists and other opponents, and acted as if above the law, the dominant and sustained approach, and the major object of constitutional and institutional change, has been to undermine all sources of independent and dispersed political power and concentrate it in the populist regime. Second, the techniques of concentration have become somewhat more varied, with structural populists abandoning legal scrupulousness and formal legality altogether where necessary, and not deemed too politically costly. Although abusive constitutionalism—the use of constitutional amendment and/or replacement to undermine constitutional democracy—has remained a much-employed tactic, it has been supplemented, or sometimes supplanted altogether, by both ordinary law and even outright illegality, most notably in the Polish case.[12] Third, although the determined dismantling of institutional checks and balances never happens as quickly as the more traditional methods of overthrowing democracy, it is not always the gradual process that the widely used terms like "democratic erosion" and "decay" noted above

6. Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOCRACY 141, 153 (2015).

7. Manoj Mate, *Constitutional Erosion and the Challenge to Secular Democracy in India*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 377, 380 (Mark Graber et al. eds., 2018).

8. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 83, 117–37 (2018).

9. Tom Gerald Daly, *Contemplating the Future in the Era of Democratic Decay*, INT'L J. CONST. L. BLOG (Sept. 15, 2017), http://www.iconnectblog.com/2017/09/contemplating-the-future-in-the-era-of-democratic-decay [https://perma.cc/6F54-GKAM].

10. Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 8–14 (2016).

11. PETER MAIR, RULING THE VOID: THE HOLLOWING-OUT OF WESTERN DEMOCRACY (2013).

12. *See* WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 58–95 (2019); Wojciech Sadurski, *Constitutional Crisis in Poland*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 257, 257.

suggest.[13] Rather, the time frames of structural populists have varied, ranging from the immediate launch of wholesale assaults following electoral victory and abrupt transformations in Hungary and Chávez's Venezuela, to the quick but more targeted attacks at the start of a two-year battle in Poland, to the longer game played by Erdoğan in Turkey.[14]

The literature that has developed alongside, and in response to, the fast-moving events has concentrated, largely sequentially, on three questions, which may be termed the "what," "why," and "how" questions: what is populism,[15] why populism,[16] and how does its authoritarian version operate to undermine constitutional democracy?[17] Only recently has the literature begun to focus on an all-important fourth question, which is Lenin's: what is to be done?[18] This is now, rightly, becoming the central question, and scholars have predictably started to debate the meta-version of it—which category of response is likely to be most useful and effective (constitutional design;[19] revitalizing democratic, constitutional, and/or collective norms;[20] and substantive policy[21])—as well as to provide some initial affirmative suggestions.[22]

---

13. *See supra* notes 6–10.

14. *See infra* Part II.

15. *See generally* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2015); Rogers Brubaker, *Why Populism?*, 46 THEORY & SOC'Y 357, 357 (2017).

16. *See, e.g.*, Brubaker, *supra* note 15, at 357; Joseph Weiler, *The Crumbling of European Democraccies*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 629, 638.

17. *See, e.g.*, Landau, *supra* note 3, at 195–211; Scheppele, *supra* note 4, at 571–81; Varol, *supra* note 5, at 1686–1715.

18. VLADIMIR LENIN, WHAT IS TO BE DONE? BURNING QUESTIONS OF OUR MOVEMENT (1902) (pamphlet setting out Lenin's views on how best to spread Marxist political ideals among Russian workers).

19. On the promise (and limits) of constitutional and institutional design, see, for example, TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 172–73 (2018); Richard Albert & Michael Pal, *The Democratic Resilience of the Canadian Constitution*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 117, 117–120; Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 511–12 (2018). For a critique of constitutional design, see Wojciech Sadurski, *On the Relative Irrelevance of Constitutional Design: Lessons from Poland* (Sydney L. Sch. Rsch. Paper No. 19/34, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403327 [https://perma.cc/7VY3-YHJF].

20. *See, e.g.*, Martin Loughlin, *The Contemporary Crisis of Constitutional Democracy*, 39 OXFORD J. LEGAL STUD. 435, 450–54 (2019). *See generally* Weiler, *supra* note 16.

21. *See, e.g.*, Bojan Bugarič, *Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism*, 17 INT'L J. CONST. L. 597 (2019).

22. For a helpful list of some of the initial suggestions of discrete constitutional design "solutions" in the literature, see Rosalind Dixon, Editorial, *Global Public Law Scholarship*

But as Tom Ginsburg and Aziz Huq note before exploring the first of these categories as part of their recent book, "[o]ddly . . . the question of how constitutional design might generate a measure of insulation against democratic erosion has not been investigated deeply before."[23]

This Article aims to contribute to this latest turn in the scholarship by building on and further developing the inquiry into ways in which institutional and constitutional design might help to address the fourth question. It argues that since undermining institutional checks and balances has been the distinctive strategy and primary focus of structural populism, the defense and protection of constitutional democracy must develop a similar disciplined focus as its enemies in the form of an *anti-concentration principle* that makes dismantling separation of powers more difficult to accomplish. This principle has a number of components in practice, addressing most of the major structural elements of constitutional, institutional, and democratic design, and amounts to a counter-playbook[24] on how to increase resistance to, or preemptively thwart, the structural populist moves that have proven so successful over the past few years. This counter-playbook consists of two main parts: (1) identifying which institutional arrangements in the areas exploited or targeted by structural populists—including the framework of government, constitutional and ordinary courts, party and electoral systems, and the independent media—are most likely to preserve pluralism and resist concentration, and (2) determining how to protect, maintain, or entrench these institutional arrangements against attack or change.

Of course, relying on constitutional, institutional, and democratic design to render the concentration of political power more difficult for structural populists to achieve is not a panacea, and can only be part of any solution, alongside addressing the underlying causes of their current electoral appeal. But it is not irrelevant. Institutional design can and does both facilitate and hinder many of the moves that structural populists have taken to undermine the separation of powers.[25] It can be, and is, both part of the problem and part of the answer. At the same time, the anti-concentration principle potentially creates

---

*and Democracy*, 16 INT'L J. CONST. L. 1049, 1050 n.9 (2019).

23. *See* GINSBURG & HUQ, *supra* note 19, at 170.

24. I acknowledge that, strictly speaking, the "counter-playbook" metaphor is not wholly apt in that playbooks start with the rules in place and craft winning strategies within them, whereas the anti-concentration principle is mostly about the rule-design stage. At a broader or meta level, however, the metaphor encapsulates the Article's proposal of rule-design strategies that anticipate or take into account the structural populist playbook. Thanks to Mark Tushnet for raising this point.

25. *See infra* Part IV.

significant trade-offs with other key values and goals of constitutional democracies, including effective governance and responsiveness, that must be taken into account and calibrated to the perceived risks and dangers of authoritarian populism.[26]

To be clear, the aspiration of the Article is to contribute towards developing structural populist-*resistant* institutional, constitutional, and democratic design—not systems that are populist-*proof*. The latter would be both naive and hubristic. More specifically, the Article takes the position that it is the authoritarianism, and not so much the populism per se, of the current moment which is deeply objectionable, inconsistent with constitutional democracy, and the proper object of resistance.[27] To this end, the counter-playbook may help in three ways. First, its democratic design components can be employed to hinder authoritarian populists of both would-be regime types[28] from gaining power at all, or acquiring full, undivided power, especially without an electoral majority. Second, it may help to stop or prevent type one populist regimes from becoming type two regimes. Third, by making assaults on the separation of powers more difficult to achieve ex ante, it may also help to frustrate or slow down the slightly less determined, ruthless, politically astute, or publicly supported structural populist so that some future type two regimes will be less successful in attaining their goals and/or shorter-lived.

The Article proceeds as follows. Part I provides working definitions of the terms "populism," "constitutional democracy," and "separation of powers" for the limited purposes of this Article. Part II presents brief case studies of structural populism, focusing specifically on showing that and how separation of powers has been the primary target, as well as highlighting each regime's particular, and slightly different, legalistic or non-legalistic strategy for consolidating power. Part III further explains why institutional design is relevant as part of the resistance to authoritarian populism, despite certain events that might, and recent scholarship that does, suggest otherwise. It also provides a few important qualifications to the main argument, including an acknowledgement and discussion of the potential trade-offs with other goals and values of democratic governance that the anti-concentration principle may engender. The heart of the Article is Part IV,

26. These trade-offs include the risk of increasing the perceived lack of responsiveness to ordinary citizens' interests that is widely seen as a major cause of populism's electoral appeal. For a discussion of this particular concern, as well as the more general issue of trade-offs, see *infra* text accompanying notes 119–121.

27. For some of the reasons why, see *infra* text accompanying notes 30–33.

28. Several type one regimes consist of populist leaders with authoritarian impulses who find themselves constrained from transitioning into type two regimes. *See supra* note 2.

which sets out the various components of the counter-playbook and discusses when, how, and why—especially in combination—they may be effective in strengthening resistance to the primary strategy of structural populists.

## I. WORKING DEFINITIONS

As this is not a conceptual article and a good deal of excellent analytical work has already been done to clarify terms in answering the "what" question and in otherwise attempting to understand the current populist phenomenon,[29] I will be brief in explaining how I am using the three central concepts for the purposes of this Article: *populism*, *constitutional democracy*, and *separation of powers*.

First, in terms of *populism*, my focus is on the various current regimes with quasi- or semi-authoritarian overtones that are frequently identified as "populist," whether or not this is the best or most appropriate label for them and whether or not populism is properly viewed as inherently negative or hostile to constitutionalism.[30] Whatever the label, these regimes have certain common identifying features and characteristics that distinguish them from both standard constitutional democracies and full-scale authoritarianism.[31] Here, effectively, I am following Wojiech Sadurski and others in focusing on the "anti-constitutional" element in these regimes' political identity and make-up:[32] the celebration of pure forms of majoritarianism; the rejection of an

29. *See, e.g.*, MÜLLER, *supra* note 15; Brubaker, *supra* note 15. *See also* Mark Tushnet & Bojan Bugarič, *Populism and Constitutionalism: An Essay on Definitions and Their Implications* (Apr. 21, 2020).

30. As indicated above, I do not believe that populism per se has these features, but only those versions of it with authoritarian impulses or agendas. For arguments that there are positive or normatively desirable versions of populism, see, for example, Robert Howse, *Epilogue: In Defense of Disruptive Democracy—A Critique of Anti-Populism*, 17 INT'L J. CONST. L. 641, 647–50 (2019); BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW 1–16 (2019). For the argument that populism as such is not incompatible with constitutionalism as such, see Tushnet & Bugarič, *supra* note 29.

31. Levitsky and Way have characterized Hungary and Turkey as competitive authoritarian regimes, and Venezuela as having recently crossed into full-blown authoritarianism. Steven Levitsky & Lucian Way, *The New Competitive Authoritarianism*, 31 J. DEMOCRACY 51 (2020). While their tripartite distinction between democracy, competitive authoritarianism, and full-blown authoritarianism is very helpful for many purposes, it misses the commonalities among (political and structural) populist regimes that may and do span the first two, and perhaps even all three categories.

32. *See* SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 12, at 14–20.

inclusive sense of equal citizenship in favor of a more exclusive conception of the "true" people, whether defined in class, ethnic, racial or religious terms, versus "others"; and the direct, unmediated relationship of the leader with this people and his exclusive accountability to them. In this sense, what I am referring to as populism for the purposes of this Article is not essentially defined by content or substantive, non-mainstream policy positions—whether based on economic egalitarianism (left varieties); forms of ethnic, cultural, religious or racial nationalism (right varieties); or anti-globalization (both)—but as a style of politics that rejects the mediated, constrained, rationalistic, institutional, pluralistic, accountability-driven nature of modern constitutional democracy without (necessarily) embracing full-fledged authoritarianism.[33] Notwithstanding these common features, type one populist regimes have broadly been limited to practicing this style of politics within the existing institutional structure of constitutional democracy, while the more dangerous type two regimes have made dismantling this structure their major priority.

My corresponding, minimalist conception of *constitutional democracy* follows that of several recent commentators in emphasizing the basic ingredients of free and fair elections; respect for civil and political rights, including especially but not only freedom of speech and expression; rule of law; and separation of powers.[34] All four of these basic ingredients imply certain legal and/or practical limits on governmental power.[35] They also tend to combine to create a style of democratic politics and governance characterized by the above features that populists (as I use the term) reject. As is well known, constitutional democracy is a matter of substance not form, in the sense that a written constitution is neither necessary nor sufficient (although it is usual), and a wide variety of institutional arrangements are

33. *See* Brubaker, *supra* note 15, at 364–68.

34. *See, e.g.*, GINSBURG & HUQ, *supra* note 19, at 9–15 (includes first three ingredients in what the authors refer to as 'liberal constitutional democracy"); Loughlin, *supra* note 20, at 436 (describing the written constitutions of constitutional democracies as "incorporating a separation of powers, a commitment to the rule of law, the protection of individual rights, and the holding of free and fair elections."); Ran Hirschl & Ayelet Shachar, *"Religious Talk" in Narratives of Membership*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 515, 516 ("[C]onstitutional democratic orders . . . are committed to fundamental rights, human dignity, the protection of minorities, and the values of pluralism and equality."). This is a "minimalist" definition because there are undoubtedly other, more social conditions for a well-functioning constitutional democracy. *See* Loughlin, *supra* note 20, at 429.

35. However, these basic ingredients do not imply a general ideology of limited government or laissez-faire economics. *See* Jeremy Waldron, *Constitutionalism – A Skeptical View*, *in* CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 267, 270–73 (Thomas Christiano & John Christman eds., 2009).

compatible with the basic ingredients.[36] And in addition to institutions, well-functioning constitutional democracies require certain social conditions, including an active civil society and a culture of tolerance.[37] In this Article, the primary emphasis is on the separation of powers, not because it is the most important of the four ingredients (although a case can be made that it is[38]), but because it has emerged as the central target of structural populism.

In referring to "constitutional democracy" rather than "liberal democracy" or even "liberal constitutional democracy,"[39] I take the former to be the more capacious concept in that it accommodates the types of transformative constitutions which are perhaps more in tension with liberalism per se than with constitutionalism or constitutional democracy.[40] In the context of this Article's topic, I prefer this broader term for three reasons. First, "liberal democracy" might be thought to de-emphasize the constitutional element that is arguably the more central or essential of the two adjectives in understanding and contrasting the populist regimes I am focusing on, as suggested above.[41] Second, if not more central, it is perhaps clearer and less ambiguous given the multiple senses and nuanced meanings of liberalism. Third, in part taking advantage of this fact, liberal democracy is too easily and glibly counterposed to, and rejected in favor of, "illiberal democracy"[42] by populists. "Anti-constitutional" or "non-constitutional democracy" might be a less sly or appealing rallying call.

As for *separation of powers*, I take a broad, functional approach to mean a polity characterized in practice by some significant dispersal of political power and the existence of accountability mechanisms apart from, and in between, elections. That is, a political system in which consequential public decision-making of the various types prevalent in contemporary governance—including legislative, executive, administrative, prosecutorial, and judicial—is not effectively consolidated in one institution, organization, or person.[43] This

36. Scheppele, *supra* note 4, at 564–65.

37. *See* Loughlin, *supra* note 20, at 439.

38. *See generally* AILEEN KAVANAGH, THE COLLABORATIVE CONSTITUTION (forthcoming 2021) (on file with author).

39. *See* GINSBURG & HUQ, *supra* note 19, at 6–34.

40. *Cf.* Waldron, *supra* note 35, at 271.

41. *See supra* text accompanying note 32.

42. This is Hungarian Prime Minister Viktor Orbán's phrase to describe the political system his government aims to create. *See, e.g.*, Marc F. Plattner, *Illiberal Democracy and the Struggle on the Right*, 30 J. DEMOCRACY 5, 9–11 (2019).

43. Accordingly, the necessary dispersal of power is not simply random, as the various

value, and its functional requirement of plural sites of public power, can be, and is, manifested and institutionalized in various specific ways and to varying degrees among constitutional democracies. The gamut ranges from formally separated institutional powers, to constitutionally prescribed oversight and accountability obligations, to constitutional conventions and culture, and to the nature of the political party system. Some may be more effective than others, some episodic, and all are deeply affected by and entwined with the realities of electoral politics; but in the aggregate and in combination at any given time, they ensure that governance is not a single-player enterprise.

## II. VERY BRIEF CASE STUDIES

The four current paradigmatic structural populist regimes all, for the most part, exhibit a common pattern in which their major strategy and priority has been a legalistic assault on the separation of powers. Each has employed the formal tools of constitutional and/or ordinary law to dismantle the preexisting institutional frameworks of constitutional democracy in a way that concentrates power in the regime's hands. As noted above, Poland provides a partial exception, in that the governing Law and Justice Party has on occasion violated formal legality when no lawful route to its political goals was available.[44] Interestingly, however, each of the regimes has relied primarily[45] on a *different* legal/constitutional tool to achieve the same goal. In the case of Venezuela under Chávez and Maduro, this was the constituent assembly; in Orbán's Hungary, it was constitutional replacement by a newly elected legislature; in Erdoğan's Turkey, constitutional amendment; and in Poland, the Law and Justice Party has relied significantly on ordinary statutes that appear to be clearly unconstitutional but are upheld by a captured constitutional court.

branches and institutions play particular roles in these several types of public decision-making in a constitutional democracy. *See* Aileen Kavanagh, *The Constitutional Separation of Powers*, *in* THE PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 229–31 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

44. *See infra* Section II.D.

45. Although, to be sure, no regime has relied exclusively on a single legal/constitutional tool, as will be seen from the brief case studies that follow in Part II.

### *A. Venezuela*

Hugo Chávez, the model charismatic, populist outsider, was inaugurated as Venezuela's president in February 1999 after winning election with fifty-six percent of the vote in the context of widespread alienation from the two mainstream political parties that had jointly governed the country in the increasingly corrupt, elite-driven "partyarchy" system since the return of democracy in 1961.[46] Hours after being sworn in and faced with an opposition-controlled Congress, he decided to bypass the existing constitution's "general reform" mechanism that required a two-thirds legislative vote and issued a decree calling for a referendum on establishing a constituent assembly to draft a new constitution fit for his Bolivarian revolution.[47] Critically, the non-captive Supreme Court narrowly approved this extra-textual maneuver as constitutional on the basis that the people's constituent power is superior to the existing constitution, and the people in turn backed the April referendum by a wide margin.[48]

Due in part to electoral rules drawn up after the referendum that were designed to favor Chávez and in part to a partial boycott by the opposition, the ensuing constituent assembly election resulted in a body dominated by Chavistas, who held ninety-three percent of the seats with sixty-five percent of the votes.[49] Absent real input from the opposition parties, the constitution that emerged concentrated powers in the president relative to the old one by increasing the formal powers of the office,[50] extending its term from five to six years, permitting two terms rather than one, and changing Congress from a bicameral to a unicameral body.[51] It also allowed for greater popular participation in politics at the expense of elites, by creating mechanisms for the recall of elected officials and the repeal of statutes by public initiative.[52] The

---

46. Parts of this section draw from David Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 161, 161–175, and Joshua Braver, *Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez over the Creation of the 1999 Constitution*, 14 INT'L J. CONST. L. 555 (2016).

47. William Partlett, *Hugo Chávez's Constitutional Legacy*, BROOKINGS INST. (Mar. 14, 2013) https://www.brookings.edu/opinions/hugo-chavezs-constitutional-legacy/ [https://perma.cc/YJT6-HKMD].

48. *Id*. The majority in favor was seventy-two percent to twenty-eight percent.

49. Landau, *supra* note 46, at 164.

50. *Id*. at 164–65.

51. It also renamed the legislature the National Assembly. *Compare* art. 138 of the 1962 constitution ("Congress") *with* art. 186 of the current one ("National Assembly").

52. *See* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CRBV], arts. 72,

new constitution was approved by referendum in December 1999. At least as important, the constituent assembly declared itself sovereign and took complete power between its establishment and the first elections under the new constitution a year later, during which period it neutralized Congress and controlled all key institutions.[53] As David Landau concludes, "the Constituent Assembly allowed Chávez to consolidate power unusually quickly, and without having to win as many intervening elections as he otherwise would have needed."[54]

A failed coup attempt by the opposition in 2002 accelerated this consolidation further, as Chávez increased his control over the judiciary and the media. A 2004 organic law expanded the number of judges on the new Supreme Judicial Tribunal, the constitutional court created in 1999, from twenty to thirty-two, changed the rules for appointing them to a simple majority vote of the legislature, and permitted sitting judges to be removed without the two-thirds vote required by the constitution.[55] The result was a packed, pro-Chávez court. That same year also saw the enactment of the Law on Social Responsibility in Radio and Television, which enabled censorship of the media in order to "promote social justice and further the development of the citizenry, democracy, peace, human rights, education, culture, public health and the nation's social and economic development."[56] The law was extended to cover the internet and social media in 2011.[57] Also, in 2004, Chávez comfortably survived a recall attempt, winning fifty-eight percent of the vote, and although he lost a 2007 referendum to amend the constitution to abolish presidential term limits, he succeeded in a second attempt in 2009 and remained in office until his death in 2013.[58]

Enter Nicholas Maduro, Chávez's hand-picked successor, who narrowly won the subsequent presidential election, but decisively lost

---

74. *See also* Landau, *supra* note 46, at 165.

53. Landau, *supra* note 46, at 165.

54. *Id*. at 166.

55. *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, HUM. RTS. WATCH (June 16, 2004), https://www hrw.org/report/2004/06/16/rigging-rule-law/judicial-independence-under-siege-venezuela [https://perma.cc/8UCL-YPG6] (while technically, the requirement of a two-thirds vote remains, the law permits it to be circumvented by indefinite suspension pending a vote).

56. Katelyn Fossett, *How the Venezuelan Government Made the Media into its Most Powerful Ally*, FOREIGN POL'Y (Mar. 11, 2014), https://foreignpolicy.com/2014/03/11/how-the-venezuelan-government-made-the-media-into-its-most-powerful-ally/ [https://perma.cc/XM6T-88V4].

57. *Id*.

58. Landau, *supra* note 46, at 167.

the December 2015 legislative elections, held in the midst of an economic meltdown, to the opposition. [59] With fifty-eight percent of the vote, the opposition held two-thirds of the seats in the National Assembly.[60] The increasingly desperate and authoritarian Maduro, lacking the charisma, political skills, and popular legitimacy of his mentor, employed the captive Supreme Judicial Tribunal to strip the National Assembly of all its powers in March 2017 and, forced to partly backtrack, then began the process of calling a new constituent assembly based on powers granted by the 1999 constitution.[61] This time, the electoral rules were written entirely in his favor, the opposition boycotted completely, and Maduro supporters won all 545 seats in a body now aimed primarily at exercising sovereign power rather than constitutional drafting.[62] Maduro was officially reelected to a second term in May 2018 amid calls for a boycott by many opposition leaders, with a turnout of below fifty percent and widespread claims of rigging.[63] Following his inauguration in January 2019, the National Assembly declared Maduro's investiture illegitimate and swore in its president, Juan Guaidó, as acting president of the Republic.[64] Despite broad international recognition, Guaidó has so far been unsuccessful in his attempts to oust Maduro, who has mostly retained the loyalty of the military, and the standoff between the two continues. A new National Assembly election, in which all the main opposition parties have agreed not to participate, is scheduled for December 2020.

59. *Id.* at 169.

60. *Id.*

61. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CRBV], arts. 347–48 (empowering the president, the legislature by a two-thirds vote of its members, or fifteen percent of registered voters, to call for a constituent assembly). *See Venezuela: Supreme Court Backtracks on Powers Bid*, BBC (Apr. 1, 2017), https://www.bbc.com/news/world-latin-america-39468045 [https://perma.cc/X5MX-NGTM]; *Venezuela's President Maduro Calls for New Constituent Body*, BBC (May 2, 2017), https://www.bbc.com/news/world-latin-america-39775092 [https://perma.cc/T8XL-3FPJ].

62. Landau, *supra* note 46, at 172–73.

63. *Venezuela Election: Maduro Wins Second Term amid Claims of Vote Rigging,* BBC (May 21, 2018), https://www.bbc.com/news/world-latin-america-44187838 [https://perma.cc/FY3A-AB6F].

64. Camille Bello, *Is It Legal for Juan Guaidó to be Proclaimed Venezuela's Interim President?*, EURONEWS (Jan. 27, 2019), https://www.euronews.com/2019/01/27/is-it-legal-for-juan-guaido-to-be-proclaimed-venezuela-s-interim-president [https://perma.cc/VL3X-CJXN].

### *B. Turkey*

Although the plans of the governing Law and Development Party (AKP) to replace the constitution were foiled in 2011–12 by opposition to then-Prime Minister Recep Tayyip Erdoğan's determination to convert the parliamentary system into a strongly presidential one, formal amendments to the existing 1982 Turkish Constitution have been a major tool in Erdoğan's consolidation of power. As the key example of what Ozan Varol has termed "stealth authoritarianism,"[65] the plausibility of the more innocent or legitimate justifications provided for each step in the process have diminished to zero over time, as the true nature of the regime and Erdoğan's ambitions have become increasingly unequivocal over the seventeen years he has been in power.

In retrospect, the 2007 constitutional amendment changing the mode of election of the still-largely ceremonial presidency of the republic from indirect parliamentary to direct popular vote, as well as permitting reelection to office,[66] was an early harbinger of Erdoğan's long game, especially given his own party's rules limiting its elected representatives to three full terms in the legislature.[67] Even more significant were two constitutional amendments dealing with the judiciary, which were approved in 2010 in an up-down vote as part of a package of twenty-five amendments ostensibly designed to satisfy requirements for EU accession.[68] The first expanded membership of the Constitutional Court from eleven to seventeen, limited the term of office for the first time, to twelve years before the mandatory retirement age of sixty-five, and gave the National Assembly the power to elect three members by simple majority vote (previously all had been selected by the country's president).[69] The second increased the

65. *See* Varol, *supra* note 5, at 1679.

66. Ozan Varol, *Stealth Authoritarianism in Turkey*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 339, 348; CAROL MIGDALOVITZ, CONG. RESEARCH SERV., RL34039, *Turkey's 2007 Elections: Crisis of Identity and Power* (2007), https://fas.org/sgp/crs/mideast/RL34039.pdf [https://perma.cc/PTQ9-PE3P].

67. Orhan Coskun, *Turkish Party Keeps Term Limit, Hinting at Erdogan Presidency*, REUTERS (May 2, 2014), https://www reuters.com/article/us-turkey-election/turkish-party-keeps-term-limit-hinting-at-erdogan-presidency-idUSBREA410U820140502 [https://perma.cc/P5FU-X3AL].

68. Varol, *supra* note 66, at 348–49.

69. *See* Aslı Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*, 11 INT'L J. CONST. L. 666, 670, 693 (2013). *See also* Michael Sercan Daventry, *What Does Turkey's Referendum Change? The Constitutional Court*, JAMES IN TURKEY (Sept. 9, 2010), http://www.jamesinturkey.com/what-does-turkeys-referendum-change-the-constitutional-court/ [https://perma.cc/NBP6-CGGT].

membership of the Higher Council of the Judiciary (HSK), the body appointing judges and prosecutors to all other courts, from seven to twenty-two and opened up voting for these positions to all members of the judiciary and legal profession.[70] In the context of two important Constitutional Court decisions in 2008—one striking down an AKP constitutional amendment overturning the ban on headscarves at universities, and the other finding the AKP to be an unconstitutional party[71]—there were those who saw this move as illegitimate court-packing,[72] and others who viewed it as legitimate democratization of those parts of the unelected state (especially the military and judiciary) dominated by the elite guardians of Kemalist secularism.[73]

The regime mostly dispensed with the stealth nature of its growing authoritarianism when, as in Venezuela, a failed coup attempt by the opposition in 2015 accelerated the process and visibility of the consolidation of power.[74] Having switched offices to avoid AKP term limits on its legislators in 2014, now-President Erdoğan ruled first as de facto head of state and government, employing Constitutional Court-upheld emergency decrees to target all sources of opposition, and finally fulfilled his long-held, de jure ambitions through constitutional amendment in 2017.[75]

Erdoğan not only followed Russian autocrat Vladimir Putin's example of toggling between offices to stay in power, but also governed with the formal powers of a Russian-style presidency after the 2017 amendments. Along with various new unilateral powers and the abolition of the office of prime minister, the president now appoints six of the thirteen members of the HSK (reduced from twenty-two), with the AKP-dominated National Assembly electing the other seven by simple majority.[76] This allows the AKP not only to fill the lower courts with its supporters, but also, because judges of the

70. Bâli, *supra* note 69, at 695.

71. For details, see *id.* at 681–83, 688–90. In the second case, the Constitutional Court held by six to five that the AKP unconstitutionally challenged the principle of secularism, but a supermajority of seven judges is required for a party ban.

72. *See* Can Yeginsu, *Turkey Packs the Court*, N.Y. REV. BOOKS: NYR DAILY (Sept. 22, 2010, 3:30 P.M.), https://www nybooks.com/daily/2010/09/22/turkey-packs-court/ [https://perma.cc/3YEF-45FM].

73. *See* Bâli, *supra* note 69, at 666.

74. Varol, *supra* note 66, at 353.

75. *Id.* at 353–54.

76. Serap Yazıcı, *Constitutional Amendments of 2017: Transition to Presidentialism in Turkey*, GLOBALEX (Sept./Oct. 2017), https://www nyulawglobal.org/globalex/ 2017_Turkey_Constitution_Amendments html#AmendmentsConcerningtheJudiciary [https://perma.cc/9HLW-WZX2].

Constitutional Court are mostly drawn from those ranks, to futher control its membership.[77] After calling for early elections, Erdoğan was duly elected as the first fully executive president in June 2018 for a five-year term, with the expectation that his 2014–18 period in office will not be held to count towards the two-term limit under the 2017 amendment.[78]

Although the use of constitutional amendments has been the distinctive legalist mode of consolidation in Turkey, the AKP regime has also employed ordinary law, especially to harass, prosecute, and imprison political opponents, with the effect of raising the cost of dissent. Before governing almost exclusively through emergency decree after the failed coup—which has resulted in the firing of hundreds of thousands from the civil service, legal profession, and academia, and the prosecution and detention of many others alleged to be supporters of Fethullah Gülen, the United States-based cleric on whom Erdoğan has blamed the coup attempt—Erdoğan made extensive use of the courts to file civil and criminal libel lawsuits against those insulting or criticizing him.[79] He also engineered the prosecution of opponents and independent media owners for such crimes as tax evasion, fraud, and building code violations.[80]

### *C. Hungary*

Viktor Orbán, founder and leader of the Fidesz party, became prime minister of Hungary for the second time in 2010, after a gap of eight years. Despite not campaigning for constitutional reform, Fidesz quickly drafted a new constitution by itself and pushed it through the legislature in April 2011 with a party-line vote meeting the two-thirds requirement for it to come into effect in the new year.[81] The new constitution, along with prior and subsequent constitutional amendments

77. *See* Ozan Varol et al., *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187, 187 (2017) (finding a significant break in the ideological position of the court in the four years following the amendment).

78. Cem Tecimer, *Is This President Erdogan's Last Term in Office? A Note on Constitutional Interpretive Possibilities*, VERFASSUNGSBLOG (Mar. 28, 2019), https://verfassungsblog.de/is-this-president-erdogans-last-term-in-office-a-note-on-constitutional-interpretive-possibilities/ [https://perma.cc/YTC6-G8WJ]; *Turkey's Erdogan: Leader-for-Life?*, GLOBALIST (Mar. 20, 2018), https://www.theglobalist.com/turkey-presidency-recep-tayyip-erdogan-africa/ [https://perma.cc/VC9X-V87H].

79. Varol, *supra* note 66, at 344–45.

80. *Id*.

81. Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 243, 245–46.

as well as cardinal laws,[82] systematically undermined the independence of the public institutions that subject the executive to various forms of accountability and disperse or check the exercise of public power.

Beginning with the country's previously powerful constitutional court, a constitutional amendment taking effect in September 2011 increased its membership from eleven to fifteen, resulting in the appointment of four new justices by the Fidesz-controlled legislature along similar party-line votes after it changed the rules to no longer require cross-party consensus.[83] The new constitution limited access to the court by prohibiting judicial review of tax and budgetary laws that violate the rights to property or equal treatment,[84] and a new cardinal law abolished the *actio popularis* procedure whereby any citizen could seek abstract review of a law.[85] The Fourth Amendment of 2013 voided all constitutional court decisions prior to the new constitution, which primarily affected its many robust rulings on individual rights, as the provisions governing them in the former constitution were mostly retained in the text of the new one. The amendment also reinstated a number of laws previously declared unconstitutional by the court.[86]

Turning to the ordinary courts, the government lowered the retirement age of judges from seventy to sixty-two, immediately affecting over 200 sitting members of the judiciary including one quarter of the supreme court.[87] The new cardinal law on the judiciary also created the National Judicial Office which, run by a Fidesz loyalist, has the power to nominate new judges, replace retiring judges, and move

82. Cardinal laws require a two-thirds vote to change. *See id.* at 246; MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY] [CONSTITUTION] Apr. 25, 2011, art. T(4) (Hung.).

83. MAGYARORSZÁG ALAPTÖRVÉNYE June 29, 2018, art. 24(8) (Hung.). *See* Kim Lane Scheppele, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement, Part I*, VERFASSUNGSBLOG (Aug. 9, 2012), https://verfassungsblog.de/evade-constitution-case-hungarian-constitutional-courts-decision-judicial-retirement-age/ [https://perma.cc/UJF3-3KPL].

84. MAGYARORSZÁG ALAPTÖRVÉNYE June 29, 2018, art. 37(4) (Hung.). *See* Kim Lane Scheppele, *Hungary's Attacks on the Rule of Law and Why They Matter for Business*, FIN. TIMES (Feb. 5, 2014), https://www ft.com/content/6c538e70-168f-3d1e-ba92-8a80790a6247 [https://perma.cc/YX59-D68Q].

85. Act on the Constitutional Court, CLI of 2011. *See* HUNGARIAN HELSINKI COMM., OPINION ON THE NEW CONSTITUTIONAL COURT ACT OF HUNGARY 7, (Jan. 2012), https://hclu.hu/files/tasz/imce/ngo_analysis_of_the_new_constitutional_court_act_of_hungary_january_2012.pdf [https://perma.cc/EX7R-EEBG].

86. Halmai, *supra* note 81, at 247.

87. *Id.* at 246.

any sitting judge to a new court.[88]

Other laws restructured various independent entities within the executive branch, including the electoral commission, the budget council, and the media board, to have all-Fidesz memberships and terms of office ranging from six to twelve years.[89] Combined with the Fourth Amendment provision banning political advertising during election campaigns in any venue except the public broadcast media controlled by the media board, the restructuring of formerly independent government entities simultaneously consolidated the government's power and undermined the freedom of the electoral process. In 2018, a third straight election returned Fidesz and Orbán to power. In March 2020, to deal with the "state of danger" caused by the COVID-19 pandemic, the Fidesz-dominated parliament enacted a law permitting Orbán to govern by decree indefinitely.[90] Although the controversy this created led the government to repeal the legislation in June,[91] the repealing act empowers the government to reintroduce rule by decree without a parliamentary vote whenever it declares a state of public health emergency.[92]

### *D. Poland*

The Law and Justice Party (or PiS, its Polish acronym) led by the surviving Kaczyński twin, Jaroslaw,[93] first won the Polish presidential election in May 2015, and then in October gained simple

88. HUNGARIAN HELSINKI COMM., ASSESSMENT OF THE AMENDED HUNGARIAN LAWS ON THE JUDICIARY 4 (Sept. 2012), https://www helsinki.hu/wp-content/uploads/HHC-HCLU-EKINT_Assessment_of_the_Amended_Hungarian_Laws_on_the_Judiciary_092012.pdf [https://perma.cc/Y3VQ-3JKK].

89. Clava Brodsky, *Hungary's Dangerous Constitution*, COLUM. J. TRANSNAT'L L. BULL., http://blogs2.law.columbia.edu/jtl/hungarys-dangerous-constitution/ [https://perma.cc/7GKU-2LEW]. *See also* Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution*, *in* CONSTITUIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA (Armin von Bogdany & Pál Sonnevend eds., 2015).

90. Shaun Walker, *Hungarian Government to End Orbán's Rule-by-Decree Legislation*, GUARDIAN (May 26, 2020), https://www.theguardian.com/world/2020/may/26/hungarian-government-to-end-orbans-rule-by-decree-legislation-emergency-coronavirus [https://perma.cc/6REU-BDZL].

91. *Id.*

92. Orsolya Lehotai, *Hungary's Democracy Is Still Under Threat*, FOREIGN POL'Y (July 17, 2020), https://foreignpolicy.com/2020/07/17/hungary-democracy-still-under-threat-orban-state-public-health-emergency-decree/ [https://perma.cc/5KY4-995P].

93. PiS was founded by Lech Kaczyński and his twin brother, Jaroslaw. Lech Kaczyński, who was President of Poland between 2005 and 2010, was killed in an airplane crash in 2010.

majorities in both houses of the legislature. As Sadurski reports, "the main aim of PiS in the first two years of its rule was to dismantle institutional checks and balances."[94] But without the supermajority required to amend or replace the existing constitutional text,[95] the "constitutional" strategy of PiS was first to capture and neutralize the Constitutional Tribunal (CT) by any means necessary, which would then effectively permit institutional reform and concentration of power through the ordinary law of enacted statutes and the exercise of ministerial discretion.

The PiS capture of the CT by the end of 2016 did not occur in one fell swoop but via a series of complex, incremental, and multi-actor steps that combined formal legality, questionable lawfulness, and seeming outright illegality in about equal measure. In brief,[96] the process started with the new PiS-dominated lower house of the bicameral legislature (the Sejm) declaring null and void the previous Sejm's pre-election selection of five new judges on the fifteen-member CT to fill upcoming vacancies. Three of these vacancies were to occur before the new parliamentary term and two during it. PiS President Duda refused to swear the five new judges into office, which he had no legal power to do. The new Sejm elected five new judges and the president swore them in shortly before the CT declared that the three original new judges filling vacancies before the new parliamentary term were properly elected. The president of the CT refused to include the three PiS "quasi-judges"[97] on panels adjudicating cases, but when he reached retirement in December 2016, the Sejm enacted a statute creating the new and constitutionally unauthorized post of "Acting President," which was filled by one of the two valid new PiS elected judges, who then included the other three quasi-judges on panels and on the CT's General Assembly of all its members. During 2016, the Sejm enacted six statutes of questionable constitutionality which targeted the CT, and had the effect of paralyzing it and thus preventing it from considering further substantive PiS legislation.[98] The PiS government

94. Sadurski, *Constitutional Crisis in Poland*, *supra* note 12, at 260.

95. Constitutional amendments require a majority of two-thirds in the lower house of the legislature and an absolute majority of members in the Senate. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, art. 235 (Pol.).

96. For the details, see Chapter 3 of SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 12, from which the following summary largely draws. *See also* Sujit Choudhry, *Will Democracy Die in Darkness? Calling Autocracy by Its Name*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 571, 574–77.

97. Sadurski refers to them using this term. *See* Sadurski, *Constitutional Crisis in Poland*, *supra* note 12, at 261.

98. *Id*. at 262.

also acted in a seemingly unconstitutional manner when it refused to publish CT judgments that it deemed improperly decided despite a constitutional requirement to immediately publish all decisions submitted to it for publication by the CT.[99] Eventually natural attrition, due to the single nine-year term of office for CT judges, combined with its five original new members, gave PiS a clear majority on the CT by the end of 2016. Since then, the CT has proven to be a useful instrument of the regime in providing formal legitimacy to its work product and permitting it effectively to amend the constitution through ordinary statute.[100]

With the CT's independence successfully undermined, PiS turned its attention to the rest of the judiciary. A 2017 statute transformed the composition of the National Council of the Judiciary (NCJ), the institution that makes nominations for all ordinary judicial appointments, by changing the method by which the fifteen judges of the twenty-five-member body are selected.[101] Previously selected by other sitting judges, the new statute gave nomination power to the Sejm.[102] Another statute targeted the Supreme Court, the highest ordinary court,[103] by reducing the retirement age from seventy to sixty-five, which immediately affected forty percent of its members, and increasing the number of judges from 82 to 120.[104] It also created a Disciplinary Chamber of the Supreme Court, appointed by the NCJ, initially with the power to punish judges for their judicial decisions and extended in January 2020 to sanction them also for criticizing judicial reforms or engaging in other "political activities."[105] A further statute grants the Minister of Justice power to appoint and dismiss the presidents of all lower courts.[106] Finally, the Sejm enacted a law merging the previously separate offices of Minister of Justice and Prosecutor

99. *See* SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 12, at 75–76.

100. Sadurski, *Constitutional Crisis in Poland*, *supra* note 12, at 263.

101. *Id.* at 264–66.

102. *Id*.

103. In Poland, as in many countries, the judicial system is divided into a specialist constitutional court, with a monopoly over the power of judicial review, and the "ordinary" or non-constitutional courts, of which the Supreme Court is the highest.

104. Sadurski, *Constitutional Crisis in Poland*, *supra* note 12, at 265.

105. On the ongoing battle with the EU to retain the Disciplinary Chamber, see *infra* Section IV.A. On the law, see Aleks Szczerbiak, *How Will the Latest Judicial Reform Controversy Affect Poland's Presidential Election?* EUROPP (Jan. 27, 2020), https://blogs.lse.ac.uk/europpblog/2020/01/27/how-will-the-latest-judicial-reform-controversy-affect-polands-presidential-election/ [https://perma.cc/3PJU-AE5J].

106. Sadurski, *Constitutional Crisis in Poland*, *supra* note 12, at 265–66.

General, which effectively ended the independence of prosecutors.[107]

With respect to other institutions, the frequent practice of legislative fast-tracking, by severely limiting opportunities for debate and introducing important PiS measures as private members' bills to take advantage of the abbreviated procedures, has marginalized the role and voice of opposition parties in parliament.[108] PiS has also brought the electoral process and political party funding under its control by restructuring the National Electoral Commission, formerly an all-judicial body appointed by the top three courts, and authorized the Sejm to appoint seven of its nine members.[109] So, too, has PiS seized control of media regulation, effectively bypassing the constitutionally independent and non-partisan National Broadcasting Council with a new statutorily created National Media Council, three of whose five members are appointed by the Sejm and are currently PiS lawmakers.[110] In addition to its primary focus on undermining all institutional checks and balances, the PiS government, like the AKP in Turkey, has actively been employing the ordinary law of both civil and criminal libel in an attempt to silence and intimidate its many critics in civil society.[111]

## III. WHY INSTITUTIONAL DESIGN IS RELEVANT

### *A. The Claim of Relevance*

Before launching into the various components of the anti-concentration principle in the next section, it is necessary to consider a recent and cogently argued claim that constitutional design is "relatively irrelevant" because "otherwise reasonably well designed institutions" have proven unable to arrest the erosion of democracy on the part of determined and popular autocrats.[112]

It is first important to clarify what "relevant" means (and does

107. *Id.* at 266.

108. *Id.* at 267–68.

109. SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 12, at 141.

110. Sadurski, *Constitutional Crisis in Poland*, *supra* note 12, at 260. For more on PiS's control of the media, see *infra* Section IV.A.6.

111. Constitutional scholar Wojciech Sadurski, for example, has been the target of both. *See Open Letter in Support of Professor Wojciech Sadurski*, VERFASSUNGSBLOG (May 6, 2019), https://verfassungsblog.de/open-letter-in-support-of-professor-wojciech-sadurski/ [https://perma.cc/R94U-6BFK].

112. Sadurski, *supra* note 19, at 1.

not mean) in this context. It does not mean that, by itself, constitutional and institutional design can be relied upon or expected to stop in its tracks a full-blown assault on the separation of powers by the most determined, ruthless, and publicly supported of structural populists. As mentioned in the introduction, obviously a menu of constitutional, institutional, and democratic options designed to render the concentration of political power more difficult to achieve is no panacea or guarantee of success and cannot be the exclusive strategy in defense of constitutional democracy. Clearly, the concerns and issues that have driven the electoral success of both types of populist regimes and vexed the mainstream political parties must be addressed as a substantive policy matter.[113] Beyond both design and policy, democratic and constitutional norms, as well as civil society, must be cultivated, nourished, deepened, and strengthened.[114] What "relevant" does mean in this context is that, as one part of such a three-pronged approach, a broad package of customized and mutually supportive constitutional, institutional, and democratic design elements may help to (1) reduce the likelihood that authoritarian populist politicians and parties gain power, (2) prevent type one populist regimes from becoming type two, and (3) deter, slow down, or shorten the terms of the slightly less determined, politically astute, or publicly supported structural populists. To use a metaphor, relevance does not mean stopping a Category 5 hurricane, but rather resisting a Category 1 or 2 storm, containing the damage from a Category 3 or 4 event, and downgrading some potential or borderline Category 5 hurricanes. Even if the strongest roof cannot withstand the most powerful storms, it is still sensible to build one capable of weathering lower-category incidents.

Why is the institutional counter-playbook relevant in this sense? There are two reasons. First, because of the nature of the acts of assault themselves. It is the choice of structural populists to employ the tool of constitutional law as their preferred weapon against the separation of powers that renders constitutional design relevant and creates the contingent opportunity for constitutional lawyers and scholars to use their professional expertise in defense of constitutional democracy. In what would otherwise obviously be an unequal match-up, this provides a form of home-field advantage. It is also the fact that institutional checks and balances have been the primary strategic target, rather than the other components of constitutional democracy, that makes institutional design a relevant part of the resistance. How institutions are structured affects the relative ease, visibility, and political

113. *See, e.g.*, Bugarič, *supra* note 21, at 597–616.

114. *See* Loughlin, *supra* note 20, at 451; Weiler, *supra* note 16, at 629–38.

costs of undermining them, and of the various methods—constitutional change, ordinary law, outright illegality—of doing so. By structuring institutions in a way that makes it more difficult to achieve the desired level of concentrated power within the existing constitution, the preference for (and generally lower costs of) the legalistic strategy pushes would-be autocrats to change or replace the constitution, despite its higher visibility and risks than a more stealthy reliance on ordinary law. And if such constitutional change or replacement is not available to them—due to how it is entrenched, democratic design, resistance by other institutions, and/or the level of public support for it—this will force would-be autocrats to choose between the even more visible and usually politically costly step of abandoning either legality or their plans.

Second, although the evidence for this proposition must wait until the counter-playbook is presented in the next section, the claim that Poland is a case study in the failure, and so the irrelevance, of a set of "otherwise reasonably well-designed institutions"[115] is not entirely justified. Obviously, in this context we are talking about "well-designed" not in the more general sense of consistent with, or well within the parameters of, constitutional democracy, or providing a good balance among the several values at stake (such as stability, representativeness, accountability, rights protection, responsiveness, effectiveness, etc.); instead, we are considering institutions specifically from the perspective of their capacity to prevent or withstand assaults on the separation of powers. Here, checked against the suggestions in the next section, Polish institutions were relatively vulnerable and lacked resilience in a number of significant respects. In this and other cases, institutional design has facilitated, and can also hinder, some of the moves that structural populists have taken to undermine the diffusion of political power.

### *B. Three Qualifications*

There are three qualifications to the Article's main argument. First, as just mentioned, the focus here on constitutional/institutional design does not overlook or ignore the large role that constitutional norms play in all constitutional democracies or the significance of populist violations of many of them.[116] Consistent with their general

115. Sadurski's article takes Poland as its case study of "relative irrelevance." *See* Sadurski, *supra* note 19, at 1–24.

116. Choudhry, *supra* note 96, at 577. *See* Samuel Issacharoff, *Populism Versus Democratic Governance*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 445,

strategy of legality, populists have learned that undermining (non-legally binding) constitutional norms of restraint and institutional comity is a relatively effective and costless way to help concentrate their power. And yet, this technique only gets them so far. As the distinction between the two types of populist regimes suggests, changing the law to restructure the institutional framework in their favor is the gold standard—but only if they can do it. Moreover, any clear substantive distinction between norms and constitutional/institutional design is often elusive, in that many of the most important constitutional norms can be formalized. Although all constitutional democracies rely on a mixture of formal powers and constitutional norms in practice, with the latter helping to determine how the text plays out in reality, the exact mixture between the two varies widely among them and is not fixed.[117] Here, perhaps, the spectrum is represented by the UK at one end, where constitutional conventions and culture traditionally play a large role in identifying and defining the constitutional order,[118] and South Africa at the other, in which a very detailed constitutional text formalizes many of the limits, functions, and duties left to constitutional norms in other countries.[119]

Second, and most importantly, the anti-concentration principle reflects the single-focused goal of maintaining the practical dispersal of political power that is one of the basic ingredients of constitutional democracy and preventing the sort of undue concentration that has been the hallmark of structural populism (as well as other authoritarian or semi-authoritarian regimes). There are, of course, other important goals and values of institutional design—the stability, effectiveness, responsiveness, and representativeness of government; the recognition and protection of rights; the transformation of society; etc.—and so trade-offs inevitably exist where they conflict.[120] More broadly, we

445. *See generally* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018).

117. *See* Choudhry, *supra* note 96, at 572–73.

118. Interestingly, in relying on it in part to find the Prime Minister's advice to prorogue Parliament unlawful, the recent Cherry/Miller II case in the UK essentially formalized and legalized the prior constitutional norm of executive accountability to Parliament. *See* R (on the application of Miller) v. The Prime Minister; Cherry and Others v. Advocate General for Scotland [2019] UKSC 41 (appeal taken from Gr. Brit.).

119. An example is the textual obligation in South Africa for the National Assembly to hold the executive politically accountable to it. *See* S. AFR. CONST., 1996, art. 55(2) ("The National Assembly must provide for mechanisms—(a) to ensure that all executive organs of the state in the national sphere of government are accountable to; and (b) to maintain oversight of—(i) the exercise of national executive authority, including the implementation of legislation . . . .").

120. *See* GINSBURG & HUQ, *supra* note 19, at 172.

want democratic politics to achieve certain desired outcomes and not merely to avoid certain risks. Accordingly, a constitution that prioritizes the anti-concentration principle will typically sacrifice a good deal. This is why it is not proposed as a universal blueprint for constitutional democracies, to be employed indiscriminately, completely, and everywhere. Rather, it is presented primarily as a specialized tool to be used as, where, and to the extent deemed necessary or prudent in particular contexts. Although it is generally to be taken into account as an important principle to be balanced against others, its full implementation and prioritization should be calibrated to the perceived level of risk.

But in addition to these potential conflicts between resisting populism/the anti-concentration principle and other goals or values of constitutional democracies, the goal of resisting structural populism through constitutional design may also be in conflict with itself. For it must be acknowledged that there is a certain tension between the benefits of dispersing power in this way to counter the risk of structural populism on the one hand and, on the other, the costs of fragmentation and gridlock that begets frustration with the ability of the political system to serve the needs of ordinary voters underlying the appeal and rise of populism in the first place.[121] In this way, it might be thought that the anti-concentration principle is ultimately likely to be counterproductive to the very goal it pursues.

It should first be noted that this serious and legitimate concern assumes the relevance of institutional design to outcomes; indeed, it suggests that design is so relevant as to turn outcomes on their head. More substantively, as just stated, the extent to which the anti-concentration principle should be employed or prioritized, given the potential general trade-offs, must be calibrated to the perceived danger of structural populism. Where this danger is highest, it is still better to risk increasing ordinary voter support for populist parties if, at the same time, the counter-playbook functions as intended to reduce the greater risk of structural populism. So, for example, the electoral components

121. This tension is reflected in two posts to the I-CONnect blog, discussing the current situations in Brazil and Chile respectively. *See* Juliano Zaiden Benvindo, *The Party Fragmentation Paradox in Brazil: A Shield Against Authoritarianism?*, INT'L J. CONST. L. BLOG (Oct. 24, 2019), http://www.iconnectblog.com/2019/10/the-party-fragmentation-paradox-in-brazil-a-shield-against-authoritarianism/ [https://perma.cc/LSM7-BWWB]; Sergio Verdugo, *On the Protests and Riots in Chile: Why Chile Should Modify its Presidential System*, INT'L J. CONST. L. BLOG (Oct. 29, 2019), http://www.iconnectblog.com/2019/10/on-the-protests-and-riots-in-chile-why-chile-should-modify-its-presidential-system/ [https://perma.cc/YB5K-AW5L].

of the anti-concentration principle discussed below[122] may mean that, despite increased support, a populist party remains a minority party and out of power, or gains power only as part of a coalition government with non-populist parties. Even if in power, the resulting populist regime may turn out to be a non-authoritarian type one variety, again avoiding the worst-case scenario. But if not, the other elements of the anti-concentration principle, if fully utilized, are designed to prevent the type one leader with authoritarian impulses from creating a type two regime. If they work, not only is the greatest risk avoided, but also the populist leader is likely to feel increasingly frustrated and stymied, resulting potentially in the types of increasingly erratic and outrageous conduct that we have seen from a Trump or Bolsonaro[123] and that may eventually undermine their new-found political support among alienated mainstream party voters. Recall also that the anti-concentration principle is not the only part of the response to structural populism; this institutional process must work in tandem with the actions of opposing political actors. Faced with the imminent risk or reality of an empowered authoritarian populist, the other political parties must address the causes of such electoral support and ensure that their policies and programs are not only responsive to the demands of ordinary voters, but also have the best chance of being enacted in the dispersed institutional environment through inter-party cooperation.

Finally, the anti-concentration principle is relevant in all democratic systems in order to counter the temptations and perhaps inherent tendency for incumbents to seek to entrench their positions.[124] Undue concentration of power is, of course, a particular concern in dominant-party democracies generally, where the monopoly in office over time risks being reflected in all governmental institutions and the absence of rotation and meaningful party competition reduces the incentives for the co-operative, restraining logic of winner today, potential loser tomorrow.[125] But the principle is especially relevant and urgent in the face of structural populism as its violation has been the

122. *See infra* Section IV.A.3.

123. Sonam Sheth, *"He's Losing His S—-": Trump's Advisers Are Increasingly Worried About His Mental State Following Days of Erratic Behavior*, BUS. INSIDER (Sept. 6, 2019, 4:22 PM), https://www.businessinsider.com/trump-aides-worried-about-mental-state-alabama-hurricane-dorian-2019-9 [https://perma.cc/8BQQ-VFFX]; Simone Preissler Iglesias et al., *Bolsonaro's Erratic Behavior Is Making His Military Backers Nervous*, BLOOMBERG (July 31, 2020, 9:17 AM), https://www.bloomberg.com/news/articles/2020-07-31/bolsonaro-s-military-backing-stokes-growing-unease-in-army-ranks [https://perma.cc/E8G9-YH3Q].

124. Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, *in* OUT OF AND INTO AUTHORITARIAN LAW 125, 128 (András Sajó ed., 2003).

125. *See* GINSBURG & HUQ, *supra* note 19, at 84–85.

distinctive method of dismantling constitutional democracy and the top priority of the various regimes in the last few years. This urgency may well justify giving greater weight to this factor in the trade-off among constitutional values than with other democratic systems.

## IV. THE ANTI-CONCENTRATION PRINCIPLE IN PRACTICE

The anti-concentration principle aims to counter the assault on the separation of powers that has been the distinctive and signature strategy of structural populists over the past few years by identifying and fortifying the actual or likely targets of attack. It has a number of components in practice, addressing most of the major structural elements of constitutional, institutional, and democratic design, and amounts to a counter-playbook for constitutional democrats on how to increase resistance to, or preemptively thwart, the moves that have proven so successful over the past few years. But it can be sub-divided into two main parts: (1) *what* institutional arrangements in the areas exploited or targeted by structural populists—including the framework of government and accountability, electoral systems and rules, constitutional and ordinary courts, and the independent media—are most likely to preserve pluralism and resist concentration, and (2) *how* to protect, maintain, or entrench these institutional arrangements against populist attack or change. In what follows, the Article starts with this first part before turning to the second in subpart B.

### *A. Institutional Arrangements*

#### 1. Federalism and Bicameralism

If the constitutional goal is to prevent the concentration of political power in the same hands that amounts to "the very definition of tyranny,"[126] then dispersing power by increasing the number of independent political entities, part of James Madison's solution for the U.S. government,[127] still makes good sense. Ginsburg and Huq are undoubtedly correct that federalism is not categorically good (or bad) ex ante at preventing democratic erosion because the potential existence of "authoritarian enclaves" means that its effects are uncertain as to whether authoritarianism at the national level may be retarded or

126. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

127. The other part of Madison's solution was to increase the size of the republic, see THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961).

enhanced.[128] But from the single-focused perspective of the anti-concentration principle, if the major concern is to prevent or reduce the likelihood of the consolidation of power that has been the central strategy of structural populism, then a unitary government seems to be far riskier than a federal one. Of course, there are no guarantees that Ginsburg and Huq's concern with enclaves will not be realized in any particular case, but as with the other parts of the counter-playbook, the advantage of federalism is partly about safety in numbers.[129] It is probably no coincidence that three of the four paradigms of structural populism involve unitary states—Hungary, Turkey, and Poland—whereas most of the political populist regimes—the United States, Brazil, and India,[130] for example—are in federal states. Even the fourth paradigm, Venezuela, has been characterized as a "centralized federation" by a leading authority.[131] The relative speed with which Orbán and Kaczyński were able to transform the institutional structures of their constitutional orders after electoral victories, and the relative lack of effective resistance they faced, was likely due in part to the unitary nature of their systems. By contrast, the partisan character and possibilities of U.S. federalism[132] meant that for two years, until the 2018 mid-term elections, the major—and most effective—political and legal resistance to Trump came from Democratic states;[133] not from the much-vaunted horizontal separation of powers in Washington, D.C., but the vertical one between Washington and opposition party-controlled state governments in various parts of the country. In this way, federalism creates the possibility of divided government nationally, even when the central government is unified.

The precise legal form of federalism (whether constitutional or statutory/devolved), its basis and geography (symmetric or

128. GINSBURG & HUQ, *supra* note 19, at 149.

129. As Ginsburg and Huq argue in the context of discussing the appropriate number of "horizontal accountability" institutions. *See id.* at 196.

130. On Modi's India, see Khaitan, *supra* note 1, at 50.

131. Allen R. Brewer-Carias, *Centralized Federalism in Venezuela*, http://allanbrewercarias net/site/wp-content/uploads/2007/09/957.-.900.-Centralized-federations-Duquesne.pdf [https://perma.cc/YR47-TJSP] (arguing that Venezuela is a federal state only in theory but not in practice, and that the process of centralization, while greatly increased under the 1999 constitution, started under the 1948-1958 dictatorship and was continued under the previous, 1961 constitution).

132. *See generally* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

133. *See, e.g.*, Pamela King & Jeremy P. Jacobs, *States Lead Court Fight Against Trump. They're Winning*, E&E NEWS (May 26, 2020), https://www.eenews.net/stories/1063239367 [https://perma.cc/5HSY-6F8E].

asymmetric, based on territory or ethnic, linguistic, or religious identity), and the exact allocations of power all matter less for this purpose than the functional requirement that there is in reality some division and dispersal of political power, and a plurality of independently elected governments or officials, some of which are—or may be—controlled by different parties than at the national level.[134]

For essentially identical reasons of dispersing power and at least potentially creating more independent political decision-making entities, a bicameral national legislature is preferable to a unicameral one. Once again, the division between structural and political populism mostly corresponds with this factor: Hungary, Turkey, and Venezuela have unicameral legislatures whereas the United States, India,[135] the Philippines,[136] and Brazil have bicameral ones. Poland has two legislative chambers, and the result of the October 2019 elections, in which PiS narrowly lost its majority of seats in the upper house (while marginally increasing that in the lower), means that the possibility of greater checks on its legislative program and fast-tracking procedural tactics now exists. Had the 2018 U.S. midterm elections led to a switch from Republican to Democratic control of the Senate, the president's ability to appoint "Trump judges" to the federal courts would have ended.[137] The existence of two chambers may also reinforce the relative rigidity of constitutional amendment rules by adding a second veto player.[138]

### 2. Form of Government/Structure of Executive Power

From the perspective of the anti-concentration principle, there

134. Opposition party wins in mayoral elections in the capital cities of Istanbul and Budapest in 2019, and longstanding opposition control of Warsaw, illustrate both the importance of sub-national elections in creating islands of pluralism and the limits of an exclusively city-level approach to "federalism." *See* Tim Gosling, *Europe's Populist Governments Have a Problem: Their Capitals*, FOREIGN POL'Y (Nov. 4, 2019, 6:32 AM), https://foreignpolicy.com/2019/11/04/europes-populist-governments-have-a-problem-their-capital-cities-czech-republic-hungary-poland-slovakia/ [https://perma.cc/KWV6-3RAB].

135. Due to staggered elections for the two houses of India's parliament, Modi's BJP and its allies do not have a majority in the Rajya Sabha (Council of State), despite a landslide victory in the 2018 Lok Sabha (lower house of the legislature) general election.

136. Corresponding with the period in which he did not have a majority in the Senate, prior to midterm elections in 2019, Duterte was more clearly categorized as a political (rather than a structural) populist than now. *See* Gutierrez, *supra* note 1.

137. The appointment of federal judges requires the "Advice and Consent" of the Senate. U.S. CONST., art. II, § 2, cl. 2.

138. *See infra* Section IV.B.

does not appear to be very much difference in practice among the three main forms of government: presidential, semi-presidential, or parliamentary. In their modern versions, all three concentrate executive power in the person of the chief executive, although (1) the degree of concentration varies somewhat *within* each form (i.e., some presidents and prime ministers enjoy more concentrated power than others); (2) depending on whether or not the president's party has a majority in the legislature, in a semi-presidential system power is sometimes concentrated in the president and sometimes in the prime minister; and (3) when the former occurs, a semi-presidential president effectively combines the power of president and de facto prime minister due to political control of the parliamentary government, what might be termed "superpresidentialism."[139]

On the margins, it may be that presidential systems of both stripes have greater scope for concentrating executive power in a single person than parliamentary ones, due to their direct, exclusive, and personal electoral mandate. Apart from the additional prestige of being head of state as well as government, this is why various strongmen leaders have switched their systems from parliamentary to presidential—most recently Erdoğan in Turkey—and none the other way around. But, importantly, all three modern forms provide sufficient platforms for expanding executive power outwards by attacking and undermining the independence of other branches and institutions, and so consolidating and absorbing additional (i.e., external) power in the executive. Orbán has undertaken his structural populism as prime minister, as did Erdoğan before 2014, whereas Chávez and Maduro used the presidential office as their platform. By contrast, Kaczyński concentrated power in his person without holding *any* executive office.[140] Accordingly, for all the political science literature devoted to the promise and perils of each form of government, for our particular purposes the actual record of structural populism suggests that here the choice really is "relatively irrelevant."

---

139. *See* Stephen Gardbaum, *Political Parties, Voting Systems, and the Separation of Powers*, 65 AM. J. COMPAR. L. 229, 254–55 (2017). For a different use of this term, see John T. Ishiyama & Ryan Kennedy, *Superpresidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan*, 53 EUR.-ASIA STUD. 1177 (2001) (characterizing these four countries as having a distinct type of presidential system of government with more formally concentrated powers).

140. Apart from being the PiS founder and leader, he was an ordinary member of the legislature until being appointed to the cabinet as one of four deputy prime ministers on September 30, 2020. *See* Vanessa Gera, *Kaczyński Joins New Polish Cabinet as Deputy Prime Minister*, ASSOCIATED PRESS (Sept. 30, 2020), https://apnews.com/article/jaroslaw-kaczynski-poland-cabinets-education-e1bd7e1a8fb331028cdb236ff70e9052 [https://perma.cc/9CW9-E8G5].

This said, the anti-concentration principle does call for serious exploration of new, more pluralistic and less concentrated forms of executive power than we see almost everywhere, in line with traditional republican practice and theory, which viewed a single executive magistrate as a monarchy regardless of title or election.[141] Attempts to reduce the concentration of modern executive power in the person of the president or prime minister commonly take the form of both temporal limits and measures to resist the "unitariness" of the executive. Presidential term limits of different lengths and permissible sequencing are fairly ubiquitous attempts to restrict the duration of individually concentrated executive power, given the risks of further increased concentration that comes with absence of rotation in office.[142] This is why they are perhaps the most common and important constitutional design mechanism to be challenged, legalistically or otherwise, by incumbents, with much resting on the outcome of the struggle.[143] Prime ministerial term limits, by contrast, are rare, primarily because in theory the term of office is not fixed and independent of the legislature, so that an unpopular, corrupt, or incompetent incumbent can be ousted either by a majority of legislators or by their own political party at any time. In practice, given both their dominance of the parties they lead

141. Thus, all the well-known pre-U.S. republics in history had plural executives, from the two consuls (and other magistrates) of the Roman Republic to the States-General of the Dutch Republic. For Montesquieu, a monarchy is a government "in which a single person governs by fixed and established laws." CHARLES DE SECONDAT, BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 9 (J.V. Prichard ed., D. Appleton & Co. 1900) (1748). For Rousseau, the term "government" meant the legitimate exercise of the executive power as authorized by the sovereign people and "monarchy" is defined as the form in which the sovereign [people] chooses to "concentrate the whole government (i.e., the executive power) in the hands of a single magistrate from whom all others hold their power." JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 55, 63 (G.D.H. Cole trans., Digireads 2018) (1762).

142. *See generally* David Landau et al., *Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*, *in* THE POLITICS OF PRESIDENTIAL TERM LIMITS (Alexander Baturo & Robert Elgie eds., 2019); Mila Versteeg et al., *The Law and Politics of Presidential Term Limit Evasion*, 120 COLUM. L. REV. 173 (2020).

143. The two most recent attempts (at the time of writing) to evade term limits have been by Vladimir Putin in Russia, via constitutional amendment, and by Evo Morales in Bolivia. Having failed in a referendum to gain a majority to amend the 2009 constitution to permit a fourth term, Morales requested the Bolivian Plurinational Constitutional Tribunal to annul the result as a violation of the people's right under the American Convention to freely elect a leader of their choice, which it did. In the subsequent presidential election, he "officially" attained the requisite ten percentage point lead over his nearest rival to win in the first round under highly suspicious circumstances before the combination of mass demonstrations, an OAS report finding clear electoral irregularities, and withdrawal of support by the military forced him to resign and accept asylum in Mexico. *See* Linda Farthing, *Bolivia Says Goodbye to Term Limits*, NACLA (Dec. 15, 2017), https://nacla.org/news/2017/12/20/bolivia-says-goodbye-term-limits [https://perma.cc/ML6C-5B84].

and party-dominated legislatures, the longevity in office of authoritarian prime ministers like Orbán and Hun Sen in Cambodia[144] raises the question of constitutional term limits in parliamentary systems.

The second type of mechanism seeks to bolster pluralism within the executive branch or function at any given time, and so may be called executive (or administrative) separation of powers.[145] It comes in three sub-types. The first ends a president's monopoly as the only directly elected executive official by requiring the election rather than the appointment of certain specified others. State governments in the United States have long pioneered this form of a plural executive, with directly elected attorneys general, secretaries of state, and other officials.[146] The second is the creation of independent executive or administrative agencies, over whose top officeholders there is no (or limited) political control.[147] Here, at the federal level, the United States has several examples, such as the Federal Trade Commission and the Federal Energy Regulatory Commission.[148] These independent agencies (usually multi-member commissions with staggered terms) contrast with executive departments or agencies that operate with a norm of independence but do not have formal protection from presidential manipulation.[149] Finally, relying on, and reinforcing, the division between politics and administration, the creation, maintenance and protection of an independent career civil service, with only a limited and minimally necessary role for political appointments within government departments, is an important safeguard for a constitution to incorporate. Attacks on the civil service and civil servants have been a common method of attempting to consolidate power in recent years.[150]

---

144. Hun Sen has held office since 1985.

145. *See generally* Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

146. *See* Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 975 (2014).

147. *See infra* Section IV.A.5 on "horizontal accountability" for a discussion of independent agencies outside of the executive branch.

148. By statute, the president can only fire members of the commission for cause, and not (as usual) at will. *See* Federal Trade Commission Act of 1914, 15 U.S.C. § 41; Department of Energy Organization Act, 42 U.S.C. § 7171(b) (establishing the Federal Energy Regulatory Commission [FERC]).

149. Such as the U.S. Department of Justice.

150. *See* GINSBURG & HUQ, *supra* note 19, at 150–52; *The Trump Administration's Multifaceted Attacks on the Civil Service*, PROTECT DEMOCRACY (July 30, 2018), https://protectdemocracy.org/update/the-trump-administrations-multifaceted-attack-on-the-civil-service/ [https://perma.cc/5GAR-BQQY].

If these mechanisms are primarily designed to disperse political power within the executive, they may also help to reduce the consolidation and absorption of power across institutions and branches by the executive that is the main strategy of structural populism, although the other measures discussed in this entire part are more directly geared towards achieving this goal.

### 3. Electoral and Party Systems

Political parties are *the* central actors in modern democracies. They define the terms of democratic and political competition, raise the majority of funds, mostly select which individuals we can vote for as chief executive and/or legislators, significantly structure political and policy debate, and hold and exercise state power. As Maurice Duverger wrote about the UK as long ago as the 1950s:

> Officially Great Britain has a parliamentary system . . . . In practice the existence of a majority governing party transforms this constitutional pattern from top to bottom. The party holds in its own hands the essential prerogatives of the Legislature and the Executive . . . . Parliament and Government are like two machines driven by the same motor, the party. The regime is not so very different in this respect, from the single party system. In this, Executive and Legislative, Government and Parliament are constitutional facades: in reality the party alone exercises power.[151]

As such, the dispersal or concentration of power among political parties is as important as it is among branches of government. Because they can unify or divide power across institutions, political parties are a major mechanism of separation of powers.[152]

As Duverger's famous "law" also reminds us,[153] it is electoral systems that in turn structure party systems, with the basic choice of a majoritarian or proportional regime largely determining whether a

---

151. MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 394 (Barbara North & Robert North trans., John Wiley & Sons, Inc. 1965) (1954).

152. *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006); Gardbaum, *supra* note 139, at 230.

153. Duverger's law (or rule) consists of the following pair of propositions: (1) one-seat districts with plurality/majoritarian electoral rule tend to reduce the number of parties to two, and (2) multi-seat districts with proportional representation tend to be associated with more than two parties. *See* Gardbaum, *supra* note 139, at 231 n.4.

two-party or multiparty system prevails. Notably, the particularities of electoral systems have played a significant role in the success of several current populist regimes, just as they also played a role in thwarting the potential emergence of others. Facilitated by a mixed majoritarian/proportional representation (PR) system, in 2010 Orbán's Fidesz achieved its all-important two-thirds majority of seats in the unicameral Hungarian parliament with just under fifty-three percent of the vote.[154] By tilting the electoral rules further in its favor once in power, Fidesz retained its supermajority with only forty-four and forty-nine percent of the vote in 2014 and 2018 respectively.[155] This also illustrates the important interplay between constitutional amendment rules and legislative election systems.[156] In Poland, PiS was only able to win a simple majority of seats in 2015 (and thus form a government by itself) with thirty-eight percent of the vote in a proportional system because the five percent threshold rule had the effect of excluding from the legislature the numerous small, center-left parties that failed to agree on a common platform.[157] As a result, fifteen percent of those voting were left unrepresented.[158] Of course, Trump gained a comfortable Electoral College victory in 2016 while losing the popular vote by nearly three million, or two percentage points. On the other hand, France's two-round presidential election system made a Le Pen victory far less likely in 2017, and, as long as they are considered "toxic" by other parties, far-right populists have tended to face a natural cap of support well under what is required to govern by themselves under pure PR systems.[159]

---

154. *See* Chris Terry, *The Birth of Hungary's Franken-Voting System*, ELECTORAL REFORM SOC'Y (Apr. 13, 2018), https://www.electoral-reform.org.uk/hungarys-franken-voting-system/ [https://perma.cc/PL79-F7NV].

155. Apart from redrawing the boundaries of single-member constituencies in Fidesz's favor and virtually halving the number of MPs (from 386 to 199), the post-2010 electoral system changes the balance of the mixed majoritarian/PR system towards the former, by increasing the percentage of single-member seats from 44.2 to 53.3. *See* Nathan Schackow, *Hungary's Changing Electoral System: Reform or Repression Inside the European Union?*, https://www.researchgate.net/publication/260183189_Hungary's_Changing_Electoral_System_Reform_or_Repression_Inside_the_European_Union [https://perma.cc/7WTK-6AB6].

156. *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 396 (3d ed. 2014).

157. *See* Sadurski, *Constitutional Crisis in Poland*, *supra* note 12, at 257–58.

158. *See id.*

159. This toxicity is holding in many countries but breaking down in a few others, such as Austria, where the right-wing populist Freedom Party joined the governing coalition as the junior partner for the first time in 2017. At the village council level only, the mainstream Christian Democratic Party of Angela Merkel has controversially, and in defiance of the center, formed a few alliances with the Alternative für Deutschland (AfD). *See* Katrin Bennhold et al., *A Far-Right Dilemma for Europe's Mainstream: Contain It or Join It?*, N.Y.

Accordingly, for our purposes, almost certainly more important than the choice of presidential, semi-presidential or parliamentary form of government are the electoral practices within which each operates. In parliamentary democracies, a multiparty system coheres with the anti-concentration principle because, given party government, it tends to disperse power among political parties more than a two-party system. For this reason, a PR electoral system is to be preferred, notwithstanding other costs or consequences that may result.[160] In pure PR systems, a single party rarely obtains the legislative majority necessary to govern alone, resulting in coalitions, and thus power-sharing, with other parties. This is especially important because of the inherent "partial fusion"[161]—i.e., concentration—of legislative and executive power in modern parliamentary systems resulting from the single election for both. In short, where there is no separate election of the executive, the only way voters can register disapproval of the government is by voting against their legislative representative or party, so that acting or campaigning against "their" government is ordinarily not the way for legislators to be reelected. On the other hand, without an independent term of office or electoral mandate, the prime minister and the government as a whole are dependent on retaining majority support in the legislature for survival and cannot afford systematically to alienate its "backbench" party members. This mutual dependence, or "sink or swim together" logic, creates a structurally greater tie between executive and legislature, which typically results in government dominance of parliament where there is a majority party. Again, this preference for a PR system from the perspective of the anti-concentration principle is enhanced to the extent that authoritarian populist parties are deemed "toxic" by the other parties, rendering their path to governmental power as coalition partners more difficult.[162]

Apart from this inherent preference for PR, it is also the most risk-averse voting system in terms of the goal of keeping authoritarian populist parties as minority parties in the legislature, and thus either out of power altogether or in power only as part of a coalition

---

TIMES (Oct. 15, 2019), https://www.nytimes.com/2019/10/08/world/europe/far-right-coalitions html [https://perma.cc/77FK-P5V8].

160. *See, e.g.*, Rivka Weill, *On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties*, 16 ELECTION L. J. 237 (2017). In this Article, I do not take a position on which version of a pure PR system is preferable, the main ones being open and closed party list, and single transferable vote.

161. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 65–66 (Fontana/Collins 1963) (1867).

162. *See* Bennhold, et al., *supra* note 159.

government.[163] With two of the three main majoritarian voting systems—first-past-the-post and ranked choice (or preferential) voting[164]—the risk is that a populist party becomes one of the two main parties and so benefits from its overrepresentation to emerge as a majority party. Under first-past-the-post, this typically happens with significantly less than fifty percent support nationwide.[165] Under ranked choice, it is possible that most voters will either love or hate the populist party and so place it first or last in their preferences, in which case it would be unlikely to pick up sufficient second or third place preferences to win the required majority in many individual seats, and as a result will do worse than under PR.[166] But it is also possible that ranked choice would permit enough voters to register a "guilt-free" second or third preference for the populist party ("I didn't vote for them") to boost their representation as compared with PR. The third main majoritarian system, a run-off between the two leading candidates in the first round of voting, avoids this possibility and, as in the 2017 French presidential election noted above,[167] incentivizes a combined anti-populist vote. So, although this is likely the least risky majoritarian system from this perspective, these incentives are potentially more effective at the single-office national executive election level than in the hundreds of local legislative districts nationwide. While PR, therefore, tends to result in greater legislative representation for populist parties than majoritarian systems, at the same time (with the possible exception of the second-round run-off system) it more reliably reduces the greater risk of their winning legislative majorities.

As noted above, a common feature of PR systems is a

163. The latter situation currently exists in the Czech Republic and Slovakia, where populist parties won the most seats in the last elections but, not having legislative majorities, formed coalition governments with non-populist parties. *See* Robert Anderson, *Social Democracy: What's Left in Central Europe?*, BALKAN INSIGHT: REPORTING DEMOCRACY (Mar. 26, 2020, 7:26 AM), https://balkaninsight.com/2020/03/26/social-democracy-whats-left-in-central-europe/ [https://perma.cc/2EY4-HSL6].

164. Ranked choice voting is a majoritarian system when used in single-member constituencies, requiring the winning candidate to receive a majority of votes, including second and third preferences where necessary. When used in multi-member constituencies (here often referred to as "single transferrable vote"), it is effectively a version of PR.

165. If this risk does not materialize, then (like all other parties) populist parties will likely be underrepresented relative to their support under first-past-the-post and compared to PR.

166. *See* Tarunabh Khaitan, *Constitutional Design and Political Systems*, 7 CAN. J. COMPAR. & CONTEMP. L. (forthcoming 2021) (on file with author) (arguing that for this reason ranked choice voting supports the "antifaction principle," which requires that political parties do not operate as factions).

167. *See* Sadurski, *Constitutional Crisis in Poland, supra* note 12, at 257–58.

minimum electoral threshold, often five percent,[168] for a party to gain representation in the legislature. Most famously employed (although not actually originating[169]) in Germany, such thresholds have the dual purpose of making it harder for fringe antidemocratic parties, especially neo-Nazis, to win legislative seats and to bolster the stability side of the representation of voters' views versus effective governance trade-off that PR otherwise resolves overwhelmingly (and sometimes infamously) in favor of representation, by reducing the number of parties in the legislature.[170] The risk of such thresholds from the perspective of the anti-concentration principle is not only what happened in Poland in 2015, but also in Turkey in 2002, when the AKP first won power. Turkey has the highest threshold in the world, at ten percent,[171] and as a result, the AKP was able to win a fraction under two-thirds of the legislative seats in 2002 with just over thirty-four percent of the vote in a party-list PR system.[172] Accordingly, as the creation of a stable structural populist regime is a worst-case scenario and not a valuable feature of an electoral system from the perspective of this Article, such thresholds are a design vulnerability and presumptively should not be employed.[173]

Of course, as with all the other mechanisms discussed in this section, while a pure PR system in a parliamentary democracy makes the path to power more difficult for authoritarian populist regimes, it is no guarantee, as the 2017 election in Italy demonstrates. Here, two

168. *See* Schackow*, supra* note 155, at 14; *see also* JACKSON & TUSHNET, *supra* note 156, at 838.

169. *See* Greg Taylor, *The Constitutionality of Election Thresholds in Germany*, 15 INT'L J. CONST. L. 734, 734 (2017).

170. *Id*. at 734–739.

171. *See, e.g.*, Sinan Alkin, *Underrepresentative Democracy: Why Turkey Should Abandon Europe's Highest Electoral Threshold*, 10 WASH. U. GLOB. STUD. L. REV. 347, 352 (2011); Daan Louter & Kate Lyons, *The World's Most Unfair Election System – How Would Your Parliament Fare?*, GUARDIAN (June 1, 2015, 8:25 AM), https://www.theguardian.com/world/2015/jun/01/turkey-the-worlds-most-unfair-election-system [https://perma.cc/Q4NY-YCJ7].

172. AKP won 363 of the 550 seats. *Election to the Turkish Grand National Assembly - Results* Lookup, ELECTION RESOURCES, http://www.electionresources.org/tr/assembly.php?election=2002 [https://perma.cc/ZD2K-PL67]. *See also Turkey's Election – Erdogan Triumphs – With Plenty of Help from His Enemies*, THE ECONOMIST (Nov. 7, 2002), https://www.economist.com/europe/2002/11/07/erdogan-triumphs-with-plenty-of-help-from-his-enemies [https://perma.cc/YG39-7M6D].

173. It is conceivable that in a particular context, the absence of an election threshold would help an authoritarian populist party, by increasing the number of mainstream parties and thereby rendering a coalition government more difficult to form, so as to increase the perception that the existing political system is unable to address the concerns of ordinary citizens. Thanks to Stijn Smet for this point.

populist parties—the League and the Five Star Movement— were able to gain a legislative majority by forming a post-election coalition and joint government, after they came first and second in the election.[174] However, the episode also underscores the importance of separation of power among political parties that pure PR tends to foster, as the coalition fell apart after a year due to internal rivalries, ambitions, and policy differences, to be replaced by a new coalition between Five Star, the less dangerous and authoritarian of the two populist parties, and the mainstream center-left Democratic Party.[175]

Within presidential systems, the political science literature is well known for identifying and debating the "perils" of combining this form of government with a PR electoral system.[176] This is so even though all pure presidential systems with the exception of the United States and the Philippines do so, primarily because the need to trade representativeness for governability is less compelling where the executive is separately and independently elected. The major risk is that a president with a strong sense of a personal mandate resulting from this separate election will feel increasingly frustrated by a fragmented, multiparty legislature in which s/he has no majority, and that this scenario has often been the catalyst for coups against democracy—by the president, the military, or both—especially in Latin America.[177] But if the current conventional wisdom that such sudden, extralegal, and often violent overthrows of democracy are increasingly rare and have largely been replaced by democratic erosion and "stealth authoritarianism" is correct, then the greater danger by far in the contemporary world is that of structural populism. And here, the scenario to be avoided is the type of concentrated power held by a president with a firm legislative majority. Accordingly, the anti-concentration principle and the counter-playbook call for the dispersal of power, and so once again for PR in its pure form.[178]

Almost as important as the mode of parliamentary election is

174. Laura Silver et al., *The Populist Parties That Shook Up Italy's Election*, PEW RSCH. CTR. (May 30, 2018), https://www.pewresearch.org/fact-tank/2018/05/30/views-of-italian-populist-party-supporters/ [https://perma.cc/5CTW-JZJ7].

175. *See* James Reynolds, *Italy Crisis: PD and Five Star Agree Coalition Deal After Talks*, BBC NEWS (Aug. 28, 2019), https://www.bbc.com/news/world-europe-49502232 [https://perma.cc/E6PY-9XYW].

176. The classic article is Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990). *See also* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 680 (2000).

177. *See* Ackerman, *supra* note 176, at 646.

178. For an argument that in Brazil this combination of presidentialism and PR is serving as a counter to Bolsonaro becoming an Orbán, see Benvindo, *supra* note 121.

the *timing* of the separate legislative and executive elections in presidential and semi-presidential systems. Where they are more or less simultaneous, there is far greater probability of unified party government; that is, with the same party or parties winning the presidency and a legislative majority.[179] France provides a well-known natural experiment of this phenomenon, often referred to in the U.S. context as the "coattail effect."[180] Prior to a constitutional amendment in 2002, French elections were not simultaneous and the result was the frequent dispersal of power known as "cohabitation." Since elections were made more-or-less simultaneous in 2002, the presidential victor's party has also won the near-contemporaneous legislative elections every time. The most striking instance of this was in 2017, when President Macron's brand new,[181] rapidly assembled, purpose-built party La République En Marche! won a landslide victory in the National Assembly election six weeks after he was elected to the presidency.[182] In the United States, constitutionally mandated midterm congressional elections often result in a flip from a unified government emerging from the simultaneous presidential and legislative elections to a divided government two years later, as occurred when Republicans took control of the House of Representatives in 2010 and Democrats in 2018. A more routine instance of this phenomenon than the French, but for our purposes equally illustrative, is the Polish case in 2015. Like France, Poland has a semi-presidential system and held its presidential and legislative elections five months apart,[183] which, although not exactly simultaneous, is still more likely to result in the same party winning both and the highly concentrated power that results, than if they were held in different years. It is largely irrelevant that this concentrated power ("superpresidentialism") is primarily wielded by the party leader than the elected front man. Turkey's first fully executive presidential election was held on the same day as its legislative elections, with predictable results.[184]

---

179. MATTHEW S. SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 220–27 (1992).

180. *See, e.g.,* John A. Ferejohn & Randall L. Calvert, *Presidential Coattails in Historical Perspective*, 28 AM. J. POL. SCI. 127, 127 (1984).

181. Macron formed the party on April 6, 2016.

182. The second round of the presidential election was held on May 7, 2017, and the legislative elections on June 18, 2017.

183. The elections were held in May and October.

184. However, Erdoğan's AKP party actually lost its independent legislative majority, only retaining control after the election in alliance with its formal partner, the far-right MHP. *See* Kemal Kirişci, *How to Read Turkey's Election Results*, BROOKINGS INST.: ORDER FROM CHAOS (June 25, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/06/25/how-

Finally, putting the mode and timing of elections together, the combination of simultaneous or near-simultaneous elections and a majoritarian voting system for the legislature is most likely to lead to the concentration of power in the executive, and so is the riskiest from the perspective of the anti-concentration principle. Only slightly less risky are simultaneous elections and a modified PR system that permits legislative majorities or even supermajorities by over-rewarding the leading party, as in Poland and Turkey. Non-simultaneous elections combined with a majoritarian voting system come next, likely followed by non-simultaneous elections with modified PR, and then simultaneous elections with a pure PR system. The least risky, and therefore the preferred choice for the counter-playbook, is non-simultaneous elections with a pure PR voting system.

Turning briefly to voting rules per se, it has been suggested that mandatory voting, as in several countries including Australia, might be a useful tool, given that some populist regimes have benefitted from relatively low electoral turnouts.[185] The underlying idea here is that populism has thrived from the sense of alienation that large swaths of the population feel with the mainstream parties, resulting in a lower likelihood of supporters turning out to vote for them as compared with the more highly motivated partisans of populist parties. If this thesis is accurate, however, it is far from clear that requiring people to vote would likely result in greater support for non-populist parties or presidential candidates rather than many of the alienated lodging protest votes.[186] Empirically, this is a risky bet and one whose outcome may well vary based on timing and context, whatever the independent normative reasons for such a system.

For the most part, populist regimes retain free and fair elections overall by current international standards. Nonetheless, tilting electoral rules and practices in their favor, as several have done,[187] is

---

to-read-turkeys-election-results/ [https://perma.cc/J2T8-VSK9].

185. *See, e.g.*, András László Pap & Anna Śledzińska-Simon, *Mandatory Voting as a Tool to Combat the "New Populism,"* INT'L J. CONST. L. BLOG (Apr. 19, 2017), http://www.iconnectblog.com/2017/04/mandatory-voting-and-the-new-populism [https://perma.cc/9WFW-3GVG]; Rosalind Dixon & Anika Gauja, *Australia's Non-Populist Democracy? The Role of Structure and Policy*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 395, 406–10.

186. For example, compulsory voting in Belgium may have helped the far-right Vlaams Belang (Flemish Interest) party to increase its number of national legislative seats from three to eighteen in the 150-member body in 2019. *See 2019 Belgian Federal Election Results: Conventional Parties Lose Ground*, ELECTIONARIUM (May 27, 2019), https://electionarium.com/2019-belgium-federal-election-results/ [https://perma.cc/6CUR-44HQ].

187. On Hungary, see *supra* note 155.

another means of concentrating power by reducing the likelihood of defeat and rotation. Accordingly, how such rules and practices are made and changed, and by whom, are important questions of democratic design. Compared to the common practice of constitutions specifying the precise mode of presidential election—even though, as an inherently winner-take-all office, one of the few available forms of majoritarian voting systems must be used—the far wider choice of systems for the multiple offices in legislative elections is relatively rarely made in a constitutional text. Rather, in all three forms of government, they tend to be left to organic or ordinary laws.

One of the exceptions illustrates how and why constitutionalizing legislative election rules may help to prevent this means of consolidating power. The South African constitution mandates PR for its single parliamentary election.[188] Although the African National Congress (ANC) has been the dominant political party in the country since the end of apartheid, only rarely has it been able to achieve the legislative supermajority under PR needed to amend this provision of the constitution to a majoritarian or other electoral system that would make this achievement more routine and thereby significantly increase its power. For example, if unilaterally armed with the general amendment power, the ANC would be in a stronger position to undermine the constitutional independence of the various Chapter 9 "state institutions supporting constitutional democracy."[189] As things stand, the ANC is unable to act by itself, and other parties are unlikely to agree to amend the PR provision, which generally benefits them as compared with a majoritarian system given the dominant status of the ANC and the likely consolidating consequences of such amendment. By contrast, if the electoral rule were not constitutionally entrenched but simply an ordinary law, as in many countries, the ANC would likely have changed it long ago, and consolidated its control of the legislature.

Where drawing and redrawing electoral districts to keep up with population changes is required by the choice of electoral system for the legislature,[190] the anti-concentration principle requires that this task be undertaken by politically independent, expert entities, such as boundary or election commissions to avoid the familiar problems of

188. *See* S. AFR. CONST., 1996, art. 46(1).

189. These institutions include the South African Human Rights Commission, the Public Protector (anti-corruption official), and the Electoral Commission. *See infra* Section IVA.5.

190. Such drawing or redrawing is necessary where there is a majoritarian system with single-member districts or multi-member districts that are not co-extensive with separately established political boundaries (e.g., states).

partisan gerrymandering. Indeed, as an important type of horizontal accountability institution to be discussed below,[191] independent election commissions should be primarily (i.e., as supplemented by special or general courts) or exclusively tasked with all aspects of election management, including proposing changes to any sub-constitutional laws, investigating and remedying electoral fraud, and resolving disputes before, during, and after elections.

Despite the centrality and importance of political parties as constitutional actors, they remain largely unregulated by democratic constitutions,[192] with one or two specific exceptions. This mostly reflects their underlying conceptualization as "private" organizations whose autonomy and freedom of association is protected against the state, on a par with religious organizations, civil society groups, and trade unions.[193] Indeed, the right to form or join a political party as an instance of freedom of association is one of the only few ways that constitutions typically even mention or acknowledge the existence of parties. The others include the well-known bans on "militant democracy" in Germany and a few other countries[194] and on parties rejecting the basic constitutional principle of secularism in Turkey.[195] The former approach has been subject to widespread critique in recent years[196] and, in any event, does not, and should not be understood to, include authoritarian populist parties. With respect to the latter, as referenced above, the ruling AKP narrowly survived a Turkish constitutional court ban in 2008.[197]

This prevailing "private actor" approach to political parties is clearly unrealistic given their huge role in the public life of a democracy. This is true even if their distinctive role in bridging the gap between individual citizens, civil society, and public office means that

191. *See infra* Section IV.A.5.

192. *See* Gardbaum, *supra* note 139, at 234; Kim Lane Scheppele, *The Party's Over*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 495, 510; Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 CURRENT LEGAL PROBS. (forthcoming 2020) (on file with author).

193. On the greater practical ability of such organizations as political parties, trade unions, and religious groups to resist governmental violations of their constitutional rights than ordinary, disconnected individuals, see ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 45 (2020).

194. *See, e.g.*, SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 36 (2015)

195. *See* Bâli, *supra* note 69, at 671.

196. *See* ISSACHAROFF, *supra* note 194, at 38–39; GINSBURG & HUQ, *supra* note 19, at 170–73.

197. *See supra* text accompanying note 71.

their appropriate regulation is a more complex issue, involving a variety of interests and claims, than the regulation of fully public entities.[198] Moreover, the role of political parties specifically in structural populism has been huge. It is not only Orbán, Chávez, Erdoğan, and Kaczyński, but also Fidesz, PSUV, AKP, and PiS—the distinctive, once-outsider parties they founded and lead—that are in and exercising power as the essential tools of the autocrats. From the perspective of the anti-concentration principle, there are several goals or concerns that constitutional regulation and design may help to achieve or address.

The first is that political parties should be expected to accept and maintain a minimum level of intra-party democracy to prevent them from becoming a breeding ground for, or exporter into the public sphere of, authoritarian modes of leadership.[199] Here, Germany is one of the only countries with such a constitutional requirement, as implemented through its Party Law,[200] although the minimal mandate to elect the party leader by party congress does not address the major concern, which is concentrated, consolidated powers within the party rather than the leader's popularity. The second is the problem of individual consolidation of power over time and lack of rotation in office, which might justify constitutional term limits as a party's elected official *of any sort* and/or party leader. Although obviously overlapping with term limits on the presidency or prime ministership discussed above, they could address two scenarios that the latter do not and which have been employed by populist leaders. Erdoğan transferred seamlessly from prime minister to (directly elected but then still supposedly ceremonial) president in 2014 when he exhausted his three-term limit as an AKP legislative representative under the party's internal rule. The other scenario is the long-term party leader who does not hold executive office, as with PiS's Kaczyński. Of course, had it not been in his interest to switch office, Erdoğan would have had the party's rule changed, or perhaps even formed a new party, but constitutionalizing such a rule would make it more difficult or costly to evade. The third goal is financial transparency of political parties and sources of funding, which may help to deal with concerns about the concentration of economic power being converted into political power (and vice-versa) by shedding light on the shadowy financing of party

198. Khaitan, *supra* note 166.

199. Scheppele, *supra* note 192, at 511.

200. Parteiengesetz [ParteienG] [Political Parties Act], July 24, 1967, BUNDESGESETZBLATT, TEIL I [BGBL] I at 149, §§ 6–11 (Ger.), translation at https://www.bundestag.de/blob/189734/2f4532b00e4071444a62f360416cac77/politicalparties-data.pdf [https://perma.cc/A2QE-DHKB].

activity and the connections between economic and political oligarchs. As we will see below,[201] such connections have played an important role among structural populist regimes in consolidating power vis-à-vis the media in particular.

In addition to such obligations or regulations that the anti-concentration principle suggests for political parties, there are also a few important *rights or privileges* beyond the standard freedom of association or membership model. Specifically, in all forms of government the opposition party or parties should be guaranteed certain rights in legislative proceedings and procedures that their minority status would not otherwise provide in order to reduce the concentration of power and increase executive accountability, especially in a context of unified/majority government.[202] For example, in some legislatures opposition parties are allocated a certain number of committee chairs and/or debate days.[203] Similarly, a minority of legislative members may be empowered to set up a committee to investigate the government for possible illegality or maladministration,[204] and even individual members of the legislature may be granted rights to introduce legislation and/or motions of censure free of majority party control of procedures or timetable.[205] As we have seen, the sidelining and neutralizing of opposition party legislators has been a feature of PiS's fast-track lawmaking process since 2015.

Finally, although not strictly part of the anti-concentration principle per se, the method of selecting party candidates for chief executive can have a significant effect on the likelihood of populist of both types gaining power in the first place. In earlier work, Rick Pildes

---

201. *See infra* Section IV.A.6.

202. On opposition party rights, see David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 575 (2009); *see also* GINSBURG & HUQ, *supra* note 19, at 97. An insightful presentation on this topic was given by Sujit Choudhry at the panel on Political Parties and the Constitution at the 2019 ICON-S conference in Santiago.

203. These two opposition party rights have fairly recently been introduced into the UK's House of Commons. Although they are not constitutionally guaranteed, they are part of the current rules of procedure and apply regardless of the majority, minority, or coalition status of the government. *See* Fontana, *supra* note 202, at 574–75. In Germany, the Bundestag's (lower house of the legislature) rules of procedure allocate standing committee chairs by relative party strength, meaning that the opposition party always chairs several (including the budget committee in particular). *Id.* at 571.

204. Art. 44(1) of the Basic Law in Germany provides this right. GRUNDGESETZ [GG] [BASIC LAW], art. 44(1) (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index html [https://perma.cc/Q9GC-64NK].

205. The South African Constitutional Court's interpretations of sections 55(1)(b), 73(2), and 102(2) of the constitution have provided this right. *See* Oriani-Ambrosini v. Susulu 2012 (6) SA 588 (CC) ¶¶ 51, 57 (S.Afr.); Mazibuko v. Sisulu 2013 (6) SA 249 (CC) ¶ 41 (S. Afr.).

and I argued that the presence of "peer review" can help to filter out candidates known to their fellow politicians, but not necessarily to ordinary party members or voters, to be unqualified for office by virtue of temperament, judgment, intelligence, or ethics.[206] The absence of such a filter, as more-or-less unique in the modern U.S. system of primary elections, facilitates the capture of a mainstream party by a populist outsider like Trump and smoothes the path to power. By contrast, its presence may effectively force populists to form their own parties, which, combined with PR and their toxic reputation, may leave them as ideologically purer but minority parties outside of government.

4. Judicial Independence

As the specialist institutional arbiters of legality, courts are in a central position to affirm or reject many of the moves made by structural populists. It is this key role that creates their strategic importance and has led to the common populist move of either amending/replacing the constitution to render concentration of power constitutional (including greater control of the courts themselves), or the use of ordinary law to achieve the same goal after first capturing the constitutional court, or both. Accordingly, the anti-concentration principle places particular emphasis on protecting and insulating the independence of judges, both those empowered to conduct constitutional review and (where different) those performing the ordinary judicial functions of interpreting, applying, and adjudicating the criminal and civil law that is employed as part of the populist toolkit to harass opponents.

This emphasis plays out in terms of the various (albeit somewhat interdependent) institutional dimensions and design choices regarding the judiciary. The discussion that follows is, once again, framed by the context and risk of structural populism, and is not directed at well-functioning democracies seeing less reason to adapt to this danger, or at judicial review in general. What is prudent in one may well be unnecessary and/or undesirable in the other. Starting with the organization of constitutional review, the basic choice between a specialist constitutional court and decentralized review is perhaps the most difficult from the perspective of the anti-concentration principle. On the one hand, a single court exercising the power of judicial review of legislation, and perhaps also of constitutional amendments, may be too tempting a target and easier to capture than are multiple courts and

206. Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 658 (2018).

judges.[207] It places all the constitutional review eggs in one basket, as it were. Here, as elsewhere in institutional design, pluralism is inherently less risky than monism. And this risk has of course materialized of late, as the centralized constitutional courts in all four of the paradigmatic cases of structural populism were targeted and captured, albeit some more quickly and with greater priority than others. By contrast, in Poland it has been the multiple ordinary courts, which lack the power of judicial review and are part of the civil service bureaucracy, that have been somewhat more resistant to capture and control by the government.[208]

But on the other hand, comparative constitutional experience suggests that the relatively rare combination of decentralized judicial review and a career, civil service judiciary—as distinct from the second career, high-status judiciary of the common law tradition—is normally a recipe for less robust and more deferential constitutional review, as per the examples of Japan and the Scandinavian countries.[209] However appropriate this may be for these countries, and however much it may even correlate with their overall success as mature, wealthy, well-functioning democracies,[210] this is not the context in which we are assessing this combination. Indeed, it was precisely this concern about the training, mentality and incentives of the ordinary career judiciary that led most civil law countries to create a new, specialized, and specially staffed and appointed constitutional court in the first place.[211] Accordingly, short of fundamental, counter-cultural reform of the ordinary judiciary, decentralized judicial review remains a risk in terms of the independence required of the function where the threat or reality of structural populism exists, but overall perhaps less of a risk than the relative ease of capture and neutralization of a single court. A third option worth exploring in this context is a form of hybrid review, with a mix of centralized and decentralized review, as differently institutionalized and practiced, for example, in Brazil, Colombia, and South Africa.[212]

---

207. *See* SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 12, at 96–97.

208. *Id.* at 96–110.

209. *See* Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts?*, 29 DUKE J. COMPAR. & INT'L L. 1, 38 (2018).

210. *See* Ran Hirschl, *The Nordic Counternarrative: Democracy, Human Development, and Judicial Review*, 9 INT'L J. CONST. L. 449, 458 (2011).

211. *See, e.g.,* Wojciech Sadurski, *Constitutional Review in Europe and the United States: Influences, Paradoxes, and Convergence* (Sydney L. Sch. Legal Stud. Rsch. Paper No. 11/15, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754209 [https://perma.cc/H82X-FAZW].

212. *See, e.g.*, Albert H. Y. Chen & Miguel Poiares Maduro, *The Judiciary and*

The other, somewhat interdependent, institutional design issues are perhaps slightly easier to resolve. With respect to the number of judges, this should be constitutionalized to render more difficult the common playbook tactic of increasing the size of the court by statute. With respect to the appointments process of both the constitutional and ordinary judiciary, where these differ, minimizing or excluding altogether political nomination, and especially political nomination by a single body or by simple majority, seems to be the order of the day, given recent experiences of court-capture in both types of populist regimes. In Poland members of the Constitutional Tribunal are selected exclusively by the Sejm, by a simple majority of members, which, after October 2015 meant by PiS.[213] In Hungary, the requirement is a two-thirds majority of the unicameral legislature.[214] Fidesz changed the previous rule requiring cross-party consensus for constitutional court appointments in 2011.[215] In Venezuela, a 2004 law changed the appointments process to simple majority vote of the single-chamber legislature.[216] The minimizing of political nomination also accords with a growing trend around the world. The two main contemporary forms of rejecting or limiting political control of judicial appointments are (1) the independent appointments commission, consisting of various legal and lay members and on which the government may be represented but in a minority capacity, and (2) the exclusively judicial council. Of course, as always, neither is a guarantee against governmental influence or even capture but, when interwoven with the other institutional dimensions, both help make concentration more difficult. And there are the usual trade-offs with other constitutional goals— here, those specifically concerning the judicial review function, such as imbuing it with as much indirect democratic legitimacy as possible, bringing more representative, less elite views to bear, etc.[217] But again, from the perspective of the anti-concentration principle, discussion should focus on the relative merits of, and variations on, the two least politically controlled processes.

Regarding length of tenure, for constitutional/apex court

*Constitutional Review*, *in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 97, 99 (Mark Tushnet et al. eds., 2013).

213. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ Apr. 2, 1997, art. 194(1) (Pol.).

214. MAGYARORSZÁG ALAPTÖRVÉNYE June 29, 2018, art. 24(4) (Hung.).

215. *See* Scheppele, *supra* note 83.

216. *See supra* text accompanying note 55.

217. There is also the risk of too much judicial independence in a context where courts are the partisan guardians of one group or value, as with the Kemalist legacy in pre-2010 Turkey. *See* Aslı Ü. Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235, 280–81, 294–95 (2012).

judges, at least, the comparative menu of options runs from life terms with and without a mandatory retirement age, to renewable and unrenewable fixed terms of various lengths, the latter most commonly between nine and twelve years.[218] From the perspective of the anti-concentration principle, this issue of tenure is largely secondary to the mode of appointment which, if independent of political control, should be a bulwark against capture regardless of length of judicial terms. But as insurance against politicization of the appointments process, what is to be said for the various term lengths? To reduce the number of constitutional court vacancies, and so limit the legal opportunities for packing and capture, life tenure without mandatory retirement seems the best option. This is so even though it also has the cost of entrenching the selection, and so controlling the fewer vacant seats for the longest periods, and in all other contexts is likely the least defensible option.[219] However, the alternatives all create the risk of higher natural turnover, and thereby of formally valid capture of a majority of the court, as partly happened in Poland.

The jurisdiction and powers of constitutional courts are, of course, also important. First, relatively broad standing rules to challenge the legality of government action seem appropriate, as courts cannot counter concentration if their doors are closed. Fidesz's early abolition of the *actio popularis* enabling ordinary citizens to seek abstract judicial review was a harbinger of more restrictive and concentrative actions to come. The plausibility of many of the Trump administration's routine standing challenge to lawsuits filed against it demonstrates the potency of restrictive standing rules.[220] Second, constitutional courts should have clear and express jurisdiction to maintain the structure of democracy,[221] even if other independent institutions such as election commissions operate in similar territory as the initial barrier against abuse. Temporal concentration of political power by changing the rules of electoral competition in their favor in an attempt

218. As is well known, where fixed terms are used and future employment prospects become potentially relevant, best practice for the protection of judicial independence is anonymous judgments without concurrences or dissents, in the civil law tradition. *See, e.g.*, Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225, 266 (2017).

219. Among major democracies, only the United States grants this judicial tenure (to its federal judges).

220. *See, e.g.*, Citizens for Resp. & Ethics in Washington v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017); Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020); *see also* Jeremy Venook, *The Case(s) Against Trump*, ATLANTIC (Mar. 27, 2017), https://www.theatlantic.com/business/archive/2017/03/the-search-for-standing/520467/ [https://perma.cc/PA9K-72BY].

221. *See* ISSACHAROFF, *supra* note 194, at 238–39.

to entrench the position of the regime has been such a common feature of structural populism that all available resources should be geared towards resisting it.[222] Third, since procedurally valid constitutional amendments concentrating political power and dismantling constitutional democracy have been one of the hallmarks of abusive constitutionalism, it is important that constitutional courts have the power to review their substance—in combination with textual provisions that reject such moves, including eternity clauses discussed below.[223] Finally, in addition to standard judicial review of legislative outputs, constitutional courts should have the power to review legislative processes, including internal rules of proceedings. This can be an important way to counter concentration of political power, especially between the executive and the legislature, by requiring legislatures to fulfill their constitutional and political obligation to hold executives accountable, and affording opposition parties and legislatures certain procedural rights, such as initiating debates, oversight hearings, legislation, and votes of confidence.[224]

As far as the non-constitutional court judiciary is concerned, its independence is also an important part of the counter-playbook. This is obviously the case where judicial review is decentralized for, as the lower part(s) of the constitutional judiciary, these judges are both the first barrier against government anti-constitutionalism and harder to capture because they are more numerous. But even where centralized, a still-independent ordinary judiciary is a key foil against the ordinary law strategy of harassing political opponents via tax, libel, sedition, and anti-terrorism laws in particular. The priority the various structural populist regimes have given to gaining control over the ordinary judiciary, typically second only to capturing the constitutional court, evidences the importance of the enterprise. Once again, in light of the common playbook move of subjecting the appointment, promotion, transfer, deployment, and retirement of ordinary judges to direct political control, the key countermeasure is to insulate the ordinary judiciary through independent or even entirely self-governing judicial councils, supported (where they are members of it) by the more general independence of the bureaucracy required for executive separation of

222. In this context, the formalistic reasoning of the U.S. Supreme Court in denying its jurisdiction to prevent flagrant partisan gerrymandering due to lack of justiciable standards reads more like the arguments of the underminers of democracy, the autocratic legalists, than its defenders. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

223. *See infra* Section IV.B.

224. For an example of how judicial review of legislative processes can help to counter the concentration of power, see Stephen Gardbaum, *Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa*, 9 CONST. CT. REV. 1, 6–9 (2019).

powers.

5. Horizontal Accountability Institutions

In addition to executive separation of powers—dispersing power *within* the executive branch, the branch that almost everywhere has become the most powerful—discussed above, the anti-concentration principle also suggests the usefulness of creating certain independent institutions *outside* the executive branch. Variously referred to as the "fourth"[225] or "fifth"[226] branch, "horizontal accountability"[227] and "Chapter 9"[228] institutions, or "institutions protecting constitutional democracy,"[229] they serve a dual function in the context of structural populism. The first is to provide politically independent management and oversight of specific areas or issues that are key to the well-functioning of constitutional democracy but which are also characteristically prone to partisan conflict and abuse—and therefore tempting targets for would-be consolidators of all stripes, including authoritarian populists. Such areas and issues include all aspects of elections, corruption in politics, maladministration of the law by public officials, and monetary policy, and have resulted in the creation of constitutionally protected election commissions and tribunals, anti-corruption agencies and officials, various kinds of ombudspersons, civil service commissions, and independent central banks.[230] The second function is the more general one of further dispersing power and accountability mechanisms among a larger number of institutions that are insulated from political control or capture. In this way, such institutions can be said to protect constitutional democracy both directly, insofar as they successfully manage their important specific tasks, and indirectly, by their existence as multiple sites of independent power, and so erecting numerical barriers to consolidation.[231] Once again, ordinarily, the

225. *See generally* Michael Pal, *Electoral Management Bodies as a Fourth Branch of Government*, 21 REV. OF CONST. STUD. 85 (2016).

226. *See, e.g.*, MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 96–112 (discussing an emerging fifth branch of government).

227. *See generally* Guillermo O'Donnell, *Horizontal Accountability in New Democracies*, 9 J. DEMOCRACY 112 (1998).

228. The institutions are based on the chapter of the South African constitution entitled (and containing the various) "State Institutions Supporting Constitutional Democracy."

229. Mark Tushnet, *Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries*, 70 U. TORONTO L. J. 95, 96 (2020).

230. *Id.* at 105.

231. *See* GINSBURG & HUQ, *supra* note 19, at 196.

number, powers, and appointments processes of these institutions raise difficult design issues in terms of tensions and trade-offs among relevant values, especially accountability and independence,[232] but in the context of structural populism, a large thumb on the scale for the latter appears prudent.

The potential role of such institutions in countering concentration of power is well illustrated by recent events in South Africa. Triggered initially by robust media coverage of the Nkandla and Gupta scandals involving President Zuma,[233] the Public Protector, the constitutionally created independent misconduct and anti-corruption official, issued two damning reports that eventually led to Zuma's ouster by the ANC, first as party leader and then as the country's president.[234] The Public Protector's work was also supported by the courts, which held her reports to be legally binding on the government and parliament, in an interesting and important example of cross-institutional support among the media, Public Protector and courts, to counter the concentration of power in the dominant governing party that threatened to create impunity for criminal acts.[235] On the other hand, one should not be Pollyannish about this institution, whose incumbents are appointed by the president with the approval of both Houses of Parliament by supermajority vote for seven-year non-renewable terms.[236] Apart from Thuli Madonsela, the author of these two reports, the other Public Protectors since 1995 have mostly not exhibited significant independence from their ANC patrons.[237]

The importance of independent election commissions in helping to sustain constitutional democracy and prevent the obvious risk of concentrating power by executive or legislative manipulation of elections and their rules, has gained increased recognition and focus

232. *See* Tushnet, *supra* note 229, at 98–101.

233. The first involved use of public funds to upgrade Zuma's private country home. The second concerned allegations of a corrupt relationship with the Gupta business family, including their influencing Zuma's ministerial appointments. *See, e.g.*, Rod Alence & Anne Pitcher, *Resisting State Capture in South Africa*, 30 J. DEMOCRACY 5, 12–13 (2019).

234. Stu Woolman, *A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President*, 8 CONST. CT. REV. 155, 155–56 (2016).

235. *Id.*

236. S. AFR. CONST., 1996, arts. 183, 193(5)(b(i).

237. The current Public Protector, Busisiwe Mkhwebane, appointed by Jacob Zuma in 2016, was held by the Constitutional Court to have acted in bad faith against Cyril Ramaphosa, who ousted and succeeded Zuma as president in 2018. Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC), ¶ 172 (S. Afr.).

around the world.[238] This, in turn, has led to a rise in partisan/executive capture of election commissions, as exemplified in at least three of our case studies.[239] Accordingly, as with other institutions, the balance and tension between accountability and independence should, for our purposes, be skewed in favor of the latter, and the two issues of what arrangements are most likely to secure their independence and how to preserve or entrench these arrangements are central. As with constitutional courts, the anti-concentration principle calls for an independent selection process for horizontal accountability institutions, leading to the appointment of non-party affiliated individuals, with longer tenures as insurance to limit the number of openings. In terms of powers, an appropriately structured and composed commission should be empowered to resolve all aspects of elections and electoral disputes, either exclusively or with final review by the constitutional court. And in terms of legal status, they should be constitutionalized, as in South Africa,[240] India,[241] and in several other countries,[242] in order to complicate the possibilities of capture or jurisdiction-stripping that inhere in statutory bodies.

### 6. The Media

The Zuma case in South Africa demonstrates the important role of an independent and robust media in maintaining democracy and resisting its erosion. As noted above, structural populists have not, for the most part, engaged in mass violations of civil and political rights, including the freedom of speech and expression of ordinary citizens. Rather, here too, the main and more distinctive (though not exclusive) strategy has been structural. It aims to systematically undermine pluralism and consolidate power by gaining control over and/or ownership of formerly independent media outlets. This has occurred most visibly in Turkey and Hungary, although Poland is not too far behind

238. Richard Albert & Michael Pal, *The Democratic Resilience of the Canadian Constitution*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 7, at 117, 127. As well as in scholarship, *see generally, e.g.,* Pal, *supra* note 225.

239. Hungary, Venezuela, and Poland. On Hungary, see *Submission and Fear Everywhere*, HUNGARIAN SPECTRUM (Apr. 19, 2018), https://hungarianspectrum.org/tag/national-election-commission/ [https://perma.cc/DDG6-Z4EL]. On Venezuela, see Landau, *supra* note 46, at 170. On Poland, see SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 12, at 140–143.

240. S. AFR. CONST., 1996, arts. 190–91.

241. INDIA CONST. art. 324.

242. These include Mexico, Costa Rica, South Korea, Kenya, and Bangladesh. *See* Pal, *supra* note 225, at 98–102.

and is catching up.[243]

All three regimes have followed similar strategies for their assaults on the freedom of the press and media. In Hungary and Poland, the populist governments acted quickly to take over control of the public television and radio broadcasters. In Hungary, all public stations were bundled together into a single entity and placed under the supervision of the new statutorily created watchdog, the Media Council, whose members are selected by parliament and are all Fidesz supporters.[244] In Poland, PiS replaced the management and many journalists of the public television and radio broadcasting company, and bypassed the constitutionally independent National Broadcasting Council with the statutorily created National Media Council, three of whose five members are appointed by the Sejm and are currently PiS lawmakers.[245] As a result, public television and radio have become virtual mouthpieces for the government, with opposition parties or their positions rarely given air time. By presidential decree in 2018, Erdoğan placed Turkey's public broadcaster directly under his control.[246]

The second prong of the strategy has been to bring about a transfer in ownership of almost all independent private media outlets to pro-government business tycoons. In Turkey, nearly ninety percent of national mainstream press and television media are now owned by Erdoğan allies.[247] These transfers have been engineered by such tactics as securing billion-dollar fines for trumped-up tax evasion charges,

---

243. Among the four paradigm cases, Venezuela is somewhat exceptional in that the government's control of the media has, for the most part, relied more on direct regulation and censorship of the still predominantly private media than structural measures to transfer ownership and control into friendly hands. The major tool has been the 2004 Law on Social Responsibility in Radio and Television, discussed at *infra* text accompanying notes 55–56, which also includes a provision empowering the government to compel private radio and television stations to carry its broadcasts: the "cadenas nacionales" (national broadcasts).

244. Marton Dunai, *How Hungary's Government Shaped Public Media to its Mold*, REUTERS (Feb. 19, 2014, 12:35 AM), https://www reuters.com/article/us-hungary-media-insight/how-hungarys-government-shaped-public-media-to-its-mould-idUSBREA1I08C20140219 [https://perma.cc/D6ME-2Y7J].

245. Annabelle Chapman, *Pluralism Under Attack: The Assault on Press Freedom in Poland*, FREEDOM HOUSE, (June 2017), https://freedomhouse.org/sites/default/files/2020-02/FH_Poland_Media_Report_Final_2017.pdf [https://perma.cc/E4R9-H3D9].

246. *Turkey's Public Broadcaster TNT Put Under Direct Control of President Erdoğan*, STOCKHOLM CTR. FOR FREEDOM (July 25, 2018), https://stockholmcf.org/turkeys-public-broadcaster-trt-put-under-direct-control-of-president-erdogan/ [https://perma.cc/NK5U-T3CN].

247. Zia Weise, *How Did Things Get So Bad for Turkey's Journalists?*, ATLANTIC (Aug. 23, 2018), https://www.theatlantic.com/international/archive/2018/08/destroying-free-press-erdogan-turkey/568402/ [https://perma.cc/T3UW-7GX3].

forcing the sale of assets, and the closing down of media outlets by the government-controlled Radio and Television Supreme Council.[248] Where these types of moves are unavailable, as with global information and social media outlets, the Turkish government has turned to a mixture of outright bans on use, as with Wikipedia,[249] and regulating local content.[250] In Hungary, a similar percentage of private media sources are now owned by Orbán supporters, capped by the "donation" of four hundred independent outlets to a foundation run by Fidesz loyalists in 2018.[251] Along with other forms of pressure and harassment by the regulatory authorities, starving critical outlets of state advertising revenues has been a major government tactic to weaken them. In Poland, where the majority of independent private media companies are German-owned, and financially stronger, PiS has, after its 2019 electoral victory, renewed talk of taking steps to bring about the "repolonization" of the media.[252]

The third and final prong of the strategy has been the outright targeting of critical journalists and outlets—in Turkey by means of prosecution and jailing for sedition or supporting terrorism, and the above-mentioned criminal tax charges—as well as criminal and civil libel actions in Hungary, Poland, and Turkey.[253]

Constitutional protection of an independent media should seek to guard expressly and specifically against each of these three pages from the structural populist playbook. The independence of public broadcasting ought to be a requirement, supported by a prohibition on governmental operation or control, the creation of an independent supervisory board or commission, and the guarantee of an autonomous funding source. As for private media outlets—television, print and

248. Suzy Hansen, *What Remains of the Turkish Press*, COLUM. JOURNALISM REV. (Summer 2019), https://www.cjr.org/special_report/turkish-press.php [https://perma.cc/NS43-AK72].

249. *Turkey's Wikipedia Ban Ends After Almost Three Years*, BBC NEWS (Jan. 16, 2020), https://www.bbc.com/news/technology-51133804 [https://perma.cc/LZ38-X52M].

250. Marc Santora, *Turkey Passes Law Extending Sweeping Powers Over Social Media*, N.Y. TIMES (July 29, 2020), https://www.nytimes.com/2020/07/29/world/europe/turkey-social-media-control.html [https://perma.cc/ZF8G-TK5H].

251. Patrick Kingsley, *Orban and His Allies Cement Control of Hungary's News Media*, N.Y. TIMES (Nov. 29, 2018), https://www nytimes.com/2018/11/29/world/europe/hungary-orban-media.html [https://perma.cc/SA77-E7PQ].

252. *Polish Government to 'Repolonize' Media in Next Term, Deputy PM Says*, REUTERS (June 20, 2019, 8:10 AM), at https://fr reuters.com/article/us-poland-media-idUSKCN1TL1EX [https://perma.cc/AS9P-88FQ].

253. *See* Varol, *supra* note 66, at 342–45; Sadurski, *Constitutional Crisis in Poland*, *supra* note 12, at 269; Dunai, *supra* note 244.

online—a constitutional commitment to pluralism is essential and should include (1) a prohibition on a monopoly for public broadcasting; (2) a prohibition on most forms of governmental interference with, or regulation of, the political content of journalism, including banning outlets; and (3) specified limits on the concentration of private ownership of the media. Certain of these provisions have been inferred by, for example, the German Constitutional Court and the European Court of Human Rights from more general rights to freedom of expression and of the media,[254] but in our context, express and specific provisions are to be preferred. Finally, protection against the techniques for the outright targeting of journalists requires a combination of greater constitutional rights to freedom of expression against sedition and libel, and the existence of an independent ordinary judiciary to reject governmental abuse of tax and criminal laws by throwing out trumped-up or selective, politically motivated prosecutions.

### 7. Transnational and International Law

Transnational and international law may provide a legal and political check on structural populism that is harder to undermine or degrade than purely internal ones.[255] The nature of the potential check is dual. First, the more fully external dimension derives from membership in an international or regional organization or regime, such as the European Union, the Council of Europe (and hence the European Convention on Human Rights), the Organization of American States, or the Inter-American Convention on Human Rights. Membership typically imposes international legal obligations on members that cover not only their inter-state but also their domestic conduct, and the organization may have mechanisms to enforce some or all of them, including potentially suspension of membership or expulsion. Depending on the political and economic benefits of membership, the visibility and publicity attached to violations, and the likelihood or severity of enforcement procedures, populist regimes may feel constrained

254. *See, e.g.*, Informationverein Lentia and Others v. Austria, App. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90 EUR. CT. H. R. (1993) (public broadcasting monopoly violates freedom of expression under Art. 10 of the European Convention on Human Rights).

255. *See generally* GINSBURG & HUQ, *supra* note 19, at 191–92. On the growing importance and frequency of transnational constitutional engagement, see generally VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010). On the specific role of transnational norms for application of the unconstitutional constitutional amendments doctrine, see generally Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015).

in how they act domestically as a result. It could certainly affect assessment of the cost-benefit ratio of their actions.

The second dimension is more internal, in that transnational or international law may directly be part of national law that domestic courts apply and enforce. This in turn may be (1) because this legal effect is part of what membership of a specific international organization requires—such as the EU[256]—or (2) because this is the general position that a country's own constitutional system takes towards international law or parts of it. So, for example, a constitution may specify that all ratified international treaties, only human rights treaties, and/or principles of customary international law are part of domestic law, and may grant them a legal status below, on a par with, or above ordinary statutes (or even, in principle, the constitution itself, in a case of conflict).[257]

Following the collapse of the Soviet Union, a self-conscious attempt was made by Western European countries to support and protect the transition to democracy in Central and Eastern Europe (CEE) by absorbing its newly emancipated countries into the "disciplinary structures" of the European project at the earliest opportunity.[258] Indeed, the procedure for citizens of member-states to bring claims against their governments before the European Court of Human Rights was significantly reformed and streamlined in anticipation of the volume of new cases.[259] As part of the same initiative, the Council of Europe also established the Venice Commission for Democracy through Law in 1990. Hungary and Poland were the first former Soviet-bloc countries to join the European Convention system (which Turkey joined as the thirteenth member in 1950), and both joined the EU, along with five other CEE countries in 2004.[260] EU membership involves not only the supremacy of EU law over all domestic law within national legal systems, but also respect for the values of "human dignity, freedom, democracy, equality, the rule of law and human

256. The "direct effect" of EU law in member-state legal systems is one of the fundamental principles of EU law. *See* Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1.

257. Because this second route depends only on a country's own internal choice of what constitutional status to afford international law, it would (other things being equal) be easier for a structural populist regime to amend than the first, where this status is tied to membership in an international organization that may bestow other benefits or otherwise be harder to leave.

258. *See, e.g.*, David Lane, *Post-Communist States and the European Union*, 23 J. COMMUNIST STUD. & TRANSITION POL. 461, 470–71 (2007).

259. *See, e.g.*, Rudolf Bernhardt, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145, 147–48 (1995).

260. Turkey's attempts to join the EU have so far been unsuccessful.

rights."[261] Venezuela was an original member of both the Inter-American Convention on Human Rights and the Organization of American States (OAS), but chose to leave the former in December 2012 and the latter in 2017.[262]

The record, however, does not suggest that transnational or international law has had very much of a constraining effect on the various regimes. Turkey has the highest number of adjudicated violations of the European Convention of Human Rights (ECHR) of any member country,[263] many for the same types of violation, suggesting the severe limitations of its system of inter partes, or party-specific, decisions for structural reform. Moreover, because Turkey domesticated the ECHR in 2012 and permitted claims under it to be brought in its own courts, the Strasbourg court's jurisdictional requirement of exhausting domestic remedies is less often and easily met than previously, as cases are frequently tied up in Turkish courts for years.[264] This in turn means that the external deterrent, however small in the first place, has further decreased.

Although the EU has initiated the procedure in Article 7 of the Treaty on European Union that can lead to suspension of membership against both Poland, for rule of law concerns due to PiS's undermining of judicial independence, and (belatedly) Hungary for the same and, in addition, its attacks on the media and NGOs,[265] the procedure has stalled, in part because of an obvious design flaw. Sanctions require the unanimous approval of all member-states (apart from the defendant),[266] and even if a joint vote were eventually taken against both to avoid their mutual vetoes, other central and eastern European member-states may exercise theirs. Moreover, amending the treaty to avoid this

261. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, art. 2. [hereinafter Treaty of Lisbon].

262. The departure from the OAS was effective in April 2019.

263. As of the end of 2019, Turkey had 3,645 total violations, Russia came in second with 2,699, and Italy was third with 2,410. Statistics of the ECHR, at: https://www.echr.coe.int/Pages/home.aspx?p=reports&c= [https://perma.cc/B2MF-U6QJ].

264. *See, e.g.*, *The Collapse of the Rule of Law and Human Rights in Turkey: The Ineffectiveness of Domestic Remedies and the Failure of the ECtHR's Response*, HUM. RTS. FOUND. (Apr. 2019), https://hrf.org/wp-content/uploads/2019/06/Turkey-ECtHR-Report_April-2019.pdf [https://perma.cc/58MV-ZPFJ].

265. *EU Deploys Article 7 Against Poland & Hungary for Democratic Backsliding*, YALE MACMILLAN CTR. (Sept. 17, 2018), https://macmillan.yale.edu/news/eu-deploys-article-7-against-poland-hungary-democratic-backsliding [https://perma.cc/Z9TZ-KTSE].

266. Treaty of Lisbon, art. 7(2) requires that prior to suspending a member, the European Council, which consists of the heads of government of each Member State, act unanimously to "determine the existence of a serious and persistent breach" of EU values.

problem also requires unanimous approval. On the other hand, other actions within the framework of transnational organizations may curb structural populists in some cases. For example, pressure from other European states may have helped sway Polish PiS President Duda to veto a handful of bills that the EU and Council of Europe found particularly objectionable.[267] Two successful infringement actions brought by the EU Commission against Poland in the Court of Justice of the EU (CJEU) concerning the lowering of the retirement age for Supreme Court and ordinary judges did result in the laws' repeal and the judges' reinstatement.[268] Moreover, in a November 2019 preliminary ruling the CJEU set out the criteria for the necessary judicial independence and impartiality of domestic courts under EU law and invited the referring Polish Supreme Court to ascertain whether the new Disciplinary Chamber satisfied them.[269] Following the Supreme Court's negative decision, the Commission requested the CJEU to suspend the chamber's operation pending a final judgment.[270] Soon afterwards, the Sejm responded by extending the Chamber's powers to sanction judges for criticizing the judicial reforms or other "political activities."[271] In April 2020, the CJEU approved the Commission's request and issued a temporary order requiring the Polish government to immediately suspend the chamber.[272] As yet, it has not complied.[273]

---

267. Mary Stegmaier & Kamil Marcinkiewicz, *So Poland's President Surprised Everyone, Vetoing Two Bills that Threatened the Courts' Independence. Here's What That Means*, WASH. POST (July 25, 2017), (https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/25/so-polands-president-surprised-everyone-vetoing-two-bills-that-threatened-the-courts-independence-heres-what-that-means/ [https://perma.cc/5EBJ-YS25].

268. C-619/18, European Comm'n v. Republic of Poland, ECLI:EU:C:2019:924, (Nov. 5, 2019); Case C-192/18, European Comm'n v. Republic of Poland, ECLI:EU:C:2019:531, (June 24, 2019); Matteo Mastracci, *The Rule of Law and the Judicial Retirement Age in Poland: Is the ECJ Judgment the End of the Story?*, INT'L J. CONST. L. BLOG (July 19, 2019), http://www.iconnectblog.com/2019/the-rule-of-law-and-the-judicial-retirement-age-in-poland-is-the-ecj-judgment-the-end-of-the-story/ [https://perma.cc/UZ2E-AQE6].

269. Joined Cases C-585/18, C-624/18, & C-625/18, A.K v. Sądownictwa, CP v. Najwyższy, DO v. Najwyższy, ECLI:EU:C:2019:982, ¶ 31 (Nov. 19, 2019).

270. *EU Wants Poland's Supreme Court Disciplinary Chamber Suspended*, DEUTSCHE WELLE (Jan. 14, 2020), https://www.dw.com/en/eu-wants-polands-supreme-court-disciplinary-chamber-suspended/a-52005287 [https://perma.cc/DEG9-5NRT].

271. *Polish Parliament Approves 'Judge Muzzle Law,' Commission 'Very Concerned,'* EURACTIV (Jan. 24, 2020), https://www.euractiv.com/section/justice-home-affairs/news/polish-parliament-approves-judge-muzzle-law-commission-very-concerned/ [https://perma.cc/P4N7-Z4X6].

272. Zosia Wanat, *EU Top Court Orders Poland to Immediately Suspend a Disciplinary Panel for Judges*, POLITICO (Apr. 8, 2020), https://www.politico.eu/article/ecj-orders-poland-to-suspend-a-disciplinary-panel-for-judges/ [https://perma.cc/6M6X-N87B].

273. *See, e.g.*, Daniel Tilles, *Judge Opposed to Polish Government's Judicial Reforms*

Accordingly, overall there is evidence that this external check has had some, but not significant, effect.

That said, the fact that the strategy of tying constitutional systems to transnational democratic laws and norms did not stop determined structural populism in these cases does not mean that it is powerless to make a difference in others, especially those potentially flirting with transitioning from the first type of populist regime to the second. Accordingly, dispersing political power by both limiting traditional state sovereignty through membership in transnational organizations and by incorporating international law into domestic law with at least equal status as national statutes can be a useful, if hardly foolproof, part of the counter-playbook.

### *B. Constitutional Amendment and Replacement*

So far, this Part has examined what institutional arrangements might best protect pluralism and resist the assault on the separation of power, both in terms of their substance and legal status (i.e., which of them should be constitutionalized). It now turns to the issue of how best to preserve, maintain, or entrench these institutional arrangements against the threat of structural populist attack or change.

As we have seen, constitutional amendment and/or replacement in accordance with the preexisting rules in order to concentrate political power in the regime and its leader has been the hallmark of structural populism in countries like Hungary, Venezuela, and Turkey. Accordingly, making these rules more onerous and harder to satisfy in order to preserve the underlying institutional arrangements, is one obvious design option. Constitutional systems vary considerably in the rigidity or flexibility of their formal amendment rules, and in light of the practice of abusive constitutionalism, greater "selective rigidity"[274] seems to be a sensible response. For example, the preexisting Hungarian constitution that was lawfully replaced in 2010 by Fidesz required only a single two-thirds vote of its unicameral legislature.[275] Turkey's series of constitutional amendments consolidating Erdoğan's power since 2007 required a three-fifths vote of its unicameral legislature plus

*Stripped of Immunity by Disciplinary Chamber*, NOTES FROM POL. (Oct. 13, 2020), https://notesfrompoland.com/2020/10/13/judge-opposed-to-polish-governments-judicial-reforms-stripped-of-immunity-by-disciplinary-chamber/ [https://perma.cc/DTF5-LKKE].

274. Landau, *supra* note 3, at 193.

275. ACT XX OF 1949 [FORMER CONSTITUTION] (revisited and restated by Act XXXI of 1989), art. 24(3) (Hung.).

a simple majority of those voting in a popular referendum.[276] Comparative experience and scholarship shows that there are several ways to increase the rigidity of a constitution,[277] ranging from higher supermajority requirements, votes of more than one national legislative chamber, agreement of sub-national/federal legislatures or governments, additional requirements of national or popular referenda with varying majority and participatory thresholds, sequenced or multiple votes over a period of time,[278] and tiered amendment rules with higher thresholds for certain types of amendments.[279]

Equally well known is the use of unamendability or "eternity" clauses to protect the central features or values of a constitution against formal amendment altogether. Although existing eternity clauses tend to protect other values, such as federalism and the social state in the German case,[280] and republicanism and secularism in the Turkish,[281] there is nothing to prevent such a clause covering provisions dealing with or relating to the separation of powers. For our purposes, such an express textual provision (together with one granting the power of judicial review of constitutional amendments to enforce it[282]) is preferable to the increasingly common comparative alternative of a judicially created "basic structure" doctrine licensing constitutional courts to review for substantively unconstitutional amendments.[283] The reason is

276. TURKIYE CUMHURIYETI ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 175 (Turk.).

277. *See generally* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS (2019).

278. For example, in Norway a constitutional amendment must be approved by a different (i.e., subsequent) parliament than the one proposing it. KONGERIKET NORGES GRUNNLOV [CONSTITUTION] 1814, art. 121 (Nor.).

279. For example, the South African constitution contains the higher threshold of seventy-five percent support of the National Assembly for amendments of the founding values of the constitution in Section 1 or the bill of rights in chapter 2, rather than the general two-thirds vote for all other amendments. S. AFR. CONST., 1996, art. 74. Several of these different mechanisms, and especially tiered amendment rules, are discussed in Dixon & Landau, *supra* note 18, at 438. *See also* ALBERT, *supra* note 277, at 100–01.

280. GRUNDGESETZ [GG] [BASIC LAW], art. 79(3) (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index html [https://perma.cc/D449-4RR8].

281. TURKIYE CUMHURIYETI ANAYASASI [CONSTITUTION] Nov. 7, 1982, arts. 2 and 4 (Turk.).

282. Turkey has the former but not the latter under its 1982 constitution, hence the controversy over its 2008 headscarf decision invalidating a constitutional amendment on the substantive ground of changing the unamendable provision protecting secularism. *See* Bâli, *supra* note 69, at 281–82.

283. The basic structure doctrine originated with the Indian Supreme Court's 1973 decision in Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India), and has subsequently been adopted by several other countries, including Pakistan, Bangladesh, Singapore, Uganda, Malaysia, and (referred to as the "substitution of the constitution

that its formal legality is clearer and unarguable, and so more of a hurdle for structural populists to surmount, whereas a constitutional court relying on its own jurisprudential creation to resist concentration through amendment is more likely to become the next target.

As several authors have noted, the risk of employing such textual rigidities to foil autocratic legalism is to push a regime into replacing the entire existing constitution with one more to its liking,[284] although the Hungarian case shows this is also a risk of flexibility. As only relatively few constitutions contain provisions for their replacement,[285] this enables structural populists to plausibly deny violating formal legality. Accordingly, including such provisions, and reasonably rigid ones at that, will force either compliance or a fairly visible breach of the constitution.[286] Even here, however, would-be autocrats may seek to rely on the inherent constituent power of the people to bypass the formal replacement provisions where they cannot satisfy them. As mentioned above, faced with an opposition-controlled legislature and a "general reform" provision for a new constitution requiring its approval by two-thirds vote before being put to a referendum, this is what Chávez did in 1999 shortly after his inauguration.[287] The 1961 constitution was silent on calling a constituent assembly and the then still independent apex court narrowly upheld this move, which was subsequently approved in a free and fair referendum, which resulted in a Chávez-dominated assembly and a new, power-concentrating Bolivarian constitution. But here again, unless this becomes the point at which the regime fairly visibly departs from legality,[288] formal provisions and conditions for the calling of a constituent assembly or convention may be included in the existing text, as sometimes happens. For example, the Colombian and Costa Rican constitutions specify the requirements for calling a constituent assembly to replace them.[289] Indeed, Chávez's 1999 constitution includes such a

---

doctrine") Colombia.

284. GINSBURG & HUQ, *supra* note 19, at 173; Dixon & Landau, *supra* note 19, at 462–63.

285. *See* Landau, *supra* note 3, at 242.

286. Landau suggests that including replacement provisions in constitutional texts may be helpful in countering abusive constitutionalism. *See id.* at 243–46.

287. *See* Partlett, *supra* note 47.

288. I say "fairly" visibly or openly because the regime may fall back on the claim that the constituent power of the people can never legitimately be constrained by any terms of an existing constitution, including the conditions for calling a constituent assembly.

289. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] 1991, art. 376 (requiring simple majority votes of both the legislature and voters by referendum); CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE COSTA RICA 1949, art. 196 (a two-thirds vote of the legislature is required).

provision, but permits the president to initiate the calling of a constituent assembly unilaterally, as his successor did in 2017.[290] Moreover, to preempt the Chávez (and Maduro) move of an ad hoc writing of electoral rules for the constituent assembly that heavily favored his supporters, the existing constitution should also specify in advance how members of the assembly are to be elected or appointed. In this way, the counter-playbook seeks to strategically plug exploitable gaps. Although such express treatment cannot guarantee that a constitutional court will not uphold the supreme constituent power of the people theory against the existing constitution's provisions for calling a constituent assembly, it is generally less likely to do so than when faced with constitutional silence on the issue.

## CONCLUSION

It is too soon to tell whether constitutional democracy is in full-blown crisis, or even perhaps terminal decline, rather than partial or temporary retreat. While the number of populist regimes of both types is still relatively small—most likely fewer than ten depending on how exactly they are defined—populist politics and parties remain on the rise in many parts of the world and more may soon be knocking on the doors of power. Now is the time for defenders of constitutional democracy everywhere—citizens, politicians, scholars, lawyers, civil society, and international organizations—to focus on the bigger picture and unite in a clear-eyed, pragmatic way to do everything possible to minimize or reduce the risks of authoritarian populism from spreading further. This is because of its many normative failings, from rejecting non-electoral accountability and constraints on the power of the governing majority (even where not supported by a majority of voters), to denying the dignity and equal citizenship of all members of the political community. Moreover, if the history of concentrated power is any guide, "illiberal democracy"[291] is destined to become the Cheshire Cat of democratic forms, with the gradual disappearance of the body politic leaving only the grin of the autocrat.

"Everything possible" undoubtedly means addressing the

---

By contrast, although the U.S. Constitution specifies the requirements for calling a constitutional convention in Article V, this is only to propose "amendments," not a replacement text. U.S. CONST. art. V. That said, the original federal constitutional convention in 1787 suggests this distinction may be a difficult one to maintain in practice, once it meets.

290. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CRBV] 1999, art. 348.

291. *See supra* text accompanying footnote 42.

causes of populism. It means developing substantive policy agendas that result in "democratic political parties and social movements with credible political ideas and programs."[292] It means revitalizing democratic norms and practices so that ordinary citizens feel that politics within constitutional democracies is responsive to their interests and identities, both individually and collectively.[293] But it also means acknowledging the role that constitutional, institutional, and democratic design can play in helping to prevent authoritarian populists from easily or artificially translating electoral support into full power, and in making the characteristic moves of structural populist regimes to undo constitutional democracy by assaulting the separation of powers more difficult or costly to achieve.

292. Bugarič, *supra* note 21, at 597.

293. Loughlin, *supra* note 20 at 450–51; Weiler, *supra* note 16, at 635.