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AUTHORITARIAN POPULISM AND THE RULE OF LAW

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Authoritarian Populism and the Rule of Law

Stephen Gardbaum *

INTRODUCTION

Within comparative politics and constitutional studies, the most consequential and discussed feature of the twenty-first century so far has been the rise and global spread of authoritarian populism.¹ Starting with the economic, class, or indigeneity-based left-wing version in Venezuela under Hugo Chávez shortly after his presidency began in 1999, and continued by Evo Morales in Bolivia and Rafael Correa in Ecuador,² this was soon followed by religious, cultural, or nationalistic right-wing variants under Uribe in Colombia, Erdoğan in Turkey and Orbán in Hungary, and then subsequently Jarosław Kaczyński in Poland, Modi in India, Trump in the United States, and Bolsonaro in Brazil.³ In many other countries, new or previously fringe, predominantly right-wing authoritarian populist parties are knocking on the doors of power.⁴

* Stephen Yeazell Endowed Chair in Law, UCLA School of Law. This Article is a revised and expanded version of my keynote address at the Spring Symposium on The Rule of Law: A Global Examination of Government and Institutional Power at California Western Law School on March 27, 2026. Many thanks to audience members for helpful comments and questions, to Jordan Smith for superb organization of my keynote, to Aidan Winter, Editor-in-Chief of the *California Western Law Review* at the time of the Symposium, for the invitation to publish, and to Logan Hannah, the current Editor-in-Chief, and the law review's members for outstanding editing.

¹ There is a huge literature on the subject within the two fields, which can only be sampled here. Among the leading books are: CAS MUDDE & ROVIRA KALTWASSER, *POPULISM IN EUROPE AND THE AMERICAS: THREAT OR CORRECTIVE FOR DEMOCRACY?* (2012); JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016); TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); MARK GRABER, SANFORD LEVINSON & MARK TUSHNET, *CONSTITUTIONAL DEMOCRACY IN CRISIS?* (2018); ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* (2021); MARK TUSHNET & BOJAN BUGARIČ, *POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM* (2021); WOJCIECH SADURSKI, *A PANDEMIC OF POPULISTS* (2022).

² For details, *see* works cited in *supra* note 1.

³ For details, *see* works cited in *supra* note 1.

⁴ In Western Europe alone, these include (but are certainly not limited to) the National Rally led by Marine Le Pen in France, the Alternative for Germany (AfD), Party for Freedom (PVV) led by Geert Wilders in the Netherlands, and Reform UK in that country. Richard Wike et al., *Right-Wing Populism in the Decade Since Brexit*, PEW RESEARCH

Three main consequences of this distinctive brand of politics gaining public office through electoral victories have dominated the discussion. As part of their open hostility to constraints on their power, pluralism, and institutional intermediaries between them and the “true people” they claim to speak for,⁵ authoritarian populist regimes have standardly engaged in (1) democratic backsliding,⁶ (2) assaults on the separation of powers,⁷ and (3) undermining the rule of law.⁸ To the extent that these latter two principles or political ideals are often deemed constitutive of constitutional democracy, attacks on them are also key components of democratic backsliding.⁹

This Article will focus specifically on this third characteristic, the undermining of the rule of law, for (unlike the other two) there appears to be some ambiguity, or even perhaps confusion, in the literature on the issue. While the ways in which authoritarian populist regimes are hostile to the rule of law are routinely emphasized,¹⁰ some influential commentators have also identified and underscored their scrupulous adherence to the law, preferred employment of procedurally valid forms of legal and constitutional change, and overall legalistic approach to governance.¹¹ Since these might be thought of as laudable, rather than nefarious, traits from a rule of law perspective, this seemingly bifurcated analysis calls for a closer look.

CENTER (May 28, 2026), <https://www.pewresearch.org/global/2026/05/28/right-wing-populism-in-the-decade-since-brexit/>.

⁵ These are some of the main distinctive features of authoritarian populist politics, as detailed in the works cited in *supra* note 1.

⁶ See works cited in *supra* note 1. This now-ubiquitous term to describe the erosion of democracy by authoritarian populist regimes was coined by political scientist Nancy Bermeo. Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 5 (2016) (“At its most basic, [democratic backsliding] denotes the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy.”).

⁷ See, e.g., works cited in *supra* note 1; Stephen Gardbaum, *The Counter-Playbook: Resisting the Populist Assault on Separation of Powers*, 49 COLUMB. J. TRANSN’L L. 1, 1–2 (2020).

⁸ See, e.g., works cited in *supra* note 1; Nicola Lacey, *Populism and the Rule of Law*, 15 ANN. REV. L. & SOC. SCI. 79, 79 (2019); Andreas Kyriacou & Pedro Trivin, *Populism and the Rule of Law: The Importance of Institutional Legacies*, 70 AM. J. POLI. SCI. 104, 104 (2024).

⁹ See, e.g., GINSBURG & HUQ, *supra* note 1; TUSHNET & BUGARIC, *supra* note 1.

¹⁰ See generally works cited in *supra* note 1.

¹¹ See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191, 196 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 562–63 (2018).

So, in what follows, this Article seeks to explore more fully the relationship of authoritarian populism to law, and to the rule of law specifically. It will suggest that, as is also the case with democracy, authoritarian populist regimes have more of a selective approach towards the rule of law than an unrelentingly and wholly hostile one. While they violate or undermine certain of its key components, they mostly adhere to some others so that, overall, the rule of law is not completely rejected.¹² In other words, there is a rule of law equivalent to the survival of minimally free and fair elections. Now, there can be no doubt that when compared to “normal” democratic governments, this mixed or minimalist attitude results in significant weakening of the rule of law, but it does not necessarily (although it can) amount to breaking or completely negating it. To be clear at the outset, the aim of this exercise is not to defend or rehabilitate the authoritarian version of populism.¹³ Rather, the goal is to help understand it, as a highly visible contemporary regime type that falls somewhere in between such normal governments in democracies (including ordinary, or non-authoritarian, populist governments) and fully authoritarian ones.¹⁴

The Article proceeds as follows. Part I briefly outlines the relevant features of the rule of law. It provides a basic meaning of the term as well as a description of what the rule of law requires, in terms of form, procedures, and general constraints. Along with other commentators, this Article

¹² In his reconsideration of the relationship between democracy, populism, and the rule of law, Vasileios Adamidis presents a mostly conceptual analysis distinguishing four versions of the rule of law—rule by law, formal legality, democracy + formal legality, and a substantive account—and argues that populism “is possibly the ‘rule by law’ system *par excellence* and may be compatible with formal legality. By contrast, for its exploration of the relationship between the specifically authoritarian version of populism and the rule of law, this Article proposes a single, consensus-based conception of the rule of law that includes formal, procedural, and constraining components, and illustrates how in practice authoritarian populist regimes have violated some of these components but mostly adhered to others. See Vasileios Adamidis, *Democracy, Populism, and the Rule of Law: A Reconsideration of Their Interconnectedness*, 44 *POLITICS* 386, 394, 394–96 (2024).

¹³ Ordinary populist politics are a recurring, if usually episodic, feature in democracies and do not raise the specific concerns or consequences of its currently powerful authoritarian version. See Bojan Bugarič, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 *GERMAN L.J.* 390, 390–91 (2019); see also Cas Mudde, *The Populist Zeitgeist*, 39 *GOV’T & OPPOSITION* 541, 563 (2004).

¹⁴ See Bugarič, *supra* note 13, at 390–91 (2019) (“What is peculiar about the current populist surge is the dominance of authoritarian over democratic flavors of populism.”).

insists that the rule of law is a political ideal that is distinct from, although not entirely unrelated to, other such ideals such as democracy, equality, liberty, and human rights.¹⁵ Part II assesses the relationship of authoritarian populism with the rule of law in practice, primarily by exploring the ways in which it characteristically does and does not undermine the various requirements and components set out in Part I. The upshot is to suggest a type of rule of law backsliding, rather than elimination, akin to that with democracy.¹⁶ Part III considers how, if at all, this relationship differs from that in fully authoritarian systems. To help answer this question, it identifies three types of such regimes that are distinguished by their approaches to law. In particular, Part III asks whether the authoritarian populist approach should be thought of as essentially the same as one of these three fully authoritarian regime types, frequently referred to by commentators as “rule by law,”¹⁷ in sharp contrast to rule *of* law.¹⁸ Based on the ground covered in the earlier parts of this Article, Part IV posits a rule of law-lawless governance spectrum and locates various distinct regime types, including authoritarian populism, on it. This spectrum reflects the position that adherence to the rule of law is not simply a yes or no binary. Rather, there are a series of gradations representing

¹⁵ See Robert Deinhammer, *The Rule of Law: Its Virtues and Limits*, 74 *Obnovljeni Život* 33, 33 (2019).

¹⁶ Kim Lane Scheppele and Laurent Pech used the term “rule of law backsliding” in the title of two works and defined it as follows: “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.” This definition, however, does not really focus specifically on the rule of law *per se* but rather reflects the more general understanding of democratic backsliding. Kim Lane Scheppele & Laurent Pech, *What is Rule of Law Backsliding?*, VERFASSUNGSBLOG, 2 March 2018, at <https://verfassungsblog.de/what-is-rule-of-law-backsliding/>; Kim Lane Scheppele & Laurent Pech, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 *CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES* 3 (2017).

¹⁷ See Tom Ginsburg & Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, 1 3–11 (Tom Ginsburg & Tamir Moustafa eds., 2008) (explaining that authoritarian regimes use courts and legal instructions to exercise social control, bolster regime legitimacy, and otherwise advance regime interests); see also works cited in *infra* note 88.

¹⁸ See Bingham Ctr. For the Rule of Law, *America Risks Confusing the Rule of Law with Rule by Law* (June 3, 2020), <https://binghamcentre.biicl.org/comments/95/america-risks-confusing-the-rule-of-law-with-rule-by-law?cookieset=1&ts=1790502134> (distinguishing the “rule of law,” which constrains political leaders and requires equality before the law, from “rule by law,” in which the state uses law to control citizens without necessarily subjecting itself to the same legal constraints).

diminishingly robust and eventually less than minimalist compliance with the rule of law in between the poles.

I. WHAT IS THE RULE OF LAW AND WHAT DOES IT REQUIRE?

The rule of law is a much employed and essentially contested concept, with over 16,000 citations to books and articles on the topic¹⁹ and two primary areas of contestation. The first concerns the scope or depth of the rule of law, with rival “thinner” and “thicker” conceptions. These conceptions—also sometimes described as “formal” versus “substantive,” or “weaker” versus “stronger”—depend significantly on whether, and to what extent, requirements as to the content of the laws, especially their moral content, are appropriately brought within its terrain.²⁰ The second concerns the components of even the thinner conceptions, with several competing lists of formal (and sometimes also procedural) requirements of the rule of law.²¹ As the goal of this Article is not to add to this general body of work, but to explore the use and abuse of the rule of law by authoritarian populist regimes, it will mostly draw on the existing literature to stipulate its relevant basic meaning and requirements.

In essence, the rule of law means law-based rule and contrasts with the opposite of lawless governance.²² That is, a system in which public acts are not premised upon, permitted or required

¹⁹ According to Professor Paul Craig, The Rule of Law (Introduction), paper presented to UK House of Lords Select Committee on Constitution, Sixth Report (2007), available at: <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm>

²⁰ Well-known exemplars of “thinner” and “thicker” “conceptions, respectively, are JOSEPH RAZ, THE AUTHORITY OF LAW 210–29 (2009) and TOM BINGHAM, THE RULE OF LAW 69–70 (2010).

²¹ See, e.g., LON L. FULLER, THE MORALITY OF LAW 39 (1969) (noting eight ways that the rule of law can fail); RAZ, *supra* note 20; Jeremy Waldron, *The Concept and the Rule of Law*, 43 GEORGIA L. REV. 1, 6 (2008); Cass R. Sunstein, *The Rule of Law*, 4 AM. J. L. & EQUALITY 498, 498 (2024).

²² See Waldron, *supra* note 21.

by, duly enacted or recognized law.²³ Among the possible alternatives to law in such systems are perhaps the equivalent of Max Weber’s “kadi justice,” or *ad hoc*, case-by-case judgments on the part of wise decision-makers, often with religious training, as extended from adjudication to governance.²⁴ Other alternatives may include AI algorithms, the personal whims of the leader, or the rule of terror. However, although the existence and causal role of law is a necessary condition of the rule of law, it is not sufficient. Not everything that analytically qualifies as “law” within a system, or satisfies a society’s “rule of recognition,”²⁵ provides the type of law-based rule that (even a minimal, thin, or non-substantive conception of) the ideal of the rule of law outlined here requires. In addition, there are certain (1) formal characteristics that laws must have, (2) procedures that must be afforded individuals before they can be penalized for breaking the law, and only for breaking the law, and (3) general constraints that apply to government actions with respect to the law. Importantly, none of these requirements involve the content of the laws. Let us briefly consider each of these three in turn.

First, in terms of the formal characteristics of laws in a rule of law based legal system, the consensus requirements²⁶ are that they must be (a) general in their terms and apply equally to all, rather than referencing, regulating, or exempting specific individuals; (b) prospective rather than retrospective in application; (c) relatively clear and intelligible rather than vague; (d) open and accessible; (e) set forth in advance; and, (f) relatively stable over time.²⁷ The latter four

²³ See, e.g., Waldron, *id.*, at 18 (noting the Nazi regime’s lawless practices, such as retroactive directives and verbal orders overriding formal statutes).

²⁴ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 976–78 (Guenther Roth & Claus Wittich, trans. 1978).

²⁵ H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961).

²⁶ That is, consensus among the rival lists of formal rule of law components, see *supra* note 21.

²⁷ Sunstein, *supra* note 21, at 498–501 (2024); JEREMY WALDRON, *THOUGHTFULNESS AND THE RULE OF LAW* 7-8, 22-27 (2023).

requirements are designed to promote knowledge of and planning around legal rights and duties, while avoiding chilling effects on freedom.²⁸

The rule of law also requires certain fairly specific procedures to be followed before any person may be penalized for violating the law,²⁹ as well as adherence to the proposition that a person may be officially sanctioned only for violating the type of law described above.³⁰ These procedures correspond to the “natural principles of justice” or “due process of law” and include (a) impartial judges and, if the two differ, factfinders who are independent of those bringing a charge or claim; (b) the opportunity to see or hear the evidence against you, and respond to it by presenting evidence on your behalf; (c) access to competent legal representation; (d) an open, public, and ordinary judicial forum; (e) a reasoned judgment based on the law, at least where there is a judicial factfinder; and, (f) at least a presumptive right to an appeal for legal error.³¹

The formal and procedural requirements focus on the necessary characteristics of a legal system as a whole for rule of law purposes, but the final component consists of two very general constraints on governmental action in relation to the law. The first is that public power must be exercised within, and according to, the law.³² Again, this is part of the very essence of the political ideal and distinguishes it from its opposite, lawless rule. A corollary of this constraint is that, as far as the government is concerned, the law in action cannot stray very far from the law in books.

²⁸ Sunstein, *supra* note 21, at 517 (2024) (“When cases are settled in advance, people are able to plan their affairs and to do so with knowledge of what government may and may not do.”); WALDRON, *supra* note 27, at 7-8, 22-27.

²⁹ WALDRON, *supra* note 27, at 7-8, 22-27.

³⁰ See, e.g., Dicey’s “first principle” of the rule of law: “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.” A.V. DICEY, *THE LAW OF THE CONSTITUTION* 225 (10th ed., 1959).

³¹ WALDRON, *supra* note 27.

³² Bingham’s fourth principle is a version of this requirement: “Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.” See BINGHAM, *supra* note 20, at 63.

The second general constraint is that in its application of the law, and especially when enforcing the law through the prosecutorial function,³³ the government must act impartially, as an “officer of the law” rather than as a discretionary political actor. This is because, at least presumptively, the law must be applied to every person equally.³⁴

As a political ideal, the rule of law is often stated to serve the values of the dignity and autonomy of the individual,³⁵ in that it protects them from arbitrary rule and domination, and enables various types of life planning within and around the legal rules under which they live.³⁶ From the global perspective within which we are considering authoritarian populism, this understanding may have overly and unnecessarily individualistic and liberal connotations. There is every reason to view and value the rule of law though the lens of human dignity and autonomy *tout court*, whether of individuals or of various kinds of groups, communities, and collectivities to which we may belong.

Finally, as has been emphasized by several commentators, the rule of law is better understood as a political ideal that is distinct from, rather than an aggregation of, several others that we also value, such as democracy, human rights, liberty, and equality; indeed, may value more highly than the rule of law.³⁷ So understood, we can see that the rule of law without

³³ In some systems, prosecution is undertaken by a body or institution that is entirely independent of the government, as, for example, the Crown Prosecution Service in England and Wales. See Crown Prosecution Service, About CPS, <https://www.cps.gov.uk/about-cps> (last visited Sept. 20, 2026).

³⁴ Again, Bingham presents a version of this constraint in his combined second and third principles, which state “(2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion” BINGHAM, *supra* note 20, at 51, and “(3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.” BINGHAM, *supra* note 20, at 58. As his eighth principle, Raz states: “The discretion of the crime-preventing agencies should not be allowed to pervert the law.” RAZ, *supra* note 20, at 218.

³⁵ See RAZ, *supra* note 20, at 221; see generally, F.A. HAYEK, THE CONSTITUTION OF LIBERTY ch. 14, pp. 205-219 (1960) (the rule of law is valuable because it protects individual freedom).

³⁶ RAZ, *supra* note 20, at 219-21.

³⁷ See, e.g., RAZ, *supra* note 20, at 226-229.

democracy is perfectly possible, as illustrated by pre-democratic eighteenth-century England, which Montesquieu famously admired,³⁸ contemporary Singapore,³⁹ and perhaps Hong Kong before the recent Chinese security law crackdown on the nascent democracy movement.⁴⁰

Conversely, democracy without the rule of law is conceivable, as arguably during the 1793-94 Reign of Terror in revolutionary France under the elected National Convention.⁴¹ Of course, to say that the rule of law is distinct is not to say that it never overlaps with these other values.

Despite these possibilities and examples, democracy and the rule of law appear together more often than not.⁴²

II. THE AUTHORITARIAN POPULIST RELATIONSHIP WITH THE RULE OF LAW

As with the distinct political ideal of democracy, authoritarian populist regimes have challenged, weakened, and undermined important aspects of the rule of law while leaving others

³⁸ In particular, Montesquieu admired, and was fascinated by, what he viewed as the achievement of political liberty in the England of his time, for which the separation of powers was mostly responsible. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748).

³⁹ See Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in TOM GINSBUG & TAMIR MOUSTAFA EDS., *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73, 74 (2008) (arguing that Singapore is an authoritarian system that adheres to the rule of law); *but cf.* Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 397 (2015) (arguing that “Singapore’s legal system is clearly not that of a liberal democracy, but neither is it fully authoritarian,” rather it is an instance of the hybrid “authoritarian constitutionalism”). Whether or not Singapore is correctly viewed as fully authoritarian, both authors appear to agree that it is not democratic but adheres to the rule of law.

⁴⁰ Like Singapore, despite its limited democratic institutions, pre-crackdown Hong Kong was famed for its rule-of-law protections that helped attract foreign investment. *See, e.g.*, ANNIE BOYAJIAN & SARAH COOK, *DEMOCRATIC CRISIS IN HONG KONG: RECOMMENDATIONS FOR POLICYMAKERS* (2019) <https://freedomhouse.org/report/policy-brief/2019/democratic-crisis-hong-kong-recommendations-policymakers>.

⁴¹ The elected National Convention, which exercised legislative authority while drafting the Constitution of 1793, established the Committee of Public Safety in April 1793 and selected its members; the Committee subsequently became the primary instrument of the Reign of Terror. *See* RONALD SCHECHTER, *A GENEALOGY OF TERROR IN EIGHTEENTH-CENTURY FRANCE* (2018).

⁴² SVEND-ERIK SKAANING, *DEMOCRACY: CONTESTED CONCEPT WITH A COMMON CORE*, in *RESEARCH HANDBOOK ON DEMOCRACY AND DEVELOPMENT* 27, 27 (Gordon Crawford & Abdul-Gafaru Abdulai eds., 2021) (noting that rule of law is an attribute associated with the concept of democracy).

intact. The result is a significantly diminished rule of law, with practice falling much further from the ideal than before, but not a completely abandoned one.

Given the open hostility to constraints on their power and the direct relationship with their “true people” base that is in the DNA of this brand of politics,⁴³ authoritarian populist leaders primarily target and violate those aspects of the rule of law that most stand in their way. These are the two general constraints on government action in relation to the law noted above and the key item in the list of procedural protections of due process that is most relevant to undermining them; namely, judicial independence.

As almost universally evidenced by their words and deeds, authoritarian populist regimes have no normative commitment to the rule of law principle that public power must be exercised within and according to law. Instead, they tend to view this principle as an elite or establishment dogma designed to interfere with their democratic legitimacy and direct relationship with their base.⁴⁴ This is significantly what makes them an “authoritarian” version of populism. Notwithstanding their recourse to legalistic defenses and approaches *ex post*, there is little sense that they have internalized the *ex-ante* restraint of acting within lawful parameters that the rule of law requires and that we typically expect of democratic governments. If the law stands in their way, authoritarian populists will often make a tactical assessment as to how best to proceed. They may quickly change the law, take their chances that the courts will eventually re-interpret it, back down while changing the subject, or simply act anyway and rely on popular support and trust to pay little or no political cost.⁴⁵ This underlying and general threat of acting despite the

⁴³ See works cited in *supra* note 1.

⁴⁴ Sandra Destradi, David Cadier & Johannes Plagemann, *Populism and Foreign Policy: A Research Agenda*, 19 COMPARATIVE EUROPEAN POLITICS 663, 667 (2021).

⁴⁵ See Gardbaum, *supra* note 7, at 59.

law, which is intended to have a chilling effect on political opposition and the media, is illustrated by the second Trump administration's attack on birthright citizenship⁴⁶ and talk of denaturalizing citizens beyond the very narrow legally permissible grounds.⁴⁷

Even more clearly, authoritarian populists do not practice impartial application and enforcement of the law, especially the criminal law, as the rule of law requires.⁴⁸ Instead, they act according to the maxim attributed to several South American presidents: "For my friends everything, for my enemies the law."⁴⁹ This politicization and weaponization of law enforcement has been a common theme of the authoritarian populist playbook from Hugo Chávez onward.⁵⁰

Judicial independence is the procedural protection most important to enforcing these two general rule of law constraints. If the rule of law requires the government to act within and according to law, then judges serve as key external actors for enforcing this requirement and determining if it has been breached.⁵¹ Accordingly, capturing or packing courts can neutralize *ex post* constraints, facilitate favorable reinterpretations of the law, and extend politicization from the decision to bring cases to their adjudication.⁵² From Chávez onward, undermining the

⁴⁶ In *Trump v. Barbara*, 609 U.S. __ (2026), a 6–3 majority of the Supreme Court held that President's Trump's Executive Order titled "Protecting the Meaning and Value of American Citizenship," signed on the first day of his second term and negating birthright citizenship, was unlawful and affirmed that children born on U.S. soil automatically receive citizenship regardless of their parents' legal status.

⁴⁷ See Jaclyn Diaz, *Trump vowed to revoke hundreds of citizenships. It's proving harder to do*, NPR (June 2, 2026), <https://www.npr.org/2026/06/02/g-s1-124866/trump-doj-citizenship-denaturalization-revoke-legal-protections>.

⁴⁸ See, e.g., Erman Örsan Yetiş, *Governing Through Criminal Selectivity and Lawfare: Non-Democratic Politics to Entrench Authoritarian Populist Imagination*, INTERNATIONAL SOCIAL SCIENCE JOURNAL 1, 2 (2026) ("To analyse the lawfare mechanism in Turkey, we need to understand its enactment through criminal selectivity . . .").

⁴⁹ The phrase is most often credited to Peruvian President Oscar R. Benavides (in office 1914-1915 and 1933-39) and Brazilian President Getúlio Vargas (in office 1930-1945 and 1951-54). See Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506, 1526 (2018); Mark Galeotti, *War of Prosecutors Suggests Tension Within Russian Elite*, RAAM (Dec. 17, 2018) (applying this maxim to Vladimir Putin's rule in Russia).

⁵⁰ See works cited in *supra* note 1.

⁵¹ Tomasz Widiak, *Rule of Law and the Criteria for Appointment of Judges: A Case for Judicial Virtues*, 17 HAGUE J. ON RULE L. 199, 205 (2025). Obviously, enforcement normally derives not only from such external actors as judges, but also internally, through political accountability within the elected branches.

⁵² See Hannah Van Dijke & Venla Stang, *The Dictators Toolkit: Disguised Judicial Attacks*, HUMAN RIGHTS FOUNDATION (Aug. 24, 2023), <https://hrf.org/latest/the-dictators-toolkit-disguised-judicial-attacks/> ("Yet, more often

independence of both constitutional and ordinary courts has been a priority, and sometimes the top priority, for authoritarian populists.⁵³

The methods have ranged from creating additional judges,⁵⁴ lowering the retirement age for existing ones,⁵⁵ changing the appointments process to one controlled by the government,⁵⁶ giving a politically appointed official control over the make-up of judicial panels and whether forced retirees are able to continue in office,⁵⁷ establishing “disciplinary chambers” to punish judges for their statements and rulings,⁵⁸ making highly partisan and politicized judicial appointments,⁵⁹ and launching unusually blunt verbal attacks on particular courts or individual judges.⁶⁰ Under the Orbán and Kaczyński regimes, Hungary and Poland were eventually subjected to the full range of European Union measures arising from their long-running disputes over judicial

than not, creeping authoritarian regimes use measures disguised as legitimate or reasonable that intimidate and harass judges or otherwise obstruct their work.”).

⁵³ For details, see the works cited in *supra* note 1.

⁵⁴ In Hungary, a constitutional amendment taking effect in 2011 increased the number of constitutional court judges from 11 to 15. *Hungary’s Government Has Taken Control of the Constitutional Court*, HUNGARIAN HELSINKI COMMITTEE (last visited Sept. 20, 2026), <https://helsinki.hu/en/hungarys-government-has-taken-control-of-the-constitutional-court/>.

⁵⁵ In Poland, the government lowered the retirement age for Supreme Court judges from 70 to 65 in 2018, affecting nearly forty percent of its members. *Poland: Court of Justice Ruling Must Herald Return to Rule of Law*, INTERNATIONAL COMMISSION OF JURISTS (June 25, 2019), <https://www.icj.org/poland-court-of-justice-ruling-must-herald-return-to-rule-of-law/>.

⁵⁶ Hugo Chavez’s government enacted an organic law in 2004 changing the appointment process for members of the Supreme Judicial Tribunal to simple majority vote of the legislature. INTER-AM. COMM’N ON HUMAN RIGHTS, DEMOCRACY AND HUMAN RIGHTS IN VENEZUELA, ch. III, arts. 195-96 (Dec. 30, 2009).

⁵⁷ As in Hungary with the creation of the National Judicial Office run by a Fidesz loyalist. Johan Norberg, *How Viktor Orbán’s Hungary Eroded the Rule of Law and Free Markets*, CATO INSTITUTE (Mar. 31, 2026), <https://www.cato.org/policy-analysis/how-viktor-orbans-hungary-eroded-rule-law-free-markets#dismantling-barriers> (“A National Judicial Office was created. The Fidesz appointee who led it was granted the power to hire, fire, promote, and demote all of Hungary’s judges.”).

⁵⁸ In Poland, the authoritarian populist government created such a disciplinary chamber for the Supreme Court, the country’s highest ordinary (i.e., non-constitutional) court. Daniel Tilles, *Poland Closes Judicial Disciplinary Chamber at Heart of Dispute with EU*, NOTES FROM POLAND (July 15, 2022), <https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/>.

⁵⁹ Trump’s appointments of Justices Gorsuch, Kavanaugh, and Barrett left little doubt that their positions on certain key, litmus test issues, such as abortion, were central to their nominations. See Press Release, Senate Democratic Caucus, What’s At Stake: President Trump Promised to Nominate Justices to Overturn Roe (June 28, 2018); Jonathan Allen, *Trump Is Out of Office. But the Supreme Court Is Ensuring His Legacy Lives On*, NBC NEWS (June 24, 2022), <https://www.nbcnews.com/politics/supreme-court/trump-office-supreme-court-ensuring-legacy-lives-rcna35241>.

⁶⁰ Luke Broadwater & Tyler Pager, *Even After Supreme Court Ruling, Trump Insists He Can Do as He Wishes*, NYT (Feb. 20, 2026), <https://www.nytimes.com/2026/02/20/us/politics/trump-justices-gorsuch-barrett-roberts.html>.

independence—which Articles 2 and 19 of the Treaty on European Union protect as a requirement of EU Membership.⁶¹

If these are the primary ways in which the rule of law has been hollowed out, its other components have been targeted far less—or not at all—largely because they are less directly connected to the constraints on their power that authoritarian populist leaders openly reject. So, the conventional requirements of legal form—generality, prospectivity, relative clarity and stability—are mostly adhered to.⁶² That said, however, the pace of legal change has been unusually rapid in certain areas that do not directly impact private legal relations, namely constitutional and institutional matters, even by the standards of newly elected governments with large majorities.⁶³ Apart from the admittedly key issue of judicial independence discussed above, the other essential rule of law procedural protections do not appear to have been targeted. For example, none of these regimes have created special political offenses to be tried in separate courts, with the exception of Venezuela following its transition from authoritarian populism to full authoritarianism under Maduro. Similarly, radical change to pre-existing laws of criminal and civil procedure in ways that depart from the rule of law have not been common. To the significant extent these regimes have utilized ordinary laws, like defamation and tax codes, to harass and punish political opponents and

⁶¹ Consolidated Version of the Treaty on European Union, 2016 O.J. (C 202) 13; *see also.*, Kim Lane Scheppele & John Morijn, *Frozen: How the EU is Blocking Funds to Hungary and Poland Using a Multitude of Conditionalities*, VERFASSUNGSBLOG (Apr. 4, 2023), <https://verfassungsblog.de/frozen/>.

⁶² *See Adamidis supra* note 12, at 394 (“in principle, populism may be compatible with most criteria of formal legality, since law can be certain, prospective, and universal in application.”).

⁶³ For example, Chávez and Orbán wrote new constitutions shortly after gaining power. Trump’s use of his Sharpie and the rate of change at the start of his second term was more 100 hours than the 100 days of FDR. The White House, *The First 100 Hours: Historic Action to Kick off America’s Golden Age* (Jan. 24, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/the-first-100-hours-historic-action-to-kick-off-americas-golden-age/>.

the media,⁶⁴ as part of the politicization of law application, this has been in the ordinary courts and using existing procedural frameworks.⁶⁵

As part of this “legalistic” approach, these regimes employ large numbers of mostly well-trained lawyers to formulate and deploy legal arguments defending governmental actions. Although these arguments are often spurious or disingenuous under pre-existing law and professional norms, they may nonetheless succeed before captured courts. Moreover, from a broader rule of law perspective, it is presumably preferable to resort to law and legal forms than completely ignore or bypass them. As widely noted, authoritarian populist regimes tend to exploit⁶⁶ the formal processes of legal change to implement their “anti-constitutional” programs.⁶⁷ This is especially the case with constitutional amendment rules, where they possess the requisite supermajorities; otherwise, they rely on friendly constitutional courts to validate their measures under the existing text.⁶⁸

Finally, it is relatively rare for authoritarian populist regimes to openly ignore or flout judicial decisions, although—much like fully authoritarian ones—they prefer to put themselves in positions where such rulings are unlikely to occur. But they cannot always guarantee this outcome, and there are instances where such regimes have accepted independent judicial decisions against them. The most famous example in comparative constitutional law involved Colombia’s popular right-wing populist president, Álvaro Uribe, who accepted a constitutional court ruling that prevented him from amending the constitution to permit a third term in office.⁶⁹ Had the then-still

⁶⁴ See Scheppele, *Autocratic Legalism*, *supra* note 11, at 574–78) (noting how authoritarian populists place economic pressure on and deny social benefits to their opponents).

⁶⁵ For details, see works cited in *supra* note 1.

⁶⁶ See Landau, *supra* note 11, at 192-94.

⁶⁷ WOJCIECH SADURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN 1–4 (2019).

⁶⁸ See Landau, *supra* note 11 at 192-93; Scheppele, *Autocratic Legalism*, *supra* note 11 at 562-63, 568-69.

⁶⁹ See DAVID LANDAU & MANUEL CEPEDA ESPINOSA, COLUMBIAN CONSTITUTIONAL LAW: LEADING CASES 351-360 (2017).

independent Venezuelan Supreme Court rejected (rather than accepted) Hugo Chavez's extra-constitutional call for a constituent assembly in 1999,⁷⁰ it is certainly possible that he would have felt constrained to obey so soon after coming to power. In the United States, President Trump has not openly rejected the handful of Supreme Court decisions against him. For example, his administration has begun complying with and issuing refunds under the Court's major decision declaring his tariffs illegal,⁷¹ although it has certainly not fully complied with several lower court orders.⁷² In the case of Hungary and Poland, there was a mixed record of resistance, compliance, and compromise with adverse decisions on judicial independence by the two major regional European courts.⁷³

To emphasize a point made above, authoritarian populist leaders and regimes are not normatively committed to the rule of law or any part of it, any more than they are to democracy.⁷⁴ Nonetheless, they either feel constrained not to violate it any further than they have or find such partial compliance instrumentally useful for promoting their interests.

Regarding this constraint, some empirical evidence suggests that authoritarian populists tend to weaken the rule of law less when they operate in robust rule of law contexts compared to

⁷⁰ William Partlett, *Hugo Chavez's Constitutional Legacy*, BROOKINGS (Mar. 14, 2013), <https://www.brookings.edu/articles/hugo-chavez-constitutional-legacy/>.

⁷¹ See *Learning Resources, Inc. v. Trump*, 607 U.S. 229 (Feb. 20, 2026); Lauren Almeida, *US refunds \$81bn in Trump tariffs after supreme court ruled them illegal*, THE GUARDIAN (July 14, 2026), <https://www.theguardian.com/us-news/2026/jul/14/trump-tariffs-us-refunds>. Accepting the decisions, however, has not stopped Trump from personally attacking the justices ruling against him. Aaron Pellish and Gregory Svirnovskiy, *Trump attacks Supreme Court justices after he is handed a major tariff loss*, POLITICO (Feb. 20, 2026), <https://www.politico.com/news/2026/02/20/donald-trump-tariff-supreme-court-reaction-00791245>.

⁷² *The Trump administration's conflict with the courts, explained*, PROTECT DEMOCRACY (Oct. 2, 2025), <https://protectdemocracy.org/work/the-trump-administrations-conflict-with-the-courts-explained/>.

⁷³ See, e.g., *European Union's Top Court Rules Against Hungary and Poland in Rule of Law Showdown*, WORLD JUSTICE PROJECT (Feb. 16, 2022), <https://worldjusticeproject.org/news/european-union%E2%80%99s-top-court-rules-against-hungary-and-poland-rule-law-showdown>.

⁷⁴ In the mid-1990s, before attaining national office, Erdoğan reportedly stated: "Democracy is like a tram. You ride it until you arrive at your destination, then you step off." Katia Anastas, *Turkey's Tilt: Erdogan, Deteriorating Democracy, and the West's Role*, HARVARD POLITICAL REVIEW (Aug. 21, 2013) <https://harvardpolitics.com/turkeys-tilt-erdogan/>.

more fragile ones.⁷⁵ Since most major authoritarian populist regimes have come to power in previously consolidated or near-consolidated democracies, which is why the term “democratic backsliding” is used to characterize their conduct, this is likely a significant factor in explaining the rule of law situation. For example, the greater attacks on the rule of law during the second Trump administration than the first,⁷⁶ suggest a less robust rule of law context in 2025 compared with 2017, in large part due to what transpired in between. While lacking normative commitment to the rule of law is, of course, a failure in political morality and departs from the ideal, the concern here, however, is not to assess the culpability of authoritarian populism but rather the extent of its real-world impact on the rule of law. In terms of the instrumental rationale for limited adherence, there is no doubt that electoral victory is by far the main source of legitimacy—both normative and sociological—for these regimes.⁷⁷ But adherence to at least some of the minimum requirements of the rule of law is likely a useful supplement to their claims of legitimacy and helps to parry the charge of full authoritarianism.⁷⁸

III. DOES THIS DIFFER FROM FULLY AUTHORITARIAN REGIMES?

How, if at all, does this attitude and approach to the rule of law differ from those of fully authoritarian regimes? To address this question, it may be helpful to distinguish among three types of such regimes from the perspective of the rule of law.

⁷⁵ See Kyriacou & Trivin, *supra* note 8, at 111 (noting that the ability of populist governments to undermine the rule of law is hampered by a strong heritage of rule of law).

⁷⁶ See *Erosion of the rule of law in Trump’s second term*, BRIGHT LINE WATCH, <https://brightlinewatch.org/erosion-of-the-rule-of-law-in-trumps-second-term/> (last visited Sept. 20, 2026).

⁷⁷ See, e.g., Allen Buchanan, *Normative and Sociological Legitimacy*, in GEORGE KLOSKO, ED., *THE OXFORD HANDBOOK OF POLITICAL OBLIGATION* 25-32 (2025);

⁷⁸ Scheppele, *Autocratic Legalism*, *supra* note 19, at 563 (discussing how authoritarian leaders embrace legalism as a means of legitimizing their rule); Adamidis, *supra* note 12, at 396 (arguing that populism’s potential compliance with a thin version of the rule of law enables it to claim the associated legitimacy).

The first is the “dual state,” a term coined by Ernst Fraenkel in the late 1930s to describe the Nazi dictatorship from which he fled, although (as the book’s subtitle indicates) it is widely applicable to others.⁷⁹ The dual state is defined by the parallel existence of both the “prerogative state” and “normative state.” The “prerogative state” applies to the political sphere and is characterized by lawless, arbitrary, unreviewable discretion. The “normative state” refers to the ordinary, largely pre-existing, rules-based legal system that applies primarily to private and economic issues.⁸⁰ Critically, officials of the prerogative state determine the scope of its jurisdiction and are free to transfer entire subjects or spheres of life into it.⁸¹ Whereas the normative state may resemble⁸² the forms and procedures of rule of law systems, the prerogative state operates quite differently. It is prototypically characterized by draconian national security measures, secret police, political crimes, special courts and procedures, the pre-determination or irrelevance of guilt, and institutions such as gulags and concentration camps.⁸³

The second type of regime is widely referred to as “rule by law.” In recent decades, scholars of mostly fully authoritarian regimes that have developed extensive and sophisticated legal systems, such as China, have coined this phrase to pithily convey the difference between the role of law in such regimes and in those governed by the rule of law.⁸⁴ Here, the role of law, and typically courts, is much more central, systematic, and predictable than in the first type.⁸⁵ Such

⁷⁹ ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (2017).

⁸⁰ *Id.* at xlii.

⁸¹ *Id.* at 28.

⁸² Resemble though it is not equivalent, for as Fraenkel points out, “The Normative State, however, is by no means identical with a state in which the ‘Rule of Law’ prevails...[It] is a necessary complement to the Prerogative State and can be understood only in that light. Since the Prerogative and Normative State constitute an interdependent whole, consideration of the Normative State alone is not permissible.” *Id.* at 71.

⁸³ *See id.*, at 9–14; 50–51.

⁸⁴ *See, e.g.*, TOM GINSBURG & TAMIR MOUSTAFA, EDS., *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 207–09 (2008); RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* (2002) (arguing that China is in transition from rule by law to a version of rule of law, although not a liberal democratic version).

⁸⁵ *See GINSBURG & MOUSTAFA, id.*, at 3, 19.

regimes invest in a rules-based system and the form of legality for one or more of the self-serving reasons canvassed in the literature, including social control, monitoring the bureaucracy, attracting foreign investment, and legitimacy.⁸⁶ The key differences from the rule of law are usually stated to be that in rule by law, law and courts are employed instrumentally, as a tool for efficient governance of the population rather than as a constraint on power,⁸⁷ and that the government itself is not subject to the law of which it is the source.⁸⁸

As Jeremy Waldron has observed, however, there is not as much difference between rule by law, so understood, and rule of law as these scholars appear to assume.⁸⁹ Rule by law is inevitably a large part of the rule of law, which, as previously discussed, is generally taken to mean something like law-based rule. In this sense, rule by law is “not a minimal assurance,” or at least not as minimal as the phrase’s coiners seem to intend, since it means that the government is generally constrained by the form of legality.⁹⁰ In other words, if the opposite of the rule of law is lawless governance, then rule by law seems to fit reasonably well within the former. While the dual state is clearly the negation of the rule of law, rule by law regimes occupy a position significantly closer to it.

⁸⁶ See *id.*, at 4-11. The fact that the regime acts for such instrumental reasons does not rule out its also relying on more normative arguments to justify its authoritarianism, such as the need to maintain order in society. See Madhav Khosla, *The Authoritarian Argument*, 36 J. OF DEMOCRACY 47 (2025).

⁸⁷ See Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEORGETOWN J. L. & PUB. POLICY 565, 581 (2014) (“The rule of law builds upon the theory of natural law that justice is the measure by which both man and king are to be judge . . . Rule by law, in contrast, asserts that the four corners of the law that governs society are what the sovereign says they are when it says they are.”).

⁸⁸ See, e.g., WALDRON, *supra* note 27, at 312 (“Rule by law is almost always associated in the literature with the use of law as a tool or instrument to serve the ends of power in an authoritarian regime.”); Arthur Garrison, *id.*, at 610–11 (“The rule of law includes why the government is to be controlled.”); Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT’L L. 471, 472 (2002) (“At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the State and individual members of the ruling elite . . .”). See also BINGHAM, *supra* note 18.

⁸⁹ WALDRON, *supra* note 27, chap. 10, at 335–36.

⁹⁰ See *id.* at 335–36.

It is not entirely clear whether, for Waldron, the issue is primarily a poor choice of label—one that unintentionally minimizes the real differences between the two types of regimes—or that there really are fewer differences. If it is the former, other phrases used in this context, such as “authoritarian legality,”⁹¹ “legalized authoritarianism,”⁹² or “illiberal legality,”⁹³ while less pithy, perhaps do a better job of conveying the twin idea that the absence of lawless governance is very much a plus, but there are still meaningful differences from the generally accepted requirements of the rule of law, even acknowledging their essentially contested nature and wide range of conceptions.⁹⁴ These differences are, first, that although the form of legality does constrain, it is unclear by how much in itself, absent the constitutive procedural protections or general governmental limitations.⁹⁵ Moreover, as we have seen, not everything that takes the form of legality and is recognized as “law” within a system necessarily satisfies the rule of law’s requirements of generality, prospectivity, accessibility, etc.⁹⁶ Second, when the government need not act within the law, or apply it equally and impartially, there is political discretion as to when and whom the law applies in practice.⁹⁷

⁹¹ See WEITSENG CHEN & HUALING FU, *AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION* 1–2 (2020).

⁹² See Weitseng Chen & Hualing Fu, *Introduction: Authoritarian Legality, the Rule of Law, and Democracy*, in *id.* at 5 (“[A]uthoritarian legality is about ‘legalized authoritarianism . . .’”).

⁹³ See Tímea Drinóczi & Ronan Cormacain, *Introduction: Illiberal Tendencies in Law-Making*, 9 *THE THEORY AND PRACTICE OF LEGISLATION* 269, 270 (2021) (referencing the term).

⁹⁴ For this reason, from this point I will refer to this second type of regime as authoritarian legality.

⁹⁵ Cf. RAZ, *supra* note 20, at 210–229).

⁹⁶ See text accompanying *supra* note 25 (H.L.A. HART, *THE CONCEPT OF LAW* (1961)).

⁹⁷ Cf. A.V. DICEY, *THE LAW OF THE CONSTITUTION* 225 (10th. Ed., 1959) (“[T]he rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.”); BINGHAM, *supra* note 20, at 69–70) (“A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law . . .”).

The third type of regime is the rule of law authoritarian state, which is perhaps most closely realized in practice in Singapore.⁹⁸ Here, the basic forms and procedures of the rule of law are adhered to.⁹⁹ There is also a general, albeit self-imposed, normative commitment to its constraints on the part of the government, as distinct from strategic or purely instrumental (partial or full) compliance.

So, how do authoritarian populist regimes compare with these three types of fully authoritarian ones? Starting with the dual state: despite the politicization and weaponization of law enforcement that is characteristic of authoritarian populism, there is (as yet) little evidence of an emerging prerogative state. Rather, within the broad political sphere, ordinary criminal, defamation, and tax law is applied and adjudicated in ordinary courts using standard procedures. Although the rule of law has been weakened or undermined within this system, it is still recognizably a legal system rather than a lawless one.

Among the ordinary judges hearing these cases, as well as constitutional court judges where they are separate, there are at least remnants of genuine judicial independence despite the priority all authoritarian populist regimes have placed on undermining it. Within the first two types of fully authoritarian systems, in the rare situation where judicial independence exists, it is almost always bestowed by the regime for its own purposes and contingent on continuing to serve them.¹⁰⁰ Such genuine independence is, of course, critical to resisting the weaponization of law enforcement

⁹⁸ As evidenced in the works cited in *supra* note 39, there is some disagreement as to whether Singapore should be considered fully authoritarian or an instance of “authoritarian constitutionalism”; i.e., somewhere in between the former and liberal democracy. But there is no disagreement as to whether it generally abides by the rule of law.

⁹⁹ Silverstein, *supra* note 39, at 73 (2008); Tushnet, *supra* note 39.

¹⁰⁰ See GINSBURG & MOUSTAFA, *supra* note 84 at 4-11. .

and attempting to ensure that government remains bound by the law despite claims to unconstrained powers.

Evidence of such surviving judicial independence in authoritarian populist regimes includes the resistance of the Polish Supreme Court, the highest ordinary court, once the Constitutional Tribunal had been captured, forcing the Law and Justice Party government into the risky visible step of creating and expanding the powers of its Disciplinary Chamber.¹⁰¹ Even with respect to captured constitutional courts, including the Polish, dissenting opinions by non-governing party appointees have been common and important.¹⁰² In India, the authoritarian populist Bharatiya Janata Party (BJP) leader, Narendra Modi, has faced the unique system of essentially judicial self-appointment of the senior judiciary. Notwithstanding recent concerns about its relative decline, this institutional arrangement has ensured the survival of significant judicial independence.¹⁰³ In the United States, its unique system of life tenure without a mandatory retirement age¹⁰⁴ has meant that, so far, court packing has been undertaken one federal judge at a time, so that overall judicial independence remains reasonably robust. By contrast, few, if any, comparable examples exist among either dual state or authoritarian legality regimes.

Turning now to the latter, authoritarian populist regimes share the lack of normative commitment to rule of law constraints. Indeed, they tend to be more visible and voluble in openly denying or contesting them. Nonetheless, unlike the practical self-regulation for instrumental

¹⁰¹ For details, see SADURSKI, *supra* note 1.

¹⁰² See Benjamin Bricker, *The (V)ery Political Dissent: Dissenting Opinions and the Polish Constitutional Crisis*, 21 GERMAN L.J. 1586, 1588 (2020) (noting the value of dissenting opinions generally).

¹⁰³ On the concerns, see Rohit Sarma, *Judicial powerplay: independence of judiciary under the shadow of illiberalism*, 9 INDIAN L. REV. 109, 131–32 (2025); *Judicial Independence in India: Tipping the Scale*, INTERNATIONAL COMMISSION OF JURISTS, January 2025, at: <https://www.icj.org/wp-content/uploads/2025/02/Judicial-Independence-in-India.pdf>; Rehan Abeyratne & Surbhi Karwa, *The institutional failings of India's Chief Justice in the age of Modi*, 23 INT'L. J. CONST. L. 160, 160–61 (2025).

¹⁰⁴ See U.S. Const. art. III, § 1.

reasons emphasized by rule by law scholars, authoritarian populist regimes typically find themselves in contexts where such constraints are, at least in part, imposed on them.¹⁰⁵ The sheer resources devoted to the law and to making legal arguments defending and justifying their actions, both inside and outside the courtroom, reflects a constraint not only to the form of legality but also to at least appear to be acting within the law. As previously mentioned, one of the differences between the two not generally noted in the rule by law literature is the potential absence of some or all of the procedural requirements of due process that mostly survive under authoritarian populism. Moreover, as a species of full authoritarianism, authoritarian legality regimes typically have the prerogative state mode to fall back upon in the event of serious challenges to their political interests or survival. Think here of the treatment of the Uyghur minority in China.¹⁰⁶

Finally, of course compared to the ideal-type rule of law authoritarian regime, authoritarian populist regimes typically fall short in rule of law compliance in the various ways described above. This is precisely because the rule of law is a distinct political ideal from democracy, with respect to which the survival of reasonably free, fair, and regular elections renders them superior to full authoritarianism.

IV. OVERALL SPECTRUM ON THE RULE OF LAW

Like most of our other political ideals, including democracy, liberty, equality, as well as certain institutional principles that are valued as a means to achieving them, such as the separation of powers, the rule of law is better understood as existing on a spectrum rather than as a binary. At

¹⁰⁵ See Kyriacou & Trivin, *supra* note 8, at 111.

¹⁰⁶ See *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN RELATIONS (Oct. 3, 2025), <https://www.cfr.org/backgrounders/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights>.

one end of this spectrum would be a system that is in full normative and practical compliance with all its requirements of legal form, procedure, and governmental actions in relation to the law.¹⁰⁷ This would represent a model rule of law system, a position no actual regime has ever occupied without room for possible improvements or identifiable shortcomings.

At the opposite end of the spectrum would be a regime of fully lawless governance, in which none of the requirements are satisfied. Of the potentially virtuous conceivable instances of such a regime, we can also safely assume that none have ever existed, at least among humans as distinct from angels.¹⁰⁸ As mentioned above, Weber’s “kadi justice” of ad hoc, case-by case decisions on the substantive merits might be a relatively benign instance of this polar position, as extended from adjudication to governance.¹⁰⁹ Tragically, we do have ample experience of vicious examples of regimes at or near this extreme, such as the French Revolutionary Reign of Terror and Fraenkel’s prerogative state of twentieth century totalitarianism.¹¹⁰

Moving away from the polar rule of law position, the next section of the spectrum includes regimes that have more or less full normative commitment to the rule of law and mostly satisfy its requirements in practice, with varying degrees of smaller lapses. This could be in any of the three types—form, procedure, constraints—as none can obviously or straightforwardly be said to have categorical priority over the other two. Because the rule of law is best treated as a distinct political ideal, such a regime may be partially or fully non-democratic, unequal, and lacking in (mostly non-

¹⁰⁷ Again, this Article presents a fairly “thin” conception of the rule of law so that “thicker” or stronger ones would have greater requirements at this polar point. *See* JOSEPH RAZ, *THE AUTHORITY OF LAW* 210–18 (2009); *see supra* Part I.

¹⁰⁸ To amend James Madison slightly, if men were angels, no laws would be necessary in addition to government. *See* THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter, ed. 1961).

¹⁰⁹ *See* WEBER *supra* note 24.

¹¹⁰ SCHECHTER, *supra* note 41, at 3 (2018); FRAENKEL, *supra* note 110, at 3.

procedural) human rights that the rule of law does not itself require.¹¹¹ At the same time, because the rule of law is itself part of the liberty of citizens, these two political ideals are less distinct than the others.

Further along the spectrum would be regimes that have no normative commitment to the rule of law but nonetheless exhibit some significant compliance with its practical requirements. The extent of this compliance would determine whether they are closer to the previous section of the spectrum or to the lawless governance pole. In principle, there may be a certain amount of overlap in position between a regime of this type that scores highly on practical compliance and one of the previous type that, notwithstanding its genuine normative commitment, scores relatively poorly on practical compliance. This may occur, either temporarily or otherwise, in some constitutional democracies during wartime or other perceived national security emergencies.

This is the general part of the spectrum where we can typically locate both authoritarian populist and authoritarian legality regimes. Both also have a tendency to shift within this section, and potentially over into the next, towards the lawless governance pole.¹¹² As between these two types of regimes, authoritarian populist ones—especially fairly early in their exercise of power—tend to be slightly closer on the spectrum to the previous rule of law position. This is because their practical compliance is mostly externally driven, rather than self-imposed, procedural requirements are more central and thus less avoidable, and the prerogative state mode is at most inchoate rather than available but in the background.

¹¹¹ As discussed above, pre-democratic England, contemporary Singapore, and pre-crackdown Hong Kong illustrate that rule-of-law protections can exist without full democracy. *See supra* notes 43–45.

¹¹² A tendency but not necessity, as a rule by law regime may, in principle, develop into a rule of law one, as claimed by Randall Peerenboom in the case of China. *See PEERENBOOM supra* note 84, at 6.

Authoritarian legality regimes may range from occasionally occupying a position closer to the rule of law end of the spectrum than authoritarian populist ones to (more commonly) a space nearer the lawless governance pole. This latter holds where the regime lacks both normative and practical compliance with the rule of law, other than general adherence to the form of legality. In other words, it mostly satisfies only the first type of requirement, but lacks procedural protections or the two general constraints on government action. Even closer to the lawless pole would be a type of “pure” rule by law regime where “laws” exist, but the rule of law’s formal requirements for what counts as law are significantly unmet. By rule of law standards, this amounts to more than complete lawlessness which is why it is one space removed from the polar end, but not much more.

CONCLUSION

In an illuminating recent Article, Madhav Khosla and Benjamin Liebman argue that comparative constitutional scholarship on democratic backsliding has yet to draw on an extensive literature dealing with traditional authoritarian systems and issue a call for the two to be brought together to deepen our understanding of the phenomenon.¹¹³ This Article responds to the call by seeking to understand the authoritarian populist approach to the rule of law not only in comparison with “normal” democracies, but also with the use and abuse of law by fully authoritarian regimes.

¹¹³ Madhav Khosla & Benjamin Liebman, *Comparative Authoritarian Law*, 26 THEORETICAL INQUIRIES IN LAW 1, 1 (2026).

As noted at the outset, the rule of law is an essentially contested concept, with several well-known competing theories and lists of components.¹¹⁴ For purposes of understanding the relationship between authoritarian populism and the rule of law, this Article argues that it is helpful to view the rule of law as a distinct political ideal rather than a conglomerate of all or most of our political ideals. It draws on the literature to suggest a tripartite set of basic requirements—of legal forms, procedures, and governmental actions in relation to the law—that say nothing about the content of the law but are primarily designed to facilitate the exploration.

This Article also distinguishes the authoritarian populist approach to the rule of law, and not only to democracy, from both “ordinary” democratic systems and two types of fully authoritarian ones: the dual state and authoritarian legality regimes. The upshot is to suggest that what we are witnessing is mostly “rule of law backsliding”¹¹⁵ rather than complete elimination. This Article then proposes a spectrum in which authoritarian populist and authoritarian legality regimes tend to occupy adjoining positions, with the former generally closer to the rule of law pole. This—along with the survival of reasonably free, fair, and regular elections—arguably explains and justifies considering them to be semi-authoritarian in nature.

The major reason for these differences between the two types of regime lies not in their normative commitments but in the background context that authoritarian populist governments typically operate within what were previously robust rule of law systems.¹¹⁶ And not only rule of law, of course, but also at least reasonably robust systems of constitutional democracy with accompanying separation of powers, civil societies, and free media. Although authoritarian

¹¹⁴ See According to Professor Paul Craig, The Rule of Law (Introduction), paper presented to UK House of Lords Select Committee on Constitution, Sixth Report (2007), <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm>; RAZ, *supra* note 20, at 210–11.

¹¹⁵ See *supra* note 16.

¹¹⁶ See Kyriacou & Trivin, *supra* note 8, at 111.

populist leaders have prioritized the dismantling and hollowing out of these institutional and normative frameworks, far more have typically survived than in fully authoritarian contexts, where either such a context never existed or it is long gone. This survival is a significant source of both resistance and enforced constraint.

To be sure, the ambition of most authoritarian populist rulers is to rid their legal and political systems of this context and move them in the direction of long gone as quickly as possible.¹¹⁷ This is why it is so critical to take advantage of the surviving rule of law and especially the mostly free and fair elections while they last, by addressing the underlying substantive concerns propelling the global spread of authoritarian populist politics. If and where faced with the reality of authoritarian populists in power, the worst-case scenario is to become the next Venezuela or Russia. Far better to be the next Poland or Hungary, and organize to vote the would-be full authoritarians out of office before it is too late.¹¹⁸

¹¹⁷ Scheppele, *Autocratic Legalism*, *supra* note 11, at 577 (autocrats aim to capture and exercise unconstrained power, but they have realized they do not need to annihilate their opponents to do so).

¹¹⁸ Having been elected in 2015, the Polish Law and Justice Party ruled the country until it lost office in 2023, after losing the October election. See Aleks Szczerbiak, *How Will the Law and Justice Split Affect Polish Politics?*, NOTES FROM POLAND (Aug. 21, 2026), <https://notesfrompoland.com/2026/08/21/how-will-the-law-and-justice-split-affect-polish-politics/>. Viktor Orban led Hungary from 2010 until he was voted out of office in 2026. Stefano Fella, *Hungary: Developments Under Viktor Orbán and the 2026 Parliamentary Election*, House of Commons Libr. Research Briefing No.10612, at 5, 8 (Apr. 29, 2026) <https://commonslibrary.parliament.uk/research-briefings/cbp-10612/>.