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## Judicial Populism,

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## Article

### Judicial Populism

**Anya Bernstein & Glen Staszewski<sup>†</sup>**

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#### INTRODUCTION

The rise of populism is one of the most significant developments in contemporary politics.<sup>1</sup> This phenomenon can be difficult to

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1. The *Cambridge Dictionary* even declared “populism” its word of the year in

capture succinctly: populism does not constitute a uniform political movement, and the label has been applied to quite different political movements and moments.<sup>2</sup> But commentators generally recognize a particular, contemporary form of authoritarian populism characterized by several key traits.<sup>3</sup> Populist leaders claim to represent the will of a morally pure people against a corrupt, out-of-touch, or unresponsive elite.<sup>4</sup> They present this “people” as a unified whole, with a single, undifferentiated will to which the populist leader claims exclusive, unmediated access.<sup>5</sup> Populists use this image—one leader, one people, one will—to suggest that political questions have one correct answer: the answer the populist provides.<sup>6</sup> They deny the very possibility of legitimate disagreement and seek to exclude those who diverge from the populist’s view, labeling them outsiders or even enemies.<sup>7</sup> Populism is thus an exclusionary form of identity politics.<sup>8</sup> Populist leaders use this rhetorical frame to claim legitimacy by fiat. Populism challenges the commitments of republican democracy, which rests on institutions that mediate the divergent interests of a pluralistic populace through ongoing negotiation to produce incremental, provisional responses to the public’s problems.<sup>9</sup>

Discussions of populism generally focus on politics. This Article identifies a related phenomenon in law. *Judicial populism* uses political populism’s tropes, mirrors its traits, and enables its practices. Like political populism, judicial populism insists that there are clear, correct answers to complex, debatable problems. It disparages the mediation and negotiation that characterize democratic institutions and rejects the messiness inherent in a pluralistic democracy. Instead, it simplifies the issues legal institutions address and claims special access to a true, single meaning of the law.

In this image, there is no room for legitimate disagreement. Writers in this vein often accuse those who disagree with them of bad faith or willful blindness. Deploying stock stories and familiar tropes,

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2017. *Cambridge Dictionary's Word of the Year 2017*, CAMBRIDGE DICTIONARY: ABOUT WORDS (Nov. 29, 2017), <https://dictionaryblog.cambridge.org/2017/11/29/cambridge-dictionary-word-of-the-year-2017> [<https://perma.cc/3HJL-U3M7>].

2. JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 1 (2016).

3. *See infra* Part I.

4. MÜLLER, *supra* note 2, at 2–3.

5. *Id.* at 3.

6. *Id.* at 25–26.

7. *Id.* at 4.

8. *Id.* at 3.

9. *See generally* JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (Melvin L. Rogers ed., 2012) (discussing the source of democracy’s legitimacy).

this rhetoric presents good judging as mostly a matter of using the correct method. It imagines away judges' unavoidable participation in the production of law and relieves them of responsibility for the consequences of their actions. Because they focus on method, these stories and tropes can be deployed to whatever substantive ends a writer wants, while also disparaging those who acknowledge normative and practical concerns as activist elites imposing their preferences on the public. Judicial populism thus echoes the anti-pluralist, anti-institutionalist, and Manichean stance of its political cousin.

Not all who draw on populist reasoning are populists through and through.<sup>10</sup> Populism provides tropes—standardized ways of acting and arguing—that people can utilize to differing ends and extents. Those tropes, moreover, have no special claim to legitimacy or acceptance; like any approach, they should be evaluated on their merits. In this Article, we show how populist tropes have made their way into, and even entrenched themselves in, legal theory. And we argue that the legal theory of a republican democracy should not accept, much less submit to, judicial populism.

Part I of this Article briefly sketches the most salient characteristics of political populism. Part II argues that public law adjudication and legal theory host an analogous, though previously unrecognized, judicial populism. In Part III, we survey three areas where judicial populism has become entrenched through extensive articulation in well-known theories: textualism, originalism, and unitary executivism. These theories exemplify judicial populist rhetoric, insisting on peculiar frames through which to see law, judging, and democracy.<sup>11</sup> Part IV explores how those frames are constructed: specious claims to minimalism—of legal method and policy effect—work as a magic ticket out of the normative contestation that characterizes legal decision-making. A set of stock stories helps bolster claims to exclusive, unmediated access to the true meaning of the law that bypasses the institutions of democratic governance and places the judiciary above the fray of pluralistic debate. And misusing the familiar syllogistic argument form creates a veneer of certainty, setting up battle lines for a Manichean contest.

Disassembling the frame shows that, despite its claims, populism has no monopoly on legitimate legal methods and no special access to legal truths. Nor, as Part V explains, should a republican democracy

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10. MÜLLER, *supra* note 2, at 1–2, 38–39.

11. In a companion work in progress, we explore related manifestations of judicial populism specifically addressing the administrative state.

want a theory that did. A republican democracy, we argue, should embrace judicial approaches that value its commitments and build on its strengths: pluralism, institutional mediation, deliberation, debate, and flexibility. Legal thinkers should reject judicial populism's self-righteous claim to reflect the only legitimate legal method, and instead embrace republican democracy in legal interpretation.

### I. WHAT IS POPULISM?

With the end of the Cold War, many believed that liberal constitutional democracy would imminently achieve a permanent, decisive victory over alternative forms of government.<sup>12</sup> But not everyone benefited from the economic and political upheavals that followed or from the new orders created in their wake. Populist leaders seize on the resulting alienation and resentment to empower themselves instead. Working within democracies, populists use the principle of popular sovereignty to secure power, but their modus operandi are profoundly undemocratic.<sup>13</sup> Populism comes in many flavors and can be hard to pin down,<sup>14</sup> but scholarship in political theory and related disciplines has identified its most salient characteristics.<sup>15</sup> This Part draws on that work to present our understanding of populism and highlight the features most relevant for our analysis.

The notion of populism we use here focuses on its central features in contemporary democracies, including the United States. This contemporary, authoritarian populism trades on a favorable image from other movements that have borne the same label as a way to signal a desire to advance the interests of people marginalized or

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12. See Aziz Z. Huq, *The People Against the Constitution*, 116 MICH. L. REV. 1123, 1123 (2018) (citing FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 211 (1992)) (“[T]here are no serious ideological competitors left to liberal democracy.”).

13. See MÜLLER, *supra* note 2, at 44–49 (discussing populist “techniques of governing”).

14. For example, populism comes in both left- and right-wing variations, and can be attached to different “host ideologies.” See CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* 21 (2017); Andrew Arato & Jean L. Cohen, *Civil Society, Populism, and Religion*, 24 CONSTELLATIONS 283, 286–87 (2017). And it is internally diverse and complex. See, e.g., David Fontana, *Unbundling Populism*, 65 UCLA L. REV. 1482 (2018) (arguing that the notion of populism can be unbundled from the authoritarian and xenophobic dimensions that often accompany it); Nadia Urbinati, *Political Theory of Populism*, 22 ANN. REV. POL. SCI. 111, 114 (2019) (“Populism is the name of a global phenomenon whose definitional precariousness is proverbial.”).

15. See generally MÜLLER, *supra* note 2; Arato & Cohen, *supra* note 14, at 285–89; Huq, *supra* note 12, at 1134 (claiming that Müller provides “the most useful definition of populism” in the literature); Urbinati, *supra* note 14.

ignored by economic and political powers.<sup>16</sup> Like those predecessors, the brand of populism we address here also makes claims justifying action in the name of “the people.” But because contemporary authoritarian populism’s defining characteristics are in fact *exclusionary* in nature, this version of populism is normatively problematic and fundamentally undemocratic. In particular, we focus on three related overarching traits: contemporary authoritarian populism is anti-pluralist, anti-institutional, and Manichean.

Populists, Jan-Warner Müller explains, “are always *antipluralist*. Populists claim that they, and they alone, represent the people,” and that the people themselves constitute a unified whole.<sup>17</sup> The populist thus lays claim to *exclusive representation* of the whole people. This discourse is universalizing—the populist encompasses all. But it is also exclusionary: it does not typically call for greater inclusion of different kinds of groups into the political process.<sup>18</sup> Instead, it claims to *already* speak for the whole of the people, which is *already* constituted as a unity with one common interest and one shared will.<sup>19</sup> Populist claims express seemingly irrefutable, universal truths, even as they marginalize the experiences and interests of those who do not fit the story the populist tells.<sup>20</sup> The supposed unity of the people casts divergent viewpoints as illegitimate,<sup>21</sup> in contrast to a democratic conception in which ongoing negotiation among diverse values and interests are integral. This imagined unity also gives populists a claim

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16. Think, for example, of the farmer-labor alliance of the nineteenth-century Populist Party in the United States, or the “plurinational” populism of Evo Morales. *See, e.g.,* Michael Kazin, *How Can Donald Trump and Bernie Sanders Both Be ‘Populist’?*, N.Y. TIMES (Mar. 22, 2016), <https://www.nytimes.com/2016/03/27/magazine/how-can-donald-trump-and-bernie-sanders-both-be-populist.html> [<https://perma.cc/XH6U-WB77>]; Carlos de la Torre, *In the Name of the People: Democratization, Popular Organizations, and Populism in Venezuela, Bolivia, and Ecuador*, 95 EUR. REV. LAT. AM. CARIBBEAN STUD. 27, 33–36 (2013).

17. MÜLLER, *supra* note 2, at 3.

18. *Id.*

19. Thus, for instance, Müller argues that members of the Populist Party in the United States in the late nineteenth century were not really “populists” in the modern sense, because they sought greater inclusion and equality and did not purport to represent or speak for all the people. *Id.* at 85–91.

20. *See* CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY 9 (Ellen Kennedy trans., 1988) (footnote omitted) (“Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second—if the need arises—elimination or eradication of heterogeneity.”). Schmitt was a key political theorist of the Nazi regime; his understanding of democracy closely echoes contemporary populism.

21. *Id.*

to clear, correct answers to problems that are in fact inherently complex and multifaceted.<sup>22</sup>

Contemporary authoritarian populism is thus an exclusionary form of identity politics.<sup>23</sup> It pits the true people, whom populist leaders purport to represent, against “others” who do not properly count as part of the polity.<sup>24</sup> The others, who might include political opponents, bureaucrats and other experts, independent courts, the mainstream media, transnational organizations, foreign citizens and governments, immigrants, and members of marginalized minority groups, are blamed for the nation’s problems and provide a convenient scapegoat for leaders’ own shortcomings.<sup>25</sup> Think for instance of the slogans “Black lives matter” and “all lives matter.” The former insists on the value of a group marginalized in political practice, seeking to bring an excluded participant into the political fold. The latter also sounds inclusionary because it encompasses “all lives.” But in context it erases the way that Americans’ experiences of state power differ in racialized ways. The universality of “all lives matter” excludes those groups whose lives have, in practice, mattered less to the systems they address. In the same way, claims to represent “the people” falter on the fact that a diverse democracy *has* no one, unified “the people.” Claiming it does thus excludes experiences, views, and statuses that populists present as falling outside “the people” proper—as, in fact, mattering less.

Contemporary authoritarian populism also has a “noninstitutionalized notion of ‘the people.’”<sup>26</sup> It rejects the mediating role of democratic institutions in which divergent preferences can be expressed and negotiated.<sup>27</sup> Populist leaders claim special access to

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22. See MÜLLER, *supra* note 2, at 25–26 (discussing populist “oversimplification”).

23. *Id.* at 3.

24. *Id.* at 4; see also Urbinati, *supra* note 14, at 112 (“While the populist interpretation of the people stresses the inclusion of the ‘ordinary’ many, this inclusion occurs through a process of exclusion: The political establishment is the externality against which populism’s ‘people’ positions itself and without which populism cannot exist.”).

25. See Arato & Cohen, *supra* note 14, at 288–89 (“Targeting the separation of powers, the press, independent courts and the rights of opponents and minorities is a standard part of the populist playbook . . . [and populists in power] use ‘participatory’ media to constantly attack the professional accredited press, to discredit science, [and] established facts as well as fact checking that may challenge the populist leader’s claims and bona fides.”).

26. See Huq, *supra* note 12, at 1133–34 (quoting MÜLLER, *supra* note 2, at 31) (discussing the second main element of Müller’s conception of populism).

27. See MÜLLER, *supra* note 2, at 32 (“[T]he problem is . . . always the institutions that . . . produce the wrong outcome.”).

the people's will, which democratic institutions allegedly miss, ignore, or distort.<sup>28</sup> This view again presupposes a unified body with "a single and morally-privileged . . . will," which the populist leader is uniquely capable of discovering.<sup>29</sup> This aspect of populism implies that popular self-rule can be achieved only through the populist's leadership—one reason populist leaders routinely claim to return power to the people.<sup>30</sup>

Populists seize on the inherent messiness of republican democracy—its separated powers, checks and balances, and ongoing disagreements worked out in incremental steps—to "offer[] a more parsimonious, seemingly more candid, and more authentic alternative."<sup>31</sup> They posit "a singular common good" that "the people can discern and will," and which "a politician . . . can unambiguously implement" without cumbersome institutional procedures and debates.<sup>32</sup> In this image, the will of the people *is* whatever the populist leader intuits and says; deviations are necessarily undemocratic.<sup>33</sup> This is refreshingly simple to grasp. It also effectively allows populist leaders to attribute their own preferences and choices to the people.

Finally, populist leaders invoke a Manichean conflict between a morally pure, unified people and a corrupt elite or other outsider group.<sup>34</sup> By treating the people they represent as a single, and singularly righteous, entity, populist leaders "deny the legitimacy of opposing or alternative perspectives or values."<sup>35</sup> Their claim to protect the people against an out-of-touch or invidious establishment goes beyond criticizing existing inequities or representing neglected constituencies.<sup>36</sup> Rather, it denies the very possibility of ongoing

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28. *Id.* at 25–32.

29. Huq, *supra* note 12, at 1133.

30. See MÜLLER, *supra* note 2, at 76–77 (explaining the "attractiveness of populism" to its followers).

31. Huq, *supra* note 12, at 1133–34; see also Margaret Canovan, *Populism for Political Theorists?*, 9 J. POL. IDEOLOGIES 241, 244–45 (2004) (discussing the "Bagehot Problem").

32. MÜLLER, *supra* note 2, at 25. Müller explains that "the emphasis on a singular common good that is clearly comprehensible to common sense and capable of being articulated as a singularly correct policy that can be collectively willed at least partly explains why populism is so often associated with the idea of an oversimplification of policy challenges." *Id.* at 26.

33. *Id.* at 31.

34. *Id.* at 4, 19–25; see also Huq, *supra* note 12, at 1132–33 (describing this "moralized antipluralism" as one of the two main elements of Müller's conception of populism).

35. Huq, *supra* note 12, at 1133.

36. See MÜLLER, *supra* note 2, at 2 ("It is a necessary but not sufficient condition

political engagement among groups with different interests or views; it sees contestants as enemies. In this image, politics is not an ongoing negotiation over variably distributed interests that are divergent and convergent by turn; it is a fight to the death between cleanly delineated, fundamentally opposed forces.

Populists also use the image of Manichean struggle to deflect and delegitimize criticism.<sup>37</sup> In the circular reasoning that typifies this movement, since the populist leader enacts the people's will, those who disagree with her must be that people's enemies. They can be shoved into a flexible, expansive category of excluded others who do not properly count as members of the polity. This group also forms a reservoir of convenient scapegoats on whom populists can blame the nation's problems. Such deflection helps explain "why revelations of corruption rarely seem to hurt populist leaders," who are allowed openly "to hijack the state apparatus," engage in "mass clientelism," and systematically try "to suppress civil society."<sup>38</sup> Claiming to represent an authentic people's will against a hostile elite establishment helps populists achieve the semblance of legitimacy by fiat.

The rhetoric of populist leaders lends itself most naturally to outsiders who challenge an establishment to return power to the people. They therefore typically present themselves as protest candidates who promise to disrupt prevailing practices and redeem a tainted status quo.<sup>39</sup> Because populists tend to elide the distinction between campaigning and governance, effectively running "a permanent electoral campaign,"<sup>40</sup> populists can frame themselves as an opposition movement even when in power.<sup>41</sup>

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to be *critical of elites* to count as a populist.").

37. See *id.* at 38–41 (claiming that populism is distinctive because its leader's claim of representation "cannot be disproven"); Huq, *supra* note 12, at 1133 ("Whereas on the ordinary understanding of democracy the actions of a specific coalition or leader are always amenable to critique as misleading or unlawful, it is never possible to launch a parallel challenge against a populist leader.").

38. MÜLLER, *supra* note 2, at 4.

39. See Urbinati, *supra* note 14, at 122–23 (footnote omitted) (recognizing that "when populists find themselves in the electoral opposition, they see that as itself a flagrant injustice that requires 'taking back' the country from those who have stolen it from the authentic people," and explaining that "[i]n claiming that they want to reinstall the true people in power, populists reveal an ontological and antiprocedural interpretation of the people and the majority" that privileges "the issue of *who* rules" over "the issue of *how* procedures are operated and used").

40. *Id.* at 121.

41. *Id.*; see also Arato & Cohen, *supra* note 14, at 288–89 ("The gambit of the populist leader in power is to retain the mask of the beleaguered outsider constantly

Because electoral victory legitimizes the leader, populism is inextricably intertwined with democratic processes even as it perverts them.<sup>42</sup> The idea is that if the populist's claim to exclusive, unmediated representation of the people's will were false, she would be defeated at the polls.<sup>43</sup> That is why populist leaders are frequently obsessed with the symbolism of even flawed or unrepresentative elections, and treat electoral victories as full-throated mandates to implement their programs without interference.<sup>44</sup> It is also why populist leaders who attain power will characteristically do whatever is necessary to remain in office.<sup>45</sup> Populist leaders routinely control or deconstruct liberal democratic institutions and undermine free and fair elections, while keeping the outward show of democratic procedure to legitimize their power.<sup>46</sup> All this gives populism a profoundly destructive potential.<sup>47</sup>

Meanwhile, by harnessing the trappings of democracy even while undermining its practices, populist rhetoric often disarms other political participants.<sup>48</sup> The populist's interlocutors may continue operating under the normal rules of democratic discourse, which treat those with opposing views "no[t] as . . . enem[ies] to be destroyed, but as . . . 'adversar[ies]'" who have a recognized right to defend their

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foiled by the opposition or by the 'deep state,' even when (s)he is busily exercising and expanding executive power, and corrupting or eviscerating counter-powers and mechanisms meant to keep that power in check.").

42. See Urbinati, *supra* note 14, at 115 (recognizing that populism is distinct from fascism because "electoral legitimacy is a key defining dimension of populist regimes").

43. At the same time, populists routinely challenge the legitimacy of their opposition when they run for office and question the integrity of the outcomes when they lose. See, e.g., MÜLLER, *supra* note 2, at 26–27, 31–32.

44. *Id.* at 31; Urbinati, *supra* note 14, at 119–20.

45. See MÜLLER, *supra* note 2, at 56–57 (claiming that populists in power "tamper[] with the institutional machinery of democracy"); Huq, *supra* note 12, at 1130 (recognizing that populist leaders make "changes to the electoral framework" to remain in office); see also David Landau, *Personalism and the Trajectories of Populist Constitutions*, 16 ANN. REV. L. & SOC. SCI. 293, 297 (2020) (noting that populists often undertake political projects that "tilt the electoral playing field in their favor, making future elections less fair and making it more difficult to dislodge incumbents from power").

46. Landau, *supra* note 45, at 297.

47. See Urbinati, *supra* note 14, at 118–24 (providing "a theory of populism in power").

48. See, e.g., Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 n.2 (2004) (noting the importance of "the 'go without saying' assumptions that underpin working systems of constitutional government"); see also Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 921 (2018) ("A political maneuver can amount to constitutional hardball when it violates or strains constitutional conventions for partisan ends.").

ideas.<sup>49</sup> Rejecting these fundamental assumptions, populists foment an antagonistic political atmosphere that inhibits the proper functioning of democratic governance.

Populists' commitment to the image of a unified people with a single will allows them to insist on simple correct answers to social issues that are inherently complex and multifaceted. Their anti-pluralist, anti-institutional perspective elevates unity, singularity, and closure over multiplicity, reasoned deliberation, and ongoing contestation.<sup>50</sup> Because constitutional democracies are in fact characterized by a plurality of interests and perspectives and multiple institutions with interacting authority, the polity populists conjure does not actually exist. Populism is, rather, "an ideology based on trust through faith more than trust through free and open deliberation (and thus also dissent)."<sup>51</sup>

Populism should thus be taken seriously, but not literally. It has been aptly described as "a modern form of *political theology*."<sup>52</sup> Populist leaders themselves construct the single will of a unified people through their claims of anti-pluralism, anti-institutionalism, and Manichean struggle. These devices provide a frame into which populists can inject the policy contents of their choice. As the following Part explains, the primary traits of populism find important resonance in the legal arena. While political populists claim the unique capacity to represent and embody the will of today's people, *judicial populism* claims special access to the truth of the law and the only valid methods for reaching it.<sup>53</sup> Real democracies, however, rarely

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49. Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RES. 745, 755 (1999) ("[Democracy] presupposes that the 'other' is no[t] seen as an enemy to be destroyed, but as an 'adversary,' i.e., somebody with whose ideas we . . . struggle but whose right to defend those ideas we will not . . . question.").

50. See MÜLLER, *supra* note 2, at 72–73, 76–79 (explaining that populists "break off the chain of claim-making" that is vital to democracy in favor of a kind of constitutional closure or finality, and "[t]hey speak and act as if the people could develop a singular judgment, a singular will, and hence a singular, unambiguous mandate"); Arato & Cohen, *supra* note 14, at 287–89 (citing Andrew Arato, *Political Theology and Populism*, in THE PROMISE AND PERILS OF POPULISM: GLOBAL PERSPECTIVES 31 (Carlos de la Torre ed., 2014)) (explaining that populism "entails a *pars pro toto* dynamic through which the authentic part of the population stands for the whole people; an imaginary of the *sovereign people as one*, as an ideal unity; a *friend/enemy* conception of politics, and an *embodiment model* of representation"); Urbinati, *supra* note 14, at 123 ("The logic of populism is the glorification of one part.").

51. Urbinati, *supra* note 14, at 122.

52. Arato & Cohen, *supra* note 14, at 288. See generally Andrew Arato, *Political Theology and Populism*, 80 SOC. RES. 143 *passim* (2013) (discussing populism as a political theology).

53. See Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV.

experience a unified public will. Populist rhetoric, thus, does not describe a reality. Rather, it constructs a frame that legitimizes a legal writer's policy choices while undermining alternative views, all the while alleviating the responsibility to justify decisions on the merits.

## II. SEEING POPULIST TRAITS IN LEGAL WRITING

Scholarship establishing the contours of contemporary authoritarian populism has focused on the political sphere, especially on populist leaders and their routes to power through democracy's electoral channels. In this Part, we argue that the populist approach is not limited to chief executives, or even to political actors. Rather, a populist rhetoric occupies a prominent place in American legal theory. This *judicial populism*, which has risen to prominence over the last several decades, has not yet been recognized as a phenomenon.<sup>54</sup> But with the primary characteristics of contemporary authoritarian populism in mind, it should be easily recognizable.

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2193, 2195 (2017) (“[T]extualists . . . view themselves as faithful agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver.”).

54. Others have described legal writing as populist as well, sometimes in a general way. See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 9 (2009) (referencing an “American populist taste for simple answers to complex questions.”); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 711–13 (2009) (recognizing that originalists tend to pit restrained judges “who leave constitutional decisionmaking in the hands of the people” against “power-hungry elites” that “usurp our sovereignty”). Others have sometimes described it in ways distinct from our usage. See, e.g., William D. Araiza, *Samuel Alito: Populist*, 103 CORNELL L. REV. ONLINE 14, 16, 23–24 (2017) (describing populist writing as “accessible,” as “reflect[ing] an impatience with formal, or elite, legal rules and, instead, favor[ing] a more instinctive reaction,” and as drawing on “unlearned but common-sense folk wisdom”); Mila Versteeg, *Can Rights Combat Economic Inequality?*, 133 HARV. L. REV. 2017, 2020 (2020) (describing “judicial populism” as “catering justice to the middle class”). There is also nascent literature emerging on judges’ use of populist rhetoric outside the United States context. See, e.g., Paul Blokker, *Populism as a Constitutional Project*, 17 INT’L J. CONST. L. 535 (2019); Alon Harel & Noam Kolt, *Populist Rhetoric, False Mirroring, and the Courts*, 18 INT’L J. CONST. L. 746 (2020); Rafael Mafei Rabelo Queiroz, *Judicial Populism in Brazil: Evidence from a Criminal Trial of Political Elites by the Brazilian Federal Supreme Court* (2021) (unpublished manuscript) (on file with authors); Diego Werneck Arguelles, *Judges Speaking for the People: Judicial Populism Beyond Judicial Decisions*, VERFBLOG (May 4, 2017), <https://verfassungsblog.de/judges-speaking-for-the-people-judicial-populism-beyond-judicial-decisions> [<https://perma.cc/783G-PYUL>]. The term is multivalent, both over time and over discipline; we do not mean to insist on some definitive meaning. Our point, rather, is to illuminate the resonance between certain styles of legal reasoning and a specifically contemporary, authoritarian politics on the rise across the globe today. We draw our description of contemporary authoritarian populism’s primary traits from key works in political theory to help focus our analysis on the phenomenon rather than the word.

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The preceding Part laid out the key attributes of contemporary political populism: it presents the world in Manichean terms; it claims to speak for all people with one voice; and it disparages the mediation of democratic institutions. Populism can be seen as a rhetoric that propounds an exclusionary universalism, denigrates the legitimacy of pluralism, and denies the possibility of provisionally reconciling differing political positions. In this Part, we show how those same key attributes have found expression in American judicial writing and legal theory.

To be clear, we do not argue that judicial populist rhetoric caused political populism or vice versa, and we make no historical claim about the co-evolution of these rhetorical forms. We think further research is needed to determine the precise historical route each took to reach its present position, and how they interacted with one another along the way.

We claim instead that the political and the legal populist rhetorical styles resonate with one another through elective affinities that have not been adequately recognized.<sup>55</sup> This resonance, moreover, has pernicious effects. Judicial populist rhetoric casts doubt on the legitimacy of basic features of modern democracy, which involves working out pluralistic policy perspectives through complex ongoing negotiations in mediating institutions. And it bolsters the authoritarian populist image of a single leader uniquely embodying the will of a unified people, making that image seem less absurd and more legitimate. In our view, judicial and political populism are mutually enabling.

Democracy, like any political project, depends not only on institutions and practices but also on an ideational component: a widespread commitment to its legitimacy. Judicial populist rhetoric instead denigrates the legitimacy of basic democratic tenets and structures—pluralism, institutional mediation, multilateral negotiation. We draw attention to judicial populism not just because it harmonizes with political populism, but because we believe that it undermines democracy.

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55. “[E]lective affinity is a process through which two cultural forms—religious, intellectual, political or economical—who have certain analogies, intimate kinships or meaning affinities, enter in a relationship of reciprocal attraction and influence, mutual selection, active convergence and mutual reinforcement.” Michael Löwy, *Le Concept d’Affinité Élective chez Max Weber* [*Max Weber and the Concept of Elective Affinity*], 127 *ARCHIVES DE SCIENCES SOCIALES DES RELIGIONS* 93, 103 (2004).

## A. USING MANICHEAN IMAGERY

Like populism in the political sphere, judicial populist rhetoric paints a world riven by fundamental, irresolvable conflict between a pure people and a devious elite. Some versions of the populist style present this elite as a capitalist or oligarchic class that oppresses an economically disempowered people.<sup>56</sup> The American version tends to be less perturbed by wealth disparity.<sup>57</sup> It focuses instead on educational credentials, imagining an intellectual elite that oppresses a simple people through confusion, contempt, and cosmopolitanism; it also disparages racial minorities and members of other disfavored groups who are distinct from the “true” people.<sup>58</sup> Distinguishing an intellectual from an economic elite in American public discourse should ring familiar. Just think of the way scientists who explained the dangers of COVID-19 quickly became objects of public controversy while corporate leaders who made record profits from the crisis avoided it.<sup>59</sup> This ability to swap out one disfavored group for another highlights the way that populism is largely a rhetorical style for justifying the accrual and use of power, rather than a political program for achieving particular substantive policy goals.

The Manichean image of society, which demonizes one group and valorizes another, can be a useful tool for promoting whatever policy preferences one happens to have. A well-known instance of us-versus-them imagery appeared in Justice Scalia’s dissent in *Lawrence v. Texas*, which railed against a cosmopolitan elite out of touch with

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56. See generally, e.g., CHANTAL MOUFFE, FOR A LEFT POPULISM 9–24 (2018) (discussing the “populist moment”).

57. See Urbinati, *supra* note 14, at 119 (“Central in populism’s narrative is antiestablishment rhetoric, but this does not refer to socioeconomic elites and is neither class-based nor money-based.”).

58. See MÜLLER, *supra* note 2, at 23–24 (noting that right-wing populists in the United States have historically conceived “of political morality in terms of work and corruption,” and discerned “a symbiotic relationship between a [liberal intellectual] elite that does not truly belong and marginal groups that are also distinct from the people”).

59. Compare Philip Rucker, Laurie McGinley, Josh Dawson & Yasmeen Abutaleb, *Rancor Between Scientists and Trump Allies Threatens Pandemic Response as Cases Surge*, WASH. POST (July 17, 2020), [https://www.washingtonpost.com/politics/rancor-between-scientists-and-trump-allies-threatens-pandemic-response-as-cases-surge/2020/07/17/d950e9b6-c777-11ea-a99f-3bbdff1af38\\_story.html](https://www.washingtonpost.com/politics/rancor-between-scientists-and-trump-allies-threatens-pandemic-response-as-cases-surge/2020/07/17/d950e9b6-c777-11ea-a99f-3bbdff1af38_story.html) [<https://perma.cc/4H3M-DYYV>], with Douglas MacMillan, Jonathan O’Connell, Peter Whoriskey & Chris Alcantara, *America’s Biggest Companies Are Flourishing During the Pandemic and Putting Thousands of People out of Work*, WASH. POST (Dec. 16, 2020), <https://www.washingtonpost.com/graphics/2020/business/50-biggest-companies-coronavirus-layoffs/> [<https://perma.cc/JF2V-G23E>].

mainstream values.<sup>60</sup> When the majority held that criminalizing same-sex sexual conduct violated the Constitution, the dissent accused it of “tak[ing] sides in the culture war”—*the* culture war, note, a preexisting entity readers are expected to recognize.<sup>61</sup> Drawing on classic populist imagery of an out-of-touch elite opposing the will of the people, the dissent described the majority as being “[s]o imbued . . . with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously ‘mainstream.’”<sup>62</sup> Decisions about the suppression of marginalized groups, the dissent goes on, “are to be made by the people, and not imposed by a governing caste that knows best.”<sup>63</sup> There were other ways to argue for the non-constitutional status of sexual conduct, like long-standing state power over private conduct and the limits of the Constitution’s reach. But Justice Scalia chose instead a Manichean figuring of an innocent people oppressed by an imperious cosmopolitan elite.

Part of Justice Kagan’s dissent in *Janus v. AFSCME* struck a similar note.<sup>64</sup> *Janus* invalidated state laws requiring unionized public sector employees to pay the equivalent of union dues even if they were not union members themselves.<sup>65</sup> Although the dissent praised the “healthy” and “democratic[] debate” about such “fair-share” arrangements,<sup>66</sup> its concluding sentences strike a darker, more Manichean note. Justice Kagan wrote that, because it uses the First Amendment as a route to affect “economic and regulatory policy[,] the majority’s road runs long. And at every stop are black-robed rulers overriding citizens’ choices.”<sup>67</sup> This phrasing echoes that of the *Lawrence* dissent, with its vision of a judicial elite oppressing a powerless people. As this example demonstrates, elements of judicial populist rhetoric can be present without being pervasive. The rhetoric is available to anyone, at any moment, to help justify more or less any legal position.

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60. *Lawrence v. Texas*, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting).

61. *Id.* at 602.

62. *Id.* at 602–03.

63. *Id.* at 603–04.

64. *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2487–502 (2018) (Kagan, J., dissenting).

65. *Id.* at 2486 (majority opinion).

66. “Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements.” *Id.* at 2501 (Kagan, J., dissenting). At the time *Janus* was heard, there were “22 States . . . on one side, 28 on the other (ignoring a couple of in-betweeners).” *Id.*

67. *Id.* at 2502.

Choosing a different intellectual elite as his target, Chief Justice Roberts used a similar Manichean approach to cast doubt on the legitimacy of Supreme Court regulation of partisan gerrymandering in *Gill v. Whitford*.<sup>68</sup> In oral argument, he suggested that “the intelligent man on the street” would not understand the complex calculus that some experts proposed for determining electoral districting fairness.<sup>69</sup> This man, Justice Roberts feared, would say:

“Well, why did the Democrats win?” And the answer is going to be because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party X votes plus party Y votes. And the intelligent man on the street is going to say that’s a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans.<sup>70</sup>

This image presents an intellectual elite confusing ordinary people and casts doubt on the legitimacy of Supreme Court decisions utilizing such expertise.

Justice Roberts had other options for justifying his position. There was the historical fact that the Supreme Court has refrained from curbing gerrymandering on any basis other than race.<sup>71</sup> There was the potential difficulty of applying the complex algorithm. Or he might instead have recalled his own assertion that, for the specialized field of law, “judges are necessarily engaged in civic education,”<sup>72</sup> which could involve explaining to the intelligent man that the Court figured out how to draw districts to make the election fair. One could even posit that an intelligent man on a street might realize that his society has a lot of complexity, rather than treating complexity as a failing or a ruse. Instead, Justice Roberts chose to use the Manichean imagery of society as divided between honest, simple folk and the incomprehensible elites intent on confusing them.<sup>73</sup>

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68. 138 S. Ct. 1916, 1922–34 (2018).

69. Transcript of Oral Argument at 37, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

70. *Id.* at 37–38.

71. See *The Supreme Court, 2016 Term—Leading Cases*, 131 HARV. L. REV. 303, 303 (2017) (footnotes omitted) (“Although gerrymandering is often discussed as a partisan issue, the Court has dealt with it only as a matter of equal protection for racial minorities, such that racial gerrymandering is unconstitutional, whereas partisan gerrymandering is not.” (discussing *Cooper v. Harris*, 137 S. Ct. 1455 (2017))).

72. John G. Roberts, Jr., *2019 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 2 (Dec. 31, 2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> [<https://perma.cc/8HYL-9U55>] (“By virtue of their judicial responsibilities, judges are necessarily engaged in civic education.”).

73. Since districting falls within the Court’s mandatory jurisdiction, Justice Roberts also predicted that if the Court agreed to adjudicate partisan gerrymandering, it would “have to decide in every case whether the Democrats win or the Republicans win.” Transcript of Oral Argument, *supra* note 69, at 36–37. One could, in contrast, treat

## B. DENYING PLURALISM

Populist rhetoric also rejects “the necessary complexity of representative democracy,”<sup>74</sup> subscribing to a “moralized antipluralism”<sup>75</sup> instead of recognizing the diversity of interests and perspectives that characterizes a large democratic polity. It presents “the people” as a unified mass with a single will that—conveniently enough—populists themselves are best suited to embody. Those who disagree are treated as not just wrong, but fundamentally illegitimate—the “deep state” or the “fake news.”<sup>76</sup> That image also provides fodder for the Manichean imagery described above, allowing those who use it to paint themselves as reformist outsiders even when they occupy positions of power and influence.

In judicial populism, this feature often comes through in references to a unitary people with a single understanding of a law, to which the writer has special unmediated access. Litigation is characterized by adversarial disagreement, but writers employing judicial populism often assert that their conclusions are not just correct but indisputable, even obvious. And they imply that the very possibility of thinking otherwise—the possibility of disagreement about the law—is illegitimate. In effect, judicial populist rhetoric gives legal writers tools to assert unassailable legitimacy and universal accord while in fact merely presenting their own views of what the law should be.

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fair elections, which underlie a polity’s democratic character, as a boon for *all* participants in a democracy. On that view, the Court would be asked to decide, not whether Democrats win or Republicans win, but whether an election is fair—whether, that is, democracy wins. Justice Roberts instead chose to portray the legal review of electoral integrity as taking sides in a Manichean conflict between parties happy to undermine democracy in their hunger for power at any cost. This way of presenting the situation itself undermines the very notion of democratic process.

74. Huq, *supra* note 12, at 1134 (quoting Canovan, *supra* note 31, at 245) (describing how populism “exploits” the “Bagehot problem” that “modern representative forms of democracy tend to be predicated on complex institutional arrangements that seek to account for a plurality of interests and public goods that might bear on governance,” producing “a tangled network that cannot make sense to most of the people it aims to empower”).

75. See *supra* notes 34–36 and accompanying text.

76. See Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 688 (2021) (footnotes omitted) (noting that the Trump Administration’s efforts to deconstruct the regulatory state involved both economic policy and “a mix of partisan advantage, ideological faith, and sociological theory. Experts were viewed as not only elite but also dismissively scornful; statements of science and truth were not just obstacles but hoaxes and ‘fake news’; government [was] not merely costly but also a treasonous ‘deep state.’”).

For an example, think of *Chisom v. Roemer*, in which the Supreme Court was asked to evaluate a Voting Rights Act of 1965 (VRA) prohibition on giving one class of “citizens . . . less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>77</sup> A majority held that the restriction applied to judicial elections as well as legislative ones, but Justice Scalia found that clearly wrong: “There is little doubt that the ordinary meaning of ‘representatives’ does not include judges, see Webster’s Second New International Dictionary 2114 (1950).”<sup>78</sup> It was so obvious that the opinion did not even bother to quote the dictionary entry it cited.<sup>79</sup>

To others, representation has often seemed a rather complex notion. Hanna Fenichel Pitkin’s *The Concept of Representation*—already a classic when *Chisom* was decided—described the term as having a wide range of meanings: “the giving of authority to act[;] . . . the holding to account . . . for [such] actions[;] . . . the making present of something absent by resemblance[,] reflection . . . [or] *symbolic* . . . connection[;] . . . [and] *acting for* others.”<sup>80</sup> The ordinary meaning of a term at the heart of centuries of political theory might be more complicated than a glance at a *Webster’s* entry suggests. Indeed, as a contemporaneous letter to the editor noted, while *Webster’s Second* defined “representative” as “one who represents a people or community in its legislative or governing capacity,” *Funk & Wagnall’s* phrased it as a “member of a deliberative or legislative body chosen by the vote of the people,” a definition that could easily include elected judges, whose job—one hopes—includes deliberation.<sup>81</sup> The dissent, however, rejected the very possibility of plural opinions on this thorny subject. “[T]he word ‘representative’ connotes one who . . . *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense.”<sup>82</sup> The dissent could authoritatively declare this ordinary sense because—well, it just knew.

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77. *Chisom v. Roemer*, 501 U.S. 380, 383 n.2 (1991) (quoting 42 U.S.C. § 1973) (current version at 52 U.S.C. § 10301(b)).

78. *Id.* at 410 (Scalia, J., dissenting) (citing WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 2114 (1950)).

79. *Id.*

80. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 11–12 (1967).

81. See Theo Lippman, Jr., *In an Opinion that Involved the Definition...*, *BALT. SUN* (June 29, 1991), [http://articles.baltimoresun.com/1991-06-29/news/1991180021\\_1\\_dictionary-funk-wagnall-definition](http://articles.baltimoresun.com/1991-06-29/news/1991180021_1_dictionary-funk-wagnall-definition) [https://perma.cc/D5BZ-92BJ].

82. *Chisom*, 501 U.S. at 410 (Scalia, J., dissenting).

Alternatively, the dissent argued, “[w]e are to read the words . . . as any ordinary Member of Congress would have read them.”<sup>83</sup> From what we know of Congress, an ordinary Member of Congress would gain her understanding of a statute from congressional staff memoranda, committee and conference reports about the statute’s purposes and likely effects, and follow-up conversations with staffers.<sup>84</sup> She would likely not read the full statute,<sup>85</sup> and it is highly unlikely that she would consider one word in isolation from those memos and reports explaining the statute.<sup>86</sup> And she would certainly not go to a dictionary.<sup>87</sup> While stating that the Court should “read the words . . . as any ordinary Member of Congress would have read them,”<sup>88</sup> the *Chisom* dissent betrayed no interest in the actual practices of Members of Congress,<sup>89</sup> nor in showing that any Member of Congress would actually have read the provision in any particular way. Instead, the dissent imagined the judge alone as being in the best position to declare what a Member of Congress would have—should have—must have—thought.

Using this rhetoric was a choice the dissent did not have to make.<sup>90</sup> Against a background that suggested many ways to use the

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83. *Id.* at 405 (Scalia, J., dissenting).

84. See Jesse M. Cross, *The Staffer’s Error Doctrine*, 56 HARV. J. ON LEGIS. 83, 100–10 (2019) (highlighting survey data that indicates Members of Congress rely mostly on memoranda and briefings when learning a bill’s contents); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 968 (2013) (“[M]embers [of Congress] are more likely to vote (and staffers are more likely to advise their members) based on a reading of the legislative history than on a reading of the statute itself.”); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 843–47 (2014) (documenting the increased size and influence of Congressional Committee staff, “the staff most relevant to [legislative] drafting”).

85. See Gluck & Bressman, *supra* note 84, at 972–73 (quoting survey responses of congressional staffers) (“Members [of Congress] don’t read [a bill’s] text . . . they all just read summaries.”).

86. See *id.* at 970 (“More than [ninety percent] of [surveyed congressional staff] respondents confirmed . . . that legislative history is used by drafters to explain the purpose of the statute.”); Shobe, *supra* note 84, at 815 (“Legislative history undoubtedly serves a role in Congress’s internal process.”).

87. See Gluck & Bressman, *supra* note 84, at 938 (quoting congressional staffer respondents) (“[N]o one uses a freaking dictionary.”).

88. *Chisom*, 501 U.S. at 405 (Scalia, J., dissenting).

89. Accord Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 986 (2017) (“[T]he nuances of the legislative process are largely irrelevant for the purpose of [statutory] interpretation.”).

90. As in Justice Kagan’s dissent in *Janus*, other parts of the *Chisom* opinion used other rhetorical approaches, such as canvassing statutory history, interrogating the

term—from differing dictionary definitions to political philosophy to the fact of this litigation itself—the dissent insisted that there could only be one way for a reasonable person to legitimately understand the notion of representation. It is, in other words, not necessarily the conclusion it reached, but the way it got there, that gives this part of the *Chisom* dissent its judicial populist air.

Judicial populist rhetoric often displays a similar self-confidence about facts in the world, too, rejecting an institutional weighing of factors or deference to policy makers. In the landmark voting rights decision *Shelby County v. Holder*, the Court was asked to invalidate the VRA's requirement that states with a history of racial discrimination in elections preclear changes to electoral practices with the Department of Justice (DOJ).<sup>91</sup> The majority opinion recognized that "Congress compiled thousands of pages of evidence" about current election practices "before reauthorizing the Voting Rights Act" in 2006.<sup>92</sup> The record showed that "between 1982 and 2006, DOJ objections blocked over 700 voting changes . . . determin[ed to be] discriminatory"; that 800 more proposed changes were withdrawn or modified in response to DOJ scrutiny; and that some contemplated proposals were simply never made based on "informal consultation" with the DOJ.<sup>93</sup> It revealed many attempts to simply reinstate previously invalidated discriminatory measures, as well as outright violence and "more subtle forms of voting rights deprivations."<sup>94</sup> At the same time, the record showed that "the racial gap in voter registration and turnout" in the covered states had narrowed dramatically since the VRA's enactment in 1965; in fact, the national average racial gap exceeded that of most states covered by the VRA provisions.<sup>95</sup> Despite these gains, Congress voted overwhelmingly to reauthorize the VRA: 98 to 0 in the Senate, 390 to 33 in the House.<sup>96</sup> Indeed, in light of evidence that attempts at voter discrimination had become more innovative as minority voter registration and turnout

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key phrase's relation to other statutory provisions, and putting the term "representative" in the context of election law doctrine. *Chisom*, 501 U.S. at 412-17 (Scalia, J., dissenting).

91. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

92. *Id.* at 553.

93. *Id.* at 571, n.4 (Ginsburg, J., dissenting) (citing H.R. Rep. No. 109-478, at 21, 40-41 (2006)).

94. *Id.* at 575 (quoting Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 202 (2007)).

95. *Id.* at 535 (majority opinion).

96. *Id.* at 565 (Ginsburg, J., dissenting).

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increased, Congress amended parts of the statute to “prohibit more conduct than before.”<sup>97</sup>

The *Shelby County* majority had a different view: it was “irrational for Congress to distinguish [among] States in such a fundamental way” as to require preclearance “when today’s statistics” about voter registration and turnout “tell an entirely different story” than the one Congress confronted when it enacted the VRA in 1965.<sup>98</sup> The majority asserted special, better knowledge of the empirical world the legislation addressed. It could say decisively that increased minority voter registration and turnout mattered more to voting rights than did continuing efforts to deter minority voters. There was no room for multiple legitimate views on the matter.

*Shelby County* also demonstrates that judicial populist rhetoric, though replete with invocations of the people, is not a way to *actually* give power to the populace. Ignoring a democracy’s inherent pluralism, it gives legal writers a way to claim universal support for their conclusions without needing to actually garner support from anyone in particular. This rhetoric of universal agreement helps justify the use of legal power without defending, or even acknowledging, its effects. *Shelby County*, after all, did empower *some* people—the decision made it easier for some people to prevent citizens from voting. The opinion avoided justifying or even acknowledging this result, instead using judicial populist tropes to claim special knowledge—true, indisputable, better than Congress—about what voting rights really required.<sup>99</sup> In this claim, it echoed the political populist’s assertions of direct access to the clear, unified needs and desires of “the people”—an image of the people that inevitably empowers some while excluding others, even while it claims to encompass all.

### C. AVOIDING INSTITUTIONAL MEDIATION

For political populism, the unity of the people’s will and the leader’s embodiment of it obviates the need for institutional mediation of plural, divergent interests over time. Conveniently enough, the populist alone can authoritatively discern and articulate that understanding; and without mediating institutions, people have no way of speaking for themselves.

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97. *Id.* at 539 (majority opinion).

98. *Id.* at 556.

99. *See id.*

Judicial populist rhetoric follows suit. *Shelby County* again provides a useful example. In that case, Congress, a key institution that mediates plural perspectives in our democracy, had based decisions on a large factual record. *Shelby County* rejected the legislature's interpretation of the record in favor of its own.<sup>100</sup> A large democracy has a plurality of interests and faces complex realities that require policy judgment and compromise to address problems in ways that are unlikely ever to be perfect. In contrast, the language of judicial populism conjures a unified people which needs no mediating institutions to make its will clear, and simple factual situations with obvious answers. That language allows legal writers to make their conclusions seem correct and even necessary without engaging the realities of democratic governance. This is, again, not actually a way of giving power to the populace. On the contrary, as decisions like *Shelby County* show, it offers legal writers a way to justify undermining the very institutions that represent and mediate among divergent policy preferences—and divergent claims to power.

Denigrating the complex institutions that facilitate democratic contestation and the ongoing practices that render democratic governance accountable, the rhetoric of judicial populism tends to fixate on one clear point of authority—the President—authorized in one clear point in time—the election. So, for instance, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, a Supreme Court majority rejected a conventional administrative accountability structure,<sup>101</sup> in which an employee of an agency is removable only for good cause by someone who themselves is removable only for cause.<sup>102</sup> Instantiating the accountability network and internal separation of powers that scholars have identified as a feature of effective modern democracies,<sup>103</sup> this arrangement helps insulate

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100. *See id.* at 557 (stating that Congress's failure to update the VRA's coverage provision in light of improvement in racial voter turnout disparities leaves the Court "with no choice" but to declare § 4(b) of the VRA unconstitutional).

101. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483–84 (2010).

102. Justice Breyer's dissent listed many federal government positions structured in this way. *Id.* at 549–88 (Breyer, J., dissenting).

103. Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 861 (2011) (describing an accountability network as "rules and procedures through which civil servants are embedded in their liberal democratic societies" by being enmeshed in complex webs of legal, political, and social relationships with "elected officials, organized interests, the courts, and the general public," as well as other administrators); *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322–43 (2006) (arguing that increasing the independence of agency personnel through job security

positions that require expertise or neutrality from pressure by interested parties—including the President—without immunizing them from oversight.<sup>104</sup>

In contrast, *Free Enterprise Fund* presents governance as the unified rule of a unified people: “The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.”<sup>105</sup> In reality, no president is chosen by the entire nation; some are even chosen by a minority of voters.<sup>106</sup> It is, moreover, not plausible that any executive decision about the oversight of board membership will find the kind of intricately coordinated, geographically distributed response needed to impose a discernible effect on a presidential election.<sup>107</sup> Elections are just one part of governance in a modern republican democracy. They help establish the roles in which people participate in government processes, the

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and administrative redundancy benefits the legitimacy and the efficacy of the executive branch); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425 (2009) (“Internal checks can be, and often are, reinforced by a variety of external forces—including not just Congress and the courts, but also state and foreign governments, international bodies, the media, and civil society organizations.”); Anya Bernstein, *Interpenetration of Powers: Channels and Obstacles for Populist Impulses*, 28 WASH. INT’L L.J. 461, 462–63 (2019) (“By discrediting the ability of the standard intervening institutions of democracy to legitimately express, enact, or respond to the people’s will . . . the populist leader positions himself as the only legitimated actor left.”).

104. See 561 U.S. at 532 (Breyer, J., dissenting) (“Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal.”).

105. *Id.* at 499; see, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1159, 1175–85 (1992) (comparing Article II and III Vesting Clauses to argue that the Constitution strongly suggests, or even requires, a unitary executive model).

106. See Sanford Levinson, *Our Undemocratic Constitution: Where the U.S. Constitution Goes Wrong (and How We the People Can Correct It)*, 60 BULL. AM. ACAD. ARTS & SCI. 31, 33 (2007) (“Because of the way the Electoral College operates, we have regularly, since World War II, sent to the White House presidents who did not have a majority of the popular vote.”).

107. Voters in the United States have many opinions on many topics, care about different topics to different degrees, and generally have little accurate knowledge about the specific policy preferences or positions of presidential candidates. Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 378–81 (2010) (discussing studies showing that voters often lack accurate understandings of presidential candidate policy positions, and that even well-informed voters often vote for candidates who share some of their policy preferences but not others). Partly for these reasons, “[p]olitical scientists have largely abandoned the simplistic account of presidential elections as national policy referenda that can be legitimately interpreted as issue mandates.” *Id.* at 381 n.105.

interests that will be represented, and so on. But the work of government lies in ongoing negotiations, collaborations, decisions, and actions themselves. The rhetoric of judicial populism pictures elections not as the beginning of the democratic process but as its end: the point at which the leader is empowered with an exclusive mandate to speak and act for the people.<sup>108</sup>

*Free Enterprise Fund* lodged accountability definitively in the moment of election, as though that moment created an exclusive, direct line of accountability between a President and “the entire Nation” that elected him.<sup>109</sup> If the president is not fully empowered to control the administrative apparatus, *Free Enterprise Fund* worried, there is no solution to the “concern that [the Executive Branch] may slip from the Executive’s control, and thus from that of the people.”<sup>110</sup> Such images—equating the leader with the people, naming the leader as the only one who can fulfill that people’s will, and denigrating institutions that mediate divergent preferences—typify the rhetoric of judicial populism.

#### D. JUSTIFYING POWER IRRESPECTIVE OF ITS EFFECTS

The rhetoric of judicial populism clears a special place for law in the exercise of power. It presents law as autonomous from politics and even from social values. This vision of law as somehow divorced from the social structures and relationships that produce and implement it implies that legal writers need not, and should not, justify or even consider the effects of their decisions on the society law regulates. That implication, in turn, leaves judges free to use judicial populist rhetoric to justify the use of their power without pressure to justify that power’s effects.

This image presents law as “static, given, autonomous, [and] seamless,” as though it could clearly and conclusively settle conflicts without normative justification or compromise.<sup>111</sup> This “legalistic” view “holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”<sup>112</sup> rather than responsiveness to social conflict and political preference. Indeed, according to this view, courts are undermined when they

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108. In the political sphere, this helps explain why populist leaders tend to engage in a perpetual campaign against their opponents, even while serving in office. *See supra* notes 39–40 and accompanying text (describing the oppositional nature of populism).

109. 561 U.S. at 499.

110. *Id.* (emphasis added).

111. Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 120 (2003).

112. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 1 (2d ed. 1986).

consider normative values, because they exercise legitimate authority only insofar as “their judgments are thought to obey an external will and not their own,”<sup>113</sup> a view expressed in neutral-sounding but empowering slogans such as “the rule of law as a law of rules”<sup>114</sup> or “a government of laws and not of [people].”<sup>115</sup>

Legal thinkers following this path present law “as if it were or should be sharply precise and free of ambiguity.”<sup>116</sup> They do so “by *taking words seriously*”—that is, by focusing on the law’s words rather than the consequences or normative implications of legal decisions.<sup>117</sup> These views are not exclusive to judicial populist rhetoric, but they fit it comfortably, giving legal writers a way around the pluralistic values and institutions that characterize legal as much as political decision making. This rhetoric allows writers to cast differences of opinion as illegitimate, and to avoid responsibility for the effects of legal decisions, as though law were not itself an institution of democracy.

This is one reason that we focus on the tools judicial populism gives writers for justifying their legal conclusions, rather than on the conclusions themselves. Populist framing does not impose consistency on judicial decisions. In the *Gill v. Whitford* oral argument, Justice Roberts mobilized populist rhetoric to support the legal status quo and legislative decisions;<sup>118</sup> in the *Shelby County v. Holder* opinion, he used a similar rhetoric to invalidate them.<sup>119</sup> These paired cases demonstrate the protean quality of judicial populist rhetoric, which can be mobilized for a variety of purposes, yet present a veneer of decisive coherence through its repeated invocations of the people’s needs, imaginary everymen versus pointy-headed experts, and politics as a zero-sum contest that precludes common commitments.

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113. PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 57 (1978) (footnote omitted) (“In interpreting and applying [autonomous] law, jurists are to be objective spokesmen for historically established principles, passive dispensers of a received, impersonal justice.”).

114. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); see also NONET & SELZNICK, *supra* note 113, at 57–60 (identifying the separation of law and politics as a defining feature of theories of autonomous law).

115. NONET & SELZNICK, *supra* note 113, at 53.

116. *Id.* at 61.

117. *Id.* (“Close scrutiny of meanings is a hallmark of autonomous law.”).

118. Transcript of Oral Argument, *supra* note 69, at 37.

119. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013) (characterizing Congress’s mandate, through the VRA, that certain States obtain federal permission before enacting any voting-related law as a “dramatic departure from the principle that all States enjoy equal sovereignty”).

Judicial populism offers a well of rhetorical tropes and approaches. Anyone can dip into the well and use aspects of the judicial populist style, and many legal thinkers deploy it now and again. In this sense, judicial populist rhetoric is neutral as to policy ends, equally available to conservatives, liberals, and anyone else who cares to use it. It provides a way to justify the use of power, rather than a means for achieving some particular substantive policy end.

At the same time, our impression is that the judicial populist style has recently been deployed more—though not exclusively—by writers who subscribe to conservative politics than by those with liberal ideologies. This asymmetry may have a number of different causes. The formalist approach to understanding law and government structure favored by conservative thinkers fits comfortably with the rhetoric of judicial populism: both prefer clear solutions based on limited sources, present power as working autonomously, and express doubt about the legitimacy of disagreement or multivalence.<sup>120</sup> Similarly, much (though not all) conservative writing of recent years presents adherents as morally righteous and epistemologically certain,<sup>121</sup> while much (though not all) liberal writing figures proponents as pragmatic, realistic, or reasonably equivocal.<sup>122</sup> Additionally, since populist rhetoric is a means for justifying the use of power without justifying its effects, it may be particularly useful for those whose substantive policy preferences are difficult to justify on the merits or do not garner widespread political support.<sup>123</sup> There may be other reasons we have the impression that conservative jurists use judicial populist rhetoric more frequently than liberal ones do. We do not claim to exhaust or evaluate the possibilities here, nor have we sought to determine empirically the

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120. See *infra* Part III.

121. See, e.g., NEIL M. GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* (2019) (emphasizing the importance of originalist and textualist ideologies when interpreting America's founding documents); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) (proposing textualism as the proper approach to legal text interpretation).

122. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (finding that the Constitution's principal role is to encourage citizen participation); ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) (arguing for courts to look beyond text when interpreting statutory language).

123. There is some evidence to suggest that important aspects of the conservative political agenda have not had widespread public support in recent years. See, e.g., Jacob S. Hacker & Paul Pierson, *The GOP Is Trying to Pass a Super-Unpopular Agenda—and That's a Bad Sign for Democracy*, VOX (Dec. 7, 2017), <https://www.vox.com/the-big-idea/2017/12/7/16745584/republican-agenda-unpopular-polls-tax-reform> [<https://perma.cc/5T8K-P33L>].

specific distribution of populist rhetoric across political ideologies.<sup>124</sup> Moreover, the adoption of this rhetoric by prominent writers makes it seem useful, powerful, and even legitimate. As these tropes get deployed more and more by people in positions of power, we would expect more writers to take them up. The conservative or liberal use of judicial populist rhetoric is not relevant to our argument here.<sup>125</sup>

Whatever ends it is mobilized to serve, the rhetoric of judicial populism rejects key features of representative democracy. It gives legal writers ways to avoid justifying the effects of judicial decisions, and it harnesses extreme and unrealistic images of society and politics to justify the use of legal power in a way that undermines the possibility of legitimate criticism or disagreement. Judicial populist rhetoric *itself* has anti-democratic implications. Its use, for whatever purpose, undermines the legitimacy of democratic governance in a pluralistic society.

### III. STANDARD MANIFESTATIONS OF JUDICIAL POPULISM

The rhetorical style described in the preceding Part brings the populist preference for anti-pluralism, anti-institutionalism, and Manichean conflict into the legal sphere. This approach provides a grab bag of tropes any legal writer can draw on, and many use one or another of them now and then. That is, judicial populism characterizes arguments more than people: it can come out in offhand remarks and reveal unarticulated presuppositions. In some cases, though, it can characterize an entire body of legal theory. In this Part, we canvass three such areas.

In writing on legal interpretation, textualism and originalism purport to use uniquely correct methods to implement the true will of a unified people.<sup>126</sup> And in unitary executive theory, legal writers imagine a regal executive with an electoral mandate to speak and act on behalf of a unified people, unhampered by plural institutions designed to leverage expertise and moderate differences.<sup>127</sup> In each area, proponents habitually use Manichean imagery and recast complex, multifaceted issues as a simple pitting of obvious truth against bad faith obfuscation. While these moves are clothed in the language of judicial restraint, they enable proponents to impose their

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124. Political scientists have measured the use of populist rhetoric by various political leaders. *See infra* note 241 and accompanying text (citing this literature).

125. We do discuss the substantive ends to which judicial populist rhetoric is put in a companion work in progress.

126. *See infra* Parts III.A, III.B.

127. *See infra* Part III.C.

own understandings and preferences onto the law while denying the possibility that differing views could be legitimate.

A. TEXTUALISM

Political populism generally conjures images of an elected leader who acts on behalf of ordinary people, implementing something akin to contemporary popular opinion. It may therefore seem counterintuitive to characterize originalist methods of legal interpretation like textualism as manifestations of a deeply analogous judicial populism. Political populism is also characteristically anti-pluralist and anti-institutional in nature, while legal interpretation undeniably focuses on the products of plural democratic institutions. So how could theories of legal interpretation share the central traits of political populism?

The key, we think, is to see that judicial populism presents *legal text* as the authoritative embodiment of the people's will, and purports to provide the only legitimate interpretive methods to do *the people's* bidding. Textualists acknowledge the plural nature of the legislature when they argue that judges should not disturb the unrecorded "deals" among lawmakers necessary to secure the law's enactment and encoded in the statutory text.<sup>128</sup> But they are not interested in the actual workings of Congress, nor in what elected representatives sought to achieve or thought would follow when they enacted legislation. They also routinely suggest that judges who deviate from the "plain meaning" of legal text to implement Congress's intent or promote a statute's underlying purposes undermine democracy and the rule of law by imposing their own subjective policy preferences onto the people.<sup>129</sup> While claiming to give voice to underlying statutory meaning, textualists in effect suggest that "they, and they alone, represent the people."<sup>130</sup> We contend that their approach is anti-pluralist, anti-institutional, and Manichean in ways resembling political populism.

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128. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

129. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17–18 (Amy Gutmann ed., 1997) ("Under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

130. Cf. MÜLLER, *supra* note 2, at 3 (explaining that anti-plural, populist political candidates present themselves as the sole voice of the people; likewise, textualist judges purport to provide the sole means of deciphering the law of the people).

Also like political populists, textualist writers claim a steadfast consistency while using a theory sufficiently malleable that they can often do what they want in the name of the people. Indeed, as explained below, textualism is discretionary all the way down: one chooses whether to be a textualist, which version of textualism to follow at any particular time,<sup>131</sup> and which “plain meaning” to attribute to statutory text that is in many cases ambiguous.<sup>132</sup> Like political populism, therefore, the textualist instantiation of judicial populism is a rhetorical frame rather than a substantive position or an expression of democratically legitimate judging.

As a prescriptive theory of statutory interpretation,<sup>133</sup> textualism exhorts practitioners to ignore evidence about the circumstances in which a law was enacted, what its enactors expected to achieve,<sup>134</sup> and how legislatures draft laws or communicate their expected effects.<sup>135</sup> Instead, legal practitioners should confine themselves as much as possible to the words of the statute, whose import should ideally be clear from their “plain meaning.”<sup>136</sup> In the event that the meaning is not plain, textualists permit adherents to look to several sources for clarification: ordinary meanings, dictionaries, canons of interpretation, other statutory provisions, and general legal background.<sup>137</sup> One justification for adhering to these limitations is legal: only text that has undergone the constitutionally specified enactment process counts as law, so judges should look only to that

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131. Even commentators sympathetic to textualism acknowledge that textualists are not consistent. See Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 279–81 (2020) (recognizing that textualists’ inconsistency in using the concept of “context” has generated different versions of their approach).

132. See Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 669 (2019) (“If the cases of 2018 are any indication, the number of 5-4 splits in cases involving textual method deployed by both sides is a sure sign that there is no plain meaning to the text, since five members of the Court think it means one thing and four members think it means something entirely different.”).

133. See Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 635 (2017).

134. See, e.g., SCALIA & GARNER, *supra* note 121, at 349, 369–98 (rejecting use of legislative history and the concept of legislative intent); Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 984–85 (2020) (examining Justice Scalia’s skepticism about considering legislative purpose).

135. See Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 86 (2012) (“Textualism imagines Congress as a failed court, paying no attention whatsoever to congressional procedure on the theory that it is too chaotic or incoherent.”).

136. See Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 484–85 (2018) (discussing the values and limitations underlying the plain meaning rule).

137. *Id.* at 467–70 (discussing sources textualism allows).

text to understand what law means.<sup>138</sup> Another is institutional: enacted legal text crystallizes or embodies the results of negotiations among many legislators, and judges should not go beyond the text lest they disturb the “deals” legislators made to enact it or replace legislators’ choices with their own.<sup>139</sup> A third is prudential: restricting the sources of evidence judges may use constrains their discretion, producing more rule-bound, predictable, and legitimate decision-making.<sup>140</sup>

Textualism echoes populism’s rhetoric of simplicity.<sup>141</sup> But there is little simple about the law. Producing a federal statute involves scores of people occupying a myriad of institutional roles and social

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138. See Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 91 (2017) (arguing that drawing evidence of meaning from the enactment process is “illegitimate” because legislative history is “insufficient to constitute legislation under our system of governance”); *id.* at 82 (“Intents are irrelevant even if discernable . . . because our Constitution provides for the enactment and approval of texts, not of intents.”).

139. See, e.g., Manning, *supra* note 128, at 2390; see also John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 756 (2017) [hereinafter Manning, *Justice Scalia*] (“[I]f a judge elevates a statute’s purpose over its enacted text, he or she might unknowingly disrupt awkward, behind-the-scenes compromises . . . essential to the law’s enactment.”).

140. See Scalia, *supra* note 129, at 22, 40–41; Manning, *Justice Scalia*, *supra* note 139, at 750 (explaining that textualism rests upon an “anti-discretion principle”).

141. Our point here is not to refute textualism’s claims but to show how they manifest a judicial populism in the realm of interpretive theory. Still, it is worth briefly noting some obvious rejoinders. (1) Legally, the fact that only statutory text is enacted does not reasonably imply that nothing else may be consulted to help give meaning to that text, and indeed textualists consult other sources all the time. Dictionaries are not enacted legal text, yet textualists have no problem using them. (2) Institutionally, legislatures are complex machines, but they are not free-for-all melees. We know quite a bit about how legislatures function, and, crucially, how the people writing a statute communicate its anticipated effects to colleagues who will vote on it. So we can actually get a pretty good idea of congressional *understandings*—what those who voted on the statute thought it would do, whether they liked it or not—that reveal legislative deals better than a usually sparse statutory text that most legislators never read anyway. See Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 209 (2017) (noting that “most congressional insiders and legislation experts” read the “‘section-by-section’ summary that accompanies most statutes” to understand what the statute is about and what it is predicted to accomplish). (3) And to the prudential: just as in other areas of life, there is little reason to think that limiting information sources constrains interpretation or leads to more predictable results. See Adam M. Samaha, *Looking over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 558 (2017). Indeed, the contradictions between textualism’s purported values and its announced method render it incapable of producing consistent results. See Bernstein, *supra* note 136, at 473.

positions and is subject to ongoing commentary and assessment by individuals and institutions charged with explaining a statute's purposes and predicting its effects.<sup>142</sup> Statutes, terse yet syntactically complex and semantically odd, address broad and unpredictable social problems; they are naturally prone to ambiguity. Once a statute is enacted, moreover, our legal system works against the possibility that its meaning will be plain. The agencies that administer most statutes go through complex, multilateral processes to interpret and implement them in ways that are subject to change over time. And our adversarial system encourages would-be litigants to see different potentials in the same words, fueling arguments about meaning that lead to periodic judicial elaboration and reinterpretation. Because each authoritative reinterpretation becomes part of the law, courts are indelibly involved in the ongoing lawmaking process.

In our view, multiplicity is part of democracy's strength: a resilient system provides many people many different kinds of opportunities to participate in crafting laws whose meanings evolve over time. For textualists as for political populists, though, multiplicity appears as a danger or a weakness, or (oddly) both. Faced with information about legislative production and implementation, textualists look the other way and decry engagement with the democratic process; they share political populism's distaste for the messy practices of democratic institutions. Working in a legal system that inscribes judicial pronouncements in the law, textualists nonetheless insist that participation in lawmaking is an old-fashioned conceit of "the common law judge[ ]" whose "job [was] really that of 'playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern.'"<sup>143</sup> As this phrase suggests, textualists present lawmaking as unitary and decisive: the law-deviser is something like a king, and judges are not kings, so judges have no part in law-devising. Instead of acknowledging their part or justifying their influence in the multilateral lawmaking process that characterizes the American litigation system, textualists insist that judges are ethically

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142. See Gluck & Bressman, *supra* note 84, at 915 (discussing "the fiction of the unitary drafter"); Shobe, *supra* note 84, at 815-51 (detailing the many contributors to the legislative drafting process); Gluck, *supra* note 141, at 193-94 (noting Congressional "staff's role in statutory-text drafting"); Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 468 (2017) [hereinafter Shobe, *Agencies as Legislators*] (describing "agencies . . . as primary drafters of legislation"); Cross, *supra* note 84, at 84 (describing contemporary legislators as managers of a statute-drafting bureaucracy).

143. Manning, *Justice Scalia*, *supra* note 139, at 751 (quoting Scalia, *supra* note 129, at 7).

bound to ignore both their place in the system and the power they wield. Populism's impatience with complexity and debate resonates in textualism's imagination of the judicial role.

Textualist method further echoes populism's claim to direct, unmediated communication with the will of an imagined unitary people. Textualists seek to interpret law without looking to those who produce, assess, describe, enact, or implement it. They look instead to "the way a reasonable person conversant with relevant social and linguistic practices would have used the words" the statute contains.<sup>144</sup> Justice Scalia wrote that a statute's "words mean what they conveyed to reasonable people at the time they were written,"<sup>145</sup> because, as Judge Easterbrook put it, "the significance of an expression depends on how the interpretive community alive at the time of the text's adoption understood those words."<sup>146</sup> Textualists thus ask practitioners to ground their interpretation of legal text in audience understanding.<sup>147</sup>

Yet they also prohibit adherents from investigating how any actual people addressed by a statute might understand it. Records of the statute's production, which reveal how drafters presented the statute to colleagues in the enacting Congress—a central audience to passing a law—are off limits.<sup>148</sup> So are discussions with the agency personnel who are the co-drafters and the addressees of most statutes.<sup>149</sup> And when textualists look at indications of how people outside the government use language—dictionaries, popular publications, or even general corpora of language use—they eschew sources that might illuminate how those people would have understood the *statutory* provision at issue, rather than how they

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144. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006).

145. SCALIA & GARNER, *supra* note 121, at 16; see Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2053 (2005) (noting that textualists eschew pronouncements by those who wrote and voted on a statute, considering instead what those terms mean to idiomatic speakers).

146. Frank H. Easterbrook, *Foreword* in SCALIA & GARNER, *supra* note 121, at xxv.

147. See Barrett, *supra* note 53, at 2195 ("Textualists consider themselves bound to adhere to the most natural meaning of the words at issue because that is the way their principal—the people—would understand them.")

148. See Gluck, *supra* note 141, at 182 (arguing that looking to the Congressional Budget Office's evaluation of the economic effects of a bill can illuminate what members of the enacting Congress understood the law to accomplish); Shobe, *supra* note 84, at 815–51 (outlining the legislative drafting process).

149. See Shobe, *Agencies as Legislators*, *supra* note 142; Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1382–96 (2017) (describing the many ways administrative agencies participate in drafting legislation).

might treat some of the same words appearing in an unrelated genre or context.<sup>150</sup> Like political populists, textualists claim a direct line of contact with the people, an undifferentiated entity that understands the law in some uniform way which, it turns out, only textualists themselves are able to discern.<sup>151</sup>

This view treats a statute as though, once enacted, it took on a life removed from any practical grounding in the world it governs, with only the textualist judge able to voice its authentic reality. This transcendental certainty may help explain how textualists can propound several different interpretive approaches while maintaining that each one is superior to all others. Should statutory terms mean what they “conveyed to reasonable people” outside the legislature?<sup>152</sup> Or should we interpret them “as any ordinary Member of Congress would have read them”?<sup>153</sup> Justice Scalia has told us to take each of these—different—approaches and to renounce all others. Faced with a very old legal term like “equity” in a statute from a more recent time like 1974, should we give *equity* the meaning it had in 1974, “at the time of the text’s adoption,” as Judge Easterbrook describes Justice Scalia’s approach?<sup>154</sup> Or should we hark back to give *equity* the meaning it had in the “days of the divided bench,” as Justice Scalia did when addressing this question?<sup>155</sup> Each of these—contrary—methods is presented as showing the one true way.

Again, we are not concerned here with the particular results textualists reach in any given case, but with the path they take to get there. Textualism insists that judges should not consider the normative or practical implications of their decisions; they should just follow the one true method to reach the correct answer. But this method turns out to be inconsistent, even somewhat chaotic.<sup>156</sup> That makes it easier for judges to reach whatever results they want, while

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150. Bernstein, *supra* note 136, at 469–70; Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 160 CORNELL L. REV. (forthcoming 2021) (manuscript at 15–17) (on file with authors) (explaining that even when textualists turn to social scientific methods of evaluating how people use language, they avoid evidence that might reveal how statutory terms work in their real-world contexts).

151. Bernstein, *supra* note 136, at 466–76.

152. SCALIA & GARNER, *supra* note 121, at 16.

153. *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

154. Easterbrook, *supra* note 146, at xxv.

155. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210–12 (2002).

156. See Grove, *supra* note 131, at 279–90 (recognizing competing strands of textualism).

still righteously ignoring their normative and practical implications.<sup>157</sup>

Just last Term, a single case yielded three divergent textualist opinions. *Bostock v. Clayton County* asked whether Title VII of the Civil Rights Act of 1964, which prohibits discriminating against an employee “because of such individual’s . . . sex,”<sup>158</sup> proscribed discrimination on the basis of sexual orientation or transgender status.<sup>159</sup> According to Justice Gorsuch’s majority opinion, “[t]he answer is clear.”<sup>160</sup> An employer who fired a male employee for being in a romantic relationship with a man would not fire a woman for being in a romantic relationship with a man, so sex would be a but-for cause of the firing.<sup>161</sup> Justice Alito found this equation of sex with sexual orientation “preposterous,”<sup>162</sup> because an employer could reject an employee with homosexual leanings without even knowing their sex.<sup>163</sup> Anyway, textualism “calls for an examination of the social context in which a statute was enacted,” and “[i]n 1964, ordinary Americans . . . would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.”<sup>164</sup> Justice Kavanaugh, too, thought the “[t]he answer [was] plain[.]”<sup>165</sup> A textualist “must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase,”<sup>166</sup> which one

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157. See, e.g., Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2071–72 (2017) (recognizing the active and value laden nature of textualism); Gluck & Bressman, *supra* note 84, at 962–64 (arguing that textualism’s active nature should be acknowledged despite its claims to objectivity and neutrality).

158. 42 U.S.C. § 2000e-2(a)(1).

159. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

160. *Id.* at 1737.

161. *Id.* at 1741 (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”); see *id.* at 1735 (“[T]o discriminate on . . . grounds [of sexual orientation or gender identity] requires an employer to intentionally treat individual employees differently because of their sex.”).

162. *Id.* at 1755 (Alito, J., dissenting).

163. *Id.* at 1763 (arguing that an employer’s discrimination against an employee with a same-sex partner is not based on the employee’s sex but on their “attraction to members of their own sex—in a word, sexual orientation”); *id.* at 1760 (denying that “an employer cannot reject an applicant based on homosexuality without knowing the applicant’s sex”).

164. *Id.* at 1767. *But see* James A. Macleod, *Finding Original Public Meaning* 29–32 (2020) (unpublished manuscript) (on file with authors) (presenting experimental data indicating the opposite).

165. *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting).

166. *Id.* at 1825.

gathers from a larger legal context, and that “reflects and reinforces the widespread understanding that sexual orientation discrimination is distinct from . . . sex discrimination.”<sup>167</sup>

None of the *Bostock* opinions considers the normative value of anti-discrimination; or the way that discrimination against gays and lesbians supports patriarchy;<sup>168</sup> or even the fact that “the legislative debate over Title VII” presented sex discrimination “as a means of enforcing conventional sex and family roles.”<sup>169</sup> Rather, each opinion presents its own—distinctive—textualist method as the only legitimate option.<sup>170</sup> This pretty fairly characterizes textualist analysis.<sup>171</sup>

Textualism presents the consideration of values, norms, or effects as illegitimate, and insists that only its method can yield the right results.<sup>172</sup> But this supposedly stringent and constraining method leaves so much wiggle room that there are plenty of results to choose from.<sup>173</sup> In textualism’s peculiar argumentation style, moreover, the premise tends to be the same as the thesis: since enacted text is all there is to understanding law, it follows that all we need to understand law is the enacted text. This circular logic, reminiscent of religious exegesis, gives textualist assertions an inevitable, irrefutable sound.<sup>174</sup> But it leaves out the fundamentally social, normative, and efficacious nature of law; not to mention the wild inconsistencies of textualist analysis itself. Textualism, in other words, claims legitimation by fiat in a way that resembles political populism.

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167. *Id.* at 1830.

168. Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J.F. 115, 121–26 (2017) (reviewing decades of scholarship connecting discrimination against gays and lesbians to gender subordination).

169. *Id.* at 125 (quoting Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1328 (2012)).

170. *Cf.* MILTON ROKEACH, *THE THREE CHRISTS OF YPSILANTI* (1964) (describing an experiment in which three people who each believed himself to be Jesus Christ were housed together in the same institution).

171. *See* Grove, *supra* note 131, at 279–85 (using *Bostock* to illustrate textualism’s inconsistencies); Macleod, *supra* note 164 (same).

172. *See* Bernstein, *supra* note 136, at 467–473.

173. *See* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994) (explaining that textualism involves an “active, creative approach” to decision-making that “transform[s] statutory interpretation into a kind of exercise in judicial ingenuity” where interpretive problems are treated “like a puzzle to which it is assumed there is one right answer”).

174. *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1309–20 (1990) (rooting Justice Scalia’s approach to legal interpretation in his religious training).

Textualism's circular logic holds strong even when its premises collide. John Manning writes of Justice Scalia's devotion to "the idea of judicial restraint"<sup>175</sup> as "an independent reason to adhere to . . . textual conclusions," one that "did not necessarily derive from . . . a particular governing text."<sup>176</sup> On Manning's telling, then, textualism's tenets rest on a principle that itself is not grounded in legal text. Yet textualism's central tenet is to reject principles not grounded in legal text. Textualist teachings thus appear to delegitimize textualism itself. But through the magic of legitimation by fiat, textualists can return to the premise that the text is all that matters and conclude that all that matters is the text. Just as political populism claims special access to the will of the people, judicial populism claims special access to the truth of the law.

To be clear, attention to *text* is not a sign of populist thinking. Nor, of course, are textualists the only readers to treat text seriously. Take last Term's *Little Sisters of the Poor v. Pennsylvania*.<sup>177</sup> Federal agencies exempted organizations that claim religious scruples from the Affordable Care Act's (ACA) requirement that health insurance plans provide free contraception.<sup>178</sup> The statute provides that, "with respect to women . . . a health insurance issuer . . . shall . . . provide . . . such additional preventive care . . . as provided for in . . . guidelines supported by [the Health Resources and Services Administration (HRSA)]."<sup>179</sup> HRSA guidelines include contraception.<sup>180</sup> While the majority accepted the exemption, Justice Ginsburg argued that the statute did not give agencies the latitude to create exceptions to this mandate: the ACA says that *anyone* who is "a health insurance issuer . . . shall . . . provide [the] coverage" at issue, not that only *some* health insurance issuers should.<sup>181</sup> Justice Ginsburg noted archly, "I begin with the statute's text. But see *ante*, at 17 (opinion of the Court) (overlooking my starting place)."<sup>182</sup> And while she thought the text

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175. Manning, *Justice Scalia*, *supra* note 139, at 750 (explaining that Justice Scalia's commitment to judicial restraint provided a "central grounding for all of [his] commitments").

176. *Id.* at 755; *see also id.* at 750 ("Justice Scalia's anti-discretion principle . . . does not focus . . . upon any . . . account of Article III's original understanding.").

177. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

178. *Id.* at 2373.

179. *Id.* at 2379–80 (alterations in original) (quoting 42 U.S.C. § 300gg-13(a)(4)).

180. *Id.* at 2374.

181. *Id.* at 2404 (Ginsburg, J., dissenting).

182. *Id.*

rather clearly did not allow exemptions,<sup>183</sup> she did not deny the possibility of legitimate disagreement, or insist that one true answer was obvious, or ignore the role of legislatures in crafting statutes. Textualism, in other words, is not a shorthand for paying attention to text. It is a rhetorical frame to help legitimize legal claims, and it habitually draws on the same tropes as political populism.

#### B. ORIGINALISM

Originalism in constitutional interpretation, like textualism, exhibits the key traits of political populism by suggesting that the Constitution's text embodies the founding generation's will, and that courts can only legitimately speak on the people's behalf by using originalist interpretive methods. Originalism holds that judges interpreting the Constitution should impute to it the meanings its provisions had at the time they were enacted.<sup>184</sup> On this view, original meanings are not merely relevant to interpretation, they are dispositive.<sup>185</sup> Originalism started as an intentionalist approach that asked what the Constitution's writers meant by their words,<sup>186</sup> but soon moved in an audience-oriented direction, basing interpretation on the way a constitutional provision's original public would have understood it.<sup>187</sup> This "original public meaning originalism" had

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183. *Id.*

184. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 378 (2013) ("The two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances."); Berman, *supra* note 54, at 5 ("[O]riginalism maintains that courts ought to interpret constitutional provisions *solely* in accordance with some feature of those provisions' original character. . . . [although t]he feature of the original character that is said to demand this strong judicial solicitude varies across originalist theories."). The literature on originalism is vast. Our goal here is not to encompass all this work but to illuminate some key traits that connect originalist approaches to populism.

185. See Berman, *supra* note 54, at 2; Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *OHIO ST. L.J.* 1085, 1086 (1989) ("Originalists are committed to the view that original intent is not only relevant but authoritative . . .").

186. See Farber, *supra* note 185, at 1086 (noting that originalists believe "that we are . . . obligated to follow the intent of the framers" and that "clear evidence of original intent is controlling on any 'open' question of constitutional law").

187. Whittington, *supra* note 184, at 378 ("The terms of the debate have shifted somewhat over time, from talking about 'original intent' to talking about 'original meaning.'"); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 926 (2009) (defining "original public meaning originalism" as "the view that the original meaning of a constitutional provision is the conventional semantic meaning that the words and phrases had at the time the provision was framed and ratified").

difficulty dealing with precedent, which American law generally views as authoritative even if it does not conform to an originalist's understanding of a provision's original public meaning.<sup>188</sup> A more "inclusive" latter-day version of the theory has emerged to embrace post-founding-era changes insofar as founding-era law would have authorized such developments.<sup>189</sup> This "original law originalism" allows originalists to vaunt the original audience understanding of a constitutional provision while accepting contrary precedent, on the theory that the Constitution's original audiences recognized precedent as binding.<sup>190</sup>

Originalists tend to stay vague about what justifies choosing some original audiences over others as guides. After all, each constitutional provision governed many kinds of people on its enactment. The structure of the federal government was significantly influenced by the existence of slavery, for instance, and limits on women's autonomy formed part of the legal background to the Constitution.<sup>191</sup> Yet originalists generally do not attempt to uncover how enslaved people or women—or really anyone beyond those few who wrote, defended, and voted on it—understood constitutional text.<sup>192</sup> Originalists thus tend to seek guidance about general *public*

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188. Whittington, *supra* note 184, at 400–02 (noting that “how much respect judges should pay to judicial precedents that are apparently inconsistent with the original meaning of the Constitution” is an important “unsettled . . . question . . . within the originalist literature” and that the “theory . . . does not definitively instruct judges on what they should do if they find themselves confronted with a legal and political status quo that already departs substantially from the original meaning of the constitutional text”).

189. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2354–59 (2015) (arguing for an “inclusive originalism” that treats original meaning as the “ultimate criterion for constitutional law, including the validity of other methods of interpretation or decision,” which can be legitimate “to the extent that the original meaning incorporates or permits them”; this legitimizes precedent because the Constitution itself was “originally read . . . in the context of the common law,” which applies precedent).

190. *Id.* at 2361 (“Because originalism permits a doctrine of precedent, many of its most obvious conflicts with modern practice go away.”); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019).

191. See, e.g., JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 67–79 (2020) (detailing how electoral apportioning and the electoral college grew out of the conflict between slave states and free states); Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79 (2020) (showing that legal rules and precedents about slavery continue to permeate current American law); Michael Boucai, *Before Loving: The Lost Origins of the Right to Marry*, 2020 UTAH L. REV. 69 (discussing the evolution of family law and the legal role of women in marriage).

192. See James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 688–89 (2016) (recognizing that “the current originalist definition

meaning from writers with clear interests in having the Constitution understood in ways that would support *particular* results.<sup>193</sup> The theory insists that audience understanding must guide constitutional interpretation, but generally ignores most people in the Constitution's audience. In other words, originalism takes the anti-pluralist view that the public is an undifferentiated mass with a single shared understanding, an exclusionary universalism that obviates the need to consider alternative views. And with anti-institutionalist conviction, originalists present themselves as the only ones competent to speak for these original people.

These tendencies were on display in *District of Columbia v. Heller*, a major originalist opinion, in which the Supreme Court considered whether the Second Amendment precluded a regime prohibiting unlocked guns in the home.<sup>194</sup> As readers probably remember, the Second Amendment states, “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”<sup>195</sup> One of *Heller*'s main questions was whether the Second Amendment secured an individual right to possess firearms, or whether any right it protected was instead tied to a military purpose.<sup>196</sup> In evaluating the meanings of the phrase “bear arms,” the dissent noted an unenacted proposal by James Madison to provide that “no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.”<sup>197</sup> The way this clause linked “bearing arms” to “military service,” the dissent argued, implied that bearing arms was something typically done in a military context.<sup>198</sup>

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of public meaning itself excludes subordinated communities,” and that “originalism's need for a single, determinate meaning renders it closed to the multiple meanings that we actually find historically”).

193. The majority opinion in *District of Columbia v. Heller*, for instance, expressed doubt about looking to Antifederalist texts for clues about the original public meaning of the Second Amendment. 554 U.S. 570, 590 (2008). Yet if one seeks original *public* meaning, rather than one group's meaning or drafters' intents, then surely Antifederalists as well as Federalists—along with lots of people who did not identify strongly with either side—should count. Unless, that is, original public meaning actually means *original meaning expressed by the public that won the vote*.

194. 554 U.S. at 573; see *Solum*, *supra* note 187, at 926 (“In [*Heller*], the Court embraced originalism.”).

195. U.S. CONST. amend. II.

196. 554 U.S. at 582–95.

197. *Id.* at 660 (Stevens, J., dissenting) (quoting NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 169 (1997)).

198. *Id.* at 660–61 (quoting House debates expressing fears that the federal government would disarm “the States' militias” by unilaterally identifying those with

The majority knew better. The conscientious objector clause “was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights.”<sup>199</sup> The majority found the clause’s purpose obvious because contemporaneous Quakers objected both to military service and to personal gunfights.<sup>200</sup> Quaker tenets regarding battles and gunfights—though not Quaker tenets regarding hunting rabbits for dinner—thus held the key to what “bearing arms” meant to the Constitution’s original public.<sup>201</sup> Madison’s conscientious objector clause mentioned neither gunfights nor rabbits. But it did mention bearing arms and military service. So one might think that Madison was not concerned with *all* the uses to which a firearm might be put, but with one particular use—military—that he indicated with the phrase “bear arms.” The *Heller* majority did not waste time weighing the different implications that different kinds of evidence might suggest. It just *knew* what the clause was really for. It claimed privileged access to this historically distant iteration of the people.

With a sharply split Court, many amici on both sides, significant academic debate, a long history of local regulations, and existing precedent linking the amendment to military use,<sup>202</sup> the legal interpretation in *Heller* was, to put it mildly, contested. Yet, speaking for only a bare majority of the Court, the majority opinion called the reasoning of those who disagreed with it “[g]rotesque.”<sup>203</sup> Addressing evidence that in the eighteenth century “bear arms” normally indicated a military context, the opinion took a phrase from the Declaration of Independence and a page from the Oxford English Dictionary and declared it “*unequivocal*[.]” that the words indicated military use only “when followed by the preposition ‘against.’”<sup>204</sup> The

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religious scruples and prohibiting them from bearing arms).

199. *Id.* at 590 (majority opinion).

200. *Id.* (citing studies of Quakers).

201. See Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS (Sept. 21, 1995), <https://www.nybooks.com/articles/1995/09/21/to-keep-and-bear-arms> [<https://perma.cc/9DC5-8PNA?type=image>] (“One does not bear arms against a rabbit.”).

202. *United States v. Miller*, 307 U.S. 174, 178 (1939); see also *Moyer v. Secretary of the Treasury*, 830 F. Supp. 516, 518 (W.D. Mo. 1993) (“It has long been established that the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms.”).

203. *Heller*, 554 U.S. at 587. The majority held the right to be individual, with no relation to a militia. *Id.* at 635.

204. *Id.* at 586. *Contra* Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners at 18–19, *Heller*, 554 U.S. 570 (No. 07-290) (listing contemporaneous uses

dissent posited that although “bear arms” could be qualified to encompass many situations, unmarked by a modifier the phrase normally implied a military context.<sup>205</sup> The idea that words can imply a prototypical situation but encompass other situations when modified is a staple of research in linguistics;<sup>206</sup> the majority called it “worthy of the Mad Hatter.”<sup>207</sup> Dismissing the very *possibility* of reasonable disagreement or uncertainty typifies political populism, and it finds clear parallels in originalism.

Originalist theory has recently also claimed privileged access to hidden—yet binding—commitments that courts have made ever since the founding. Inclusive original law originalism sees original public meaning as the true test of constitutional text, but accepts non-original understandings if rendered by approaches that were themselves legally valid at the founding.<sup>208</sup> Surveying Supreme Court decisions, proponents find that constitutional interpretations always refer to original meanings or intents. Even when the Court reaches conclusions that stray from what an original audience would have thought (think *Brown v. Board of Education*), it still justifies them by reference to original meaning, intent, understanding, or principle.<sup>209</sup> Or it rests on precedent, whose power is itself based on founding-era legal principles.<sup>210</sup> This means that “[o]ur law today incorporates our

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of “bear arms” without “against” to indicate military service, including an entry from the Oxford English Dictionary).

205. *Heller*, 554 U.S. at 589.

206. See, e.g., EDWIN L. BATTISTELLA, *MARKEDNESS: THE EVALUATIVE SUPERSTRUCTURE OF LANGUAGE* ix (1990) (“The principle of markedness is a central part of structural theories of language . . .”); Charles J. Fillmore & Collin Baker, *A Frames Approach to Semantic Analysis*, in *OXFORD HANDBOOK OF LINGUISTIC ANALYSIS* 313 (Bernd Heine & Heiko Narrog, eds. 2009); Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L.Q. 1069, 1073 (1995) (discussing prototypicality in language and collecting sources).

207. *Heller*, 554 U.S. at 589.

208. Baude, *supra* note 189, at 2363 (“This form of inclusive originalism simply requires all other modalities to trace their pedigree to the original meaning.”). The theory is thus “inclusive” in the sense that it accepts things beyond original understandings, and in particular precedent, but it sticks to original law by insisting courts use only interpretive methods endorsed by the original audience. *Id.* at 2358–61.

209. *Id.* at 2380–81.

210. *Id.* It is not clear why original law originalism would include precedent but preclude other traditional modalities of constitutional interpretation like purposive, ethical, or prudential considerations, or, indeed, practical reasoning in general. See generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11–22 (1991) (describing the conventionally accepted modalities of constitutional interpretation).

original law by reference.”<sup>211</sup> And not only is that original law *relevant*, it is *dispositive*: “originalism is the official story of our legal system.”<sup>212</sup>

All cultures have “official stor[ies].” Some call such a story *ideology*, because it expresses commitments and worldviews that help people explain, justify, and interrogate their surroundings.<sup>213</sup> Others call it a *trope*, because it helps people make even new ideas feel recognizable by conforming to audience expectations.<sup>214</sup> Inclusive original law originalists call this story *our law* and maintain that it binds us: past references to historical understandings obligate courts to base interpretations on framing-era thought.<sup>215</sup> This newer form of originalism thus claims special access not just to what people thought and wanted in the framing era, but to the law they subsequently imposed on themselves so secretly that even they did not realize it. Disagreement, meanwhile, can be dismissed as just a failure to recognize the true law that binds us all.

To proponents, this view has some distinctive payoffs. It alleviates the need to provide strong “conceptual [ ]or normative justifications” for originalism, or to “show that originalism is the first-best legal arrangement as a normative matter.”<sup>216</sup> If originalism is already the law, there is, purportedly, no need to justify it: the law is the law and that is all there is to it. Instead of messy deliberation and

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211. Baude & Sachs, *supra* note 190, at 1457.

212. *Id.* at 1468.

213. See, e.g., Michael Silverstein, *The Uses and Utility of Ideology: Some Reflections*, 2 PRAGMATICS 311, 313 (1992) (“[I]deology is characteristic of any sociocultural phenomenon . . . [and] must inhere in what makes any social entity . . . cohere as that social entity. . . . [T]here is no such thing as a social fact without its ideological aspect . . .”).

214. Eric J. Segall, *Originalism off the Ground: A Response to Professors Baude and Sachs*, 34 CONST. COMMENT. 313, 313 (2019) (“Far from being our law, originalism is used by judges mainly as a rhetorical device to justify decisions reached on other grounds.”); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 506 (1948) (distinguishing between “the mechanism” of legal reasoning and its “pretense,” and explaining that constitutional interpretation gives the Court the flexibility to conceal its task “either as a search for the intention of the framers or as a proper understanding of a living instrument, and sometimes as both”).

215. Baude & Sachs, *supra* note 190, at 1458 (referring to “the binding force of our original law”); Baude, *supra* note 189, at 2397 (“Originalism obligates judges to a particular method of reasoning, both by placing the original meaning at the top of the pyramid of authority and by providing a test for which other methods may be used in the lower steps.”). Other scholars have found that federal courts have a consistent practice of *not* treating interpretive approaches as precedential. See Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014); *infra* notes 341–45 and accompanying text (discussing the Court’s interpretive pluralism).

216. Baude, *supra* note 189, at 2352.

debate about what our laws *should* be or what legal methods we *ought* to use, this originalism offers a “method of resolving conflicts among . . . modalities”<sup>217</sup> with a value-free syllogism that brooks no dispute: “originalism is the law” and “government officials should obey the law.”<sup>218</sup> This tie-breaker avoids the—apparently distressing—possibility that our legal discourse “lacks any coherent ‘truthmaker.’”<sup>219</sup> That is, in place of the institutions that democracies create for ongoing negotiation over conflicts and uncertainties, originalists seek a single truthmaker who can settle things once and for all. They locate that truthmaker in their story of the people, unified across society and through history. Originalists thus echo populism’s anti-institutional bent to solve the problem of pluralism and obviate the need to justify our law.

### C. EXECUTIVISM

Judicial populism places tremendous stock in the political accountability imposed by elections, and thus tends to view presidential elections as tantamount to a national mandate.<sup>220</sup> This view echoes the “unitary executive theory” that holds that the Constitution creates “a hierarchical, unified executive department under the direct control of the President,” who “alone possesses all of the executive power and . . . therefore can direct, control, and supervise” all other actors in the administrative state.<sup>221</sup> Unitary executive theory is not a theory of legal interpretation, but its substantive interpretation of the Constitution is informed by the same ideological commitments and rhetorical tropes as populism—namely, that there is a unified people with an identifiable political will that can be embodied in one elected political leader.

The image of a unified national executive marching lockstep under the control of one leader mirrors a corollary image of a unified people asking that leader to represent them. The president is “the only official who is accountable to a national voting electorate and no one else.”<sup>222</sup> While other elected officials are subject to subnational

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217. Baude & Sachs, *supra* note 190, at 1489 (quoting Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 497, 514–16 (2018)).

218. Baude, *supra* note 189, at 2352.

219. Baude & Sachs, *supra* note 190, at 1489 (quoting Green, *supra* note 217, at 514–16).

220. See *supra* notes 101–10 and accompanying text.

221. Calabresi & Rhodes, *supra* note 105, at 1165; see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5–11 (1994).

222. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*,

political pressures, the “true claimant to the executive throne” represents and cares about the people as a whole, not some subset of them:<sup>223</sup> he is “the conscious agent[] of . . . a national majority coalition.”<sup>224</sup> Moreover, we can rest assured that the president will act for the public good: “If that coalition will, by its very nature, be likely to be moderate, temperate, and just, so too will its agent be likely to be moderate, temperate, and just.”<sup>225</sup>

Unitary executive theory echoes political populism’s moralized anti-pluralism in pitting the single national voice of the president against parochial voices in Congress and other governmental institutions.<sup>226</sup> We can depend on a unitary executive “to protect the polity as a whole from factional strife,”<sup>227</sup> whereas a plural administration would “split the community into the most violent and irreconcilable factions.”<sup>228</sup> The president alone can therefore unify the public and serve as “a guarantee of public interestedness” against the narrow, rent-seeking behavior of critics and opponents.<sup>229</sup>

Unitary executive theory also adopts political populism’s noninstitutionalized notion of the people, claiming that the president, “and he alone, speaks for the entire American people.”<sup>230</sup> Instead of viewing Congress, the courts, and regulatory agencies as legitimate forums that weigh the president’s preferences or priorities against alternative perspectives and neutral expertise to provide desirable checks and balances, judicial populism portrays legislative oversight, judicial review, and administrative discretion as threats to the leader’s energy and accountability.<sup>231</sup> Unitary executive theory also takes a Manichean stance against public officials who seek to conduct oversight or contradict the president’s political agenda, portraying the president’s critics or opponents as nefarious members of a deep state

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48 ARK. L. REV. 23, 59 (1995).

223. *Id.* at 62.

224. *Id.* at 67.

225. *Id.*

226. *Id.* at 38, 67.

227. *Id.* at 38 (emphasis omitted).

228. *See id.* at 41 (emphasis omitted) (quoting THE FEDERALIST NO. 70, at 474 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

229. *Id.* at 42.

230. *Id.* at 36.

231. *See* JOHN P. BURKE, PRESIDENTIAL POWER: THEORIES AND DILEMMAS 87–90 (2016) (“Perhaps the theory’s greatest flaw is that it is difficult to square such a strong, unitary conception of executive control with Madison’s theory of shared powers and checks and balances on each branch.”).

or enemies of the people who are engaged in illegitimate or bad faith obstructionism or “witch-hunt[s].”<sup>232</sup>

Unitary executive theorists contend that the Constitution gives the president untrammelled authority to control his subordinates by removing them from office at will, affirmatively directing their actions, or even acting in their stead.<sup>233</sup> And proponents characteristically interpret the Constitution to promote these prerogatives and protect the president from what they view as intrusive meddling by Congressional oversight committees, government watchdogs, or the federal judiciary.<sup>234</sup> In corresponding court decisions, judges purport to remain above the fray of politics while effectively immunizing the president’s actions from meaningful scrutiny.<sup>235</sup> Because elections provide all the accountability necessary, if the people object to the president’s conduct, they will simply elect someone else.<sup>236</sup>

Like political populism, unitary executive theory suggests that the president can embody the interests of a unified people and ensure that the executive branch acts consistent with their will, meaning that strong presidential power puts the people in charge.<sup>237</sup> This could not possibly be true in a large and diverse nation; indeed, for reasons explored in Part II, the president cannot even reliably be said to represent the interests or views of a majority of Americans.<sup>238</sup> Moreover, the president cannot personally oversee or manage any more than a handful of the countless decisions of a vast regulatory

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232. See, e.g., David Smith, *Alternative Facts, Witch-Hunt, Bigly: The Trump Era in 32 Words and Phrases*, GUARDIAN (U.K.) (Dec. 28, 2020), <https://www.theguardian.com/us-news/2020/dec/28/alternative-facts-bigly-witch-hunt-trump-era-words-phrases> [<https://perma.cc/3LLG-CADV>].

233. See, e.g., Calabresi, *supra* note 222, at 58.

234. See BURKE, *supra* note 231, at 87–90 (quoting Louis Fisher, *Invoking Inherent Powers*, 37 PRESIDENTIAL STUD. Q. 1, 10 (2007)) (“[Unitary executive theory] places all executive power directly under the control of the president, leaving no room for independent commissions, independent counsels, congressional involvement in administrative details, or statutory limitations on the president’s power to remove executive officials.”).

235. See, e.g., Comm. on the Judiciary v. McGahn, 951 F.3d 510 (D.C. Cir. 2020) (holding the House Judiciary Committee’s lawsuit to enforce a subpoena for testimony from the White House Counsel nonjusticiable), *rev’d in part en banc*, 968 F.3d 755 (D.C. Cir. Aug. 7, 2020); *In re Flynn*, 961 F.3d 1215 (D.C. Cir. 2020) (granting a petition for writ of mandamus to foreclose the district court from conducting a hearing to consider the government’s motion to dismiss criminal charges against a confederate of the president), *rev’d in part en banc*, 973 F.3d 74 (D.C. Cir. Aug. 31, 2020).

236. Calabresi, *supra* note 222, at 45.

237. See Farina, *supra* note 107, at 373–95 (discussing unitary executive theory’s impossible democratic promises).

238. See *supra* Part II and accompanying text.

state.<sup>239</sup> Unitary executive theory thus propounds “false comfort and impossible promises,” including “the simultaneous insistence that the President is entitled to virtually complete autonomy *and* is uniquely motivated to govern in the national interest.”<sup>240</sup>

Unitary executive theory neatly expresses the basic tenets of populism. It denigrates the complexities and trade-offs of representative government and modern administration. It imagines instead a direct bond between a single leader and his single people. And it fantasizes that both leader and people will be righteous and fair without the inconvenience of debate or negotiation. Like textualism and originalism, unitary executive theory manifests a *frame* for judicial populist claims. We turn now to how that frame is constructed.

#### IV. BUILDING JUDICIAL POPULISM’S RHETORICAL FRAME

Certain rhetorical styles and tropes characterize political populism.<sup>241</sup> Indeed, to some extent, rhetoric defines populism, allowing a recognizably similar style to support different substantive policies or outcomes.<sup>242</sup> Judicial populism, too, employs a familiar store of rhetorical practices closely related to those of political populism but also tailored for the legal sphere. Focused on law and legal decision-making, it draws on recognizable forms of legal reasoning and known traditions in legal thought to help construct populist imagery and arguments. Using familiar conventions in a new way, judicial populist discourse constructs a peculiar frame within which to view objects like law, judging, and democracy, but treats the frame it has created as an attribute of the legal object itself. That is, writers in this vein use the populist frame to imply and insist that law,

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239. See Farina, *supra* note 107, at 396–412.

240. *Id.* at 377.

241. See, e.g., Pippa Norris, *Measuring Populism Worldwide*, 26 PARTY POL. 697, 698–700 (2020) (“In this research project populism is conceived at minimum as a form of rhetoric, a persuasive language, making symbolic claims about the source of legitimate authority and where power should rightfully lie. The discourse rests on twin claims, namely that (i) the only legitimate authority flows directly from the ‘will of the people’ (‘the citizens of our country’), and by contrast (ii) the enemy of the people are the ‘establishment.’ The latter are depicted as the powerful who are corrupt, out of touch, self-serving, falsely betraying the public trust, and seeking to thwart the popular will.”); Kirk A. Hawkins, *Is Chávez Populist? Measuring Populist Discourse in Comparative Perspective*, 42 COMPAR. POL. STUD. 1040, 1042–46 (2009) (defining populism “as a Manichaeian discourse that identifies Good with a unified will of the people and Evil with a conspiring elite,” and involves “a series of common, rough elements of linguistic form and content that distinguish populism from other political discourses”).

242. Norris, *supra* note 241, at 698–701.

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judging, and democracy simply *are* what they say. This Part explores how this frame is constructed.

The judicial populist frame centers on the claim that the law embodies the unified people's single will, which a judge can discern by using the appropriate method of interpretation or reasoning. This claim implies that normative argument is unnecessary or even illegitimate: the decisive question is whether a judge uses the correct method, which will lead to a preexisting, uniquely correct result. The (counterfactual) presupposition here is that legal interpretation can have one correct result, rather than being embedded in an ongoing multilateral process of development. In judicial populist imagery, the normative issues have already been settled. All that remains for a good judge to do is to use the correct method to discern the people's will embodied in the law.

If using the right method produces the right answers, moreover, it stands to reason that considering the normative implications or practical consequences of legal decisions merely diverts us from the truth. Those who do so can thus easily be accused of substituting the judge's will for the will of the people, legibly embodied in the law. Judicial populist rhetoric therefore prizes *minimalism*, arguing that judges should affect both law and policy as little as possible. If law is the crystallization of the people's will, judges should not mess with it. They should just discern it by sticking as closely as possible to what is already there.

This image seems to make the judge a weakling: someone who merely enunciates decisions made by others. But because in this image it is only the judge who can discern the people's will in the law, it surreptitiously gives her great power: only the judge can enunciate what the law really, correctly means.

This is the underlying image that judicial populist rhetoric conveys. In reality, of course, there are no clear global settlements on the meaning of most laws. And laws, like other linguistic products, have no inherent meanings that precede interpretation.<sup>243</sup> Legal decisions are, instead, part of the ongoing democratic process of contestation of meanings and effects.<sup>244</sup> The judicial populist image does not really ascertain the one true meaning of the law. It just lets judges present themselves as merely mouthpieces for the people's

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243. Bernstein, *supra* note 133, at 568–72.

244. *Id.* at 571–72.

will, rather than as government actors whose decisions express normative commitments and have effects on a diverse populace.<sup>245</sup>

Judicial populist writers create this underlying image through a stable of rhetorical tropes and stock stories, routinely expressed in syllogistic form. These stock stories do not reflect realities, and these syllogisms' premises do not support their conclusions. But through repeated incantations in a familiar form, writers make judicial populist tropes seem normal, legitimate, and even obvious. By insisting that stock stories are true and purportedly minimalist methods are uniquely legitimate, such writers utilize the same rhetorical devices as their political populist cousins. This rhetorical strategy allows them to avoid justifying their decisions on the merits, while also denying the possibility of legitimate disagreement.

#### A. CLAIMING MINIMALISM

In the rhetoric of judicial populism, the best judging does the least judging. Judicial populism thus claims a *methodological* minimalism that leaves the law as much as possible in its natural state, and a *policy* minimalism that exerts the smallest effects on the world around.<sup>246</sup>

Writers asserting methodological minimalism contend that "more sources of interpretation tend to yield more interpreter discretion."<sup>247</sup> Since, in this image, a judge is merely the mouthpiece for the true law, less discretion is both a worthy and an attainable goal. As Adam Samaha has noted, many legal commentators fear that having too many sources can cause problems.<sup>248</sup> One way to address that is to justify the relevance of specific sources to a particular situation. Judicial populist rhetoric, in contrast, places *a priori* constraints on sources, denouncing other categories of evidence as per se irrelevant and even illegitimate.<sup>249</sup>

Limiting sources might constrain discretion if limited sources both provide all the relevant information and compel a particular result. But given the complexity of many legal questions, that will

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245. Barrett, *supra* note 53, at 2195.

246. Judicial populism's normatively based claims to methodological and policy minimalism can be distinguished from a more pragmatic legal minimalism that seeks to avoid deciding on big issues in favor of incremental rulings limited to the case at bar. See generally Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008).

247. Samaha, *supra* note 141, at 556.

248. *Id.* at 556.

249. This is, for instance, the bread and butter of textualism, which distinguishes itself by repudiating information specific to the passage of a legal text. See *supra* Part III.A.

usually not be the case.<sup>250</sup> A judge limited to a few sources may have to fall back on guesswork, intuition, or preference.<sup>251</sup> The problem with cherry-picking, after all, is not the surfeit of cherries. Rather, the problem is the option of using a hidden principle, a bad principle, or no principle at all to choose among them.

Indeed, taking evidence into account may limit discretion, not increase it, since a judge must justify her conclusions in light of more data.<sup>252</sup> Of course, information overload can leave an interpreter confused or uncertain and require her to decide what is most relevant and what it means.<sup>253</sup> But *refusing* to consider potentially relevant information involves as much discretion as *agreeing* to consider it.<sup>254</sup>

The real problem, though, is that claims to minimalism suggest that eliminating judicial discretion is *possible*. In reality, judges must draw conclusions without the benefit of clear rules that produce obvious answers. The adversarial system itself, which brings contested legal questions to court, implies as much. The question should not be whether judges use discretion to interpret the law—they do—but whether they justify *how* they use their discretion in rational and normatively appealing ways. Contra judicial populist attempts to deflect responsibility, there is no way for judges to leave law unaffected. And given the judiciary's central role in government, there is little normative reason to ask them to try.

In practice, moreover, even legal writers who claim to limit their evidence tend to leave a lot of sources on the table. The United States Code; the common law; an evolving panoply of interpretive canons; non-legal writings; not to mention research, theories, and intuitions about anything from psychology to economics to physics—all are fair game.<sup>255</sup> This claimed minimalism, in other words, does not really minimize. Rather, it inscribes preferences for particular evidentiary

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250. See Samaha, *supra* note 141, at 615.

251. *Id.* at 558 (“As a logical matter, the notion that discretion increases as sources increase is incorrect without more. Sometimes the opposite is true.”).

252. *Id.*

253. *Id.* at 261.

254. See, e.g., James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1231–32 (2010) (“[J]udges who regularly rely on the canons [approved by textualists] have license to employ a systemic kind of discretion, in contrast to judges who regularly invoke legislative history or agency deference.”).

255. See generally Bernstein, *supra* note 136 (discussing how the role of each of these sources can lead to numerous different conclusions on the meaning of statutory text); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1263 (2012) (noting that Supreme Court opinions routinely contain factual assertions not substantiated by the record).

categories, often ones not clearly relevant to the law at issue. There are plenty of friends here to choose from.<sup>256</sup>

*Green v. Bock Laundry Machine Co.*, in which a prisoner on work release sued the manufacturer of a machine that tore off his arm, provides an example.<sup>257</sup> The defendant manufacturer introduced evidence of the plaintiff's convictions, which were unrelated to his work-related injury. Federal Rule of Evidence 609(a) required that a judge "shall" admit evidence of a witness's prior conviction "only if" its probative value outweighed "its prejudicial effect [on] the defendant"—here, the manufacturer.<sup>258</sup> If the evidence prejudiced the plaintiff, the judge had to admit it. While this might make sense in criminal cases, in civil suits it created a strange asymmetry that all members of the Court rejected.<sup>259</sup>

Writing for the majority, Justice Stevens took an exhaustive tour through the history of felon testimony and the development of Rule 609.<sup>260</sup> He concluded that the Rule's drafters were consistently concerned with potential prejudice to specifically *criminal* defendants,<sup>261</sup> and interpreted the rule to require balancing only when evidence might prejudice criminal defendants, not litigants in civil suits.<sup>262</sup> In dissent, Justice Blackmun noted that the Rules do not distinguish criminal from civil parties,<sup>263</sup> and "themselves specify that they 'shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined' in *all* cases."<sup>264</sup> Based on the Rules' text, the dissent would

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256. See Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1045–46, 1046 n.43 (2020) (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)) ("The most famous line critical of the use of legislative history . . . was from Judge Harold Leventhal . . . who said that 'the use of legislative history [was] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.'").

257. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

258. *Id.* at 509 (emphasis added) (quoting FED. R. EVID. 609(a) (1975) (amended 1987, 1990, and 2011)).

259. See *id.* at 510–11 (concluding that because our law generally treats civil litigants similarly, it was "unfathomable why a civil plaintiff—but not a civil defendant—should be subjected to th[e] risk" of mandatory admission of damaging evidence); *id.* at 527 (Scalia, J., concurring); *id.* at 530 (Blackmun, J., dissenting).

260. *Id.* at 511–24 (majority opinion).

261. *Id.* at 522 ("To the extent various drafts of Rule 609 distinguished civil and criminal cases, moreover, they did so only to mitigate prejudice to criminal defendants.").

262. *Id.*

263. *Id.* at 533 (Blackmun, J., dissenting).

264. *Id.* at 533 (quoting FED. R. EVID. 102) (1975) (amended 2011)).

have interpreted Rule 609 to require courts to weigh the probative value against the prejudicial impact of prior conviction testimony on *any* party.<sup>265</sup>

Justice Scalia concurred in the result,<sup>266</sup> but rejected using Rule 609's history,<sup>267</sup> and ignored the Rules' statement of purpose. Instead, he maintained that, of the available options, interpreting "defendant" to mean *criminal* defendant "[q]uite obviously . . . does least violence to the text."<sup>268</sup> But along what metric? Are adjectives less violent than nouns? If so, the majority wins: it inserts the adjective "criminal" but keeps the noun "defendant." Is increasing the word number violent? Then the dissent is right: it can replace "defendant" with "party" and be done with it. This supposedly minimalist approach would make legal protection turn on whether English happens to use a single lexeme or a noun phrase for some concept. Taking the claim to lexical pacifism seriously makes it clear that this is a largely nonsensical, or at least arbitrary, way to make legal decisions.

Perhaps writers taking this position actually mean that legal interpretation should do the least violence to the *meaning* of the text. But how would we know that meaning without interpreting the provision?<sup>269</sup> The *Green* majority sought that underlying meaning from Rule 609's history;<sup>270</sup> the dissent, from the Rules' statement of purpose.<sup>271</sup> Justice Scalia claimed that his interpretation accorded with "the policy of the law in general and the Rules of Evidence in particular of providing special protection to defendants in criminal cases," but gave no citation for either.<sup>272</sup> The concurrence thus rejected evidence about the provision's evolution and relation to surrounding text, unmooring itself from the kind of information that might provide a sense of an underlying meaning.<sup>273</sup> Instead, it decided

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265. *Id.* at 530.

266. *Id.* at 527 (Scalia, J., concurring) (agreeing that reading the Rule to protect civil and criminal defendants but not civil plaintiffs would be "absurd, and perhaps unconstitutional").

267. *Id.* at 528.

268. *Id.* at 529.

269. This minimalist quest recalls the Russian fairy tale in which a wicked king commands the protagonist to "*go I know not whither, and fetch I know not what.*" R. NISBET BAIN, *RUSSIAN FAIRY TALES: FROM THE SKAZKI OF POLEVOI* 70 (3d ed. 1901).

270. *Green*, 490 U.S. at 511–24.

271. *Id.* at 530 (Blackmun, J., dissenting).

272. *Id.* at 529 (Scalia, J., concurring).

273. *Id.*

for itself what the underlying meaning must be, based on “the law in general”—whatever that is—and word counts.<sup>274</sup>

This minimalist approach imputes a core or underlying meaning to a text. But those who employ minimalism also tend to reject the kinds of evidence that could give them a sense of that underlying meaning. So they are left to make it up for themselves. They obscure their own role in the process by expressing their interpretation as a premise, rather than the conclusion it is.<sup>275</sup> This naturalizing rhetoric makes it sound like the judge’s preferred meaning is part of the law, rather than just another interpretation of it.

Policy minimalism, meanwhile, urges judges to minimize their effects on the world in which they adjudicate. We saw this attitude in *Gill v. Whitford*, where the Court confronted electoral districts gerrymandered for partisan advantage.<sup>276</sup> Chief Justice Roberts, worried about wading in and deciding “whether the Democrats win or the Republicans win,”<sup>277</sup> implied that the Court should refrain from affecting the status quo. Yet if the status quo violates the rule of law, as the *Gill* plaintiffs argued, then not interfering is itself an important policy choice. Announcing that federal courts cannot intervene in partisan gerrymandering hardly leaves electoral policy in some pristine, baseline state.

Consider also the dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.<sup>278</sup> The Endangered Species Act (ESA) makes it “unlawful for any person . . . to . . . take any” endangered wildlife,<sup>279</sup> defining “take” as, inter alia, “harm.”<sup>280</sup> Regulations interpreted “harm” to include “an act which actually kills or injures wildlife,” including through “significant habitat modification or degradation.”<sup>281</sup> Commercial loggers argued that this regulation went too far: the statute proscribed only “direct applications of force against protected species” with intent to injure, not collateral damage

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274. *Id.*

275. Others have noted related phenomena in the characterization of legal issues. See, e.g., Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002); Michael Coenen, *Characterizing Constitutional Inputs*, 67 DUKE L.J. 743 (2018).

276. *Gill v. Whitford*, 138 S. Ct. 1916 (2018); see *supra* note 68 and accompanying text.

277. Transcript of Oral Argument, *supra* note 69, at 37.

278. 515 U.S. 687 (1995).

279. *Id.* at 690–91 (quoting 16 U.S.C. § 1538(a)(1)).

280. *Id.* at 691 (quoting 16 U.S.C. § 1532(19)).

281. *Id.* at 691 (quoting 50 C.F.R. § 17.3 (1994)).

from habitat modification.<sup>282</sup> The *Sweet Home* majority held the agency's interpretation of "harm" reasonable, while the dissent thought "take" required purposeful action against an animal.<sup>283</sup> As William Eskridge has noted, the dissent rested on an assumption that private property bestows an individual right against regulatory incursions,<sup>284</sup> a baseline that might make it outrageous for the government to tell "the simplest farmer" what to do with his land.<sup>285</sup> The majority treated the common law as largely superseded by statutes and regulations, with government constraints on private externalities already constituting the status quo.<sup>286</sup> What constitutes policy intervention, and what constitutes minimalism, differs depending on the baseline one chooses.

For policy minimalism to make sense, there would have to be some natural, pre-disturbance way that law acts and means things: there must be a neutral baseline against which effects can be assessed. But, as a fundamentally social enterprise, law has no before-the-fall stage. Choosing a baseline is itself a political, not to mention an interpretive, decision.<sup>287</sup> Moreover, the nature of adversarial litigation means that, usually, some legal principles argue for allowing the status quo, others for stopping it; the court must decide what to do. Neither option is policy-neutral, and neither leaves the law undisturbed. Judicial populist rhetoric obscures this by treating some selected baseline as though it were an objective fact.<sup>288</sup>

Policy minimalism also insists that judges not consider the effects of their decisions: "[T]he avoidance of unhappy consequences" does not provide an "adequate basis for interpreting a text."<sup>289</sup> In practice, Jane Schacter has noted, those who decry considering consequences

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282. *Id.* at 692–93, 697.

283. These opinions showcase judges' discretion in choosing what text to interpret. Bernstein, *supra* note 133, at 574–78. They have also become well-known for their rapid-fire deployment of statutory interpretation canons. See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 545–49 (2013).

284. Eskridge, *supra* note 283, at 549.

285. *Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting).

286. *Id.* at 698–708 (majority opinion).

287. See also Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46–47 (1989) (arguing that the Rehnquist Court was defined by "an oft-stated desire to avoid judicial value imposition" which offers "a futile quest for value neutrality" and "obscures . . . value choices" which are an inevitable part of judging).

288. *Id.*

289. Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1009 (2011) (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring)).

often do it anyway.<sup>290</sup> But they ignore concerns identified by the agencies that implement statutes and the legislatures that enact them,<sup>291</sup> acting instead like a “ventriloquist to a hypothetical congressional dummy”<sup>292</sup> to allow the judge himself to “identif[y] . . . the policy baseline against which the range of plausible legislative meanings is gauged.”<sup>293</sup> Beyond this inconsistency, moreover, judging in fact has consequences, and it seems at least normatively problematic to ask judges to pretend to work outside of the polity they help govern. Such minimalist claims smuggle in conclusions about what the law is and should be, disguising those conclusions as neutral premises and putting them off limits for reasoned debate in ways that conflict with the commitments of a republican democracy.

Some might defend this kind of minimalism for at least yielding consistent or predictable results, but it cannot accomplish even that. Following through on originalism “would introduce random chaos into the law,” since every time “new research shows that the original meaning . . . is different than we had previously thought, . . . we must upend our legal system” to accommodate the new findings.<sup>294</sup> The three contrasting textualist opinions in *Bostock*, meanwhile, demonstrate the concomitant unpredictability of textualism.<sup>295</sup> A purportedly minimalist approach does not impose consistency; it merely helps judges justify refusing to consider the consequences of their inconsistencies.

The minimalism of judicial populist rhetoric echoes the language of “passive virtues” associated most strongly with Alexander Bickel.<sup>296</sup>

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290. *Id.* (“[P]olicy consequences . . . often . . . figure quite prominently in textualist reasoning and method.”).

291. *Id.*

292. *Id.* at 1013 (quoting Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 25 (1998)).

293. *Id.*

294. Andrew Koppelman, *Why Do (Some) Originalists Hate America?*, ARIZ. L. REV. (forthcoming) (manuscript at \*25–26) (on file with authors).

295. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). See *supra* notes 159–67 and accompanying text. Justice Alito’s dissent even takes a policy minimalist swipe at the majority opinion: “[i]f today’s decision is humble, it is sobering to imagine what the Court might do if it decided to be bold.” *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting).

296. “The ‘countermajoritarian difficulty’ has been the central obsession of modern constitutional scholarship.” Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998); see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”). Barry Friedman has shown that Bickel jumped into a conversation about the proper role of the judiciary that had been

But the two are quite different.<sup>297</sup> The literature on passive virtues is normatively thick: Bickel saw the courts as a moral vanguard, “the pronouncer and guardian of [enduring] values,” not a value-neutral umpire that reports on an inherent legal meaning.<sup>298</sup> For Bickel, rather than enabling majority rule,<sup>299</sup> the Court should act as the custodian and developer of society’s ongoing normative commitments, “us[ing] whatever influence it possesses to bring principle and popular opinion into greater alignment.”<sup>300</sup> Its countermajoritarian position gives it an “educative mission . . . helping to facilitate the slow but deliberate reform of perception and attitude on which . . . moral instruction depends.”<sup>301</sup>

Passive virtue theorists also recognize that discretion inheres in judging, and they urge courts to use that discretion to principled ends. Passivity is a leadership strategy: it’s not that passivity *is* the virtue, but that virtue can be expressed in passive-seeming ways. Bickel asked judges not to stick to an imagined baseline of core legal meaning, but to gradually adjust legal and social norms by deflecting highly fraught issues.<sup>302</sup>

Later commentators followed suit. Philip Frickey praised the Court for using constitutional avoidance to deflate the excesses of mid-century anti-Communism, avoiding head-on confrontation with that era’s repressive trends while “defus[ing] political opposition [and] incrementally adjusting public law to better respect individual liberty.”<sup>303</sup> William Eskridge argues that courts should facilitate

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going on, in some way or other, since the founding of the Republic. Friedman, *supra*, at 340.

297. There is much to learn from and also to argue with in the voluminous passive virtues literature, but we do not evaluate it or endorse any of its particular strands. Our aim is to show that the mainstream of passive virtue thinking figures courts as key participants in the normative development of the American polity, and urges courts to act with an eye toward furthering normative ends. Judicial populism, in contrast, disavows a normative role for courts and views normative considerations as irrelevant and perhaps illegitimate in adjudication.

298. BICKEL, *supra* note 296, at 24; see also Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567, 1577 (1985) (quoting BICKEL, *supra* note 296, at 24).

299. Kronman, *supra* note 298, at 1578–79 (contrasting Bickel’s philosophy with that of John Hart Ely). For Bickel, elected representatives too are not “like animated voting machines . . . to register decisions made by the electorate”; they ideally represent diverse interests in a deliberative way. *Id.* at 1591 (quoting ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* 183 (1965)).

300. *Id.* at 1581.

301. *Id.* at 1586.

302. *Id.* at 1581.

303. Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon*,

“pluralistic democracy by enforcing neutral rules”<sup>304</sup> that promote broad participation in the political process,<sup>305</sup> especially by groups who face discrimination.<sup>306</sup> Along with John Ferejohn, Eskridge presents courts as custodians of a republican-democratic ecosystem:<sup>307</sup> as the institution “best situated to stand up for fundamental values,”<sup>308</sup> courts should “be deliberation-respecting” by “listen[ing] to . . . other institutions”<sup>309</sup> as they consider both practical means—“what to do”—and normative ends—“what to want.”<sup>310</sup> Cass Sunstein asks courts to be alert to the practical consequences of their actions, recognizing that “intense public convictions may provide relevant information about the correctness of [courts’] conclusions.”<sup>311</sup> For those who theorize the passive virtues, courts are stewards of public moral development, custodians who promote the health of a variegated ecosystem—not hikers who try to leave no trace.<sup>312</sup>

Judicial populist minimalism, in contrast, does not offer to effectuate incremental improvements or moral stewardship. Instead, it claims a principled refusal to consider the consequences of judicial decisions.<sup>313</sup> On this view, courts should not facilitate pluralistic deliberation, provide moral leadership, or help out with governance.

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*Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 401-02 (2005).

304. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1310 (2005).

305. Eskridge, *supra* note 304, at 1301-03.

306. *Id.* at 1284.

307. William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273 (2009). Eskridge and Ferejohn see judging as a “horticultural” project of tending to the Constitution’s “shared project in a way that allows it to flourish and contribute to the larger public interest,” rather than an “engineering” project of maintaining fidelity to the mechanism that an original creator designed. *Id.* at 1273-74.

308. *Id.* at 1283 (citing THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

309. *Id.* at 1275.

310. *Id.* at 1278.

311. Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 159 (2007).

312. “The Court has many ways of ‘not doing.’” Kronman, *supra* note 298, at 1585 (quoting BICKEL, *supra* note 296, at 71). It should pursue them not because inaction is the most legitimate option, but because inaction offers a good strategy for enacting normatively desirable change in the long term. Passivity allows the courts to “create the time for popular opinion to catch up before taking a principled stand.” *Id.* at 1586.

313. *Cf.* Schacter, *supra* note 289, at 1009 (examining, in contrast, textualism’s often “strikingly consequentialist methods”).

They can only voice underlying truths inherent in the law that lead inexorably to particular conclusions by using the right methods. This view evacuates judging of the normative considerations and moral leadership that justify countermajoritarian courts in the eyes of passive virtue theorists. Instead, it implies that judges can avoid the countermajoritarian difficulty by enunciating the true will of the unified people. Courts, in this vision, are legal bystanders to whom normative values and human consequences should be irrelevant. Legal writers can thus proclaim neutrality and universality, as though refusing to acknowledge one's commitments entailed not acting on them.

Method and policy minimalism work together to help legal writers avoid, and deny the validity of, normative and practical concerns with the use of judicial power. The idea is that a righteous judge who follows the properly minimalist method can be confident of a minimalist policy outcome. Minimalism presents the law as embodying a clear people's will for the judge to enunciate, obscuring the legal and practical effects of a judge's inevitably discretionary decisions.

Writers who use judicial populist tropes *claim* that methodological minimalism leads to policy minimalism, which makes their preferred methods uniquely legitimate. However, there is no necessary connection between the breadth of interpretive methods and the degree of their policy impact. And there is no untouched policy position to be maintained. It may sound silly to state it outright, but there is no interpretation that doesn't interpret. And because laws have practical effects, there is no legal interpretation that doesn't have policy consequences. Insisting on an illusory minimalism begs the very policy questions that judges routinely—and unavoidably—decide. Writers who use these tropes thus form the landscape in their own image while claiming to leave no trace. Rather than drawing on normative justifications for exercising passive virtues, they use what we might call *passive virtue signaling* as a cover for reaching the outcomes they want.

#### B. USING KEY TROPES AND STOCK STORIES

The judicial populist image of law does not comport with basic democratic commitments to pluralism and institutional mediation, and it runs headlong into the reality that neither legal language nor policy effects have an untrammelled baseline state that judges can access. Yet, through decades of persistent repetition, this image has permeated legal discourse so much that it seems unobjectionable,

sometimes even obvious. This image is propounded through a collection of tropes: vehicles in which the imagery of judicial populism travels. They give writers handy tools to avoid justifying positions on the merits by insisting that good judging focuses on method instead. They also help writers deflect and deny the possibility of legitimate disagreement about what good judging entails. In short, these tropes help legal writers present judicial populism's highly contestable image of law as though it were a simple fact.

To be clear, we do not criticize judicial populist writing for using rhetorical tropes. Any claim to judicial legitimacy—indeed any developed image of any aspect of law—will rely on tropes of some sort. Rhetoric is, after all, the main means of action in legal reasoning. Here we present the primary tropes that sustain the particular rhetoric of judicial populism.

The trope of a unified people that issues clear electoral mandates to authorized leaders who unequivocally inscribe the people's will into law implies that legal texts usually have one clearly correct meaning rather than being multivalent or ambiguous.<sup>314</sup> And if ambiguity and multivalence are aberrations, disagreement about legal meaning or methods should be too. A judge who means well and uses the right methods should be able to reach the right understanding,<sup>315</sup> which suggests that disagreement is likely inspired by bad faith.<sup>316</sup> This anti-pluralist premise justifies dismissing competing views and questioning the very notion that views could legitimately compete. It allows writers to suggest that they can avoid the discretion inherent in judging and act as neutral conduits for clearly ascertainable truths.<sup>317</sup> And it makes those who use other methods or reach other

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314. See, e.g., SCALIA & GARNER, *supra* note 121, at 6 ("As we hope to demonstrate, most interpretive questions have a right answer."); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017) ("In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous.").

315. See, e.g., Kethledge, *supra* note 314, at 320 ("For, in my experience at least, if one works hard enough, all the other interpretations are eventually revealed as imposters.").

316. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) (referring to the Court's "interpretive jiggery-pokery"); see also GORSUCH, *supra* note 121, at 116 (addressing "some of the sillier objections against originalism" and stating that "I'm not making this up.").

317. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the U.S.: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr., nominee to be C.J. of the United States) ("Judges are like umpires. Umpires don't make rules, they apply them."); GORSUCH, *supra* note 121, at 10 ("A judge should apply the Constitution or a congressional statute

conclusions available for description as elite activists imposing their views on the people.<sup>318</sup>

This trope also marginalizes institutions designed to mediate among divergent interests or viewpoints as necessarily corrupt or illegitimate. Staffed by people who represent the interests of particular groups rather than of the whole people, legislatures are chaotic and inscrutable, agencies, unaccountable and corrupt.<sup>319</sup> This image also helps relieve judges of responsibility for considering the purposes of laws or the effects of judicial rulings.<sup>320</sup>

The anti-institutionalist bent extends even to the institution of the judiciary itself: this rhetoric often presents judges as though they were removed from the production of law.<sup>321</sup> Considering the social effects of judging is portrayed as irrelevant and even illegitimate. This innocuous-sounding view denies the reality of our legal system, in which precedent influences the law's effects and judges unavoidably participate in making law what it is. In the populist vision, conversely, the method is the justification. This abstracted approach uses judicial populist rhetoric to justify the exertion of power without facing its practical implications.

On an individual level, judicial populist tropes echo the Manichean thrust of political populism in disparaging elites in favor of regular folks of humble origin.<sup>322</sup> Against an elite that would

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as it *is*, not as he thinks it *should be*.”).

318. See, e.g., GORSUCH, *supra* note 121, at 112–13 (“[M]any living constitutionalists would prefer to have philosopher-king judges swoop down from their marble palace to ordain answers rather than allow the people and their [elected] representatives to discuss, debate, and resolve them.”).

319. See *supra* Parts III.A, III.C; *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (“It would be a bit much to describe the result as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.” (quoting THE FEDERALIST No. 47, at 324 (James Madison) (J. Cooke ed. 1961))); Calabresi, *supra* note 222, at 62 (claiming that Congress and federal courts “will carry out their duties with state and local political preferences as their main concern, when the true claimant to the executive throne would not do so”).

320. See, e.g., SCALIA & GARNER, *supra* note 121, at 16–17 (emphasis omitted) (“[T]he dutiful judge is never invited to pursue the purposes and consequences he prefers.”).

321. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 671 (1987) (Scalia, J. dissenting) (claiming that the judiciary’s proper role in statutory interpretation is merely to ascertain “what the law as enacted meant”); GORSUCH, *supra* note 121, at 314–15 (“It is the role of judges to apply, not alter, the work of the people’s representatives.”).

322. Thus, for example, Justice Gorsuch—a graduate of Georgetown Prep, Columbia University, Harvard Law School, and Oxford University—maintains that

complicate things to impose their own views or benefit “others,” this approach presents law and judging as simple, clear, and rule-bound—an image undermined by the realities of legislation, regulation, and litigation. Some particularly active proponents propound this view through publications, speeches, and frequent references to fellow travelers.<sup>323</sup> Like an advertisement that increases name recognition, this frequent repetition of “familiar formulations” helps make judicial populist tropes feel normal and natural,<sup>324</sup> despite their inconsistency with democratic governance. As previous Parts elaborated, these tropes can be deployed for any substantive end; they do not constrain judicial decisions so much as give them a legitimating veneer. Thus, this rhetoric gives writers a way to cast doubt on the legitimacy of others without limiting their own options.

To convey these formulations, judicial populist rhetoric often uses a respected format: the syllogism, which draws a logical conclusion from several premises.<sup>325</sup> This form, so familiar to legal writers, helps make ideas feel natural and obvious by showing how they arise logically from agreed-upon foundations.<sup>326</sup>

In judicial populist rhetoric, however, syllogisms can become oddly deformed. They often suffer logical slippages, yielding conclusions that do not actually follow from their premises.<sup>327</sup> For

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“[his] story has its roots in the American West and is the product of the people there.” GORSUCH, *supra* note 121, at 11–15.

323. Justices Scalia and Gorsuch have been particularly active in seeking to influence the broader legal and political culture, including by writing books aimed at popular audiences. *See generally id.*; ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND A LIFE WELL LIVED* (Christopher J. Scalia & Edward Whelan eds., 2017). Both justices have also written judicial opinions in a demotic style designed to appeal to a general public audience. *See, e.g.*, Meghan J. Ryan, *Justice Scalia’s Bottom-up Approach to Shaping the Law*, 25 WM. & MARY BILL RTS. J. 297, 313–15 (2016). Judicial populism, like originalism, is thus a potentially powerful tool for “conservative mobilization in both electoral politics and in the legal profession.” Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 548 (2006); *see also* Greene, *supra* note 54, at 708–16 (discussing efforts to “sell[]” originalism).

324. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 597 (1989–90) (warning of “[t]he fallacy that passes for truth by the mere frequency of its repetition” and recognizing that all humans “are comfortable with familiar formulations” and “trained to follow what has been said before”).

325. *See* JAMES A. GARDNER & CHRISTINE P. BARTHOLOMEW, *LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY* 4 (3d ed. 2020) (explaining syllogisms).

326. *Id.*

327. *See* Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 785–99 (2017) (providing extensive examples from Justice Scalia’s writing).

instance, some scholarship claims that because courts interpreting law discuss original meanings, and our legal system is defined by what courts do, our legal system is originalist.<sup>328</sup> Originalism, as we have noted, holds that original meanings are decisive to the interpretation of law.<sup>329</sup> But *discussing* original meanings does not necessarily make them *decisive*. The premises may be true, but they do not support the conclusion. Similarly, some argue that since law is enacted in texts and courts interpret law, courts should limit their interpretations to legal texts.<sup>330</sup> Yet the fact that law is enacted into text does not determine the scope of information relevant for understanding that text—one might use dictionaries, legislative materials, and much else in that task. Again, one could agree with the premises but reasonably come to different conclusions. Putting the argument in syllogistic form helps the conclusion *seem* logical and uniquely correct even when it does not follow from the premises.<sup>331</sup> It also makes it easy to accuse those who accept the premises but reach different conclusions of bad faith, as though they had abandoned obvious truths or basic legal commitments.

Using unobjectionable premises to reach unsupported conclusions also gives writers tools to avoid the inescapably normative aspects of legal decision making. Many important questions in law and politics, after all, involve complicated situations, disputed propositions, meaningful nuances, competing normative perspectives, and substantial uncertainty. We often lack clear premises that lead to decisive solutions, and courts—like other governmental institutions—often try to ameliorate conflict or work toward resolutions. The rhetoric of judicial populism, in contrast, uses syllogisms to deny that inherent complexity, insisting instead that there are simple, indisputable truths that produce obvious, correct conclusions. This rhetoric uses the familiarity of the syllogistic form to create universal truths out of thin air, without the pluralistic contestation that characterizes democracy.<sup>332</sup> But giving an argument the *form* of a syllogism does not make it correct, or even sensible. As Noam Chomsky famously noted, a sentence can have a perfectly

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328. See *supra* Part III.B (discussing original law originalism).

329. See *supra* Part III.B.

330. See *supra* Part III.A (describing the central claims of textualism).

331. See GARDNER & BARTHOLOMEW, *supra* note 325, at 4.

332. See BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 72 (William E. Connolly ed., 1993) (arguing that legal strictures do not resolve or end democratic contestation over values and practices, but allow contestation to keep going).

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grammatical *form* and yet lack meaning.<sup>333</sup> Nonetheless, the syllogism provides a handy rhetorical frame through which to assert indisputable conclusions about inherently disputable issues.

C. THE “POPULIST” NATURE OF THIS RHETORIC

The rhetoric we have described invokes the same themes that define populism in the political sphere, tailored for the legal context. Its moralized anti-pluralism treats the law as a clear embodiment of a unified people’s will subject to direct enunciation by a properly discerning leader or judge.<sup>334</sup> Its antipathy toward institutional mediation presents judges as mere mouthpieces for this truth, rather than as participants in ongoing multilateral interactions among many interests, values, and commitments. And its Manichean imagery pits restrained judges who use the proper method to serve the will of the people against unconstrained judicial activists who promote the agenda of an elite establishment. Its curt rejection of alternative understandings or methods treats those who disagree as *others*—enemies of the people—whose views do not count. Judicial populists, like political populists, thereby claim the magic of legitimacy by fiat.

To make that claim, writers use the language of minimalism conveyed through stock stories and fallacious syllogisms. Framing the work of legal reasoning in this way helps such writers pretend that basic questions of value have already been settled, obviating and even delegitimizing normative debate. Having rejected disagreement, a person employing judicial populist rhetoric can use some highly malleable methods to arrive at more or less whatever conclusions they choose, while perversely claiming greater legitimacy than those who admit to being participants in the democratic process. Consistent repetition by visible, authoritative figures helps such writers get control over the terms of the conversation and discourages others from using methods that do not conform to judicial populist demands. Evidence of what legislators understood their legislation to effectuate, consideration of evolving norms, recognition of policy consequences, and frank discussion of ethical values—basic ingredients for securing the consent of the governed and achieving democratic legitimacy—have no place in a world in which legal disputes have correct answers that judges simply deduce and enunciate. Judicial populist rhetoric propounds an image of this fictional world to deny the possibility of

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333. NOAM CHOMSKY, SYNTACTIC STRUCTURES 15 (2d ed. 2002) (“Colorless green ideas sleep furiously.”).

334. See *supra* Part IV.B.

valid disagreement and to evade justifying its conclusions on their merits.

#### V. TOWARD REPUBLICAN DEMOCRACY IN LEGAL INTERPRETATION

Political populism responds to real concerns: deep-seated anxieties about liberal constitutional democracy, widespread political alienation, resentment over growing inequality, and a belief that democratic institutions neglect the concerns of ordinary people. But rather than addressing those problems by alleviating inequality or increasing participation, it undermines the functioning of democratic institutions and delegitimizes democratic practices. Judicial populism, too, responds to a liberal constitutional anxiety with unelected judges exercising policymaking discretion.<sup>335</sup> But rather than seeking to justify judicial decisions on the merits, it claims to eliminate discretion and reach objectively correct results through neutral methods. Both discourses claim to put the people in charge, and both assert legitimacy through indisputable, inherent rightness rather than reasoned persuasion. But their claims are not true, and their ideals are not desirable.

To evaluate populist discourse, we have used republican democracy as a baseline. This Part takes its perspective directly. If political populism harmonizes with judicial populism, what legal approaches sing with republican democracy? Recognizing the vagaries of judicial populism illuminates, through contrast, some key ideals of democratic judging.

In contrast to populism, democratic judging embraces pluralism of both perspective and method. Public officials like judges should recognize that legal issues are subject to reasonable disagreement by a diverse populace. They should provide reasoned explanations for their decisions, striving to reach conclusions that could be accepted by people with fundamentally competing views.<sup>336</sup> That is, we think the making and implementation of law in a republican democracy should

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335. See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 344–45 (1989) (discussing the “inability of philosophical ‘liberalism’ to provide a satisfactory theory of judging”).

336. Reason-giving of this nature is central to legitimate decision making in a democracy. See Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17 (Alan Hamlin & Philip Pettit eds., 1989); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009).

strive to be not universalizing but inclusive: judges should consider the interests and perspectives of those affected by their decisions.<sup>337</sup>

A pluralistic approach implies recognizing that challenging problems often lack simple solutions and acknowledging, even embracing, complexity.<sup>338</sup> Eschewing specious claims to neutrality, democratic judging accepts a greater responsibility: to exercise judgment, consider competing arguments, and provide reasoned justifications.<sup>339</sup> Its goal is not conforming to some implausibly neutral method but promoting the public good and avoiding arbitrary domination.<sup>340</sup>

Democratic judging takes a multi-modal approach to legal interpretation as well, seeing the methodological pluralism that characterizes the federal judiciary as a strength, not a weakness.<sup>341</sup> Courts should have flexibility to determine which kind of interpretive guidance is most relevant in each case,<sup>342</sup> considering “the full range of relevant contexts” to determine which gives the best “evidence of

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337. Administrative agencies are legally obligated to consider all the major policy issues that were ventilated in their proceedings to avoid judicial invalidation of their decisions on the grounds that they were arbitrary or capricious. *See* Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 612–22 (2018). Judges, as public officials who affect how law works, should do the same. *Cf.* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing the central elements of legitimate adjudication).

338. *Cf.* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 989 (1997) (“[Administrative law] must necessarily look to a plurality of institutions and practices [that contribute] to an ongoing process of legitimizing the regulatory state.”).

339. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) (recognizing the inevitability of judicial discretion in statutory interpretation and arguing that courts should resolve close cases in ways that will improve the functioning of democracy).

340. *See generally* Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221 (2013).

341. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”); RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 96–98 (2017) (recognizing that the Court’s approach to constitutional interpretation involves interpretive pluralism, “a vision of constitutional decision-making characterized by the absence of commitment to any particular interpretive theory”); *see also* Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1024–27 (2018) (recognizing the affirmative value of interpretive pluralism in promoting democracy).

342. *See* Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 248 (2015) (discussing the benefits of interpretive pluralism in statutory interpretation).

meaning.”<sup>343</sup> In short, an anti-populist approach to judging involves practical reasoning about law.<sup>344</sup> Courts try “to derive a practical solution in the specific case at hand” by considering “all useful and relevant evidence[,]” a process in which “disagreement is embraced rather than suppressed.”<sup>345</sup> In a pluralistic environment, judging must be an information-rich process.

Some might contend that claiming certainty is simply how judges express themselves. We believe, in contrast, that providing reasoned explanations—that neither speciously claim certainty nor deny the validity of disagreement in contested cases—is itself a component of democratic judging.<sup>346</sup> And in practice, judges often demonstrate this kind of tempered, inclusive reasoning, for instance, in opinions that take into account the deliberations of administrative agencies, legislatures, or expert bodies.<sup>347</sup> Making reasoned decisions in the absence of a single correct answer is part of the point of having courts empowered to interpret and review the law.

In practice, judges routinely choose interpretive methods without explicitly justifying their choice,<sup>348</sup> implying that the methods chosen lead to the most justifiable results in a particular case. The assumption is that judges function in an information-rich environment and must make decisions about the relevance and the implications of different kinds of information. That leaves purportedly minimalist methods no privileged place. Indeed, using minimalist methods can undermine the pluralistic deliberation at the heart of republican democracy. If minimizing the information they use means rejecting evidence without evaluating its relevance, judges should instead affirmatively justify using a purportedly minimalist approach.

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343. Daniel L. Feldman, *Should Judges Justify Recourse to Broader Contexts when Interpreting Statutes?*, 34 INT. J. SEMIOTICS L. 377, 380 (2020).

344. See Staszewski, *supra* note 340, at 271–76 (arguing that a practical reasoning approach to statutory interpretation comports best with principles of republican democracy). See generally William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

345. Eskridge & Frickey, *supra* note 344, at 365; see Staszewski, *supra* note 342, at 247 (arguing that courts should reject simplistic interpretive rules that artificially minimize ambiguity, restrict inquiry into lawmakers’ purposes, foreclose considering interpretive consequences, or ignore changes since enactment); see also William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

346. See, e.g., James A. Macleod, *Reporting Certainty*, 2019 BYU L. REV. 473, 480–83 (arguing that calibrating the level of certainty expressed is one important way judges communicate with the public).

347. See Fuller, *supra* note 337; see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

348. See generally Feldman, *supra* note 343.

Also in contrast to populism, democratic judging recognizes that popular sovereignty is exercised primarily through public institutions; there is no “public will”—much less a single unified one— independent of those institutions.<sup>349</sup> “[O]ne cannot sensibly [think] that ‘the People’ is some special sort of entity—whether comprising all citizens or only a majority of them—with a will of its own that is conceptually independent of and genetically antecedent to political institutions.”<sup>350</sup> Democratic institutions mediate competing views of the good and the best way to get there;<sup>351</sup> judicial pronouncements inevitably participate in that process. So democratic judging does not pretend that courts have no policy impact or can leave no trace on the law.

Rejecting a view of the law as “static, given, autonomous, seamless, and complete,”<sup>352</sup> democratic judging seeks to make law responsive.<sup>353</sup> It encourages robust deliberation involving interested parties, acknowledges its own effects, and justifies its decisions on normative grounds. That is, rather than imagining a law abstracted from its society, democratic judging recognizes that courts, like laws, are embedded in social context and implicated in its well-being. This advances republican democratic principles: it encourages reasoned deliberation in the judiciary, promotes a responsive legal system, provides a basis for evaluating and challenging judicial decisions, and facilitates inter-institutional dialogue about collective problems. Democratic judging justifies a decision not through claiming abstract adherence to method but through showing its beneficial effects and explaining why it can be acceptable to a range of competing views.

Understanding that popular sovereignty needs institutional mediation also favors dispersing power and sharing authority across institutions. After all, law in a constitutional republic is the result of an ongoing dialogue among many actors—legislatures, executives,

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349. Of course, social movements, non-government organizations, and a vibrant private sphere also play a vital role in facilitating popular sovereignty. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928 (2006) (exploring “the ways that principles and practices can draw each other’s authority into question, and . . . the role that political contestation plays in spurring those challenges.”).

350. HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 205 (Will Kymlicka, David Miller & Alan Ryan eds., 2002).

351. *See, e.g.*, THE FEDERALIST NO. 10, at 16–23 (James Madison) (Roy P. Fairfield ed., 1981).

352. West, *supra* note 111, at 120.

353. *See* NONET & SELZNICK, *supra* note 113, at 73–113 (presenting a “responsive” vision of the rule of law).

agencies, courts, publics—not an original speaker or an authoritative expositor alone.<sup>354</sup> Legal equilibrium is always up for grabs. Republican democracy offers citizens, legislators, executive actors, and judges opportunities to spur reform and enlist one another's cooperation; that is a strength. Concentrating authority in actors who have the power to simply pronounce and entrench unilateral decisions, conversely, undermines democratic functioning.

Democratic judging recognizes that institutions serve diverse constituencies in different ways, and it seeks to head off concentrations of power. By putting institutions at the center, democratic judging can also candidly recognize that neither the Congress that enacted a statute nor the writers who produced the Constitution could resolve, or even foresee, every issue that becomes the subject of litigation. Judicial decisions are thus an integral part of the production of law, sometimes requiring courts to do some “creative policymaking.”<sup>355</sup> While courts should avoid outcomes in tension with clear legal text,<sup>356</sup> they should also reject artificial or unrealistic limits on judicial discretion. Taking a pluralistic and institutional approach, democratic judging routinely considers lawmakers' expectations and goals, changes in law and society, and the consequences of judicial decisions, striving to use all relevant considerations to reach the most justifiable decisions in each case.<sup>357</sup>

Finally, while judicial populism presents legal disputes as Manichean conflicts pitting good judges and pure people against the activists and elites who would oppress them, democratic judging eschews hyperventilating about the disagreement inherent to democracy.<sup>358</sup> In contrast to populism's habit of excluding the

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354. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

355. Eskridge & Frickey, *supra* note 344, at 345–47.

356. Critics often overlook the core legal process theory tenet that courts should generally not interpret in ways that legal text will not bear. See Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 384–88 (2012) (describing “the purposive technique”).

357. See RONALD DWORKIN, *LAW'S EMPIRE* 239–40 (1986) (arguing that constitutional interpretation should both “fit[]” and “justif[y]” the relevant legal context). Contra Dworkin, however, we caution against imagining a judge as a Hercules: since legal questions often lack a single right answer, our courts lack a Hercules able to divine it.

358. Popular constitutionalism, for instance, envisions constitutional interpretation as the product of an ongoing multi-institutional dialogue involving a broad range of people with diverse interests and perspectives; it typically seeks greater inclusion. Popular constitutionalists take seriously social movements and marginalized groups, but do not claim they speak for everyone. See, e.g., WILLIAM N.

disempowered, the contestatory dimension of legal interpretation provides a vital safeguard that promotes a more inclusive polity.<sup>359</sup>

We should, in short, embrace a legal theory fit for a republican democracy: one that celebrates multiplicity, deliberation, and provisional resolutions. That means using a variety of methods to parse an information-rich environment and seek results that are justifiable and broadly acceptable in a particular case. This admittedly challenging enterprise advances the commitments of a republican democracy. In fact, interpretive pluralism, practical reasoning, and reasoned consideration of competing arguments are long-standing aspirations in our constitutional democracy. One might even say that these ideals tell the true story of our law.

#### CONCLUSION

Contemporary authoritarian populism is widely recognized as pernicious in the political sphere. Its moralized anti-pluralism treats disfavored members of the polity as enemies or outsiders whose interests and perspectives do not count. It pretends that a single leader can declare the people's one true will outside of institutions that mediate competing interests. Its Manichean stance treats critics and rivals as enemies to be destroyed rather than as legitimate adversaries. These moves are designed to delegitimize disagreement and opposition in a way that is fundamentally at odds with the commitments of republican democracy.

This Article identifies *judicial populism* as a related phenomenon in contemporary legal theory. Judicial populist rhetoric likewise

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ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2010); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Lani Guinier & Gerald Torres, *Chasing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007). The potential for ongoing and even vigorous disagreement regarding the most justifiable understanding of the Constitution is, in fact, central to such theories, and they thus tend to view constitutional decision making as at least potentially provisional in nature. See, e.g., FRIEDMAN, *supra*, at 383 ("One of the most valuable things that occurs in response to a Supreme Court decision is backlash."); Post & Siegel, *supra*, at 373-74 (viewing "interpretive disagreement as a normal condition for the development of constitutional law").

359. See Philip Pettit, *Republican Freedom and Contestatory Democratization*, in *DEMOCRACY'S VALUE* 164 (Ian Shapiro & Casiano Hacker-Cordón eds., 1989) (discussing the contestatory dimension of republican democracy); Staszewski, *supra* note 341, at 1025.

insists on single correct answers to complex, debatable problems. It disparages the deliberation, mediation, and negotiation that characterize democratic institutions and rejects the multiplicity of interests and perspectives that characterize a pluralistic democracy. It simplifies legal issues and interpretive methods to assert a privileged access to the one true meaning of law. And, like its political counterpart, it treats reasonable disagreement, opposition, or criticism as fundamentally illegitimate.

Despite its fundamentally undemocratic nature, judicial populism has become accepted in mainstream legal theory. Committed originalists populate the judiciary and legal academy; it has become almost trite to observe that “we are all textualists now”;<sup>360</sup> and the Court is increasingly sympathetic to unitary executive theory.<sup>361</sup> Perhaps most strikingly, the rhetorical success of judicial populism has put proponents of other approaches on the defensive, as though judicial populism had a presumptive claim to legitimacy.

But judicial populism is just as undemocratic as the broader populist movement in the United States. It should certainly not be ceded the moral high ground and allowed to win the “interpretation wars” by declaration.<sup>362</sup> Its purported minimalism secretly privileges the judge’s personal preferences and rejects appropriate normative considerations, while providing no single correct answer. Its internally incoherent methods do not offer neutral mechanisms for finding the truth of a law or the will of a people.

We should reject judicial populism and its claims to unique legitimacy and embrace instead practical reasoning and interpretive pluralism. That means encouraging reasoned deliberation and open dialogue rather than an implausible minimalism that obscures judicial discretion and legal effects. It also means acknowledging the provisional nature of legal determinations and asking judges to justify

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360. See, e.g., Diarmuid F. O’Scannlain, “We Are All Textualists Now”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303 (2017); Schacter, *supra* note 289, at 1008 (quoting Jonathan R. Siegel, *Textualism & Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057) (1998) (“It has become somewhat common for observers . . . to proclaim that ‘we are all textualists now.’”).

361. The Court has also edged ever closer to major doctrinal reforms that could deconstruct the regulatory state. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (holding that the CFPB’s structure, which included an individual director who could only be removed from office “for cause,” violated the separation of powers); *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (holding that the SEC’s administrative law judges are “Officers of the United States” subject to the Appointments Clause).

362. See Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 118–20 (2009) (evaluating recent claims that textualism has won “the interpretation wars”).

their decisions on the merits, not pretending that courts stand outside our law-making system or that rigid methods yield correct answers to complex problems. We should, in other words, reject judicial populism in favor of republican democracy in legal interpretation.