

The Social and
Political
Foundations of
Constitutions

Populism vs. Constitutionalism?

Comparative Perspectives on
Contemporary Western Europe,
Latin America, and the United States

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Policy Brief

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The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented.

Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

Executive Summary

- Populism is first and foremost a set of ideas based not only on the Manichean distinction between ‘the people’ and ‘the elite’, but also on the notion that politics is about following an allegedly self-evident general will.
- Most scholars consider that populism represents a democratic threat, particularly because of its ambivalent relationship with constitutionalism. However, a comparative perspective allows us to clarify that not all populists approach constitutionalism in the same way.
- In the case of Western Europe, populism manifests itself mainly in radical Right parties with an anti-immigration agenda. These parties are not necessarily against the constitution of their own countries. In fact, they use the language of constitutionalism to attack ethnic communities exhibiting ‘backward values’.
- Radical leftist populist forces have reached executive power in Latin America by promoting major transformations. These transformations have often been accomplished through the formation of a constituent assembly to draw a new constitution, which then has been approved via referendum. Recent developments in Venezuela reveal that these constitutional changes seriously diminish the capacity of the opposition to compete in a free and fair way against the government.
- In the US, in turn, the populist Tea Party has backed what has been referred to as ‘constitutional originalism’, and maintains that judicial interpretation is an evil mechanism. The latter is seen as an instrument designed and controlled by progressive sectors of the establishment to rule the country without taking into account the ideas and interests of the people.
- Although it is true that populists maintain a difficult relationship with democracy and have an opportunistic approach toward constitutionalism, we should be aware of the fact that there is always some value in the populist attack against the establishment. Opponents of populism should consider that populist actors give voice to groups which feel that their opinions are not being heard.

Populism vs. Constitutionalism?

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Introduction

From the United States to France and from Venezuela to the Netherlands, populist leaders, movements, and parties have been making headlines in the last few years. Many academics and pundits comment on the rise of populist forces, which allegedly represent a major threat to *liberal* democracy. Just think about the polemic laws approved by Rafael Correa's government in Ecuador with the aim of controlling the media, or the success of the Swiss People's Party in amending the Constitution to ban the construction of minarets in the country. As these examples reveal, populist forces spare no effort in generating a playing field in which the rights of their enemies are seriously constrained, if not altogether denied.

Nevertheless, populism should not be depicted as a blatant authoritarian ideology. In fact, there is an intrinsic democratic principle in the language of populism: given that 'the people' is the sovereign, nothing should constrain its will. If democracy means rule by 'the people', no aristocrats, experts, religious authorities, or foreign powers should have the capacity to take decisions that violate popular sovereignty. As I have argued elsewhere in more detail,¹ instead of treating populism as an irrational impulse buttressed by a group of 'crazy' folks, we have to accept that more often than not there is some truth in the claims advanced by those who adhere to the populist set of ideas. Of course, this does not mean that we cannot and should not criticize populist forces, particularly if their actions put at risk the pillars of *liberal* democracy. My point is rather that scholars and policymakers ought to be cautious when it comes to condemning populist actors, because many of the arguments against them lie on shaky ground.

In this spirit, the argument I want to develop in this policy brief is that the relationship between

populism and constitutionalism is more complex than usually assumed. To better understand this complexity, the text is divided into three sections. First of all, I begin by presenting the 'standard account', which takes for granted that populist forces are against constitutionalism. In the second section, I critically examine the 'standard account' by showing the ways in which three contemporary manifestations of populism — populist radical Right parties in Western Europe, leftist populist leaders in Latin America, and the populist Tea Party movement in the United States — relate to constitutionalism. Finally, I conclude the paper by elaborating some tentative policy recommendations regarding how to deal with populist forces.

The standard account: populism against constitutionalism

Any analysis of populism has to confront the problem that we are dealing with a contested concept. In fact, part of the explanation for the scarcity of cross-regional studies of populist forces is related to the existence of diverse conceptual traditions, which are adopted by area specialists dedicated to the study of different world regions. In recent times, however, there is a growing consensus amongst scholars that populism alludes to a specific set of ideas that is characterized by the moral and Manichean distinction between 'the people' and 'the elite'. In line with this approach, in this policy brief I adopt the minimal definition advanced by Cas Mudde, according to which populism is 'a thin-centred ideology that considers society to be ultimately separated into two homogenous and antagonistic groups, "the pure people" and "the corrupt elite", and which argues that politics should be an expression of the *volonté générale* (general will) of the people'.²

A detailed explanation of this minimal concept is beyond the scope of this policy brief; suffice to say here that this definition enables us to recognize that populism has two direct opposites: elitism and pluralism. Those who adhere to elitism share the Manichean distinction between ‘the people’ and ‘the elite’ but think that the former is a dangerous and unwise mob, while the latter is seen as an intellectually and morally superior group of actors who should be in charge of the government. In contrast to populism and elitism, pluralism is based on the very idea that society is composed of different individuals and groups. Thus, pluralists not only avoid moral and Manichean distinctions, but also believe that democratic politics is about taking into account diversity and reaching agreements between different positions.

After having clarified the concept of populism, it is time to turn our attention to the way in which scholars analyse the ambivalent relationship between populism and democracy. The common argument goes along these lines: given that populist forces are at odds with minority rights and intend to dismantle the checks and balances that are inherent to the liberal democratic model, they tend to foster the construction of a political regime with weak rule of law and where political power relies on a strong leader, who governs almost without institutional constraints.³

According to this ‘standard account’ that depicts populism as a disease or pathology, one of the main challenges posed by populist forces lies in their relationship with constitutionalism. To understand this, it is important to point out that liberal democratic regimes are characterized by the existence of a tension between two pillars: on the one hand, the very idea and practice of popular sovereignty best represented in the continuous realization of elections, and on the other hand, a set of institutional arrangements that are normally anchored in the constitution and which give rise to a strong judiciary that is in charge of securing the rights central to a democratic society. Populist forces tend to denounce the imbalance between these two pillars of liberal democracy. In fact, they usually

argue that given that constitutionalism is becoming increasingly influential at the cost of popular sovereignty, it is necessary to respect the will of the people and curtail the power of unelected bodies. In summary, the ‘standard account’ postulates that populist forces represent a democratic threat because they defend majority rule at any cost and thus favour the construction of a political regime in which minorities are not respected, horizontal accountability is seriously limited, and the rule of law is at risk.

How do populist forces relate to constitutionalism?

As stated above, populism is a set of ideas that is based not only on the moral and Manichean distinction between ‘the pure people’ and ‘the corrupt elite’, but also on the conception of politics as the enactment of the putative will of the people. Even though all populist forces share this set of ideas, they have diverse views with regard to which groups form part of the vilified elite and which the venerated people.⁴ Moreover, populism can favour the implementation of very different types of policies and modes of political organization. In this sense, populism has a chameleonic nature: it can be right wing or left wing, follow a top-down or bottom-up dynamic, and rely on strong leaders or give rise to rather a leaderless movement.

If it is true that there are different manifestations of populism, and that not all of them affect the democratic regime in the same way, then the following question begs an answer: how do different populist forces approach constitutionalism? A useful starting point to begin delineating an answer to this question is to consider the conception of the ‘corrupt elite’ advanced by populist actors and constituencies. Depending on the way in which the influence of the ‘corrupt elite’ is depicted, populist forces develop different proposals that might involve or not the transformation of the constitutional order. Unpacking this argument, in the next section I provide a brief analysis of the ways in which three contemporary populist forces relate to constitutionalism.

Populist radical Right parties in Western Europe

Examining the contemporary world, Western Europe provides the clearest example of a manifestation of populism that is characterized by xenophobic tendencies. Despite some differences between the political programmes of populist radical Right parties, all of them are centred on a nativist definition of 'the pure people'. As a result, the policy proposals of these parties range from the closure of the borders for new immigrants and refugees to the expulsion of ethnic minorities that are not economically productive and have not been assimilated into the national culture. While the populist radical Right targets mainly non-European immigrants, the framing of groups which are portrayed as the enemies of 'the pure people' has changed throughout the years. This became particularly evident after the 9/11 terrorist attacks, which triggered a shift from an anti-immigrant to an anti-Muslim rhetoric among radical Right populists across Europe.

As a feature of their populism, these parties criticize the establishment for their disinterest in taking into account the problems of the 'man on the street'. They normally maintain that there is no difference between government and opposition; both are seen to be participating in a shared conspiracy. According to these parties, mass immigration has occurred against the will of the people, and it has been supported by leftist parties and big business, because the former wants to increase its support base and the latter its pool of cheap labour.⁵ Thus, the populist critique of the radical Right to the political and economic establishment is directly related to their nativism: given that the elites are discriminating against their 'own population' in favour of ethnic minorities, the time has come to rise up and regain the rightful sovereignty of 'the pure people'.

Despite their radical condemnation of the establishment, populist radical Right parties in Western Europe are *not* necessarily at odds with the constitution of their own countries. Most of these

parties portray themselves as true defenders of the rule of law, particularly when it comes to denouncing Muslims as a threat to the liberal values of democracy. In fact, they increasingly make use of the language of constitutionalism to attack ethnic minorities. Based on a chauvinistic interpretation of the principle of 'no liberty for the enemies of liberty', these parties argue that mass immigration erodes the moral principles of European societies. The most sophisticated version of this argument is the notion of 'cultural differentialism', according to which there are different cultures in the world and each of them has the right to defend its own identity. Hence, foreigners who do not assimilate into their new cultures represent a threat since they challenge the moral integrity of 'the pure people'.

One of the main concerns of these parties is the growing influence of the European Union — a supranational institution that has a growing power to strike down resolutions adopted by national parliaments and which takes important decisions on key policy areas such as immigration, labour, and market regulations. As a consequence, Euroscepticism has been increasing within the populist radical Right, to the point that many of these parties are now staunch opponents of Brussels. Not by coincidence, populist radical Right parties in Western Europe are inclined to promote referendums as the only legitimate way to accept international treaties affecting national sovereignty.

Populist leftist leaders in Latin America

Since the end of the 1990s, Latin America has witnessed a re-emergence of populism, expressed in the election of radical leftist actors who are at odds with the market-friendly reforms that were implemented in the 1980s. Scholars have categorized these actors as the exponents of a 'contestatory left', which not only condemns the influence of foreign powers but also seeks to build a new model of democracy that is characterized by the continuous mobilization of the masses. The most emblematic examples of this 'contestatory left' are the governments of Rafael Correa in Ecuador (in power since 2009), Hugo Chávez in Venezuela (in

power between 1998 and 2013), and Evo Morales in Bolivia (in power since 2006).

In contrast to the nativist language of the populist radical Right in Western Europe, leftist populist forces in contemporary Latin America have developed an inclusionary approach. In this way, they seek to give more dignity and power to groups that historically have been discriminated against. Their programmes are centred on the definition of 'the pure people' as the underdog in socioeconomic terms. Relying on this frame, Latin American populist leaders argue that democracy is much more than realizing free and fair elections; it is mainly about tackling existing inequalities and empowering the demos, with the aim of impeding the formation of an elected aristocracy. This conception of democracy leads to the endorsement of various strategies, which range from the occupation of public spaces to the organization of massive protests and the continuous realization of plebiscites.

Despite some differences between contemporary populist forces in Latin America, they have a common view of 'the corrupt elite'. They argue that the establishment is composed of a coalition of national and foreign actors, who protect their own interests and rule the country. Along this line of reasoning, business groups, traditional political parties, and media owners are presented as the enemies of 'the people'. When sectors of the establishment openly criticize the populist forces and try to boycott them, the latter refer to them as part of 'the corrupt elite'. Take, for instance, the case of Venezuela, where the support of George W. Bush for the coup d'état against Hugo Chávez in 2002 fostered an anti-imperialist language of the Chavista movement and the intimidation of those who maintain ties with the United States.⁶ As this example shows, the populist critique against the 'corrupt elite' is based not only on false presumptions and exaggerations, but also on the establishment's past and present behaviour.

Not surprisingly, the worldview shared by many Latin American populist leaders often has as a consequence that they are at odds with the

constitution of their own countries. These are considered to be a set of rules designed by the (old) elites to protect their interests and bypass popular sovereignty. A wholesale replacement of the constitution via the enactment of the constituent power is thus one of the main proposals advanced by the populist Left in contemporary Latin America. In fact, the coming into power of Evo Morales in Bolivia, Hugo Chávez in Venezuela, and Rafael Correa in Ecuador has been accompanied by legal and political battles to form a constituent assembly in charge of drawing up a new constitution, which has subsequently been ratified through a plebiscite in each of these countries.⁷

It is worth noting that the type of political organization supported by each of these presidents has an impact on the way in which the constitution has been replaced: whereas in Bolivia, grass-roots organizations had the capacity to participate in the constituent assembly and push for the inclusion of certain provisions, both in Ecuador and Venezuela, the constituent assembly was controlled by the government, and civil society organizations had little leverage to influence the reform process. Beside this, recent developments have shown that these new constitutions are problematic because they seriously diminish the capacity of the opposition to compete in a free and fair way against the government when elections are held.

The populist Tea Party in the United States

The most recent expression of populism in the US is the Tea Party movement. As a matter of fact, a majority of the Tea Party supports the Republicans, and some of its most important leaders are members of the Republican Party (e.g., Sarah Palin, Ron Paul, and Michele Bachmann). However, the Tea Party is first and foremost a political movement which is composed of grass-roots organizations that operate at the federal level and put pressure on moderate Republican officeholders to avoid any steps toward moderation. This does not mean, however, that the Tea Party is a clear-cut example

of bottom-up populism. Without the economic and organizational support of corporate lobbyists, billionaires, and conservative media outlets, the Tea Party would have never been able to gain momentum in the last few years.⁸

Not by coincidence, the image of ‘the corrupt elite’ sketched by the Tea Party is not applied to the whole establishment, but rather those elite sectors defending liberal values and thus allegedly acting against a self-evident will of ‘the pure people’. To understand this populist critique, it is important to bear in mind the political context in which the Tea Party arose. Deep political polarization and a major economic crisis played an important role in the 2008 presidential campaign. Moreover, the end of the eight years of G. W. Bush’s conservative government and the coming into power of the first African American president certainly created the feeling of a historic turn in US history — a turn which some conceived of as a move towards a sort of second New Deal.

Those who support the Tea Party are inclined to think that US democracy is in danger and that citizens should mobilize against any attempt to transform the unique legal and governmental structure of the country. Not by chance, as Elizabeth Price Foley⁹ argues, the Tea Party embraces three core principles: limited government, unapologetic US sovereignty, and constitutional originalism. This last principle is particularly relevant for the purpose of this policy brief because it points to the way in which the populist Tea Party deals with constitutionalism. The so-called originalist approach maintains that the Constitution is, first and foremost, a sacred document that leaves no space for reinterpretation. Otherwise stated, it only allows for interpretation of the Constitution through consideration of the thought of those who originally ratified the passages in question. At the same time, the defence of constitutional originalism must be seen as an attack on what is referred to as living constitutionalism, which is depicted as an evil mechanism whereby ‘the corrupt elite’ can govern without respecting the principles laid out by the

founding fathers and supported by US citizens.

It is important to stress that the discourse of the Tea Party and its followers does not translate into an invocation of the constituent power at the cost of the constitutional form, or that it is radically opposed to constitutional change. The Tea Party movement present itself as a committed protector of the existing Constitution and its mechanism of change. In particular, it defends Article V, which states that amendment proposals must be approved by supermajorities in both houses or by a national convention assembled at the request of the legislatures of at least two-thirds of the federal states. Of course, by defending the existing mode of constitutional change as the only valid mode of modification and simultaneously denying the legitimacy of living constitutionalism, those who support the Tea Party adopt a position that favours the status quo (e.g., the protection of the right to bear arms stated in the second amendment) and rejects the role of a vigilant judiciary.

Conclusion

In this policy brief I have underscored existing differences between contemporary populist forces in Western Europe, Latin America, and the US, and argued that they adopt different approaches towards constitutionalism. While some populists tend to invoke the constituent power to change the constitution, others present themselves as guardians of the present constitution and develop a very specific interpretation of this. To a great extent, these differences can be explained by the degree to which the existing constitutional order reduces the room of manoeuvre of populist forces. The more the populist constituencies and leaders of a country consider that the constitution has been designed by ‘the corrupt elite’ to protect their own interests, the more they will be prone to promote a process of constitutional change by activating a constituent power. By contrast, when populists do not have major problems with the existing constitution, they argue that unelected bodies such as the judiciary or supranational institutions should not have the capacity to act against ‘the silent majority’.

One of the main consequences of this argument is that there are important differences between contemporary populist forces. Not all of them affect the democratic regime in the same way, and in consequence, one should avoid the temptation of generating a general law for dealing with populism. Whether one likes it or not, there is always *some* value in the populist attack against the establishment. The more the elites govern without taking into consideration the ideas and interests of the electorate, the more legitimate the populist discourse turns out to be. Therefore, the way ahead does not consist in simply attacking populist forces, but rather in understanding the way in which they are able to give voice to groups that do not feel represented by the establishment.

That said, a moral condemnation of populism is particularly questionable because it gives more plausibility to the populist discourse. Scholars and practitioners should be aware of the fact that populist forces offer (simplistic) responses to certain dilemmas that do not have clear democratic solutions. Instead of portraying populists as anti-democrats, those who are interested in defending liberal democracy should emphasize the importance of pluralism, as well as institutional checks and balances. Given that populism relies on a Manichean distinction between 'the pure people' and 'the corrupt elite', it is prone to generate a playing field in which the rights of the enemies of populism are seriously constrained, if not denied. This anti-liberalism certainly should be criticized and condemned, but without elaborating a discourse that distrusts the moral and intellectual competence of ordinary citizens.

Notes

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- ¹ Cristóbal Rovira Kaltwasser (forthcoming), 'The responses of populism to Dahl's democratic dilemmas', *Political Studies*, DOI: 10.1111/1467-9248.12038.
 - ² Cas Mudde, 'The populist Zeitgeist', *Government & Opposition*, 39/4 (2004), 541-63. For a thorough discussion of this concept of populism and its differences with other conceptual approaches, see Cas Mudde and Cristóbal Rovira Kaltwasser, 'Populism', in M. Freedman, M. Stears, and L. T. Sargent (eds), *The Oxford Handbook of Political Ideologies*, 493-512. Oxford: Oxford University Press, 2013.
 - ³ A paradigmatic example of this negative view about populism is the work of Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*. Cambridge: Cambridge University Press, 2008.
 - ⁴ Cas Mudde and Cristóbal Rovira Kaltwasser, 'Inclusionary versus exclusionary populism: contemporary Europe and Latin America compared', *Government & Opposition*, 48/2 (2013), 147-74.
 - ⁵ Cas Mudde, *Populist Radical Right Parties in Europe*. Cambridge: Cambridge University Press, 2007.
 - ⁶ Kirk Hawkins, *Venezuela's Chavismo and Populism in Comparative Perspective*. New York: Cambridge University Press, 2011.
 - ⁷ Eduardo Silva, *Challenging Neoliberalism in Latin America*. Cambridge: Cambridge University Press, 2009.
 - ⁸ Ronald Formisano, *The Tea Party*. Baltimore: Johns Hopkins University Press, 2012.
 - ⁹ Elizabeth Price Foley, *The Tea Party: Three Principles*. Oxford: Oxford University Press, 2013.
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