Political Constitutionalism in the Age of Populism

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Abstract

This article examines the relationship between populism and political constitutionalism. It claims that while political constitutionalism is at odds, and better than, the wide range of experiences labelled under the term 'populism', political constitutionalists would do well to distance themselves from the claim that the constitution is political "all the way down". First, the article argues that the normative ambiguity of the term populism makes it ill-fated for the purposes of constitutional theory and a call for clearer language for constitutional discussion is defended. Second, it argues that political constitutionalism should abandon, or significantly adjust, its commitment to what the article calls *constitutional lawlessness* and defines as the idea that the constitution is and ought be entirely malleable. The reasons offered for this proposal differ from those advanced by legal constitutionalism and instead hang on the democratic authority that political constitutionalists vindicate for majoritarian institutions. Political constitutionalism, the article concludes, should grant some of the normative advantages of the law to the outcomes of constitutional decisionmaking processes. The move makes political constitutionalism more consistent in its own right and, importantly, safer from the charge that it feeds different sorts of constitutional disorder.

1. Introduction

Political constitutionalism faces a crucial challenge today. At a time when electoral majorities are supporting illiberal and authoritarian governments globally, the traditional defence of majoritarian decisionmaking and popular sovereignty endorsed by political constitutionalists seems more questionable than ever before. The rise of populism across Europe and the Americas has brought to the constitutional surface the most feared threat to liberal democracy: the possibility that political majorities abuse minorities precisely through the democratic process. In this context, it comes as no

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surprise that long-standing concerns regarding the tyranny of the majority and the appropriate role of courts are intensely revisited. Some scholars argue that populism justifies the need for judicial constraints on majoritarian institutions and that, if anything, the independence and powers of courts should be strengthened.[2] Others are sceptical that the old remedies of liberal constitutionalism work as well as it is expected, claiming that countermajoritarian solutions will not help in times when citizens demand more participation, not less, in political decisionmaking.[3]

In this article I will be siding with the latter but, instead of making a general case for political constitutionalism, what I want to address here is the relationship between populism and political constitutionalism. While the relationship between populism and constitutionalism has recently started to gain attention, the connections between populism and political constitutionalism are in need of further exploration. In particular, the implications of their shared majoritarian readings of the constitution deserves examination. The article argues that while political constitutionalism is at odds, and better than, the wide range of experiences labelled under the term 'populism', political constitutionalists would do well to distance themselves from the claim that the constitution is political "all the way down". The reasons offered for this proposal differ from those advanced by legal constitutionalists. The move makes political constitutionalism more consistent in its own right and, importantly, safer from the charge that it feeds illiberal or authoritarian constitutionalism.

In developing my argument, the article proceeds in four steps. Section II surveys the literature on populist constitutionalism, outlining the different views on the topic to show that the label is, at the very least, extremely contested. In Section III, I take on populism to explain why views on the relationship between populism and constitutionalism are so disputed. In a nutshell, I argue that the term populism fails to do the work constitutional theorists want it to do. Indeed, the shortcomings of populism are so problematic that I claim we are better off without the term, at least for the purposes of constitutional theory. Moreover, its ambiguity leads to the conflation of authoritarianism with democratic and legitimate appeals to popular and parliamentary sovereignty. This mistakenly detracts from political constitutionalism as a worthy theory of constitutional government in liberal democracies. Unlike legal

[2] Kuo 2019; Prendergast 2019.
[3] Suteu 2019; Loughlin 2019.

constitutionalists, political constitutionalists endorse the view that constitutional decisionmaking belongs to the political, not the juridical, arena. A reason for this is that they sometimes envisage constitutional disagreement as political "all the way down". Legal constitutionalists denigrate this position as self-defeating but, as I will defend in Section IV, their critique is wanting. That said, there is one way in which political constitutionalism can fall prey to self-defeat when it insists on the view that the constitution is political 'all the way down'. If there is nothing legal in the constitution, political constitutionalism can hardly live up to its promise to enable self-government in a society of equals. I develop this critique of what I call *constitutional lawlessness* in Section V. I argue that political constitutionalism should abandon or significantly moderate its commitment to the idea that the constitution is and ought be essentially malleable, for reasons that hang on the democratic authority that political constitutionalists claim for majoritarian institutions. Instead, political constitutionalists should grant some of the normative advantages of the law to the outcomes of constitutional decisionmaking. This, I will conclude, does not weaken the merits of political constitutionalism. On the contrary, it will immunise it from the critique that it can fuel different sorts of constitutional disorder.

2. Populist Constitutionalism

In recent years, the literature on constitutionalism and populism has grown considerably. As populism became a major topic in other social sciences, most obviously in political science, and as it gained geopolitical traction (initially in Latin America, then in Central and Eastern Europe and more recently in the US, the UK and continental Europe), scholars of constitutional law have turned to the wide scholarship on populism and taken issue with its constitutional dimension. A survey of the literature reveals a huge divergence in the understanding of what populist constitutionalism comprises.

In his book *What Is Populism?*, Jan-Werner Müller argues that populism and constitutionalism are not as contradictory as they seem.[4] Populists, he argues, do not oppose constitutional systems and their institutions. While populists usually criticize constitutionalism when they are in the opposition, they frequently seek to establish new populist constitutional orders once in power, either by promoting constituent processes

[4] Müller 2016.

or by approving deep constitutional amendments.[5] In Müller's view, the core element of populism is anti-pluralism rather than anti-constitutionalism. Populist leaders, he claims, hold the view that "it's possible for the people to be one and -all of them- to have one true representative".[6] Populism, in his view, is a "moralistic imagination of politics" that splits the alleged "morally pure and fully unified people against elites who are deemed corrupt or in some other way morally inferior."[7] In populist constitutionalism, constitutions are partisan instruments to make the promises of such moralized antipluralism true, by occupying power in what would otherwise seem liberal constitutional institutions.

In a similar way, Paul Blokker defines populist constitutionalism as a variant of political constitutionalism "but with a specific twist."[8] Political constitutionalists tell us that politics should enjoy primacy over law. In this 'revolutionary' tradition, political institutions have authority over courts in constitutional decision making, not vice versa as legal constitutionalists argue.[9] The connection between this political strand of constitutionalism and populism comes as no surprise, since a common feature of all accounts of populism includes an alleged defence of popular sovereignty.[10] But an appeal to defend and represent the general will cannot by itself be dismissed as populist. What then is distinctive about populist constitutionalism? In Blokker's view the answer lies in a defence of popular sovereignty but also in the prevalence of majority rule, an instrumental use of constitutions, and a strong resentment towards law and courts. When combined, these elements ultimately usher in policies that violate the principles of pluralism and inclusiveness.[11] In practice, thus, populist constitutionalism is at odds with the political constitutionalist idea of giving all citizens equal say and equal vote.[12] As Kim Scheppele notes, reality shows that populists are hardly committed to populism in any serious sense.[13] Once in power, populists ignore their appeals to popular

[5] Müller 2016: 62-63; Landau 2018.
[6] Müller 2016: 20.
[7] Müller 2016: 19-20. See similarly Mudde & Rovia Kaltwasser (2017) who define populism as "a thin-centered ideology that considers society to be ultimately separated in two homogeneous and antagonistic camps, 'the pure people' and the 'corrupt elite'" at 5.
[8] Blokker in De la Torre 2018: 116.
[9] Corrias 2016; Blokker 2019.
[10] See eg Canovan 1999: 4 "Populists claim legitimacy on the grounds that they speak for the people: that is to say, they claim to represent the democratic sovereign, not a sectional interest such as an economic class."
[11] Blokker 2019.
[12] Similarly see Alterio 2019.
[13] Scheppele 2019.

sovereignty and their previous criticisms of constitutional government and instead make corrupt use of constitutional institutions to hold on to power.

These accounts of populist constitutionalism share an exclusionary understanding of populism.[14] Here, populism is understood as a disease that corrodes constitutionalism's commitment to pluralism, individual rights and the rule of law. By conceiving of the political framework in friend-foe terms, between the allegedly pure and ordinary majority of people and its impure opposition and minorities, it excludes the latter from the political game based on ethnicity, sexual identity, gender, religion and other characteristics that should be protected by constitutional law.[15]

Given this hostility against the core values of constitutional democracy, constitutional scholars have strongly reacted against populists. Hence, it is commonly agreed that the role that courts should play in today´s democracies is to "reinforce constitutional constraints".[16] Although it is conceded that "sometimes courts themselves embrace populism"[17] and that courts will only be able to resist populists "as long as they have a strong support of initiatives within civil society",[18] most scholars seem to agree that the point of constitutionalism is precisely to resist the kind of threat that populism poses to liberal democracy.[19] Legal constitutionalism conceives of law and courts as a limit to the excesses of ordinary politics and majoritarian democracy. Certainly, this reaction is a tantalising one. Our liberal constitutional systems were designed for resisting the kinds of threats posed today by populism. If the countermajoritarianism found in strong judicial review could be possibly justified by political constitutionalists it was for non-core cases, to use Waldron's well-known distinction.[20]

Yet, it appears that things are not as simple. It is far from clear that constitutional courts are willing or able to limit anti-pluralist or illiberal decisions of elected branches, whether executive or parliamentary.[21] Moreover, judicial intervention sometimes appears to be counterproductive, having enhanced judicial backlash instead of a

[14] The terms exclusionary and inclusionary populism where introduced by Mudde and Rovira Kaltwasser see 2012.
[15] See eg Bugaric 2019.
[16] Issacharoff 2017.
[17] Harel 2017.
[18] Arato 2017.
[19] Kuo 2019; Harel 2017; Prendergast 2019; Issacharoff 2015.
[20] Waldron 2006.
[21] Bugaric 2019; Sadurski 2019.

commitment to the rule of law.[22] Importantly, populism and social discontent towards our basic liberal institutions (constitutional courts included) can be analysed not just as a disease but also as a symptom or even a potential cure to the internal tensions of modern constitutionalism.[23]

With this in the background, other scholars seek to distinguish between 'good' and 'bad' populist constitutionalism. From this standpoint, only some varieties of populism are intrinsically incompatible with the core elements of liberal constitutionalism. The sort of populist constitutionalism described previously is bad because it delivers authoritarian politics and is committed to nativist, patriarchal and racist policies and discourses. To hold on to power, bad populists attack the rule of law, the independence of the judiciary and promote partisan constitutional reform. Examples of bad populism include Latin American parties such as the United Socialist Party of Venezuela (PSUV), Donald Trump and the Tea Party movement in the U.S. or the Hungarian Civic Party (Fidesz) led by the country's Prime Minister Viktor Orbán in Europe. Yet good populism,[24] also referred to as democratic or emancipatory,[25] inclusionary[26] or left-wing,[27] is essentially different. It is so different that some authors consider that bad populism is false populism, or indeed not populism at all.[28] Like its bad version, it endorses the thin ideology of a society separated in two opposed camps, 'the pure people' and the 'corrupt elite',[29] but in this case its aim is to promote pluralism and the inclusion of traditionally underrepresented groups. Good populists are not intrinsically corrupt nor are their constitutional proposals necessarily partisan. Examples of good populism are political parties like Podemos (Spain) and Syriza (Greece); political leaders like Bernie Sanders, Alexandria Ocasio-Cortez in the United States or Jeremy Corbyn in the United Kingdom; transnational initiatives like the European movement DiEM-25 or social movements like Occupy Wall Street.

What these cases share, it is argued, is a preference for forms of government that stress the value of popular sovereignty in political decisionmaking (for instance by favouring mechanisms of direct democracy or by fostering political activism and social

[22] Pin 2019; Candia 2019.
[23] Walker 2019; Doyle et al 2019.
[24] Halmai 2019.
[25] Bugaric 2019.
[26] Mudde and Rovira Kaltwasser 2012.
[27] Tushnet 2019.
[28] Halmai 2019; Scheppele 2019.
[29] Mudde and Rovira Kaltwasser 2017.

movements) with the recurrent aim to democratize the economy. In this sense, not only is populist constitutionalism not necessarily a bad thing, but it might foster the best normative readings of the constitution.[30] For this reason, it is also argued that the choice between a form of constitutionalism that is committed to liberal values and a form of populism that is reactionary and authoritarian or led by "apostles of mob rule" is a false dichotomy.[31] There is room today for good populism, as there was before too.[32] Finally, there are also those who consider the divide between good and bad populism as a simplification of a rather complex phenomenon of incremental constitutional practice.[33]

The ambiguity of 'populist constitutionalism' evidenced from the above is not surprising as it mirrors the ambiguity of the term 'populism' in the political science literature. In the following section, I will argue that that this ambiguity is more problematic than is usually conceded. It is so problematic, I will hold, that constitutional scholarship is better off without the term.

3. Calling A Spade A Spade

The literature on populism is abundant, sophisticated and interdisciplinary. Yet as we saw with the previous discussion of populist constitutionalism, the value of populism as an analytical tool is far from obvious. The term remains highly contested and there are dozens of alternative and conflicting conceptions and definitions of populism such as a strategy,[34] a style,[35] an ideology,[36] a political experiment,[37] a "way of constructing the political"[38] or even the "essence" of it,[39] the inner periphery[40] or the spectre of democracy,[41] a corrective and a threat to democracy,[42] a "moralistic imagination of politics"[43], a form of plebeian politics[44], "the people in moral battle against the elites"[45]

[30] Tushnet and Bugaric 2020.
[31] Howse 2019.
[32] Tushnet and Bugaric 2020.
[33] Doyle et al 2019.
[34] Weyland 2001: 14.
[35] Moffitt 2016.
[36] Mudde 2004, Mudde and Kaltwasser 2012.
[37] Frei and Rovira Kaltwasser 2008.
[38] Laclau 2005: xi.
[39] Laclau 2005: 22.
[40] Arditi 2004.
[41] Arditi 2007.
[42] Rovira Kaltwasser 2012.
[43] Müller 2016: 19.
[44] Vergara 2020.
[45] Mansbridge and Macedo 2019: 60.

or a disfigurement of representative democracy.[46] In a gracious exercise of intellectual honesty, Moffit and Tormey noted a few years ago that:

"it is an axiomatic feature of literature on the topic to acknowledge the contested nature of populism […], and more recently the literature has reached a whole new level of meta-reflexivity, where it is posited that it has become common to acknowledge the acknowledgement of this fact."[47]

Considering this state of affairs, the applicability of the term remains challenging. To be sure, not all of the issues raised by the ambiguity of the term should concern constitutional theorists. Perhaps populism proves a useful tool for political scientists to describe the behaviour of political parties and their leaders, to analyse voters' preferences, or to design strategies of electoral campaign.[48] But it is very difficult to examine the relationship between populism and constitutionalism when the available definitions for the former are so varied and contradictory, not least to evaluate whether populism is, in and of itself, compatible or incompatible with core elements of liberal constitutionalism. It is difficult to think about how constitutionalism can help to protect liberal democracies if we do not agree on what are the most serious threats these societies are facing. Making it even more challenging, most studies acknowledge that the case of populism is never clear-cut, but a matter of degree.[49]

The problem is not only one of conceptual ambiguity. If that was the case many other key terms in legal and political theory would be susceptible to the same critique. Rather, the key problem of populism inheres in its normative ambiguity. Unlike other contested ideas like democracy, freedom or equality, we cannot agree on whether populism is a good or a bad thing, whether it threatens or offers a useful corrective for liberal democracies. If we cannot agree on whether populism is ideally to be eradicated, controlled or fostered, then it will hardly take us far in the sort of questions that constitutional scholars are due to answer; such as what are the limits of legitimate government, what is the best institutional design of a constitutional system, which rights are fundamental and so forth.

[46] Na Urbinati 2019.
[47] Moffitt and Tormey 2014: 2.
[48] Eg Mouffe 2018.
[49] Muller 2016: 74: "whether a particular claim is democratic or populist will not always be a clear-cut, obvious matter."

For present purposes, the pitfalls of the term are threefold. First, populism fails to point out a novel, distinctive feature of politics and constitutionalism. Scholars of constitutionalism seem to agree that populism excludes or aims to exclude some people (not "pure people") from the polity and its decisionmaking processes, by denying their legitimate political agency and restricting their rights.[50] We have better, clearer and well established terms to do that work for us. When the exclusion is based on gender, nationality, race and so forth, we speak of sexism, xenophobia, racism correspondingly. In the unfortunate but not uncommon cases where these exclusions overlap and when the basic procedural values of liberalism like the rule of law or separation of powers begin to fray we speak of illiberalism, authoritarianism or even fascism.[51] Thus, we should move beyond acknowledging the contested meaning of the term to test it against other, more serviceable concepts. This is relevant not only because populism fails to do the conceptual work we want it to do. The term also obscures the actual wrongness of such authoritarian governments, which are often closer to far-right ideology and institutional arrangements that bolster executive powers to the detriment of plural parliaments than to perennial two-sided power struggles for political hegemony.

Second, an excessively ambiguous concept like populism might also divert us from the causes of democratic decline. Instead of struggling to determine the meaning of populist constitutionalism, perhaps we could concentrate on more tangible forms of illiberalism and authoritarianism and pay heed to the root causes of popular discontent. I do not intend to elaborate on the extent or causes of democratic backsliding across the globe here[52] and we will never know if the fate of liberal democracy would have been any better had it followed the 'revolutionary' tradition of constitutionalism, but it is a possibility worth exploring. If anything, it is unlikely that constitutional democracy's decay is primarily due to an excessive display of popular or parliamentary sovereignty within liberal democracies over the last decades. In this sense, the crisis of legitimacy that our liberal institutions seem to suffer today should not be confronted from the anti-popular sensibility that characterizes legal constitutionalism. The move risks fuelling

[50] Or, in the case of good populism, by controlling the political influence and eliminating the privileges of corporations and millionaires. While the literature is, for good reasons, more concerned with bad populism than with the good one, my argument works against the term across the board: we could speak, for instance, of democratic socialism for these cases.

[51] Jason Stanley has powerfully argued that fascist politics can take place in countries that still stand as formal democracies, and identifies the practices lately ascribed to populists as fascist tactics or fascist politics see Stanley 2018.

[52] On this point see eg Graber et al 2018.

the political disaffection that in turn feeds authoritarian political parties. As political constitutionalists never tire of emphasizing, constitutional attempts to save democracy from its demos do not appear to be the best solution to deep political challenges.

Third, the ambiguity of populism jeopardizes the value and potential of political accounts of constitutionalism by conflating authoritarianism and sundry moral and political claims of sovereignty. Populist-based analysis of constitutional practice risk taking alternatives to legal constitutionalism as if these were prone to authoritarianism due to their preference for popular or political decisionmaking processes.[53] The bias matters because scholars use concepts and ideas not only to describe how constitutions work but, strategically, to establish how constitutions can legitimately work too. Scholarship often reveals an anti-popular sensibility (or anti-populist, if you want) that penalizes majoritarian constitutional decisionmaking by default, casting a blanket shadow of suspicion over proposals within the political constitutionalist spectrum. Arguably, critics of liberal constitutionalism consider the model guilty, if only partially, of the problems of political disaffection that liberal democracies currently face.[54] Political constitutionalism aims to rectify this by defending the constitutional merits of popular and parliamentary sovereignty that inform democratic decisionmaking against its legalistic counterpart. But while political constitutionalism defends democratic sovereignty against a judicial countermajoritarian elite, it is at odds with any version of the phenomena recently packed under the label populism. The reason, chiefly, is that the popular and political constitutionalist defence of majoritarian decisionmaking is driven by the idea of political equality and not merely of self-government, as an authoritarian view of constitutionalism would imply. That said, there are some grounds for the suspicion that political constitutionalism is a self-defeating view that makes liberal democracies vulnerable to tyrannical forms of government. In the following section, I will elaborate how these are different from what legal constitutionalists and scholars of populist constitutionalism have pointed at.

4. From moral disagreement to constitutional lawlessness

[53] Not long ago, the label 'populist constitutionalism' was not as pejorative as it is now. It was often used interchangeably with popular constitutionalism, the American form of political constitutionalism that famously attacks judicial supremacy in constitutional decisionmaking and favours instead practices of participatory democracy. See Tushnet 1999, Kramer 2004, Balkin 1995.
[54] See eg Loughlin 2019; Walker 2019.

Political constitutionalists share a sceptical view on the idea of courts as guardians of democracy. The reasons for their opposition to judicial review, typically courts' low democratic pedigree, have been widely discussed in the last decades.[55] In the two next sections, what I want to focus on is a tricky feature of political constitutionalism that I shall call *constitutional lawlessness*. I will refer to constitutional lawlessness as the idea that the constitution does not share, and ought not share, the normative advantages and disadvantages of the law. I will argue that one does not need to commit to constitutional lawlessness to endorse political constitutionalism. Rather, abandoning constitutional lawlessness closes the door to potential illiberal or authoritarian turns of the constitution that scholars of populism rightly fear.[56] My claim will be that, by rejecting the idea that there is no such thing as constitutional norms, political constitutionalism can better live up to its promise of self-government in a society of equals.

Let me start by clarifying that, contrary to what it is often asserted, most political constitutionalists are not moral relativists. Political constitutionalism needs not, and usually does not, deny the existence of moral facts that law aims to safeguard.[57] In my understanding of political constitutionalism, scepticism does not lie in the realm of moral ontology. What political constitutionalism denies, particularly in its British version, are constitutional facts. It is the ontology of constitutionalism that is at the heart of political constitutionalists' scepticism towards constitutional *law*. Other than uncontested, thin, procedural rules on how laws ought to be made, political constitutionalists fail to recognize the democratic value, and in some cases even the existence, of substantive constitutional precommitments of the people themselves or their elected representatives. This constitutional scepticism will be my target here.

Although not all political constitutionalists endorse constitutional lawlessness in the same way, to a larger or lesser extent the idea that the nature of the constitution is, and ought be, entirely malleable is shared by all. From American popular constitutionalists Mark Tushnet's idea that "all constitutional provisions are up for grabs at all times"[58]or Richard Parker's claim that "there are no supra-political *guarantees* of anything"[59] to

[55] See Gargarella 1996; Tushnet 1999, Waldron 1999 and 2006, Bellamy 2007.
[56] For instance, Mudde recently linked British political constitutionalism to populism:"[i]n essence, the populist position on constitutionalism holds many similarities to extreme interpretations of parliamentarianism, such as the Westminster model" see 2021: 235 note 3.
[57] Waldron 1999: 164–187.
[58] Tushnet 1999: 42.
[59] Parker 1993: 583 (italics in the original).

British political constitutionalists John Griffith famously arguing that "law is politics carried on by other means"[60] and Richard Bellamy's idea that "the democratic process *is* the constitution"[61] and that there "can be no higher rights-based constitutional law that sits above or beyond politics"[62] or Jeremy Waldron's critique of constitutionalism as a form of limited government [63] all sceptics of judicial review agree that the constitution is more about what happens to be decided in the legislature at present than it is about what was decided in the past. This view makes it difficult to justify the democratic merits of any legal norm to which government is bound to and, in turn, makes it easier for illiberal or authoritarian actors to game the constitution. Before I attempt to save political constitutionalism from constitutional lawlessness, let us briefly examine how legal constitutionalists have taken aim at it.

The view that there is no objective or neutral way to solve constitutional disagreements in the circumstances of politics is a core epistemological assumption of political constitutionalism. If there is no Archimedean way to solve reasonable disagreements, they argue, the best that democracies can ultimately do is to count heads.[64] Democratic voting thus stands above all other methods to solve constitutional disagreements in a society of equals. But legal constitutionalists argue that, if the epistemological argument is correct, there are no reasons to think it will not apply to second order disagreements, namely disagreements about the fairness of counting heads on the first place.[65] It follows, they tell us, that procedural issues are subject to the same sort of disagreement as substantive issues are claimed to be. There is nothing in the circumstances of politics that should logically move us closer to legislative supremacy and away from strong judicial review of legislation. Both options of institutional design would be subject to the same kind of disagreement that political constitutionalists use as grounds against judicial review in constitutional decisionmaking. To make things worse for political constitutionalism, critics add, an understanding of the constitution as nothing more than majoritarian politics will in practice leave minorities out of the decisionmaking processes that political constitutionalists regard as fundamental. Political

[60] Griffith 2001: 59.
[61] Bellamy 2007: 5 (italics in the original).
[62] Bellamy 2011: 90.
[63] Waldron 2016: 23-45.
[64] Waldron 1999: 113; Bellamy 2016.
[65] Christiano 2000.

constitutionalism is then doomed to abandoning its chief principle: equal participation of all members of the political community.[66]

I am not sure this is the best way to interpret the claims put forward by political constitutionalists. First, the infinite regress kind of critique is a reductio ad absurdum of the argument. Why would processes of constitutional decisionmaking be subject to an infinite number of disagreements? As will be recalled, political constitutionalists depart from a position, the circumstances of politics, where there happens to be a need to arrive at collective decisions.[67] The circumstances of politics in the sort of democracies that political constitutionalists have in mind imply the disposition of its members to arrive at a collective decision peacefully and without questioning the validity of the agreed process in the first place. This means that in ordinary politics there will be some commitment at best and pragmatism at worst, to accept the resulting outcome of a process in which members or their representatives played fairly. Since political constitutionalists accept that there is no perfect way to settle disagreements, this is not a frustrating or invalidating point to their theory.[68]

Arguably, this does not involve ruling out discussions on the merits of majority rule itself; there may well be democratic arguments for, say, sortition or countermajoritarian mechanisms at some stages of a decisionmaking processes. But it should be conceded that, in liberal democracies, there happens to be less disagreement in the process of "counting heads" than in the issue of whose heads are to be counted.[69] Notably, in liberal democracies majority rule is the ultimate process used not only in ordinary politics but also in judicial decisionmaking. The recurring problem for legal constitutionalism seems to not be the legitimacy of the majority rule itself, but whose majority rules.[70] Surely, which majority rules is an extraordinarily relevant question, and no political constitutionalist wants majorities making the wrong decisions. This applies to judicial majorities as well and, inescapably, their decisions are more contingent on who sits when in which court than legal constitutionalists seem willing to acknowledge.

[66] Kavanagh 2003.
[67] Waldron 1999: 108–113.
[68] Bellamy 2016.
[69] See contra Mac Amhlaigh 2016: 185.
[70] See Tushnet 1999, Waldron 2014.

This brings me to the second kind of self-defeating accusation against political constitutionalism. Defenders of judicial review argue that, without the protection of minorities from majoritarian discrimination, political constitutionalism gives away its chief normative claim: the value of equal voice and vote in political decisionmaking. I will say less than what the issue merits here, but again on both sides of the debate one will find acknowledges that neither courts nor legislatures are infallible guardians of minority rights.[71] It is far from clear that we are always safer in the hands of one institution than in the other, as the outcomes are more context-dependant than is desirable. Notably, to make their argument safe against cases where minorities rights are systematically infringed, political constitutionalists claim that the argument for parliamentary (or popular) sovereignty is not universal: only those societies that have a track record of respect for human rights can morally afford supreme legislatures. This distinction allows us to apply different yardsticks of legitimacy to different majorities. In imperfect but otherwise full democracies, political constitutionalism goes, the core of the case against judicial review is strong because majorities are trustworthy.

So constitutional lawlessness is not a problem for the reasons put forth by legal constitutionalists. I believe it is a problem, nonetheless, for other kind of reasons. In the following section, I will argue that there is some truth in the claim that political constitutionalism can fall into a self-defeating paradox with its commitment to the view that constitutional politics goes 'all the way down'. If there is nothing legal in the constitution, there is not much that the people or their representatives are truly deciding for themselves in the decisionmaking processes that political constitutionalists vindicate for them. It seems an ill-fated way to empower individuals if the agreements at which they arrive are not taken seriously enough to give them at least some of the advantages of that knotty thing we call law. Coming to terms with this inconsistency will make political constitutionalism a sounder project.

5. Winners in the Constitution

So far, we have seen that political constitutionalism doesn't envisage constitutions as fixed, legal settlements on how to run a liberal democracy but as part and parcel of the ordinary political process. With its uncodified constitution, its traditional defence of parliamentary sovereignty and its characteristic constitutional conventions, the picture

[71] See eg Sadurski 2002.

features most prominently in British political constitutionalism and is often summarized in John Griffith's famous claim that "[e]verything that happens is constitutional. And if nothing happened that would be constitutional also."[72]

As anticipated, I don't think this is the best kind of approach to what constitutionalism is about. Even under the UK constitution things can be, and often are, quite different. For instance, while there are no procedural differences between the enactment of constitutional and ordinary law,[73] UK courts have distinguished both (and established a hierarchy between them) by looking into whether the matters regulated in them are constitutional.[74] Parts of constitutional law are regarded so valuable, namely constitutional principles and fundamental rights, that UK courts have interpreted statutes against otherwise *prima facie* legislative intention, by reference to common law principles and rights.[75] But courts are not alone in granting constitutional law a 'higher law' explicit or implicit status. It is difficult to imagine that, say, citizens in devolved nations could be persuaded that the different Acts that establish devolved institutions in Scotland, Northern Ireland and Wales ought not be regarded as worthy of protection from the vicissitudes of ordinary politics.[76] It is for this sort of reasons that political constitutionalists should start to recognize that, to a significant extent, constitutions are

[72] Griffith 1979: 19.

[73] For the orthodox understanding of parliamentary sovereignty that justifies this, see Dicey 1915: 78 who, on this point, famously wrote "neither the Act of Union with Scotland nor the Dentists Act, 1878, has more claim than the other to be considered a supreme law".

[74] See Thoburn v Sunderland City Council [2002] EWHC 195 (Admin) at [62] where the European Communities Act 1972 was defined as a "constitutional statute"; beyond the distinction between 'constitutional' and 'ordinary' statutes see R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3 on the possibility of a conflict between two "constitutional instruments" at [208]; see more recently an endorsement of the view that some acts of parliament enjoy "constitutional character" R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [67]. For an account on the implications of this trend for the principle of parliamentary sovereignty in the United Kingdom see Elliott in Jowell and O'Cinneide 2019.

[75] See Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 and R (Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22 where the court effectively disapplied ouster clauses; see also (R) Jackson v Attorney General [2005] UKHL 56, [2006] 1 AC 262 where in obiter three Law Lords qualified the principle of parliamentary sovereignty by reference to "constitutional fundamental" see at [102] (Lord Steyn): "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. … In exceptional circumstances … [the] Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish", at [107] (Lord Hope): "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based" or at [159] (Lady Hale): "The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny."

[76] Particularly considering the references to the permanency of devolution arrangements introduced by the Scotland Act 2016 and the Wales Act 2017, see Scotland Act 1998s, 63A (1) and the Government of Wales Act 2006, s A1 (1), see Elliott in Jowell and O'Cinneide 2019: 33.

treated as legal norms by officials and citizens and thus recognize constitutionalism and parliamentarianism as differentiated practices.

As with any other part of the law, constitutions are not set in stone and are largely the result of social and political struggles. But they are no less the way to pinpoint and entrench the result of these struggles, even if only in an open-ended manner. In this sense, the hegemonic establishment of common rules is not in and of itself the elitist perversion that some political constitutionalists see.[77] Neither is constitutional disagreement in and of itself a good thing.[78] Rather, constitutionalization is a unique opportunity for the practice of citizen self-government that these scholars purport to uphold.

Political constitutionalists should not miss it so easily.[79] When we claim that the constitution is to be modified in and by any ordinary process at a constant rate we undermine the emancipatory value of political constitutionalism: that people settle disagreements in a meaningful way. The point of political constitutionalism is not (or not only) that people or their representatives get to decide on crucial issues of public law. It is that their decisions are taken as more than minor victories to be reversed in the course of ordinary political action. The linear timescale of political constitutionalism departs from a starting point, the circumstances of politics, continues through a moment of voting and arrives at a final stage of settling the disagreement. Indeed, it does not imply (as legal constitutionalists would argue) that this disagreement is then settled forever and must be insulated from political contestation as much as possible. But this is different than saying that there is a democratic reason to dismiss the normative superiority of constitutional settlements. Arguably, constitutions have the aspiration of channelling and formalizing the course of future political action. No more but no less. It is one thing to reject the view of constitutions as unmovable pre-commitments and panacea for constitutional disagreement, another to overlook the value of people meaningfully agreeing on the establishment of whatever fundamental rules of

[77] This pinpointing moment is often seen as a fraud to popular sovereignty by sceptics of judicial review, particularly when it refers to top-bottom constituent processes. See eg Ran Hirschl's 'hegemonic preservation thesis' in Hirschl 2007.

[78] Disagreement is, as I see it, just a matter of fact. Political constitutionalists like Gee and Webber 2010: 290 insist that the role of disagreement in the political model of constitutionalism (and the low degree of normativity that it brings) makes the constitution "contingent, contested and even, at times, messy—but […] none the worse for it". My point is that it makes it none the better either.

[79] Note that constitutionalization comes in different forms: from entrenchment or amendments decided by legislative supermajorities, referendums or constituent assemblies to judicial decisions, be it common law constructions developed by the courts or specific rulings on the constitutionality of primary legislation. Not all these options of institutional design can promote democratic self-government in the same way.

government they choose to give themselves. To put it simply: politics precedes law, it does not fulminate it.

Political constitutionalists are sceptics on this point because they worry that the rigidity of law locks up conservative, anti-popular views into the constitution.[80] Institutional arrangements like courts equipped with the power to strike down legislation and rigid amendment procedures are inconsistent with the idea of a constitution that is brought up to date by the political majorities of the day. But there is room between legal constitutionalism and the realpolitik view of the constitution that political constitutionalists endorse. The idea that we should be vigilant of moralistic, elitist impositions of views among citizens should not make us leave behind the attempt to build moralized conceptions of constitutionalism.[81] On the condition that it is available for change in a feasible manner, there is nothing wrong with the entrenchment and hierarchical organization of principles and rights in a constitutional democracy. Surely the opportunity to fix the content of constitutional law is not one free of risks but, hopefully, a decent amount of the outcomes of popular decisionmaking will be worthy of a higher law status. This is, arguably, the starting assumption of political constitutionalism: overall, people are trustworthy to take fundamental decisions. Although under a more rigid constitution minorities will have to work harder to accomplish changes, with one too flexible these groups would not be better off. In a legal context where everything can change easily, securing rights would require demanding levels of mobilization and might simply exhaust the chances of social groups aiming at bottom-top constitution building. Hence, constitutional decisionmaking should be accomplished by political representatives or by direct consultation to the citizenship but this should not lead us to hold that parliament should have the power to amend the constitution with one simple majority vote.[82]

Acknowledging the legal nature of constitutions matters also in terms of the authority and sustainability of constitutional government. If the constitution is no more than the

[80] Eg Griffith 1979: 15; Bellamy 2016: 215-216.
[81] For an account of 'moralized constitutional theory' see Kyritsis 2017.
[82] In most countries with a codified constitution, processes of constitutional amendment take more than a simple majority vote in the legislature. This is due to the understanding that key constitutional matters are to be settled by clear majorities. This seems a good idea not only for normative reasons but also for practical ones. Arguably, the wider the support for change is, the greater the allegiance by dissenters will be. For a defence of the democratic value of codified constitutions and constitutional amendment procedures see King 2019:32 noting how in the case of the UK's flexible constitution "there is not even agreed criteria for what would constitute a constitutional amendment in the UK, and hence nothing to prevent 'amendments' being affected even without an Act of Parliament".

ordinary process of passing laws (as political constitutionalists hold), what amount of reasons for action can derive from this never ending battle for fundamental issues? How significant is winning fundamental rights that the legislature can easily shrug off? In Richard Bellamy's view, this concern "seems exaggerated given these same objectors generally accept that constitutional courts can and do overrule their precedents and revise their competences without a descent into anarchy."[83] But this response is unsatisfactory for at least two reasons. First, because the parallel with courts does not work well. Despite all the politicization of constitutional courts that can take place in today's constitutional democracies, it cannot possibly amount to the political task that parliaments carry out. Moreover, constitutional courts are not responsible for representing the people nor for satisfying their demands, so they cannot be used as a mirror to legislatures in a worse of two evils fashion. If constitutional courts are to exist, they should not rule to the beat of contingent majorities. Unless we want to duplicate parliaments (and that would get us back to the starting competition for constitutional supremacy), political constitutionalists should argue in favour of courts as independent, unelected and counter-majoritarian bodies.

Second, and perhaps more importantly, the argument of authority is essential if political constitutionalism does not want to get dangerously close to the same kind of decisionism that is characteristic of authoritarian forms of government and that worries critics of populist constitutionalism. If we like saying that political constitutionalism is at odds with any form of authoritarianism, then we cannot say at the same time that political constitutionalism is constitutional because it refers to a form of government with a constitution but not under one. Even if the political constitution is more available to democratic amendment that what legal constitutionalists would like, it does not follow that political constitutionalism should overlook the idea of government limited by a constitution. This is true not only for political reasons. It is also a sounder ontological position to adopt. If we hold that conflict and dissent in constitutional politics are always ineliminable it will be difficult to defend the existence of any will of the people that majoritarian institutions are fit to identify and flesh out, not least that courts should stick to. Furthermore, if anything, taking the long road to constitutional decisionmaking will hardly bring less legitimacy to the process and the outcome. Rather, it will enhance both. While short-cuts like majority vote are perfectly legitimate,

[83] Bellamy 2016: 210.

one does not need to be a deliberative democrat to recognize the meaning of the outcomes of longer, thorough decisionmaking processes. The latter makes it harder for illiberals to coopt the process through piecemeal law-making and, at the same time, it makes the outcome easier to accept by those who are defeated in the political process. In the way, institutions using constitutional law are honouring, not bypassing, strong legislative processes. The form such well-deserved honours take can include many of the advantages of otherwise ordinary law such as the entrenchment of rights or the best possible judicial interpretation. It seems excessive that, in order to spare us some of the disadvantages of the law (such as the unavailability of some law to ordinary political challenge and the practical and normative complications of bringing legal change through courts) we lose all of the advantages (such as the entrenchment of rights, a fair level of rights-based adjudication or the possibility of institutional resistance against illiberalism).

In conclusion, the idea of the constitution as politics 'all the way down' stands as a mirage. From a distance, it appears as the instantiation of citizen empowerment. Yet on closer inspection, its normativity vanishes.[84] What is left is the politicization of constitutional law, albeit one that comes in different varieties: from the inclusive, democratic form that political constitutionalism defends, to the authoritarian forms that scholars of populist constitutionalism worry about. The form that this politicization takes is what constitutionalists should be concerned with, not the language of sovereignty that political leaders across the board use in their quest for power, and that keeps scholars of populism so busy.

6. Conclusion

Although they rarely put it this way, the political constitutionalist defence of legislative over judicial supremacy is underpinned by concerns about the sustainability of the citizens' bond with their representative institutions.[85] From this standpoint, constitutions need to be open for contestation so that citizens can have a say in it. For the same reason, constitutions need to offer them a reasonably certain picture of the political framework to which they are expected to show allegiance, even if the picture is more precarious and provisional that what legal constitutionalists are ready to accept. This is a vital issue at a time when, presumably, anything close to constitutional

[84] Goldoni 2010: 944-945.
[85] See eg Sumption 2019: 24.

nihilism will not help us rebuild the liberal democratic project. A view of constitutionalism in which all options are always available for change in the most flexible way clears space for the decisionism that scholars of populist constitutionalism worry. Political constitutionalists would do well to concede that the price, if any, of recognizing some of the advantages of the law to the constitution is not as high as they argue. Granting that constitutional law is law, that it is normatively higher than other parts of the law, that it deserves special amendment procedures or that it is no less political when it comes in written form does not involve handing the constitution over to the judiciary. On the contrary, it can make political constitutionalism better by delivering on the promise of self-government in a society of equals.

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