

What's the Problem with Populism?

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Giuliano AMATO, Benedetta BARBISAN and Cesare PINELLI (eds.), *Rule of Law vs Majoritarian Democracy* (Hart Publishing 2021) pp. 512

'A specter, one reads, is haunting more than just Europe'.¹ So writes Justin Collings in his contribution to *Rule of Law vs Majoritarian Democracy*. The spectre is right-wing populism – not, I think, 'majoritarian democracy' as such. Marx and Engels had an account of where the spectre they thought was haunting Europe in 1848 came from: capitalist development – the economy, in short. The spectre, that is, had a specific political content and a specific economic cause, and for Marx and Engels the remedy was social and economic transformation. But, it turned out, they were wrong: capitalists were able to push the spectre away by a series of institutional reforms of governance.

Rule of Law vs Majoritarian Democracy is representative of a spate of scholarship on the contemporary crisis of democracy, if that's what it is. That scholarship differs from Marx and Engels's work not solely because it is academic analysis rather than political polemic. It differs as well because it elides politics and economics and attends almost exclusively to institutional matters. Politics is elided by replacing a specifically right-wing populism with populism in general or, as here, with majoritarian democracy. Economics is elided by gesturing in the direction of causes of the crisis located outside of governing institutions – something like a combination of neoliberalism with modes of decision-making enabled by modern communication technologies ('social media', 'the Internet', and the like) – without seeking to change anything associated with those causes. And, as before, the remedies for the crisis are to be found within the design of governance institutions, generally – though not universally – by restricting the

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¹Collings, p. 84. This review cites the essays in *Rule of Law vs Majoritarian Democracy* solely with the name of their authors and the pages on which quoted material occurs.

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domain over which democratic majorities can govern themselves. This review addresses the two elisions before dealing with the remedial issue.

I note an initial problem of definition. The book's editors and authors use 'populism' and 'majoritarian democracy' as roughly equivalent terms. In my view, majoritarian democracy is the genus, with right-wing and left-wing populism as two distinct species. The genus is a mode of determining the preferences that guide policy-making in democracies; the species offer different substantive political agendas (though occasionally they share some 'traits' or policy proposals). In what follows I use the term 'majoritarian democracy' to describe the general mode of determining preferences and 'populism', referring when appropriate to the particular species, to describe the substantive agendas.

THE ELISION OF POLITICS

Yves Mény writes, 'The populists – all populists without exception – reject th[e] vertical division [between representatives as an elite and the people] and introduce a holistic perspective: 'the people' means everyone in society but excludes the elites, which are rejected as corrupt, incompetent or self-interested' (Mény, p. 134). Jan-Werner Müller notes that there are indeed right- and left-wing populists and writes that they 'are not always wrong when they make claims that get at something like the secession of the powerful'. But, he continues, 'they are wrong to reduce all conflicts to questions of belonging or to deem disagreement with them as automatically illegitimate That is the reason', he writes, 'why genuine left-wing populists . . . are also prone to bend the law . . .' (Müller, p. 164). The elision of politics – that is, treating 'populism' rather than different politically inflected versions as the relevant category of analysis – is clear. As is the fact that something might have gone off the tracks when Müller's reference to left-wing populists and bending the law is supported by the following: 'Think of the way the de facto ruler of Poland, Jarosław Kaczyński, charges an independent judiciary with "legal impossibilism"' (Müller, p. 164 n. 24). I suppose there might be some sense in which Kaczyński is a left-wing populist, though Müller doesn't lay it out, but the more standard view, I think, is that he is a right-wing populist.

The elision of politics is common in the literature on populism and constitutionalism. Perhaps not surprisingly for a collection of essays by European-centred authors (11 of the book's 21 chapters are written by Italian scholars and none by Latin American ones), almost all the examples of populism's downsides come from Poland and Hungary.² Yet, many of the authors' generalisations refer to populism

²There are a handful of references to Syriza and Podemos, some critical of and some admiring of their uses of internet-based internal decision-making. See, e.g., Ignazi, p. 278 (referring to 'new, internet-based, internal structuring' as having the potential to revive political parties).

generally, not merely to Poland and Hungary. And some of the generalisations are misleading even as to those nations.

Consider a theme that recurs in several chapters – that populists favour plebiscitary decision-making over representative and deliberative processes. For Wojciech Sadurski, populists ‘dislike slow, patient deliberation in parliaments, preferring a “winner takes all”, plebiscitary model of politics, under which the leader . . . obtains a *carte blanche* for the period of his . . . term’ (Sadurski, p. 197). Benedetta Barbisan offers a related critique of imperative mandates, that is, requirements that representatives take direction from their constituents rather than exercise their independent judgement during parliamentary deliberations: the ‘imperative mandate serves the purpose . . . of removing all intermediaries . . . to reconnect constituents and deputies . . .’ (Barbisan, p. 256).

The problem here is that it is descriptively inaccurate, at least to the extent that it suggests that populists have a ‘utopian dream of a world without mediation or delegation . . .’ (Mény, p. 121). Even, perhaps especially, in Poland and Hungary populist leaders are perfectly happy to use representative institutions in which they have majorities to enact their preferred policies. They reserve referendums, imperative mandates, and plebiscites for specific policies – sometimes constitutional amendments, sometimes ordinary policies central to their political programs. Perhaps they use these techniques more than non-populist leaders, and sometimes (though I believe an empirical analysis would show, rarely) they use them in circumstances not strictly authorised by standard legal analyses.³ But, overall, populists don’t oppose representation as such. Nor, I think, are populists as such committed to following the diktats of a charismatic ‘Dear Leader’ who asserts that he (rarely she) embodies ‘the People’ and that whatever he happens to prefer is a mirror of what the People want. I doubt that anyone would describe Kaczyński and Poland under the PiS in those terms, for example. Perhaps there are weak tendencies in these directions, but if so the analysis should take a different form.

The world of unmediated decision-making is, according to several authors, paradoxical. According to Giuliano Amato, populists describe ‘liberal democracy’ as ‘promot[ing] the selfish interests of the individuals’, in contrast to ‘illiberal democracy [which] proudly stands for the general interests of the nation’ (Amato, p. 2). But, Amato’s co-editor Barbisan contends, plebiscitary and other

³For myself, the most problematic cases come from Venezuela and the UK. The Venezuelan Constitution of 1999 was adopted by a process that the nation’s highest court acknowledged was inconsistent with the constitution in place, and the Brexit referendum was in tension with the constitutional commitment to parliamentary supremacy. Yet in Venezuela the court (not under populist control) held that the process for adopting the 1999 Constitution was legal though extrac-
onstitutional because it was an exercise of the people’s direct constituent power. And in the UK parliamentary supremacy has been modified to some unknown degree by the availability of referendums on some especially important topics.

forms of direct democracy favoured by populists 'labour[] under the misapprehension that citizens are always self-sufficient in determining the political drive' (Barbisan, p. 251). That is, they are 'isolated individuals' who are 'left alone in the process of developing their political wisdom, isolated in an atomised society . . .' (ibid., p. 255, 259). The houses of liberal and populist political theory are more capacious than this, though. Perhaps some Rawlsian liberals start with the premise of atomised individuals but most liberals, including some Rawlsians, acknowledge that individual preferences are shaped by social context – which is precisely why institutional design is important to ensuring the reproduction of political liberalism. And, on the level of daily politics and the shaping of people's policy preferences it's basically silly to assume that people come to their policy preferences entirely on their own: they read newspapers, scan the Internet, talk with their families and friends, and much more. I doubt that any populist leader makes such assumptions.

Having cautioned against overgeneralisations about populism, particularly those that ignore the political content of populist parties' programs, I must add that some authors in *Rule of Law vs Majoritarian Democracy* have quite astute things to say about electoral democracy and in particular about the importance of representation to democracy. Representation is of course frequently said to provide opportunities for deliberation before policies become law. Representative bodies do not always deliberate, though (sometimes they simply enact non-populist parties' election manifestos). The better form of the argument when we are thinking about populism and direct democracy is that representative bodies typically provide *more* opportunities for deliberation than do other mechanisms of determining what a majority prefers. Consider, though, the point about election manifestos: deliberation occurs in the run-up to the election, as parties offer competing manifestos – but then, so does deliberation occur in the run-up to a referendum.

The more interesting point about representative bodies is that elections for representatives provide opportunities for political parties to *shape* popular preferences. As Simone Chambers puts it, 'Elections punctuate the ongoing underlying democratic discourse . . . [and] structur[e] and demand[] regular justifications of platforms and policy proposals' (Chambers, p. 115). Elections are 'a closure procedure' that brings this process to a provisional end (ibid., p. 116). She breaks the process down into four components:

First, any decision, vote, election, or referendum is never synonymous with the people and is always fallible, corrigible, and partial. Secondly, 'the people' is always a work in progress over time. The work involved here is, on the one hand, maintaining adequate levels of the three dimensions of legitimacy: equality, inclusion, and the circulation of and access to good information as well as the undistorted

views, claims, and expressed feelings of others, and on the other hand, maintaining channels of responsiveness between citizens and decision-makers. Thirdly, the assessment of whether the democracy system does a fair job in facilitating and empowering popular opinion and will formation must be assessed along several dimensions Finally, this view places special emphasis on the structure, character, and regulation of the public sphere in determining democratic legitimacy rather than the voting booth. (Ibid, p. 113)⁴

Chambers' analysis is framed as a critique of the supposed commitment of majoritarian democrats to enacting into law the unmediated preferences of 'the People'. My only caveat about it is that many populist leaders and parties agree with Chambers' critique, understanding that their job entails more than discerning 'the People's' preferences. They know that they often have to manage factions within the party or its associated coalition, and such management is how shaping preferences occurs within parties.

This isn't to say, of course, that the political practice of populist parties is identical to the practices of parties committed to representative democracy. Some populist leaders are authoritarians taking advantage of the circumstances they confront to advance their authoritarianism. And perhaps proto-authoritarians see a distinctive political advantage in current circumstances by using the language of populism; if so, there might be a greater tendency for proto-authoritarians to present themselves as populists than for non-authoritarians. Populists across the political spectrum probably do favour using forms of direct democracy somewhat more frequently, though typically within a Rule of Law framework that reserves substantial space for decisions by representative bodies. My central point, though, is that we really should disaggregate the category 'populism' (or 'majoritarian democracy') into subcategories that expressly refer to politics. An analysis could then identify not only the commonalities between right- and left-wing populist forms of politics but also the quite important differences between their programs and (sometimes) their modes of political mobilisation.

Why don't we? Discussing the European Commission 2019 'Communication' on 'Strengthening the Rule of Law', Barbara Grabowska-Moroz and Dimitry Kochenov ask, 'What is Missing from This Picture?', and criticise the Commission for 'avoid[ing] calling a spade a spade' (Grabowska-Moroz and Kochenov, p. 78). The 'spade' is 'Rule of Law backsliding – deliberate dismantling of checks and balances – applied in Hungary and Poland', as distinct from 'typical everyday shortcomings regarding implementation of the Rule of Law principle' (ibid.). They attribute this hesitancy to 'political correct[ness]' (ibid.), or perhaps more

⁴See also Mény, p. 136 ('in practice there is no real viable alternative to the efficient principle of representation').

properly the political constraints on a multinational body like the European Commission. Academics don't, or at least shouldn't, feel the same constraints. What we do share, though, is a sense that academic analysis should operate at a higher level than we find in the daily workings of politics. Yet, where the relevant phenomenon arguably has a distinctive political tilt – that is, where the Rule of Law is distinctively threatened by right-wing populists – operating at that level can be deeply misleading. At the very least scholars concerned about the erosion of the Rule of Law should do their best to make sure that their generalisations about populism and majoritarian democracy hold true across the political spectrum.

THE ELISION OF ECONOMICS

Mostly right-wing populism/majoritarian democracy became a threat to the Rule of Law because right-wing populist parties won reasonably free and fair elections. They won those elections because they offered voters a political program that the voters found more attractive than the programs being offered by parties of the centre and the left. I think that most observers think that the right-wing populist programs were more attractive because of economics. Many centrist and left-of-centre parties were in power when the economic crisis of 2007-08 (dates varied among affected countries) hit. They responded by adopting policies that exacerbated the economic pain their citizens were feeling. And they were punished for acquiescing in or even promoting the policies that caused the crisis and for the policies they adopted in response. It wasn't so much that right-wing populists had positive programs to alleviate the economic pain, though they did promise to provide some direct payments to people who needed them, but more that they weren't the ones who had been in power when the crisis hit.⁵ Political scientists would describe this as a classic case of retrospective voting – casting your vote based on the performance of the incumbent parties rather on the promises of the opposition.

Economists Moreno Bertoldi and Michele Salvati flesh out this story. They argue that problems for domestic economies are created by the freedom of

⁵The Polish experience is instructive. According to one analysis, 'Poland experienced a sharp rise in inequality during its transition from communism to capitalism, . . . [a] trend that . . . continued into the 2000s': P. Bukowski and F. Novokmet, 'Within a single generation Poland has gone from one of the most egalitarian countries in Europe to one of the most unequal', *LSE Blog*, available at <https://blogs.lse.ac.uk/euoppblog/2019/12/02/within-a-single-generation-poland-has-gone-from-one-of-the-most-egalitarian-countries-in-europe-to-one-of-the-most-unequal/>), visited 27 January 2023. Yet, according to one measure, inequality of income distribution in Poland dropped sharply after the PiS government implemented its economic program. 'Poland – Inequality of income distribution', *Trading Economics*, available at <https://tradingeconomics.com/poland/inequality-of-income-distribution-eurostat-data.html>), visited 27 January 2023. I thank Bojan Bugaric for these references.

capitalists to organise production, which states find difficult though not impossible to control when capitalist choices impose economic hardship. An economic regime of ‘embedded liberalism’ and ‘regulated capitalism’ provided economic stability and growth after 1945 but collapsed under the pressure of ‘a globalized economy undergoing a phase of revolutionary technological change’ in the Great Recession (Bertoldi and Salvati, p. 293, 303). Unlike the post-1945 case, no solution emerged for international causes, domestic and structural-economic reasons, and political, cultural and cognitive choices by politicians (ibid., p. 293). As to the latter, they point out that European politicians were ‘anchored’ to neoliberalism even after 2008 and that centre-left parties accepted austerity programs as the least bad of the alternatives available to them, which had the effect of sapping their support from the working class (ibid., p. 299, 300). The alternatives had disappeared in part because, unlike after 1945, the world no longer had an economic hegemon and in part because ‘[d]omestic deregulation and free capital movements . . . together with a slow-down of growth . . . began to undermine . . . the post-war social compromise’ (ibid., p. 306).

All this seems reasonable enough. One would think, then, that someone concerned that right-wing populism presents a threat to the Rule of Law would focus on centrist and left-of-centre economic policies that would be more attractive than what right-wing populists have actually delivered (which is something but not all that much). Yet economics plays a small role in the analyses offered in this book. Indeed, Amato’s opening chapter asserts that right-wing populists prevailed in Poland and Hungary ‘for reasons that have nothing to do with the economy’. As he puts it, ‘even though the economy has played a paramount role, the transformation is not due to the economic consequences of globalisation’ (Amato, p. 2). The chapters focus on political theory and institutional design rather than economics.

I suggest two reasons for that focus. First and probably more important, the authors are legal scholars (as am I). We know something about political theory and institutional design, and know much less about economics. Basically we’re tilling our perhaps small corner of the field because that’s all we can do. There’s nothing wrong with that, of course, but we probably should acknowledge that whatever institutional reforms we propose are likely to have a relatively small impact on preserving or restoring the Rule of Law.

Second, if the economic villain is globalisation any efforts to defeat it – that is, any efforts to remove the cause for the success of right-wing populist parties – are likely to be extremely difficult, perhaps impossible.⁶ As Bertoldi and Salvati put it, ‘Remedies compatible with a liberal polity and a capitalist economy . . . are

⁶I find it impossible to resist referring back to the *Communist Manifesto* and its legacy of an imagined international movement of proletarian solidarity. Something akin to that might be needed

possible in principle. These remedies, however, would raise intense distributional conflict, take a long time to produce favourable effect (. . . but democracy is notoriously short-sighted) and would like the simplicity and unifying character of the . . . policies of the post-war period' (Bertoldi and Salvati, p. 310).

With economic remedies put to the side for these reasons, what can institutional reform accomplish?

INSTITUTIONAL REFORM AS A POSSIBLE REMEDY

It's probably useful to distinguish two questions: how can the Rule of Law be fully restored once it's been eroded, and how can the Rule of Law be sustained *ab initio*. The former question is addressed only glancingly in *Rule of Law vs Majoritarian Democracy*. Almost by definition public institutions are unavailable for the restoration task, having been taken over by the Rule of Law's opponents. That leaves supranational bodies and pressure from other nations and, importantly, civil society. Grabowska-Moroz and Kochenov argue that supranational European institutions haven't done much to deal with Rule of Law challenges in Poland and Hungary, and they question the effectiveness of domestic civil society institutions (Grabowska-Moroz and Kochenov, p. 70-71). They suggest that only a vibrant Rule-of-Law culture – perhaps entrenched within a nation's history – is up to the task, though I wonder where that culture might be located other than in civil society.⁷ So, for example, the Brazilian bar appears to have been an important factor in preserving a Rule-of-Law culture during the military dictatorship period from 1964 to the mid-1980s and during the recent Bolsonaro presidency.

Most of the discussion of preserving the Rule of Law in *Rule of Law vs Majoritarian Democracy* deals with designing institutions that can resist assaults from those who seek to undermine the Rule of Law by using the institutions of electoral democracy. And, unsurprisingly, an independent judiciary is the institution that receives the most attention. Sometimes references to an independent judiciary are pabulum, as in Lord Mance's essay on 'The Role of Judges in a Representative Democracy'. Sometimes they are simple gestures or markers laid down, as in Amato's introductory essay (Amato, 1 ['first of all an independent judiciary']). Dieter Grimm and Justin Collings provide readers with deeper arguments about the need for and limits upon an independent judiciary to sustain electoral democracy.

Grimm lays out the 'preconditions' underlying even the most formal notions of democracy – elections, campaigns, political parties, the existence of a private

to defeat globalisation as a cause of the economic distress that was the basis for right-wing populism's success, and such a movement doesn't seem in prospect at the moment.

⁷For a similar argument, see Pinelli, p. 149 (discussing 'habits' that sustain democracy).

sphere (Grimm, p. 49). These preconditions, though, exist *only* within a framework of law. And, Grimm argues step by step, that framework ‘cannot be guaranteed by democracy itself’ (ibid., p. 49, summarising an argument laid out in the preceding pages). Only independent courts applying or interpreting the constitutional rules for organising free elections and the like – the ‘rules about ruling’ (ibid., p. 45) – can do so: ‘The rule of law is therefore dependent on the existence of devices within the structure of the state which monitor the lawfulness of government actions’ (ibid., p. 57). Grimm of course acknowledges that constitutional rules about ruling can have a range of reasonable specifications: ‘many constitutional provisions . . . are rather vague and open-ended. Their application to cases is not fully determined by the text of the constitution’ (ibid., p. 58-59). But, he insists, that application – specification of meaning, or in an older terminology, *determinatio* – must result from legal rather than political analysis. Even so, he observes, ‘constitutional courts [can] overstep their boundaries’ (ibid., p. 59), perhaps by mistaken legal analyses, perhaps by improperly injecting political considerations into their specifications. Amendment procedures address this problem, as do regular mechanisms for judicial appointment and removal that give political actors indirect influence over the constitutional court’s membership.⁸ One might think, though, that some (though not all) amendment rules might be badly coordinated with the risk that a nation’s constitutional court will ‘overstep’. That is, one would probably want to design systems making amendment easy if the risk of judicial overstepping is high, more difficult where that risk is low, yet I know of no exploration of whether that actually occurs. If it doesn’t one might consider other mechanisms to check judicial errors, such as weak-form constitutional review.

Justin Collings picks up the argument at this point. His principal point is that:

redefining democracy in ways that cast judicial review as somehow more democratic than the demos is doubly dangerous: it proves the populists’ point about judicial review’s basic elitism, and it replicates the populists’ sleight-of-hand by claiming a special prerogative to represent, and redefine ‘the People’. (Collings, p. 83)

He is especially concerned with scholars including Ronald Dworkin, John Rawls, and Jürgen Habermas who purport to be attentive to the fact that legislatures can be less than fully representative and deliberative while exalting the deliberative capacity of constitutional courts without taking a similarly realistic view of judicial

⁸For a relevant recent analysis, see D. Kosař and K. Šipulová, ‘How to Fight Court-Packing’, 6(1) *Constitutional Studies* (2020) p. 133.

performance. Collings concludes not with strong normative recommendations but with an appropriately cautionary tone about these redefinitions.

Populists and majoritarian democrats sometimes do seek to limit the degree to which constitutional courts in their nations are independent of political actors, and sometimes they do so in the service of an anti-Rule of Law, authoritarian agenda. But, as we can infer from the arguments offered by Grimm and Collings, sometimes constitutional courts can be *too* independent, and institutional reforms reining them in – or, to develop Grimm's metaphor, attempting to keep them within proper bounds – will be appropriate. Everything, I think, depends upon the political circumstances and aims of majoritarian democrats: do they seek to correct judicial missteps – unreasonable specifications or simple political disagreement about a choice between reasonable specifications – or do they seek to impose 'rules about ruling' that do no more than serve their temporary political agendas? Here too we probably can't avoid a rather direct political analysis.

Note too that Collings's concern about redefining democracy points to the ways in which the design of constitutional courts can address and perhaps weaken some of the reasonable concerns expressed by populists and majoritarian democrats. No one could fairly deny that constitutional court judges are an elite. When they overstep, they give populists fodder for their anti-elitism. Of course we're going to disagree about whether particular decisions are examples of overstepping the bounds – but those who defend specific decisions as within bounds should at least reflect on the possibility that they are themselves expressing elite views rather than unbiased legal analysis. More important, we might disagree over whether judicial overstepping is frequent enough to warrant some adjustment in the degree of independence the judges have. Perhaps, though, even those most committed to strong versions of judicial independence might come to see some adjustment as appropriate not intrinsically but as a way of accommodating the not-unreasonable concerns populists express about judicial overstepping. They would thereby, and not incidentally, weaken the political attractiveness of populist parties.

Grimm might respond that these concerns and a number of others that one might deploy in favour of altering the rules about ruling are political rather than legal. What, he might ask in the first instance, are the rules according to which these proposals become embedded in constitutions? The initial answer is of course the rules for constitutional amendment, or more precisely, political contention over amending the rules for ruling conducted according to the constitution's amendment rules. As I've noted, that's pretty much how modern proponents of majoritarian democracy on both sides of the political spectrum act.

One might note two related concerns. First, as with all constitutional provisions, the courts will be called upon to interpret not only the amendment rules but also and probably more important the rules for organising political contention

over constitutional amendments. For example, some courts hold – peculiarly, in my view – that a nation’s president (or its executive government) must remain neutral when constitutional amendments are under consideration, the theory being that these actors are supposed to represent the nation as a whole and stay above ‘ordinary’ politics, even politics about changing the constitution. When constitutional amendments affecting the courts are at issue, we might note that judges might consciously or unconsciously interpret the rules for conducting politics about constitutional amendments in a self-interested way.

Second, constitutional courts around the world have begun to articulate doctrines that limit political contestation over constitutional amendments themselves – an unconstitutional constitutional amendment doctrine that bars the use of constitutional amendment procedures to alter the ‘basic structure’ created by the constitution.⁹ Strikingly, constitutional courts that use this doctrine seem to me to do so disproportionately with respect to constitutional amendments affecting the courts themselves, again raising the previously mentioned concern about self-interest and elitist self-preservation.

None of the foregoing implies that majoritarian democracy should displace political contestation according to the rules about ruling. And some majoritarian democrats are comfortable with using political contestation according to reasonably fair but flexible rules to alter constitutional provisions that, in their view, improperly obstruct them from achieving the political goals they have persuaded a majority of voters to support. What this means, though, is that political contestation over the rules about ruling are likely to be fluid and difficult to discipline within purely legal bounds. Grimm and others who support constitutional review by independent courts may well accept that fluidity and uncertainty by characterising it as an example of the uncertainty that accompanies all forms of governing according to legal rules.

CONCLUSION

I concede that I have offered a somewhat rosy picture of what (some) majoritarian democrats are committed to.¹⁰ And I concede, as I must, that many prominent populists don’t share the commitments to ruling according to rules, not simply with respect to amending the constitution but across the board. But, as I’ve emphasised throughout, critical analysis should use more refined analytic

⁹For the major study of this doctrine and its theoretical underpinnings, see Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).

¹⁰Of the book’s contributors, Piero Ignazi comes closest to expressing an even modestly rosy view about the political parties that are the vehicles for majoritarian democracy

categories than 'populism' or 'majoritarian democracy'. If we think that Viktor Orbán and Jarosław Kaczyński are authoritarians who have majority support and have ginned up a political theory that justifies their authoritarianism, we should say so rather than treating 'majoritarian democracy' as a theory that accounts for the positions they take. We should also consider whether left-wing populists who articulate programs that they say express 'the People's' will actually have the same authoritarian tendencies as Orbán and Kaczyński. My judgment is that some do but many don't.¹¹

Overall, then, I believe, *Rule of Law vs Majoritarian Democracy*, like much of the recent scholarship of populism and democratic backsliding, poses the underlying question badly by failing to distinguish carefully enough between majoritarian democracy and the specific right- and left-wing versions it takes today – and then, in the course of addressing the question as posed, many authors offer valuable observations and arguments about representative democracy. We can benefit from thinking about the latter even if they do not help us think about how we might respond to democratic backsliding, without buying into the question that elicited them.



¹¹When Rafael Correa and Eva Morales held power in Ecuador and Colombia a fair number of observers of populism thought them proto-authoritarians and noted that they sought and achieved constitutional amendments that would have allowed them to retain power indefinitely. Yet, though the stories are complicated, both Correa and Morales left the presidency and have withdrawn from politics at least for now.