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The Law of Constitutional Capture

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Abstract: Constitutional capture is commonplace in the world today. A government that was built to be for the common good, the public interest, is rebuilt from the inside to become a government for the interests and preoccupations of the leadership. That leadership finds ways to keep governing a people while ceasing to be truly accountable to those people. This article identifies and explains the deep legal mechanisms at work in constitutional capture. In doing so, the article finds a way to rescue our endangered democracies that has been overlooked in contemporary scholarship. A substantial interdisciplinary literature has recognized that singular leadership stabilizes tyrannies. Having one person as chief executive is the natural, equilibrium form of tyranny, to which tyrannies by committee, such as military juntas, tend to move. The existing literature on democratic erosion and constitutional capture has not recognized that singular leadership destabilizes democracies. Having one person as chief executive is democracy's Achilles heel, the structural feature most responsible for democratic erosion and constitutional capture. Legal systems grow from converging expectations that singular leaders are uniquely situated to shift. This article explains how having one true leader poses its unique threat to constitutional democracy and why formal checks and balances by legislatures and courts are insufficient to neutralize this threat. The article identifies constitutional alternatives that avoid this danger and have been proven by comparative constitutional experience to let constitutional democracy thrive.

Keywords: constitutional democracy; separation of powers; presidency; plural executive; constitutional capture

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1 Introduction

Most nations in the world today claim to be republican democracies. Written constitutions almost universally promise governments of, by, and for ‘the people.’ Russia’s constitution declares that ‘Russia is a democratic federative law-governed state with a republican form of government’ in which ‘the sole source of power’ is ‘its multinational people.’¹ China’s constitution proclaims that ‘[a]ll power in the People’s Republic of China belongs to the people,’ and that the ‘National People’s Congress and the local people’s congresses at different levels are instituted through democratic election.’² Egypt’s constitution insists that ‘its system is [a] democratic republic based on citizenship and the rule of law,’ in which ‘[s]overeignty belongs to the people alone.’³ Hungary’s constitution assures that Hungary is to be a ‘democratic rule-of-law State,’ that ‘[t]he form of government of Hungary shall be a republic,’ and that ‘[t]he source of public power shall be the people.’⁴ Yet when we look inside these systems of government, we find that their people cannot easily change who leads.

Where tyranny masquerades as democracy, its democratic façade may have been fabricated from the outset by the tyranny itself. Yet often we find that democratic forms once reflected democratic reality, and that tyranny has somehow grown up inside them. That is constitutional capture.⁵ Constitutional capture involves building a new governing system inside the existing one that hollows out and occupies the existing one rather than overtly destroying and displacing it. In any legal system, law on the books will differ in some ways from real governance,⁶ but now we often see actual power dynamics playing out deeply differently from what formal constitutions promise. American-style forms of presidential government have proved a very unreliable way to achieve and maintain republican democracy around

1 Russia Const art 1 § 1, art 3 § 1.

2 China Const art 2 cl 1, art 3 cl 2.

3 Egypt Const art 1, art 4.

4 Hungary Const art B §§ 1, 2, 3.

5 ‘Constitutional capture aims at systematically weakening checks and balances and, in the extreme case, making genuine changes in power exceedingly difficult.’ Jan-Werner Müller, ‘Rising to the Challenge of Constitutional Capture’ (*Eurozine* 2014) <<https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/>> accessed 22 May 2025.

6 See Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *Amer L Rev* 12 (illuminating divergences between what legal texts signal and what those implementing law do).

the world.⁷ British-style forms of parliamentary government have had a high failure rate too.⁸ Yet often these forms persist long after democracy has been lost.

Constitutional democracy aims to keep democracy alive over time. A constitutional democracy uses constitutional law to let its people choose their leaders easily and often. Constitutional capture stops that. Constitutional capture squeezes the life out of democracy from inside constitutional democracy's constitutional shell. After capture, the institutions of government may look much the same, but gone will be the easy ways to change who leads. No longer truly accountable to their people, leadership under captured constitutions is no longer steered to govern for the common good, the public interest. As its accountability recedes, leadership can more readily make government all about leaders' own interests and preoccupations, not those of their people.

After surveying the existing literature on constitutional capture and democratic erosion, this article asks: How does it happen? Beyond the stories of how democracy was lost in various places, what are the deep mechanisms responsible for bringing people together to do things that make government less *of the people*? Part 3 of the article identifies four deep truths of law and government that help illuminate an answer. First, legal systems are prediction systems. The so-called rule of recognition of a legal system that says what counts as law and who count as leaders is a convention. Officials follow the rule because they expect that other officials will follow the rule; that is the distinctively *legal* reason for following and what makes the rule self-fulfilling. Second, legal systems feature stabilizing stories that help morally justify them in the eyes of the public. The old stabilizing stories often said that leaders were chosen by the divine. Today's stabilizing stories say that leaders are chosen by the people. Third, prediction systems are susceptible to being supplanted parasitically from within. Leadership in a constitutional democracy may use the legal powers of government to help shift key participants' attention and grow a shadow system that puppeteers the preexisting legal system. The shadow system becomes the

7 See Juan J Linz, 'Presidential or Parliamentary Democracy: Does It Make A Difference?' in Juan J Linz and Arturo Valenzuela (eds), *The Failure of Presidential Democracy* (JHU Press 1994) 3–87 (criticizing U.S.-style presidential systems as predisposed to slide into tyranny). 'There are about thirty countries, mostly in Latin America, that have adopted American-style systems. All of them, without exception, have succumbed to the Linzian nightmare at one time or another, often repeatedly.' Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harv L Rev 633, 646.

8 'We have identified twelve presidential regimes and twenty-one parliamentary regimes that have broken down in the twentieth century.' Matthew Soberg Shugart and John M Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (CUP 1992) 40. 'Parliamentary systems with disciplined parties and a majority party offer the fewest checks on executive power, and hence promote a winner-takes-all approach more than presidential systems.' Scott Mainwaring and Matthew S Shugart, 'Juan Linz, Presidentialism, and Democracy: A Critical Appraisal' (1997) 29 Comparative Politics 449, 453.

real guide to how power is gained and lost and exercised. Keeping the forms of the old system eases the process of capture and lets the new system coopt the old system's stabilizing story. Leadership wraps itself in the will of the people while systematically shedding accountability to the people. Fourth, having one true leader nurtures the dynamic that grows a shadow system inside a constitutional democracy and captures it. Personal loyalty, fed through favors and fear, lets one true leader's will replace the preexisting system's rule of recognition and become the new focal point for shared expectation. Personal loyalty animates and energizes a shadow system. Personal loyalty lets those in government coordinate their actions without detailed formal guidance and without the kind of shared commitment to the common good that comes from real accountability to the people. Having one person as chief executive destabilizes democracies and stabilizes tyrannies.

Having one chief executive is constitutional democracies' Achilles heel, leaving them one step short of safeguarding themselves from capture. Part 4 of the article explores why having one chief executive is nonetheless so common, not just in tyrannies but in democracies too. Part 5 then explains why the ultimate safeguard against constitutional capture is pervasive power sharing, not just between institutions but within them. We have long recognized the need to share power between institutions – legislatures, executives, judiciaries. That sharing is expressed through the checks and balances of classic separation of powers theory.⁹ We have long recognized the need to share power inside legislatures and judiciaries through multi-member chambers and benches. Yet we have mostly persisted in having one person atop our executive branches. That structural choice has predisposed our democracies to capture. Part 5 explores ways to fix this, including plural executive models of the kind that has flourished in Switzerland for almost two centuries, and divided executive models of the kind that we see working at state level in the United States.

2 The Current Wave of Constitutional Capture

Constitutional capture can happen fast or slow. The past century's most notorious capture was fast; many captures underway today are slower. The Nazis' fast takeover of Germany nonetheless showcased reasons why today's would-be tyrants choose constitutional capture rather than crudely trying to overthrow democracy by brute,

⁹ 1 Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (first published 1748, Thomas Nugent tr, rev'd edn, 1900) bk 11, ch 6, 151-62 (characterizing the 'Constitution of England' as establishing a tripartite separation of legislative, executive, and judicial institutions that check and balance one another).

lawless force.¹⁰ Constitutional capture lets aspiring tyrants use ‘constitutional Trojan horses,’ as Ivan Ermakoff aptly calls them¹¹ – lawmaking powers through which an incumbent government can subvert democratic institutions from within. The German national legislature’s power to amend the Weimar constitution¹² was exploited by the Nazis when they orchestrated the legislature’s vote on the enabling law of March 24, 1933. That law delegated law making (including constitution-amending) power to Hitler’s cabinet and so let them transform the system without further involving the legislature or the titular head of state.¹³ Once that legal change was accomplished, the destruction of democracy proceeded step by step under cover of law. Observing legal forms helped the Nazis eviscerate the existing democratic system because it did not give the friends of democracy an early singular moment of collective moral outrage. There was no concentration of revulsion that might spontaneously have coordinated an early mass uprising in opposition. By moving methodically but piecemeal and under cover of law, the Nazis ‘paralyzed’ opposition party leaders.¹⁴ That legalistic and multi-step approach both diffused the emotions that can help coordinate concerned but otherwise disparate people into collective action and took advantage of pro-democracy parties’ respect for the rule of law. In Ermakoff’s words, ‘a public commitment to legality makes it difficult to embrace modes of action that can be publicly branded as illegal.’¹⁵ Legalism also coopted apolitical bureaucrats. ‘Hitler’s legalist stance deprived them of any obvious reason to oppose, or subvert, hierarchical requests. Claims of legality enabled Hitler to secure the obedience of the state apparatus.’¹⁶

Weimar Germany’s tumultuous social circumstances helped the Nazis use the Weimar legal system to transform itself on a far faster timetable than we typically see today. Both international pressures and well-developed domestic civil

¹⁰ On the likelihood that capture would be the great contemporary threat to democracy, see Guillermo O’Donnell, ‘Democracy’s Future: Do Economists Know Best?’ (1995) 6 J Democracy 23; Samuel Huntington, ‘Democracy for the Long Haul’ (1996) 7 J Democracy 3.

¹¹ Ivan Ermakoff, ‘Law against the Rule of Law: Assaulting Democracy’ (2020) 47 J Law & Society 164, 166, 179, 184–85. See also Karl Loewenstein, ‘Militant Democracy and Fundamental Rights Part 1’ (1937) 31 Am Pol Sci Rev 417, 424 (using the same metaphor to describe the same phenomenon).

¹² Germany Const 1919, art 76.

¹³ Ermakoff (n 11) 179. Richard Albert classifies such transformative use of the amending power as constitutional *dismemberment*, because it seeks to ‘repudiate the essential characteristics of the constitution and to destroy its foundations,’ to ‘dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old.’ Richard Albert, ‘Constitutional Amendment and Dismemberment’ (2018) 43 Yale J Int’l L 1, 2–3.

¹⁴ Ermakoff (n 11) 181, citing Karl Dietrich Bracher, *Turning Points in Modern Times: Essays on German and European History* (Harv UP 1995) 108.

¹⁵ *ibid* 181.

¹⁶ *ibid* 182.

expectations give today's would-be tyrants stronger reasons to subvert in slow motion. 'Revolution' conjures an image of dramatic overthrow, a thunderous and wrenching break with the past. But revolution can happen on tiptoe, and not all at once.

Constitutional capture can slow-walk revolutionary change. Instead of upending the jigsaw of government and then trying to pick up scattered pieces, capture leaves the jigsaw on the table and can quietly replace one piece at a time. Steven Levitsky and Daniel Ziblatt¹⁷ observe that '[b]ecause there is no single moment – no coup, declaration of martial law, or suspension of the constitution – in which the regime obviously 'crosses the line' into dictatorship, nothing may set off society's alarm bells. ... Democracy's erosion is, for many, almost imperceptible.'¹⁸ Yet a slow pace of capture need not stop it from becoming complete. Tom Ginsburg and Aziz Huq¹⁹ note that '[b]ecause erosion is a process of incremental downward change, there is no reason to think it must stop at any particular point. To the contrary, it is quite plausible that a process of erosion might continue until the point that a polity had passed into unmodified authoritarianism.'²⁰

In the meantime, the dynamic nature of constitutional capture puts the many governments that show signs of it onto a spectrum, with vibrant democracy on one end and full-blown tyranny on the other. In between, systems of government may be moving either way, or looking settled for a while in some intermediate condition.²¹ In some instances, capture is happening, shadow systems are under construction, and we witness successive small depredations on democracy, deaths by a thousand cuts. In other instances, shadow systems may be unraveling, and green shoots of dissent and diverse participation in government may reflect that change.²²

¹⁷ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown Publishers 2018).

¹⁸ *ibid* 6.

¹⁹ Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (UCP 2018).

²⁰ *ibid* 47.

²¹ See, e.g., Juan J Linz, *Totalitarian and Authoritarian Regimes* (Lynne Rienner Pub 2000) (drawing distinctions between systems of government by identifying features that involve differing degrees of departure from constitutional democracy). Other discussions of challenges in classifying undemocratic regimes include Gerardo L Munck, 'Drawing Boundaries: How to Craft Intermediate Regime Categories' in Andreas Schedler (ed), *Electoral Authoritarianism: The Dynamics of Unfree Competition* (Lynne Rienner Pub 2006) 27; Richard Snyder, 'Beyond Electoral Authoritarianism: The Spectrum of Nondemocratic Regimes' in *ibid* 219; Mark Tushnet, 'Authoritarian Constitutionalism: Some Conceptual Issues' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2014) 36; Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell L Rev 391; Mark Tushnet, 'Varieties of Constitutionalism' (2016) 14 Int'l J Const L 1.

²² cf Jan-Werner Müller, *What Is Populism?* (Univ of Pennsylvania Press 2016) and Mark Tushnet and Bojan Bugarcic, *Power to the People: Constitutionalism in the Age of Populism* (OUP 2022) (offering

What sorts of steps do slow walking capturers take? Kim Lane Scheppele²³ identifies expanding executive power as a primary objective,²⁴ and describes some of the discrete, formally legal actions of, among others, Viktor Orbán in Hungary,²⁵ Vladimir Putin in Russia,²⁶ Recep Tayyip Erdoğan in Turkey,²⁷ Hugo Chávez in Venezuela,²⁸ and Rafael Correa in Ecuador.²⁹ Thanks to law's esoteric complexity, many steps that help capture courts and legislatures and other formally independent institutions may look innocuous to most people. As Scheppele observes,

many of the changes that result in the de-liberalization of constitutional systems are highly technical and therefore hard for the ordinary citizen to understand. How many people in the general public grasp the importance of differences in complex rules about judicial appointments, or see the implications of jurisdictional tweaks to a court's previous operating rules? How many people really comprehend that changing rules of parliamentary procedure or altering the structural composition of independent commissions or fiddling with the arcane processes for drawing electoral district boundaries are crucial to the maintenance of liberal constitutionalism? Most people see only that there is a constitution still proclaimed in the name of 'we the people.' They see that the same institutions they knew before are still standing—the

differing perspectives on the relationship between populist movements for political change and constitutional democracy).

23 Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 U Chi L Rev 545.

24 *ibid* 549 ('Loosening the bonds of constitutional constraint on executive power through legal reform is the first sign of the autocratic legalist.') *ibid* 581 ('The move from hardball democrat to legalistic autocrat is achieved by undermining constitutionally entrenched checks on executive power, often [...] by changing the constitution so that what was once unconstitutional is no longer.') See also *ibid* 571-81.

25 *ibid* 549-55, 562-70. See also Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 J Democracy 138 (describing early stages of democratic erosion in Hungary); Matthijs Bogaards, 'De-democratization in Hungary: Diffusely Defective Democracy' (2018) 25 Democratization 1481 (describing further democratic erosion in Hungary); Kim Lane Scheppele, 'How Viktor Orbán Wins' (2022) 33 J Democracy 45 (describing the current extent of constitutional capture in Hungary).

26 Scheppele (n 23) 551-55; 562-70.

27 Scheppele (n 23) 551-55; 562-70. See also Turkuler Isiksel, 'Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism' (2013) 11 Int'l J Const L 702 (situating Erdoğan's constitutional changes within Turkey's history of hostility to democratic dissent); Ozan O Varol, 'Stealth Authoritarianism' (2015) 100 Iowa L Rev 1673 (featuring Turkey as a salient example of contemporary constitutional capture); Ozan O Varol, Lucia D Pellegrina and Nuno Garoupa, 'An Empirical Analysis of Judicial Transformation in Turkey' (2017) 65 Am J Comp L 186 (examining the impact on decision making of constitutional changes that restructured Turkey's Constitutional Court).

28 Scheppele (n 23) 554-55; 562-70. See also Javier Corrales, 'The Authoritarian Resurgence: Autocratic Legalism in Venezuela' (2015) 26 J Democracy 37 (describing democratic erosion in Venezuela).

29 Scheppele (n 23) 554-556; 568-70. See also Carlos de la Torre, 'Technocratic Populism in Ecuador' (2013) 24 J Democracy 33 (describing democratic erosion in Ecuador).

constitutional court, the parliament, the central bank, the election commission. What could have gone so badly wrong when so much looks the same?³⁰

Tarunabh Khaitan³¹ uses Narendra Modi's first term leading India as a case study in under-the-radar democratic erosion. 'The Bharatiya Janata Party government's mode of operation was subtle, indirect, and incremental, but also systemic ... The incremental assaults on democratic governance were typically justified by a combination of a managerial rhetoric of efficiency and good governance (made plausible by the undeniable imperfection of our institutions) and a divisive rhetoric of hyper-nationalism (which brands political opponents of the party as traitors of the state).'³² The goal, as in Scheppele's examples, was concentrating power in the chief executive. 'The BJP government incrementally but systemically attacked nearly all existing mechanisms that are in place to hold the political executive to account, either by ensuring that these mechanisms became subservient to the political executive or were captured by party loyalists.'³³ Opposing Modi's predations was made more difficult by his administration's 'multiple, small-scale, incremental' approach. 'Seen in isolation, each assault is relatively unthreatening to the constitutional scheme taken as a whole, especially when many of these abuses have been inflicted on the Constitution by previous governments as well. What set them apart was their systemicity – that so many of them were launched against constitutional institutions simultaneously and in an evidently choreographed fashion.'³⁴ Others have told similar stories of democratic erosion elsewhere.³⁵

The word 'capture' directly describes the class of institutional changes that are likely to contribute most to subverting democracy, namely, changes that *occupy*

30 Scheppele (n 23) 582.

31 Tarunabh Khaitan, 'Killing A Constitution with A Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14 Law & Ethics Hum Rts 49.

32 *ibid* 49–50.

33 *ibid* 92. See also Tarunabh Khaitan, 'Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism' (2019) 17 Int'l J Const L 342 (describing 'a crisis of executive accountability' (344)).

34 *ibid* 93–94.

35 See, e.g., Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019); Nicole Curato, 'Flirting with Authoritarian Fantasies? Rodrigo Duterte and the New Terms of Philippine Populism' (2017) 47 J Contemp. Asia 142; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge YB of Eur Legal Stud 3–47; Nadiv Mordechai and Yaniv Roznai, 'A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel' (2017) 77 Md L Rev 244; Tom Gerald Daly, 'Understanding Multi-Directional Democratic Decay: Lessons from the Rise of Bolsonaro in Brazil' (2020) 14 Law & Ethics Hum. Rts 199 (Brazil). Recent multi-author discussions of the general phenomenon include Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018) and Cass R Sunstein (ed), *Can It Happen Here?: Authoritarianism in America* (Harper Collins 2018).

institutions that are supposed to check and balance the executive, rather than just sidelining those institutions. Rosalind Dixon and David Landau³⁶ explain:

Strategies of democratic erosion depend heavily on the capture of courts, as well as on the capture of other independent accountability institutions such as human rights commissions, anti-corruption bodies, and electoral tribunals. These institutions are now a core part of the recipe for new constitutions around the world. ... [B]roadly speaking regimes deploy two classes of strategies to attack courts, either ‘curbing’ their powers as an institution, or ‘packing’ them by using a variety of strategies to control appointments. The same broad classes of strategies exist for other independent accountability institutions. Curbing can often neutralize the power of an institution, rendering it incapable of protecting the democratic order. Packing, though, is generally more likely to weaponize it on behalf of an anti-democratic regime.³⁷

To help obscure capture, ‘reforms’ that tighten the leader’s grasp on power may be coupled with ‘reforms’ that look idealistic, such as additional high-minded guarantees of rights, ‘a mix that is a signature element of the new autocrats who confound their critics by adding to toxic constitutional change ideas that seem like constitutional advances.’³⁸ Constitutional promises of rights are of course only as good as the actual system of government that stands behind them. If the institutions of government have been captured by a shadow system, then constitutional law’s beautiful promises are emptied.³⁹ In Montesquieu’s words: ‘No tyranny is more cruel than the one practiced in the shadow of the laws and under color of justice – when, so to speak, one proceeds to drown the unfortunate on the very plank by which they had saved themselves.’⁴⁰

Trying to guard against particular constitutional changes being put to use in constitutional capture can resemble playing whac-a-mole. As David Landau⁴¹ observed in his seminal work on the subject, ‘given the fungibility of abusive constitutional practices – there are often many ways to achieve the same goals – it would be difficult to design an effective textual regime.’⁴² Landau gave an example: ‘an actor stymied in altering a key structural provision might get a similar result by

³⁶ Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (OUP 2021).

³⁷ *ibid* 177.

³⁸ Scheppele (n 23) 554.

³⁹ See, e.g., Russia Const arts 13 (promising ideological and political diversity and a multi-party system), 17 (guaranteeing human rights recognized by international law), 27 (promising freedom of movement), 29 (promising freedom of mass media and prohibiting censorship).

⁴⁰ Charles-Louis de Secondat, Baron de Montesquieu, *Considerations on the Causes of the Greatness of the Romans and their Decline* (first published 1734, David Lowenthal tr, Free Press 1965) 130.

⁴¹ David Landau, ‘Abusive Constitutionalism’ (2013) 47 UC Davis L Rev 189.

⁴² *ibid* 217.

packing or undermining the court, a result that could be achieved by altering the selection mechanism, reducing jurisdiction, or in a host of other ways. In the absence of overarching protection, would-be autocrats may be able to find alternative provisions at both the constitutional and statutory level to achieve identical ends⁴³ To concretize the example further, suppose a chief executive wanted to guarantee their own immunity from criminal liability for acts done in office. One route would be formal constitutional amendment. Another would be statutory enactment. But the same result could be achieved by appointing judges who then newly interpret the existing constitutional scheme to immunize the chief executive from criminal liability for official acts.⁴⁴ It might also be achieved by stripping the courts of jurisdiction over attempts to prosecute for such acts,⁴⁵ or even replacing whole courts.⁴⁶

Constitutional capturers can combine their legal assaults on the system with rhetoric disparaging the roles of independent institutional hold-outs. Ran Hirschl⁴⁷ points to critique through which ‘constitutional review, ideally a power-diffusing, minority-protecting and rights-preserving enterprise, is seen as an enemy of the ordinary people and the policy preferences of the cultural and economic hinterlands.’⁴⁸ Where does all this leave us? With a world in which most people live under governments that are, to varying degrees, cloaked tyrannies. And things are getting worse.⁴⁹

⁴³ *ibid* 230.

⁴⁴ *cf Trump v United States* (2024) 603 US 593 (announcing extensive immunity for former Presidents of the United States from criminal prosecution for official acts).

⁴⁵ *cf Ex parte McCordle* (1869) 74 US 506 (interpreting Congress’s power under U.S. Const art III §2. cl. 2 to make ‘Exceptions’ to the Supreme Court’s appellate jurisdiction as power to strip the Court of jurisdiction over some matters completely); *Boumediene v Bush* (2008) 553 US 723 (not addressing the meaning of Congress’s ‘Exceptions’ power).

⁴⁶ *cf* Act to Repeal Certain Acts respecting the Organization of the Courts, 2 Stat 132, (United States Congress, 8 March 1802). In the Senate debate on this court repeal, Gouverneur Morris observed: ‘you shall not take the man from the office, but you may take the office from the man; you shall not drown him, but you may sink his boat under him.’ 11 Annals of Congress 39 (United States Senate, 8 January 1802). The Supreme Court upheld the court repeal in *Stuart v Laird* (1803) 5 US 299.

⁴⁷ Ran Hirschl, ‘Opting Out of “Global Constitutionalism”’ (2018) 12 Law & Ethics Hum Rts 1.

⁴⁸ *ibid* 15.

⁴⁹ ‘The 2023 V-Dem report noted that the global level of democracy in 2022 had returned to its 1986 value. Over seventy-two percent of the world’s population, 5.7 billion people, live in autocracy. Within the last two decades, the number of democratizing countries has dropped from forty-three to fourteen, while a tightening of regimes has occurred in forty-two states with forty-three percent of the world’s population—compared to thirteen states in 2002. Moreover, the tempo of de-democratization is increasing. Just within the last year, the number of autocratizing countries has increased by nine. The hope for the fourth wave of democratization, ignited by the Arab Spring in 2011, has been crushed, and a part of the third wave of democratization has been undone.’ Katarína Šipulová and David Kosar, ‘Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries’ (2024) 24 German LJ 1577, 1577–78.

When we survey the spectrum from democracy to tyranny, we can notice one key criterion for where we locate governments on that spectrum: *how easily and often can the people change who leads them?* Through all the anxious argument about the rise of authoritarianism and the decline of liberalism, about the true features of fascism, and about whether various other ‘isms’ apply to governments in the world today, we can trace a moral line separating governments that are accountable to their people and likely to stay so from governments that are not. Under accountable governments, the governed can readily change who governs without resort to revolutionary violence. On the other side of the line are governments that are unaccountable to their people or busy wriggling out of accountability. Their people cannot get rid of them without taking serious personal risks and potentially throwing their communities into revolutionary chaos. As Kim Lane Scheppele puts it, such governments ‘may be cheered on at first by the adulating crowds who sought change, but those same crowds will find these illiberals impossible to remove once they have destroyed the constitutional system that could have maintained their democratic accountability over the long run.’⁵⁰

Over on the accountable side of the line, those in government are steered toward seeking to serve the common good, the public interest. However selfish and career-obsessed they may be, their accountability to the people pushes them to ask what would be best for the people. On the accountable side of the line, political debate about what government should be doing takes for granted that the question is: *what would be best for the people?*

On the *unaccountable* side of the line, that is just not the main question that participants in government ask themselves. On the unaccountable side of the line, those in government have little reason to look beyond the narrow interests, desires, and delusions of the leadership. What the leadership wants is the big question that informs what those in government will do. Of course, the risk of revolutionary overthrow is reason enough for the leadership to pretend to care about what would be best for their people. But having shaken off proximate accountability to the people, that leadership can more readily indulge in whatever takes their fancy, such as empire building that is heedless of human suffering. As Montesquieu put it, they may choose to ‘raise [themselves] to grandeur on the ruins of [their] country.’⁵¹ And their underlings are set up by the shadow system to help them do just that.

⁵⁰ Scheppele (n 23) 548.

⁵¹ Montesquieu (n 9) bk 8, ch 16, 120.

3 How Constitutional Capture Happens

The contemporary commentary on constitutional capture analyzes ways that particular persons have attracted enough popular support to take office and have then used the tools of office to subvert democratic systems in favor of current leadership. Current leadership can then persist in power indefinitely and extend the tentacles of their power everywhere. Achieving such a feat inside a constitutional democracy requires that many people play along with various aspects of complex plans. For today's executive to capture the institutions that are supposed to check and balance it requires that key institutions be occupied by people who will act within those institutions in ways ostensibly against their own interests. Why would people accept important governing roles only to diminish the importance of those roles? Why would they abdicate constitutional prerogatives to check and balance, weakening the ability of both their own institutions and others to constrain the executive? Why would they effectively sideline themselves? James Madison famously counted on that not happening:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.⁵²

As Henry II discovered when Thomas Becket stood up to him, past patronage is not in itself enough to guarantee that others in high office will become puppets of the executive.⁵³ Yet in constitutional capture, they do. Why? What keeps the necessary participants united in that mission of capture? The elected or appointed officers who act as agents of capture are autonomous human beings, not a zombie army. Why do they abase their own offices and become complicit in making government unaccountable to the governed and all about the incumbent executive? To understand this deeply, we need to consider the nature of law and government.

The legal systems of nations are prediction systems that feature stabilizing stories. Law's prediction system sets up a closed loop of consequences for conformity and nonconformity with the system's predictions, including predictions about who can make more predictions. Law's stabilizing story claims the moral rightness of the

⁵² James Madison, *The Federalist No 51* (1788).

⁵³ See WL Warren, *Henry II* (Univ of California Press 1977) 112, 508; Thomas Stearns Eliot, *Murder in the Cathedral* (Faber & Faber 1935) (telling the story of the English King Henry II's conflict with his Archbishop of Canterbury, Thomas Becket).

system and its moral superiority to alternatives. Capturing the constitution atop a legal system involves growing a substitute prediction system inside the preexisting one and supplanting that preexisting system from within, while coopting its stabilizing story. How law's existing prediction system distributes power determines how readily it can be captured. Some configurations of power are much more likely than others to let an incumbent executive disconnect the interests of other officeholders from the constitutional roles of their offices. That is ultimately how capture happens.

3.1 Legal Systems are Prediction Systems

In his landmark *The Concept of Law*, H.L.A. Hart⁵⁴ observed that at the heart of every legal system is a rule of recognition that tells what counts as law.⁵⁵ In the European civil law tradition, Hans Kelsen⁵⁶ proposed the comparable concept of a *Grundnorm*.⁵⁷ When people come together in community, their success in living together involves a shared understanding of how sayings can become the law that guides their life together, including the law that says who leads, who governs, who can make more law. Hart argued that this shared understanding was needed at least among key people whom we could circularly call 'officials'.⁵⁸ Of course, the status of those people as officials depends on the very law that they together recognize.⁵⁹

What makes the rule of recognition real? The fact that enough key people are treating it as real. Its reality is self-generating, self-fulfilling. People treat as law the sayings that are pedigreed by the emerging system as law. People treat as leaders those who are pedigreed by the emerging system as government. Why do people take the system seriously in this way? Because they expect that other people will do so and will share such expectations in turn. Law and government self-generate through converging expectations that produce converging conduct that feeds back to

54 Herbert LA Hart, *The Concept of Law* (2d edn, OUP 1994).

55 *ibid* 110: 'the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.' *ibid* 109: '[I]t is important to distinguish "assuming the validity" from "presupposing the existence" of such a rule; if only because failure to do this obscures what is meant by the assertion that such a rule exists.'

56 Hans Kelsen, *Pure Theory of Law* (Max Knight tr, Univ of California Press 1967).

57 *ibid* 201-05.

58 Hart (n 54) 116-17.

59 'They are, in a sense, officials in virtue of that rule, but they are not officials prior to it (in either the factual or the logical sense). Their behaviour makes the rule possible; but it is the rule that makes them officials.' Jules L Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' in Jules L Coleman (ed) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001) 99, 121.

reinforce shared expectations. People follow because they expect others will follow, and that following by others creates strong reasons to follow too.

What are the strong reasons for following law? First and foremost, that we cannot live together in large groups without a way to share understanding about what others are likely to do and to expect when our paths cross. Jürgen Habermas⁶⁰ observed that ‘the very function of law’ is ‘to stabilize expectations.’⁶¹ To help achieve this, legal systems often signal how others will respond to failures to conform to law’s signals, and how still others will respond if the designated first responders fail to act as signaled. As the game theorist Ken Binmore⁶² puts it:

If someone deviates and we go to one of the subgames off the equilibrium path, it remains optimal in a perfect equilibrium to stick to your original strategy provided everybody else does. In particular, if your strategy tells you to punish the deviant at some cost to yourself, it will be optimal for you to carry through on the punishment. If you deviate by trying to escape your duty to punish, you will take us to yet another subgame where it is optimal for some other player to punish you for your dereliction of duty. If he fails to discharge his duty, we go to yet another subgame – and so on forever. With only a finite number of players, these chains of responsibility are necessarily closed in the manner that Kant failed to consider.⁶³

Oliver Wendell Holmes⁶⁴ called law ‘systematized prediction.’⁶⁵ Law is a signaling system⁶⁶ for what people in law’s community are likely to do and to expect.⁶⁷ A legal system can emerge through customs of following leaders that put their community on a fast track to many more customs. Customs of following leaders can sprout branches of further following as leaders delegate some leadership roles to

⁶⁰ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (first published 1992, William H Rehg tr, MIT Press 1996).

⁶¹ *ibid* 201 (‘A flat revocation of any guarantees of legal certainty leads to the conclusion that the legal system must ultimately give up the idea of satisfying the very function of law, to stabilize expectations. The realists cannot explain how the functionally necessary accomplishments of the legal system are compatible with a radical skepticism on the part of legal experts.’)

⁶² Ken Binmore, *Natural Justice* (OUP 2011).

⁶³ *ibid* 85.

⁶⁴ Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10 Harv L Rev 457.

⁶⁵ *ibid* 458 (laying ‘down some first principles for the study of this body of dogma or systematized prediction which we call the law’).

⁶⁶ David Lewis used the phrase *signaling system* more generally to describe successful communication among sentient beings. See David K Lewis, *Convention* (Harv UP 1969) 122–59.

⁶⁷ See generally Niklas Luhmann, *Law as a Social System* (first published 1993, Klaus A Ziegert tr, OUP 2004) (providing an elaborated account of law as a self-generating, self-sustaining system); Laurence Claus, *Law’s Evolution and Human Understanding* (OUP 2012).

others, expanding law's network of effective signalers and signals.⁶⁸ Each participant looks from side to side and sees strong reasons to act as expected. All this mutual expecting of actions and expectations creates a shared internal point of view⁶⁹ among participants toward the say-so of those who lead.

In his original book, Hart articulated a 'fundamental objection' to seeing law as all about prediction. He observed that 'where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.'⁷⁰ When we see that law's self-fulfilling, custom-creating character is what makes it real and valuable to our lives, we have a complete answer to Hart's objection. We have a strong moral reason to keep law real, so that we can live together in large groups. That moral reason informs our legal systems' characterizing conformity as a duty. Law is real only if it succeeds in signaling what people in law's community are likely to do and to expect. Keeping law real means keeping up its predictive effectiveness, which depends on most of us most of the time doing what it predicts we will do. That strong moral reason to do as law says we will do is pro tanto, not preemptive, and can of course sometimes be outweighed by stronger moral reasons to do differently. But as Binmore observes,⁷¹ it is bolstered by the way the system self-generates incentives to conform and deterrents against departure.

In his postscript to *The Concept of Law*'s second edition, Hart indirectly seemed to concede law's essentially predictive character by acknowledging that the rule of recognition is a *convention*.⁷²

Rules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance. ... [C]onventional social rules ... include, besides ordinary social customs (which may or may not be recognized as having legal force), certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.⁷³

68 cf William N Eskridge Jr and Philip P Frickey, 'The Supreme Court 1993 Term Foreword: Law as Equilibrium' (1994) 108 Harv L Rev 26, 30: '[L]aw is a prediction of the rules that interacting government institutions will apply.'

69 See Hart (n 54) 89–91, 203; Herbert LA Hart, *Essays on Bentham* (OUP 1982) 265–68 (elaborating Hart's concept of the internal point of view).

70 Hart (n 54) 11, 84.

71 See (n 63) and accompanying main text.

72 On the character of conventions, see Lewis (n 66); Andrei Marmor, *Social Conventions: From Language to Law* (Princeton UP 2009).

73 Hart (n 54) 255–56. Jules Coleman observed that 'the rule of recognition is a coordination convention that creates reasons for acting in the way in which coordination conventions generally do – when they do. This is by creating a system of reciprocal, legitimate expectations.' Coleman (n 59) 119–20.

If at the heart of the legal system there is just shared expectations leading to shared practices, just predictable patterns of customary behavior, then all of the law and leadership that branches out from that heart grows ultimately from shared expectations. To reassign David Hume's⁷⁴ notorious claim about authority, we have law and leadership 'because every one thinks so.'⁷⁵ What everyone thinks does not create preemptive moral duties to obey, as Hume surely understood. He elsewhere famously observed that no 'ought' follows merely from an 'is.'⁷⁶ What everyone thinks does not in itself determine conclusively whether someone *ought* to be obeyed.⁷⁷ But what everyone thinks *does* in itself determine whether there is a shared expectation about what and who will be followed, and it is from such shared expectation that we have law and government.

Hart memorably distinguished law from the threatening demands of a bank-robbing gunman.⁷⁸ That contrast is made particularly resonant by the ad hoc, arbitrary character of the robber's behavior. Law makes our relations with others less ad hoc, more predictable, and so lets us live together in large groups. But those who make our laws are not necessarily more morally justified in leading as they do than the bank robber is in brandishing his weapon. Some leaders of nations really are robbers. That does not stop their words from being law and their gangs from being government. Using the language of norms and normativity in accounts of law and government can risk conflating the concept of being *normal* with the concept of being *moral*. Law helps establish what is normal, what is customary, in the life of a society, and we have strong moral reason to want there to be a known truth about what is normal, so that we can live together.⁷⁹ What is normal may, however, be bad.

74 2 David Hume, *A Treatise of Human Nature* (OUP 1740).

75 *ibid* bk 3, pt 2, sect 8: 'it being certain, that there is a moral obligation to submit to government, because every one thinks so; it must be as certain, that this obligation arises not from a promise; since no one, whose judgment has not been led astray by too strict adherence to a system of philosophy, has ever yet dreamt of ascribing it to that origin.'

76 *ibid* bk 3, pt 1, sect 1.

77 'For the assumption of a basic norm ... not only contradicts reality, since no such norm exists as the meaning of an actual act of will, but also contains contradiction within itself, since it represents the authorization of a supreme moral or legal authority, and hence it issues from an authority lying beyond that authority, even though the further authority is merely figmentary.' Hans Kelsen, 'The Function of a Constitution' in Richard Tur and William Twining (eds), *Essays on Kelsen* (Iain Stewart tr, OUP 1986) 109, 117. cf Alf Ross, *On Law and Justice* (Univ of California Press 1958) 81. 'Every system of enacted law is necessarily based on an initial hypothesis which constitutes the supreme authority, but which is not itself created by any authority. It exists only in the form of a political ideology which forms the presupposition for the system.' *ibid* 83. See also *ibid* 92.

78 Hart (n 54) 19–25, 82–85, 281.

79 'Law is [...] not essentially a motivational device, it is essentially an informational device [...]' Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25 *Oxford J Legal Stud* 565, 573.

That's the point of legal positivism – what's legal isn't necessarily what's moral, all things considered. Of course, we would rather have good leaders than bad ones, but good or bad, people are lawgivers if their society in fact treats their words as law. Whether lawgivers came to power in good ways or bad, and whether their acts of purported lawgiving are morally justified or not, their words are law for us if and only if enough people in our community understand and expect them to be law. Our ever-present reason to care about law is not that we owe something to lawgivers, but that we need law's help to live together.

3.2 Legal Systems Tell Stabilizing Stories

Feeding the feedback loop that lets us have law, that lets us live together in a large society, is a weighty moral reason for following the law. It is not difficult to see how much we benefit from the expectations that law helps us have, the confidence we acquire from law about what strangers will likely do at an intersection or in a commercial transaction. Yet throughout our history, lawgivers have wanted more moral support than that.⁸⁰ Throughout our history, lawgivers have sought stories that tell not only why having law is good, but why *having them as the lawgivers* is good, and better than alternatives. At a minimum, these stories need to explain why the leaders are morally justified in leading. Beyond that, leaders have sought to say that their people are morally required to follow. To secure the duty to follow against claims that sometimes we have stronger reasons for not following, our leaders historically sought to claim that they had moral rights to be followed, rights that preempted, overrode, or outweighed any reasons their people might ever have had for not following. This was the old idea of *authority*.

Throughout the ancient world, and widespread until recent centuries, leaders advanced variations on the same story to support their rule: the creator or creators of humans had a right to be obeyed by humans and had delegated that right to human leaders.⁸¹ That argument helped sustain leaders staying leaders longer than people

⁸⁰ The 'operations that serve to de-tautologize and de-paradoxicalize the system will seem to the system to be naturally necessary. An observer, in contrast, can recognize the function of these semantic efforts and speculate about other, functionally equivalent possibilities; to him, every specific semantic solution to this problem appears historically determined and contingent, dependent on the supply of plausibility in the specific sociohistorical circumstances.' Niklas Luhmann, 'Law as a Social System' (1989) 83 Nw U L Rev 136, 145-46.

⁸¹ See, e.g., C J Gadd, *Ideas of Divine Rule in the Ancient East* (OUP 1948) 13, 14 (describing the structure of ancient divine right claims developed from accounts of divine creation); John Neville Figgis, *The Divine Right of Kings* (2d edn, CUP 1922) 17–21 (describing the origins of European divine right claims); Timothy Earle, *How Chiefs Come to Power: The Political Economy in Prehistory* (Stanford UP 1997) 149 (describing divine-derived status claims of ancient tribal chiefs).

wanted to follow them. The argument pointed to the *source* of the very qualities that first let the leader or their ancestor lead – the creator or creators of the leader and everyone else.⁸² The leader had a *right* to lead their community, it was said, a right delegated by the divine.⁸³ We see that claim made by leadership in many times and places. We see it still in the motto on the British monarch's coat of arms – *Dieu et mon droit*.⁸⁴ In Rousseau's⁸⁵ words: 'The strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty.'⁸⁶ The old claims of a divine right of kings had a conceptual coherence and a moral reach that no substitute theory of authority has ever attained. As exemplified by the biblical story of a divine command to Abraham to sacrifice his son Isaac,⁸⁷ the divine right to be obeyed was paramount and preemptive. It could not be morally outweighed by any competing considerations.⁸⁸

82 '[I]n every case, princely power and those groups having interests vested in it – that is, the warlord's following – strive for legitimacy as soon as the rule has become stable. They crave for a characteristic which would define the charismatically qualified ruler.' Max Weber, *Essays in Sociology* (HH Gerth and Wright Mills tr, OUP 1946) 27. 'Genuine charisma rests upon the legitimation of personal heroism or personal revelation. Yet precisely this quality of charisma as an extraordinary, supernatural, divine power transforms it, after its routinization, into a suitable source for the legitimate acquisition of sovereign power by the successors of the charismatic hero.' *ibid* 39. See also Elman R Service, *Origins of the State and Civilization: The Process of Cultural Evolution* (Norton 1975) 73, 74 (describing tribal beliefs that 'the character of the parent is transmitted to his offspring' and 'nearly universal' practices in chiefdoms of 'inheritance of status by primogeniture').

83 Rousseau observed that the divine is 'an authority of a different order, capable of constraining without violence and persuading without convincing. This is what has, in all ages, compelled the fathers of nations to have recourse to divine intervention and credit the gods with their own wisdom [...]'. Jean-Jacques Rousseau, *The Social Contract and Discourses* (first published 1762, GDH Cole tr, 1923) bk 2, ch 7. Rousseau quoted Macchiavelli: 'there has never been, in any country, an extraordinary legislator who has not had recourse to God; for otherwise his laws would not be accepted [...]'. *ibid*, quoting Niccolò Macchiavelli, *Discourses on Livy* (1513–17) bk 5, ch 11.

84 For a rare residual example of the old vision still in actual practice, see the Basic Law of Governance of Saudi Arabia, issued by royal decree on March 1, 1992.

85 Rousseau (n 83).

86 *ibid* bk 1, ch 3.

87 Genesis ch 22.

88 To justify disobeying and removing bad government, bad leadership had to be characterized as cause or evidence of a further fact – the absence or loss of divine endorsement. Max Weber noted that even natural disasters might prompt a Chinese emperor's removal by revealing him not to be 'a legitimate "Son of Heaven"'. Max Weber, *Theory of Social and Economic Organization* in Max Weber, *On Charisma and Institution Building: Selected Papers* (SN Eisentstadt ed, UCP 1968) (AM Henderson and Talcott Parsons tr, 1947) 50. See also Frederick W Mote, *Imperial China 900–1800* (Harv UP 1999) 8–10, 102, 506–20, 553–59, 861–62 (elaborating on Chinese divine status claims). Max Gluckman noted a similar story in Africa. 'Under the divine kingship, a leader became liable to attack for failures beyond his control [...]'. Max Gluckman, *Custom and Conflict in Africa* (Blackwell 1955) 39. In medieval Europe, Pope Gregory VII's conflict with the Holy Roman Emperor Henry IV prompted a papal

When the Enlightenment demolished claims of delegated divine rights to lead, human leaders' quest for stabilizing stories to support their rule shifted from claiming their leadership was the will of God to claiming their leadership was the will of 'the People.' Yet no one then or since has ever come up with a credible way to claim that popular support for leaders is reason enough for us to shut down our own moral reasoning and defer blindly to those leaders. Social contract⁸⁹ notoriously does not supply such a reason, both empirically⁹⁰ and because even when promise-making

assertion that the Church could declare badly-behaved monarchs no longer to be God's Anointed. 'He solemnly freed the subjects from their duty of obedience to the king,' Fritz Kern, *Kingship and Law in the Middle Ages* (first published 1914, SB Chrimes tr, Blackwell 1939) 108. And the moral weight of belief in divine endorsement prompted a remarkable artificiality in the characterization by some of the English Parliament's conflict with Charles I. 'It was pretended that the Parliament took up arms against the person only of the King but in support of his authority. This shews how loth men were to believe that what was legally wrong will ever be morally right.' Figgis (n 81) 223-24.

89 As David Hume observed, social contract had not figured in the historic claims of rulers and in the self-understandings of most law-abiding subjects. Hume (n 74) bk 3, pt 2, sect 8. It was an intellectuals' idea, visible among the reasons Socrates gave for obeying the laws of Athens (see Plato, 'Crito' in *The Dialogues of Plato* (Benjamin Jowett tr, OUP 1937) 435–36; cf Plato, 'Apology' *ibid* 412 (suggesting that the contractual duty to obey did not preempt a conflicting duty to the divine), as Manegold of Lautenbach's reason for denouncing and resisting his monarch, the Holy Roman Emperor Henry IV, during the latter's dispute with the Pope in the eleventh century (Kern (n 88) 119–21), and in John Milton's defense of the decision to depose, try, and execute Charles I, four decades before John Locke published his *Two Treatises of Government* (John Milton, 'The Tenure of Kings and Magistrates' (first published 1650) in John Milton, *Political Writings* (Martin Dzelzainis ed, Claire Gruzeliér tr, 1991) 3, 7 n 21, 8–13). Thomas Hobbes had also made a mid-century case for social contract. (Thomas Hobbes, *Leviathan* (first published 1651, CB MacPherson ed, Penguin 1968) 228–29.) See also the Huguenot consent theory advanced in *Vindiciae contra Tyrannem*, discussed in Figgis (n 81) 113–16 and James Tyrrell, *Patriarcha Non Monarcha* (1681). Late seventeenth-century consent theories owed a significant debt, acknowledged by Locke (John Locke, *Two Treatises of Government* (first published 1690, Peter Laslett ed, CUP 1988) 326–27), to Richard Hooker, *Of the Laws of Ecclesiastical Polity* (1593).

90 John Locke's claim that a duty to obey might be owed through *tacit* consent shared with Socrates' account a 'we could leave' rationale that may have been personally true for Locke and for Socrates but was certainly not true for most people in most communities throughout human history. Locke (n 89) 229–30; Plato (n 89) 435–36. Even where departure is physically possible, surely '[c]onsent cannot be binding on people, in the way this argument requires, unless it is given more freely, and with more genuine alternate choice, than just by declining to build a life from nothing under a foreign flag.' (Ronald Dworkin, *Law's Empire* (Harv UP 1986) 192–93.) If a government is so good that people *should* be willing to consent, could this create authority without needing actual consent? cf David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton UP 2008) (making a claim of this genre) with William A Edmundson, 'Consent and its Cousins' (2011) 121 *Ethics* 335 (critiquing such claims). How good a government is explains not why that government has a right to be obeyed, but why that government does *not need* a right to be obeyed in order for what that government says mostly to be what we should do.

does happen, promise-keeping is a good of obviously only finite and relative weight,⁹¹ certainly not always the right thing to do.⁹² And Razian epistemic authority⁹³ is neither about having rights to be followed nor a source of the reliably continuous moral guidance that the old preemptive idea was supposed to supply.⁹⁴ What's the point of an 'authority' that is not coextensive with the claimant's power and not clear ex ante about its own extent? 'Piecemeal' authority⁹⁵ would not really help us know when we should follow. We follow law not because we owe moral duties of 'allegiance' to lawgivers;⁹⁶ we follow law, when we do, both because we can see that doing so will make our own lives better in many ways and because we owe moral duties to one another as people living together in community.⁹⁷ There is no symmetry between when would-be leaders are morally justified in doing acts that lead and when other people are morally required to do acts that follow.⁹⁸ The old idea of authority tried to bind the two together, and abjectly failed to do so.⁹⁹ Yet that failure

91 Holmes (n 64) 462: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else'. On breaches of legal 'duties' and optimal resource allocation, see Richard A Posner, *Economic Analysis of Law* (6th edn, Aspen 2003) 50–53; Ronald H Coase, 'The Problem of Social Cost' (1960) 3 *JL & Econ* 1, 1–2.

92 See Robert Paul Wolff, *In Defense of Anarchism* (Univ of California Press 1970) 29, 40–42 (arguing compellingly that we cannot morally promise to do wrong and we cannot morally keep such a promise).

93 Joseph Raz's 'normal justification' of authority is 'that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not.' Joseph Raz, *Between Authority and Interpretation* (OUP 2009) 136–37.

94 Joseph Raz, *The Morality of Freedom* (OUP 1986) 80 (describing 'a piece-meal approach to the question of the authority of governments').

95 *ibid.*

96 Ronald Dworkin observed that Raz's account of authority presupposed 'a degree of deference toward legal authority that almost no one shows in modern democracies.' Ronald Dworkin, *Justice in Robes* (Harv UP 2006) 206.

97 cf MBE Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale LJ* 950 and John Simmons, *Moral Principles and Political Obligations* (Princeton UP 1979) 138–39 with Herbert LA Hart, 'Are There Any Natural Rights?' (1955) 64 *Phil Rev* 175, 182–91 and John Rawls, 'Legal Obligation and the Duty of Fair Play' in Sidney Hook (ed), *Law and Philosophy* (New York UP 1964) 3, 8–11 (all considering 'fair play' arguments for obedience).

98 Government (in Robert Nozick's terminology, the dominant protective agency) may be morally justified in acting. 'But it is not entitled to be the dominant agency, nor is anyone else.' Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974) 140.

99 See, e.g., Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Duke UP 2001) 53–55; Larry Alexander, 'The Gap' (1991) 14 *Harv J L & Pub Pol'y* 695, 695–96; Frederick Schauer, 'Rules and the Rule of Law' (1991) 14 *Harv J L & Pub Pol'y* 645, 692–93 (all recognizing that moral obligations to follow law are not necessarily present whenever there was moral justification for issuing that law).

did not stop law and government from achieving what human communities have always needed them to achieve. Law and government let us live together in large groups. The notion of a preemptive right to be followed is a fifth wheel, as Holmes put it.¹⁰⁰ Legal systems can work just fine without it. The value of an effective prediction system is obvious and morally weighty, without being preemptive.

Fortunately for leaders, the value to them and their legal systems of a stabilizing story does not depend on that story claiming for leaders a preemptive moral right to be obeyed. It is enough that the story helps morally justify the leaders in leading. The substitute stabilizing story of ‘will of the People’ can provide that moral support for leadership. And once up and running, legal systems can self-sustain regardless of the leadership’s bona fides.¹⁰¹ By systematically and credibly predicting good consequences from conformity and bad consequences for non-conformity, prediction systems can keep themselves going¹⁰² regardless of whether the way leaders reached power and what leaders command is good or bad. Yet even the most morally bankrupt leader sees value in having a stabilizing story to tell as an aid to perpetuating their power.

Stabilizing stories are especially valuable at moments of discontinuity, when revolutionary change visibly breaks with the past. New governance becomes real, new sayings become law, when enough people in a community expect that enough other people in that community will treat those new sayings as law, that is, will treat those sayings as expressing what people in the group are likely to do and to expect. What mattered crucially about the circumstances of the United States Constitution’s adoption was not that the process of adoption through elected ratifying conventions was really the most morally worthy one. That ratifying process was a revolutionary departure from the amendment rules of the existing legal system, and leading opponents condemned the process for that reason.¹⁰³ What mattered crucially was that having the document endorsed by all those specially-elected people in all those

100 Stephen Perry has argued that Holmes’s ‘basic claim is that the terms ‘right’ and ‘duty’ not only do not bear in law the same meaning as in moral contexts, but are, generally speaking, ‘empty’ terms; there are no such things as legal rights and duties.’ Stephen R Perry, ‘Holmes Versus Hart: The Bad Man in Legal Theory’ in Steven J Burton (ed), *The Path of the Law and Its Influence* (CUP 2000) 158, 187. ‘As Holmes put the point in a letter written to John Chipman Gray in 1914: “I became convinced that the machinery of rights and duties was a fifth wheel.”’ *ibid* 184.

101 See, e.g., Anastasia Edel, ‘Staring Down the Black Hole of Russia’s Future’ *Foreign Policy* (Washington DC, 10 March 2023) (describing the character of Russian governance).

102 See (n 63) and accompanying main text.

103 See, e.g., 3 Max Farrand (ed), *Records of the Federal Convention* (2nd edn, Yale UP 1937) 189 (Luther Martin, ‘Genuine Information,’ delivered to the Maryland legislature, November 29, 1787): ‘The same reasons which you now urge for destroying our present federal government, may be urged for abolishing the system, which you now propose to adopt; and as the method prescribed by the articles of confederation is now totally disregarded by you, as little regard may be shown by you to

specially-called conventions helped turn the United States Constitution into what the American people were thereafter likely to treat as *the law*. Initially fragile expectations about the Constitution's status strengthened as, month by month, people continued to act as if it was the law by doing the acts that it contemplated – holding elections, convening, governing. We could call the converging thoughts behind these converging actions *the internal point of view*.¹⁰⁴

3.3 Changing the Rule of Recognition

When we see how crucial a real legal system is to enable living and acting together with large numbers of other people, we can see why people living inside legal systems so rarely succeed in rising up to overthrow those systems. Even when a system of law and government is a tyranny that makes most of its people miserable by governing in disregard of their interests and offering them no easy way to change leaders, people only rarely rise up to force revolutionary change. Overthrowing an existing legal system by force is hard because bringing people together against the existing legal system is hard. It is the existing legal system that reliably coordinates our actions with large numbers of people we do not personally know. How can we know what others will likely do and expect when the law is not on our side, pointing the way? If we rebel against existing law and government, we risk making the sound of one hand clapping. And we know that even if many people do come out on the streets, we will have law against us, coordinating riot police and soldiers and all manner of other officials of the existing system. They will likely act as the system predicts they will, not because they love it much more than we do, but because a giant collective action problem traps them and us in cells of ignorance to which the existing legal system holds the key.

When extralegal overthrow does happen, it is often because a sub-system of the existing legal system with disproportionate access to means of force detaches itself from the rest of the legal system and uses its internal legal system to attack its parent. We call that a military coup. Those who lead the coup rely on military law to ensure their subordinates' compliance and coordinate their conquest of the mothership of state.

Military coups depend on part of the preexisting legal system that sets up chains of command. That dependence often defaults ultimate post-coup power to a group of senior military officers. The usual fate of such military juntas tells us something very

the rules prescribed for the amendment of the new system.' See Articles of Confederation of 1781, art 13.

104 Hart (n 54) 88–91.

valuable about which distributions of governing power best support democracy and which distributions of governing power best support tyranny. In their analysis of the empirical evidence, political scientists Barbara Geddes, Joseph Wright, and Erica Frantz¹⁰⁵ identified studies showing ‘that dictatorships led by somewhat collegial groups of officers (juntas) end sooner than other kinds of dictatorship.’¹⁰⁶ There are two ways that such tyrannies by committee can end – by moving toward democracy or by consolidating tyranny in one pair of hands. It is concentrating ultimate power in one person that lets tyranny last long term.¹⁰⁷

Why does tyranny by committee tend to be transitional? A government unaccountable to its people becomes estranged from their interests and intent on the interests of leadership, but having no true purpose higher than self-interest is destabilizing to a group. A group focused on self-interest will end up preying on one another.¹⁰⁸ Violent overthrowers vary in how ideologically fervent or transparently self-serving they are, but ostensible ideological fervor absent actual accountability to the people has a poor track record of maintaining shared governance. Members of a tyranny by committee therefore face a choice – move toward democracy so government, disciplined by accountability to its people, can truly be for the common good, or collapse into a tyranny of one, in which government becomes about serving that person’s interests and preoccupations. As Milan Svobik¹⁰⁹ puts it:

[T]he reasons for the emergence of personal autocracy are structural. ... [A]uthoritarian elites operate under distinctly hazardous conditions. They cannot rely on an independent authority to enforce mutual agreements, and violence is the ever-present, ultimate arbiter of their conflicts. These dismal circumstances ensure that any dictator’s aspiration to become the next Stalin is matched by the opportunity to do so. ... Rather than an accident of history, the emergence of personal autocracy is a systematic phenomenon.¹¹⁰

105 Barbara Geddes, Joseph Wright, and Erica Frantz, *How Dictatorships Work: Power, Personalization, and Collapse* (CUP 2018).

106 *ibid* 226. ‘[J]unta-led military regimes are more likely to democratize after shorter periods of rule than personalized military-led dictatorships or civilian-led dictatorships’ *ibid*.

107 *ibid* 232. See also Ruth Ben-Ghiat, *Strongmen: Mussolini to the Present* (WW Norton 2020). ‘Personalist rulers can be the most destructive kinds of authoritarians because they do not distinguish between their individual agendas and needs and those of the nation.’ *ibid* 12.

108 ‘The instability of power-sharing is a consequence of the distinctive, dismal conditions under which authoritarian power-sharing takes place. Authoritarian elites cannot rely on an independent authority to enforce their agreements about sharing power, they may use violence to resolve mutual conflicts, and they typically operate under a shroud of secrecy.’ Milan W Svobik, *The Politics of Authoritarian Rule* (CUP 2012) 81.

109 *ibid*.

110 *ibid* 55.

Tyrannies by committee become tyrannies of one because singular leadership turns out to be the ideal model for building a system of law and government that is unaccountable to the governed and focused on the self-interest of those who govern. By being clear about whose interests ultimately matter,¹¹¹ whose interests those in government will be rewarded for serving and punished for not serving, government under a singular leader can organize people into a governing system in which it is plain to each participant what they need to do to be rewarded and to avoid being punished. That can create disciplined conformity with a minimum of communication, indeed such a system can reliably serve the interests it exists to serve even if that service contradicts much of what the government formally says.¹¹² Singular leadership allows for underarticulated signaling of expectations.¹¹³ Governing is about what's best for the leader, which well situated participants in the system are rewarded for being adept at figuring out. It is the leader who supplies the focal point for shared expectation. The rule of recognition for officials in such a system becomes assimilated to the will of the leader, which can be discerned, absent explicit instructions, from asking what would serve the self-interest of the leader – their glory, their power, their permanence.

One true tyrant can and often does create an incentive structure that lets tyranny last. Government by one person produces the stable equilibrium of tyranny: a power pyramid with one bright point at the top that is the focus of shared expectation, converging participants' understanding of how to behave to succeed in sharing in the spoils of the system without falling out with one another.¹¹⁴ An

111 '[T]he astounding absurdity of personality cults fails to undermine their effectiveness [...] On the contrary, it serves to reinforce the political message behind personality cults: "In this regime, only one person counts!"' *ibid* 81.

112 cf George Orwell, *Nineteen Eighty-Four* (Secker & Warburg 1949) (featuring a Ministry of Truth that manages propaganda for the dictatorial government of Big Brother).

113 'Political actors are able to form convergent expectations about the future behavior of others to the extent that their environment provides clear clues, that is, clearly visible and clearly relevant clues.' Andreas Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* (OUP 2013) 386, 387. 'In the comparative literature on authoritarianism, dictators employ one central communication technique to let others know what they want them to know: *signaling*. [...] Needless to say, simple acts of signaling do not exhaust the repertoire of communicative strategies under conditions of opacity, neither in ordinary life (Goffman 1959) nor in ordinary dictatorship (Schedler and Hoffmann 2012).' *ibid* 386.

114 See, e.g., Juan Forero, 'Venezuela's Nicolás Maduro Relies on Army, Patronage and Fear to Stay in Power' *Wall St J* (New York, 31 July 2024) <<https://www.wsj.com/world/americas/venezuelas-nicolas-maduro-relies-on-army-patronage-and-fear-to-stay-in-power-c00ed4fd>> accessed 4 June 2025: '[The sprawling security structure], which includes officer corps that are rewarded with business opportunities ranging from food imports to gold mining and trafficking of contraband, form a tightly controlled line of defense built on patronage and a dose of fear that can keep Maduro in power regardless of discontent at home and U.S. pressure [...].'

exception that helps prove the rule is government in bifurcated societies, such as in the American South under Jim Crow.¹¹⁵ Shared governance in service of a common good can sustain itself in such societies through its actual accountability to the segment of society whose common good it serves, even as simultaneously it may tyrannize another segment of society for generations.

Tyrannies that share ultimate power are playing on democracy's turf. Democracies with one true leader are playing on tyranny's turf. And that brings us to constitutional capture, a situation where there never was a violent overthrow, there was just an election that brought someone to power inside a democracy who wants to change the system. When we see that the rule of recognition comes from converging expectations, we can see that the rule is vulnerable to shifts in expectations. If someone becomes situated to shift expectations and converge them elsewhere, then the old rule's handiwork, the existing formal legal system, may be hollowed out and occupied by a shadow system that grows from expectations converging elsewhere. A power configuration that creates the salience to grab collective attention and shift the focal point for shared expectation may change the rule of recognition.¹¹⁶

For would-be tyrants, capture may be better than overthrow in several big ways. First, capture can modulate its speed to maximize its chances. Second, capture can turn the existing system against itself. Third, capture can coopt the existing system's stabilizing story.

By maintaining continuity of institutional façades rather than just bulldozing existing institutions and setting up new ones, capture can happen slowly over time in ways that avoid spontaneous mobilizing and coalescing of opposition. Opponents can be isolated and picked off one at a time. Stealth and subterfuge allow the new system to emerge in a more stable way that improves its prospects of success. Normally it is necessary to go slow because without overt threats of overwhelming violence there is likely to be resistance, and victory requires lots of small steps that wear away the points of resistance. That makes the democratic 'erosion'¹¹⁷ metaphor especially apt.

115 See, e.g., Gabriel J Chin and Randy Wagner, 'The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty' (2008) 43 Harv CR-CL L Rev 65 (governance under Jim Crow was persistently accountable to one racial group and not another).

116 See Hart (n 54) 89–91, 203; Hart (n 69) 265–68 (elaborating Hart's concept of the internal point of view). The extensive political science literature on power dynamics in dictatorships has a Hart-shaped gap in it. 'We have also neglected to build theories that would allow us to understand the formation of beliefs and expectations under dictatorship. [...] [W]e can come to understand the convergence of political expectations under extreme uncertainty by reconstructing, not the external environment, but the internal viewpoints of participating actors.' Schedler (n 113) 387–88.

117 See, e.g., Ginsburg and Huq (n 19) 47; Levitsky and Ziblatt (n 17) 6 (each using the 'democratic erosion' metaphor).

Attempts at extralegal overthrow may face formidable multifaceted resistance from an existing legal system. In contrast, capture uses levers of the existing legal system to change formal structures and official practices from within in ways that stop existing institutions from fighting an emerging shadow system and subject those institutions to that emerging system. A military coup detaches and deploys one subsystem against the parent legal system, but capture uses much more of the existing legal system to self-subvert in slow motion. Capture also uses the levers of the existing legal system as sources of favors and fear that help staff a shadow system of personally loyal and dependent officials. Those participants come to understand that future plum jobs and lucrative other opportunities for themselves and their families depend on conforming not to signals of the formal legal system, but to the signals of the shadow system. Sometimes capturers have the added asset of an existing party or movement structure that can slide seamlessly into staffing the government in service of the shadow system. But incumbency can enable capture even without such readymade sources of placemen, as Kais Saied is demonstrating in Tunisia now.¹¹⁸ What can sufficiently guide and persuade and coax and even inspire disparate people to come together to pull off a constitutional capture? One salient person's will.

Overthrowing an existing system can be a group effort, perhaps by military coup, perhaps coming up spontaneously from the street with no single salient face behind or in front of it. But *capturing* a system of government requires a process of attaching strings to people who were formerly free, and almost imperceptibly turning them into puppets. That takes a puppet master, someone who is situated to grow the relationships that attach the strings. Capturing the constitution of a free people starts by capturing particular people and in small steps turning them unfree.

Personal loyalty is a powerful tool to swap out one prediction system for another. Once we see that law is all about signaling what people in community are likely to do and to expect, we can see that a shadow system can grow by supplying better guidance than the preexisting formal system about what people are likely to do and to expect. Singular leadership readily enables expectations to converge anew. The

118 ‘Tunisians approved a new Constitution that cements the one-man rule instituted by President Kais Saied over the past year, according to the results of a referendum released on Tuesday [...]. [I]n contrast to the previous Constitution, which divides power between Parliament and the president, the new one demotes the legislature and the judiciary to something more akin to civil servants, granting the president alone the authority to appoint government ministers and judges and weakening Parliament's ability to withdraw confidence from the government. [...] Mr. Saied appointed the board of the formerly independent elections authority as well as the committee that drafted the new Constitution, and no minimum participation was required for the referendum to pass.’ Vivian Yee, ‘Tunisians Approve New Constitution That Undercuts Democracy’ (*NY Times* New York, 26 July 2022) <<https://www.nytimes.com/2022/07/26/world/middleeast/tunisia-constitution-democracy.html>> accessed 4 June 2025.

salience of the one true leader, the relational dynamic between leader and followers, the personalizing of the emerging system's *raison d'être*, all help shift shared expectations to what the leader wants or is likely to want.

Personal loyalty can build a new pyramid-shaped prediction system inside an existing system of constitutional checks and balances and gradually capture it. People can be bullied or bought into personal loyalty. Our singular executive models supply one person with just the tools they need to end up atop a personalized power pyramid. A leader with the will and the skill can spin webs of dependent relationships through favors and fear to concentrate power in fewer and fewer hands and ultimately all in their own. They can embrace the forms of democracy en route to a government of, by, and for the leader. Through this creative process, the leader can circumvent and even repurpose formally countervailing power centers by filling them with persons who will follow the leader because they depend on the leader. Those institutions will no longer check and balance, they will just acquiesce according to the agenda of the shadow system. They can then be used to help sideline any remaining institutional holdouts. This is what Vladimir Putin did in Russia.¹¹⁹ This is what Xi Jinping is almost finished doing in China.¹²⁰ This is what many other leaders discussed in the literature on constitutional capture seem to be trying to do

119 'Dutifully performing its role in a highly-choreographed display of political theater, Russia's highest court on Monday approved constitutional changes that opened the way for President Vladimir V Putin to crash through term limits and stay in power through 2036. With a dense 52-page ruling clogged with legalese, the Constitutional Court removed one of the last, albeit very flimsy potential obstacles to Mr. Putin effectively becoming president for life. [...] Ekaterina Schulmann, a political commentator and former member of Mr. Putin's human rights council, mocked the Constitutional Court's ruling on Monday as evidence of how cravenly pliant Russia's nominally independent judicial system had become. 'It is rare that the spirit of slavery and intellectual cowardice express themselves with such fullness in a written text,' she said in a commentary posted on Facebook.' Andrew Higgins, 'Russia's Highest Court Opens Way for Putin to Rule Until 2036' (*NY Times* New York, 16 March 2020) <<https://www.nytimes.com/2020/03/16/world/europe/russia-putin-president-for-life.html>> accessed 4 June 2025.

120 See, e.g., Weiyi Cai, Aaron Byrd, Chris Buckley and Pablo Robles, 'How Xi Returned China to One-Man Rule' (*NY Times* New York, 2 September 2023) <<https://www.nytimes.com/interactive/2023/09/02/world/asia/china-xi-rule.html>> accessed 4 June 2025; Michael Schuman, 'China's "Very Dangerous Trajectory"' (*The Atlantic* Washington DC, 21 June 2022) <<https://www.theatlantic.com/international/archive/2022/06/china-xi-jinping-power-zero-covid/661228/>> accessed 4 June 2025: 'Xi Jinping [...] has concentrated more political power in his own hands than any other Chinese leader in decades, in the process upending the more balanced, government-by-committee approach that has predominated since the 1980s, thus leaving the most important decisions of the state – and the future of the world's most populous country – dependent on one man and his ideas, ambitions, and political calculations.'

too. And as Hart explained, the shared expectation that supports the new rule of recognition needs only to inform key insiders, the so-called officials.¹²¹ Everyone else can be kept in the dark about the true shape of the shadow system that really governs; everyone else can continue to be presented with the forms of the old system that has been superseded and that now operates as a passthrough for rules of behavior dictated from the shadows. And continuing the forms of that old system lets the shadow system coopt the old system's stabilizing story.

When the menu of stabilizing stories shrank from including the will of God to including only the will of the People, would-be tyrants wanted a way to tell that story. Today's tyrants sense that they need the forms of constitutional democracy. The less the reality of democracy – the more of a sham its forms are, the emptier its institutions are going to be – the more valuable its institutions' *familiarity* is. The more the institutions look the same and formally act the same – use the same procedures – the easier it is to obscure the fact that those institutions are acting under instruction from a puppeteering shadow system. The stabilizing story the institutions are pantomiming can be wrapped around actions dictated by a shadow system. This stabilizing strategy has a long pedigree. Edward Gibbon¹²² memorably recounted the care with which actually omnipotent Roman emperors deployed it, masking their power and contriving to keep the Senate looking like it mattered. Rome became 'an absolute monarchy disguised by the forms of a commonwealth. The masters of the Roman world surrounded their throne with darkness, concealed their irresistible strength, and humbly professed themselves the accountable ministers of the senate, whose supreme decrees they dictated and obeyed.'¹²³

Today's leaders have no coherent way to justify their leadership other than the people's support. So they choose to pretend that the support exists. They choose to claim that government comes from the people, and they choose to maintain the forms of institutions that look responsive to what the people want. This they can do, as we see in nation after nation, while turning the forms of democratic government

121 Hart (n 54) 116-17: 'There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever [...]. The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses.'

122 1 Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* (Strahan & Cadell 1776).

123 *ibid* 69.

into puppets controlled by a shadow system that keeps the incumbent leadership securely in place through its control over who gets to occupy the formal institutions of government. Government can continue in name to be all about the will of the people, just as it was formerly in name all about the will of God.¹²⁴ The new claim can continue to be made without being any truer than the old claim. Where the old claim just needed the formal blessing of religious institutions, the new claim needs to be played out through the institutions of constitutional democracy – elections, assemblies, courts. To capture these as securely as past monarchs established temples and churches requires some agility. It requires nurturing a set of shared understandings and expectations that become a shadow system. Through those shared understandings and expectations, the shadow system can gut each of the great constitutional guardians of democracy, and then operate inside their shells.

3.4 The Role of the One True Leader

Without one true leader, it is hard to derail a democracy. Without one true leader, it is hard to stay a tyranny. In 2020, Russia's puppet master, Vladimir Putin, orchestrated a sweeping rewrite of the Russian constitution. Along with a range of nationalistic and social welfare crowd pleasers, the changes formally concentrate more power in the president over all the other institutions of government, and blow past the old presidential term limits.¹²⁵ Under the new dispensation, President Putin's actual hold on power has an official blessing for almost as far as the eye can see.¹²⁶ In 2022, it was Xi Jinping's turn to burst through old expectations. He ignored the precedents set by China's recent leaders and secured an extension of his leadership beyond a decade, perhaps far beyond.¹²⁷

¹²⁴ See 3.2.

¹²⁵ See Bui Ngoc Son, 'Russia's Big-Bang Constitutional Amendments' (2021) 53 *NYU J Int'l L & Politics* 751 (describing the 2020 Russian constitutional changes).

¹²⁶ See Daria Litvinova, 'Russian lawmakers move to keep Putin in power past 2024' (*Associated Press News* (New York, 11 March 2020) <<https://apnews.com/article/moscow-ap-top-news-virus-outbreak-international-news-courts-1bc1532d515550bb40df29ff9652e264>> accessed 4 June 2025 (describing parliamentary approval of the changes); Andrew Higgins, 'Russia's Highest Court Opens Way for Putin to Rule Until 2036' (*NY Times* New York, 16 March 2020) <<https://www.nytimes.com/2020/03/16/world/europe/russia-putin-president-for-life.html>> accessed 4 June 2025 (describing judicial approval of the changes); Andrew Higgins, 'The Theatrical Method in Putin's Vote Madness' (*NY Times* New York, 1 July 2020) <<https://www.nytimes.com/2020/07/01/world/europe/putin-referendum-vote-russia.html>> accessed 4 June 2025 (describing electoral endorsement of the changes).

¹²⁷ Chris Buckley, "'Uncle Xi" to Exalted Ruler: China's Leader Embodies His Authoritarian Era' (*NY Times* New York, 14 October 2022) <<https://www.nytimes.com/2022/10/14/world/asia/china-xi-jinping-communist-party.html>> accessed 4 June 2025 ('Mr Xi is already looking well beyond the next five

What enables Vladimir Putin and Xi Jinping to perpetuate themselves in power? Leadership of shadow systems that make other participants so dependent on them for advancement, so deeply in their debt, or so afraid of harm, that those other participants will do whatever best serves the leader. Those participants are convinced that *other* participants in the system will do whatever best serves the leader, so they had better do so too. When we see how legal systems are built on converging expectations, we can see how a leader can build their own master system in the shadows and deploy it to control the formal outcomes of the formal legal system. From legislators to judges to party bureaucrats, those who have a formal say in whether the leader stays leader will formally say what the leader wants them to say. Vladimir Putin and Xi Jinping will continue to concentrate power in their own hands because they understand what makes tyranny work. From atop a pyramid, they can harness patronage and fear to ensure that everyone positioned to vote on their leadership will vote the right way.

These late-stage stories exemplify the role of singular leadership in a capture process that can start small and grow over time even inside real democracies, which Russia barely was, and China never was. Singular executive leadership is the pivotal structural opening for this insidious transformation. The office of chief executive gives one person powers to hire and fire and spend and command. Those formidable powers can create focal status and secure personal loyalty. Ultimacy lets the one true leader shift the spotlight and become the focus of future expectations. And inside real democracies, having one chief executive has a range of other, complementary subversive effects on elections and political parties that show up sooner and set the stage for capture.

Having one chief executive dangerously raises the stakes of elections. Electoral contests to be president or prime minister visibly pave the way for a transiently popular person to parlay their transient popularity into apex stature and power. That stature and power then open up a well-worn, well-understood path to turning temporary power permanent. In winning election and then in initiating capture, a candidate may be aided by group psychological aspects of their popularity, in particular the dynamic that Max Weber¹²⁸ called *charismatic authority*.¹²⁹ The sorts of personalities drawn to compete in such contests, the loyal followings they often

years, trying to build a lasting edifice of power and policies’); Michael Schuman, ‘China’s “Very Dangerous Trajectory”’ (*The Atlantic* Washington DC, 21 June 2022) <<https://www.theatlantic.com/international/archive/2022/06/china-xi-jinping-power-zero-covid/661228/>> accessed 4 June 2025 (‘Loyalty to Xi has also become a primary factor in getting top-notch jobs in government agencies and other posts. [...] That has completely changed how decisions are made at the upper echelons of China’s government’).

¹²⁸ Weber (n 88).

¹²⁹ *ibid* 46–62. For a range of other ways that raised electoral stakes harm the political process, see David Orentlicher, *Two Presidents Are Better Than One* (NYU Press 2013) 139–40.

attract, and the frequency with which those circumstances have led to tyranny in the past can fuel suspicions and fears on all sides that undermine confidence in the democratic process and scuttle expectations of a democratic future.

Having one chief executive also directly and deeply affects why and how political parties exist and function. Where the top of the electoral ticket is a contest for chief executive, political parties readily become preoccupied with winning that contest and scoring the rewards that flow from its outcome to those on the winner's team. As *someone* has to be chief executive, parties do not necessarily need broad and diverse support to get their candidate over the finish line first. Then they have their foot in the door to an awesome array of powers and privileges. The spoils of executive power – the jobs, the contracts, the regulatory accommodations for allies – can become what really hold parties together, rather than actually shared beliefs in and commitments to policy ideas for serving the common good. This debasing of political parties' *raison d'être* predisposes and prepares their members to participate in constitutional capture, so that the rewards of incumbency can be theirs in perpetuity. And in the meantime, their fixation on winning the executive can give them a reason when out of power to want the incumbent government to fail at being a good government. That can cause them to use the checks and balances of constitutional democracy in obstructive and destructive ways, so that what is best for the people cannot happen on someone else's watch. Having one chief executive in a democracy is a source of gridlock, which in turn can be cited in support of steps that weaken constitutional checks and balances and begin the process of capture. And when capture has happened, the truth of the system ceases to be democracy and becomes something else, something even dispassionate observers may call a tyranny, a despotism, or more often now in the clinical prose of the academy, an *authoritarian* regime.

The existing literature on so-called authoritarian regimes is puzzlingly unclear about why that description is apt¹³⁰ – what distinctive relation to *authority* do authoritarian regimes possess? When we speak of authority, we sometimes mean to invoke an idea about the *source* of law and government. On other occasions, and more often now, we use the word merely as a *synonym* for law and government. When a judge asks counsel do you have any authority for that proposition? she

130 'A peculiarity of the study of authoritarianism is that it does not start with a definition of its own main subject. The term first received extensive conceptual attention, as a category in between totalitarianism and democracy, in Linz's 1975 classic *Totalitarian and authoritarian regimes*. Linz set the tone for many subsequent studies that characterize authoritarianism first as the shortfall of democracy, and second as a container concept that is given content only in its subcategories. Great analytical work has been done on some of these subcategories, but they do not help much in defining authoritarianism as such.' Marlies Glasius, 'What authoritarianism is ... and is not: a practice perspective' (2018) 94 Int'l Affairs 515, 519.

means do you have any case law? When we speak of the local authority we mean the local government. Synonymous usage will likely always be with us, but so used, the word does not distinguish one kind of government from another – all real governments are authorities. On the other hand, authority as a *source* of law and government was the idea that particular persons had *rights to lead* and everyone else had duties to follow them. The old claims were top-down: authoritative leaders were delegates of divine rights to be obeyed.¹³¹ Since the Enlightenment, most of humanity has moved emphatically to bottom-up visions of how law and government come to be. We have moral reason to choose and follow leaders because law and government let us live together in large groups. Our duties to follow are owed not to leaders, but to one another as people living in community.¹³² This difference offers a clue to what lies behind the intuition to call certain kinds of leadership *authoritarian*. That leadership shares with the monarchies of old an aspiration to hold more power for longer than dependence on popular support would reliably allow. Unlike the old monarchies, however, most modern authoritarians cannot overtly assert a coherent theory of authority in support of their long-term leadership.

Authoritarians are not so called because they are distinctively sticklers for rule following. As Juan Linz¹³³ recounted, one was more likely to be reprimanded for minor infractions in democratic Switzerland than in Franco's Spain.¹³⁴ Authoritarians are so called not really because of their attitude to rules at all, but because of their attitude to *themselves*. They want to make government all about them, to claim like the monarchs of old a right to lead long term. But in our post-Enlightenment world, We the People think government is all about *us*. For would-be monarchs who feel the pressure of the Enlightenment's call to ground government in popular support, there is shadow law and constitutional capture. Moving real government into the shadows lets tyrants make government all about them, while pretending it is all about us.

The public relations of shadow systems call for maintaining the forms of their captured constitutions. Those forms may be shams¹³⁵ in two formally distinguishable but substantively indistinguishable ways. First, the formal text may fail to signal

¹³¹ See 3.2.

¹³² *ibid.*

¹³³ See (n 21).

¹³⁴ Robert A Goldwin, Art Kaufman and William A Schambra (eds), *Forging Unity Out of Diversity: The Approaches of Eight Nations* (AEI 1989) 255-56.

¹³⁵ cf David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 Cal L Rev 863; Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (OUP 2020); Jerg Gutmann, Katarzyna Metelska-Szaniawska, and Stefan Voigt, 'The Comparative Constitutional Compliance Database' (2022) 57 ILE Working Paper Series, University of Hamburg, Institute of Law and Economics (each considering conformity with guarantees of individual rights as a criterion of constitutional genuineness).

accurately who leads and how. In that case, the officeholders it describes are to varying degrees puppets, whose actions, if any, may be micromanaged from the shadows. Stalin's 1936 Constitution of the Soviet Union exemplifies this phenomenon. Second, and more commonly, the formal text may accurately describe who leads but not how and why. The official president will lead, but not really in virtue of the processes described in the formal text, because those processes have been captured by the shadow system. The president will be president because he leads the shadow system, and all actors involved in his formal selection know from that system whom they must choose. When a shadow system is in charge, we often see that formal voting for leadership is improbably lopsided in favor of the predetermined leader.¹³⁶

Formal constitutions that have been contrived or captured by shadow systems may accomplish more than public relations for those systems – a substantial body of scholarship explores further ways in which such documents and the institutions they describe help shadow systems *govern*.¹³⁷ An uninitiated lay person who came across a book on authoritarian constitutions might expect that the book would be devoted to distinguishing between authoritarian and democratic constitutions by pointing out what authoritarian constitutions distinctively *say*. But in fact what the reader will find is explanation and argument about why undemocratic systems sometimes *say* and seem to do democratic things. The scholars who write about constitutions in authoritarian regimes are deriving their reasons for calling those regimes authoritarian mostly not from the distinctive content of those regimes' purported constitutions, but from other real-world evidence. Their reasons for calling regimes authoritarian come mostly not from the kind of text-bound research that legal scholarship normally involves,¹³⁸ but from what we learn through the methods of investigative journalism, whether by listening to the journalists or by joining them.

136 See (n 126) (reporting that Russian legislators voted for the constitutional changes that authorize Putin's long-term continuation in power by vote of 383-0 with 43 abstentions in one chamber and 160-1 with three abstentions in the other, and that three-quarters of voters in a national plebiscite endorsed the changes too). cf Vivian Yee, 'Tunisians Approve New Constitution That Undercuts Democracy' (*NY Times* New York, 26 July 2022) <<https://www.nytimes.com/2022/07/26/world/middleeast/tunisia-constitution-democracy.html>> accessed 4 June 2025 ('The Constitution was approved by 94.6 percent of voters, according to the results released by the electoral authority').

137 For leading examples of this literature, see Steven Levitsky and Lucan A Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (CUP 2010); Jennifer Gandhi, *Political Institutions under Dictatorship* (CUP 2010); Dixon and Landau (n 36); Shucheng Wang, *Law as an Instrument: Sources of Chinese Law for Authoritarian Legality* (CUP 2022); Adam Przeworski, 'Ruling against Rules' in *Constitutions in Authoritarian Regimes* (n 21) 21; Zachary Elkins, Tom Ginsburg, and James Melton, 'The Content of Authoritarian Constitutions' in *ibid* 141.

138 cf Gábor Attila Tóth, 'Constitutional Markers of Authoritarianism' (2019) 11 *Hague J Rule of Law* 37–61 and William Partlett, 'Crown-Presidentialism' (2022) 20 *Int'l J Const L* 204–236 (considering relationships between textual constructs and non-democratic governance). On the scope for real

We can distinguish unwritten power dynamics that serve to subvert democracy from unwritten power dynamics that serve to strengthen it. The architecture of real constitutional democracy includes constitutional conventions, established practices that didn't make it into the original drawings but which complement written constitutionalism by helping to make government *more* of, by, and for the people, not less. Consider, for example, the convention of responsible government, by which the British monarch acts on the advice of ministers chosen for the support they enjoy in an elected Parliament and who resign if they lose that support.¹³⁹ When we notice unwritten power dynamics in any system of government, the crucial question we need to ask is: do these dynamics help keep the promise of democracy? Do they help government serve the common good, the public interest? Or are they complicit in breaking the promise of democracy and in reorienting the focus of government from the public interest to the narrow self-interest and preoccupations of the leadership?¹⁴⁰

4 Why One Person at the Top?

The delegates to the Philadelphia Convention faced a dilemma. They wanted to create an American republic, not a monarchy. But their most respected scholarly source of guidance on the new science of politics, Montesquieu,¹⁴¹ was clear that republics

commitment to constitutionalism that is not quite democracy, see Mark Tushnet, 'Authoritarian Constitutionalism' (n 21).

139 See Albert Venn Dicey, *The Law of the Constitution* (first published 1885, 4th edn, Macmillan 1893) 376-77 (famously describing the convention of responsible government).

140 See Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (first published 1941, OUP 2017) on shadow governance in Nazi Germany. Fraenkel argued of that under the Nazis, '[t]he political sphere is a vacuum as far as law is concerned. Of course it contains a certain element of factual order and predictability but only in so far as there is a certain regularity and predictability in the behavior of officials. There is, however, no legal regulation of the official bodies. The political sphere in the Third Reich is governed neither by objective nor by subjective law, neither by legal guarantees nor jurisdictional qualifications. There are no legal rules governing the political sphere. It is regulated by arbitrary measures (*Massnahmen*), in which the dominant officials exercise their discretionary prerogatives. Hence the expression 'Prerogative State' (*Massnahmenstaat*).' *ibid* 3. As Hart was subsequently to show us, 'a certain regularity and predictability in the behavior of officials' may be the product of converging expectations that constitute a legal system's core rule of recognition. Hart (n 54) 89-91, 116-17, 203, 255-56. Tyrannies are real governments; they govern through real law, even though their governing and that law do not serve all of the values we wrap up in the idea of 'a government of laws and not of men.' Massachusetts. Const pt 1, art 30. See generally Lon Fuller, *The Morality of Law* (Yale UP 1964).

141 See, e.g., on separation of powers: 'The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention

shared ultimate leadership, they did not let one person lead,¹⁴² and that republics could work only in small societies.¹⁴³ Montesquieu's reasons for thinking a large society could not be a republic were not merely logistical, not just concerns that today's communications technology could overcome. More deeply, Montesquieu thought that large societies were insufficiently cohesive to be held together without one person at the helm¹⁴⁴ and that disharmony would let a demagogue attract a mass following and use it to change the system and become a despot.¹⁴⁵ Two millennia before, Socrates¹⁴⁶ had noticed such a tendency in democracy more generally:

And is it not always the practice of the commons to select a special champion of their cause, whom they maintain and exalt to greatness?

Yes, it is their practice.

of mankind.' James Madison, *The Federalist No 47* (1788); 'The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing."' Alexander Hamilton, *The Federalist No 78* (1788).

142 Montesquieu (n 9) bk 2, ch 3, 14–15. In any republic, 'the sudden rise of a private citizen to exorbitant power produces monarchy, or something more than monarchy.' If that occurs in a republic, 'the abuse of this power is much greater, because the laws foresaw it not, and consequently made no provision against it.' (ibid 14.) What about wartime, or other occasions when snap decisions might need to be made? When there is 'immediate need of a magistrate invested with extraordinary power,' a republican constitution would ensure that the singular leader did not get settled in. 'In all magistracies, the greatness of the power must be compensated by the brevity of the duration. This most legislators have fixed to a year; a longer space would be dangerous, and a shorter would be contrary to the nature of government.' (ibid 14–15).

143 ibid bk 8, ch 16, 120.

144 In a small community, 'the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and, of course, are less protected.' ibid. Jacob Levy identifies three interrelated strands to Montesquieu's small republic argument: first, that increased size causes citizens' interests to diverge; second, that increased size obscures from citizens their shared, public interest; and third, that large size involves a large military whose leadership would eclipse and ultimately displace a truly republican government. See Jacob T Levy, 'Beyond Publius: Montesquieu, Liberal Republicanism and the Small Republic Thesis' (2006) 27 *Hist Pol Thought* 50, 50–56.

145 In a large community, 'the public good is sacrificed to a thousand private views.' Montesquieu (n 9) bk 8, ch 16, 120. 'In an extensive republic there are men of large fortunes, and consequently of less moderation; there are trusts too considerable to be placed in any single subject; he has interests of his own; he soon begins to think that he may be happy and glorious, by oppressing his fellow-citizens; and that he may raise himself to grandeur on the ruins of his country.' ibid. How would someone of large fortune use their privileged position to subvert the existing system and become a dictator? In a republic, by abusing the powers of republican office and exploiting a charismatic salience that produces a mass following, whether of civilians or soldiers or both.

146 Plato, *The Republic* (John Llewellyn Davies and David James Vaughan tr, 3rd edn, Macmillan 1866) 299 (bk 8, 565).

Then, obviously, whenever a despot grows up, his origin may be traced wholly to this championship, which is the stem from which he shoots.¹⁴⁷

Montesquieu's solution for nurturing political liberty in large societies was constitutional monarchy – have one chief executive but hem them in with checks and balances.¹⁴⁸

The American founders rejected Montesquieu's claim that republican government could survive only in a small society, Madison observing that '[a] citizen of Delaware was not more free than a citizen of Virginia.'¹⁴⁹ Thomas Paine later argued of Montesquieu's small republic thesis that 'Montesquieu, who was strongly inclined to republican government, sheltered himself under this absurd dogma; for he had always the Bastille [sic] before his eyes when he was speaking of Republics, and therefore pretended not to write for France.'¹⁵⁰ But there was a more receptive audience among the American founders for Montesquieu's claim that republican government was intrinsically shared governance and that this should inform the structure of a republican executive as surely as a republican legislature or court.

When James Wilson proposed to the convention that 'that the Executive consist of a single person,'¹⁵¹ Edmund Randolph countered that such a structure would be 'the foetus of monarchy' and that he 'could not see why the great requisites for the Executive department, vigor, despatch & responsibility could not be found in three men, as well as in one man.'¹⁵² George Mason wrote in speech notes that the shared governance of true republicanism 'preserves the freedom and independence of the Swiss Cantons in the midst of the most powerful nations. ... If strong and extensive powers are vested in the Executive, and that executive consists only of one person, the government will of course degenerate (for I will call it degeneracy) into a monarchy'¹⁵³ Benjamin Franklin, whose urging had elicited the debate,¹⁵⁴ concurred, observing when the debate was over that '[t]he first man, put at the helm will be a

147 *ibid.*

148 Montesquieu (n 9) bk 11, chs 4–6, 150–62.

149 1 *Records* (n 103) 357–58 (Madison's notes, June 21, 1787).

150 3 Thomas Paine, *The Writings of Thomas Paine* (Moncure Daniel Conway ed, GP Putnam's Son 1895) 350, reprinting Paine's 1797 pamphlet *The Eighteenth Fructidor*. Montesquieu lent support to this suspicion by tempering his account of England's separation of powers: 'Neither do I pretend by this to undervalue other governments, nor to say that this extreme political liberty ought to give uneasiness to those who have only a moderate share of it.' Montesquieu (n 9) bk 11, ch 6, 162.

151 1 *Records* (n 103) 65 (Madison's notes, June 1, 1787).

152 *ibid.* 66.

153 *ibid.* 112–14.

154 *ibid.* 65.

good one. No body knows what sort may come afterwards. The Executive will be always increasing here, as elsewhere, till it ends in a monarchy.¹⁵⁵

How could Franklin know that the first person at the helm would be a good one? Because everyone at Philadelphia knew that if they went with one chief executive, it would be George Washington.¹⁵⁶ Washington had won the war, Washington was the elected president of their convention, and Washington was willing to serve, but only in command. ‘Every delegate who knew him well must have understood that Washington would neither consent to serve as one member of an executive triumvirate nor be suited for such a post.’¹⁵⁷

The Philadelphia Convention, and other constitution-drafting conventions over the two centuries since, deliberated in the millennia-long shadow of the *warrior king*. Weberian charismatic authority¹⁵⁸ can be an exhilarating psychological dynamic between the person who is leader and their followers. It can help them win battles. It can help grow them from small groups into large nations through conquest. It can enable their triumph in the struggle to survive.¹⁵⁹

155 *ibid* 103 (Madison’s notes, June 4, 1787).

156 ‘Since everyone presumed that Washington would become the new government’s first executive, no one could conceive of the position without thinking about him in it.’ Edward J Larson, *The Return of George Washington* (Mariner Books 2015) 141. ‘All testimony concurs in assuring us that an office of this magnitude would not have been created unless Washington had been intended to fill it.’ W B Lawrence, ‘The Monarchical Principle in Our Constitution’ (1880) 131 *Nth American Rev* 385, 390. ‘The Duke de Rochefoucauld, in a letter to Dr Franklin in 1789, expresses his surprise, in view of the attempts made in France to restrain the powers of the monarch, that we should have given such unlimited scope to an elective Chief Magistrate, especially to one whose reelection for life was possible.’ *ibid* 392.

157 Larson (n 156) 144.

158 Weber (n 88) 46–62. Weber opined that leadership likely emerged among early humans through their recognizing and appreciating some persons’ ‘exceptional powers or qualities. These are such as are not accessible to the ordinary person, but are regarded as of divine origin or as exemplary, and on the basis of them the individual concerned is treated as a leader.’ *ibid* 48.

159 cf Charles Darwin, *The Origin of Species* (John Murray 1859) 153 (describing natural selection as preserving ‘variations in some way advantageous, which consequently endure’ and observing that ‘any form represented by few individuals will, during fluctuations in the seasons or in the number of its enemies, run a good chance of utter extinction’); Joseph Henrich, Maciej Chudek & Robert Boyd ‘The Big Man Mechanism: how prestige fosters cooperation and promotes prosocial leaders’ (2015) *Phil Trans R Soc B* 370; Service (n 82) 15–16 (‘modern ethnohistorical records argue powerfully for the presence around the world of varying developed *chiefdoms*, intermediate forms that seem clearly to have gradually grown out of egalitarian societies and to have preceded the founding of all of the best-known primitive states’); Earle (n 81) 14 (arguing that ‘the origin of states is to be understood in the emergence and development of *chiefdoms*’).

The shadow of the warrior king could be seen in the explicit case made at Philadelphia for one chief executive. Echoing Montesquieu,¹⁶⁰ Wilson argued that executive decision making distinctively required *speed*.¹⁶¹ That was true enough on a battlefield. Elbridge Gerry showed how much the battlefield analogy was on their minds when he observed that a shared executive ‘would be a general with three heads.’¹⁶² More particularly, the comment showed how much *Washington* was on their minds. His ability to make snap decisions as a commander in the field had doubtless been crucial to military success. But *in the field* was where such speed was needed. How did it follow that a separate national chief executive would need to decide things comparably fast? Did not the success of the American colonies in the war without any such separate national chief executive show that what was needed on the battlefield was not necessarily needed in the rest of life? Cannot and should not governing decision making be more deliberative in national capitals than on battlefields? At Philadelphia, the American founders let the battlefield tail wag the governance dog.

The key explicit arguments made at Philadelphia and since for one chief executive – energy, responsibility, and dispatch – can now be evaluated by examining how well real-life power sharing models have performed over the past two centuries. But before turning to that evaluation, we can notice that the explicit reasons offered for having one chief executive were not the only reasons in play. The shadow of the warrior king colored the conversation in ways never made explicit. It subjected the decision to a degree of path dependence, it lured to the familiar, it nurtured ambition and expectation.

Constitution-drafting conventions are mostly dominated by present and likely future leaders. Why *wouldn't* ambition play a part in choices to create exalted roles? Our vaunted capacities for reasoning and communication have not carried human

160 Montesquieu (n 9) bk 11, ch 6, 156: ‘The executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many.’

161 1 *Records* (n 103) 65 (Madison’s notes, June 1, 1787) (‘giving most energy dispatch and responsibility to the office’).

162 *ibid* 97 (Madison’s notes, June 4, 1787). cf Resolution 4 of the New Jersey Plan, proposed to the convention by advocates of more power dispersion: ‘4 Resd that the U. States in Congs be authorized to elect federal Executive to consist of _ persons, [...] to be ineligible a second time, and removeable by Congs. on application by a majority of the Executives of the several States; that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.’ *ibid* 244 (Madison’s notes, June 15, 1787).

power dynamics very far from those of our primate cousins.¹⁶³ When in the wake of the Terror, French reformers briefly succeeded in bringing truly shared governance to the French executive, Thomas Paine marveled at their accomplishment: ‘Those who formed the Constitution cannot be accused of having contrived for themselves. The Constitution in this respect is as impartially constructed as if those who framed it were to die as soon as they had finished their work.’¹⁶⁴ At Philadelphia, all could see that Washington’s support might be crucial to the new Constitution’s success. Without Washington at the helm, would enough key people really recognize the Constitution as law? They needed him to champion the constitutional change fervently and actively. They needed him not to be disgruntled. When the motion for one chief executive came to a vote, Wilson prevailed over Franklin and secured the Pennsylvania delegation’s support. But Washington’s own Virginia delegation was split. Madison later told Thomas Jefferson that the process of deciding on the executive ‘was peculiarly embarrassing.’¹⁶⁵ Virginia was able to join the majority of state delegations in favor because the vote was taken when Mason was out of the room and Washington voted for himself.¹⁶⁶ The American Presidency was created and helped carry a false ideal of singular leadership into the modern world. Hanging over the decision was the very shadow of the warrior king that the Enlightenment had sought to escape.

In choosing to have one chief executive, the American founders were reassured by Montesquieu’s idealized account of England’s constitutional monarchy.¹⁶⁷ More than two centuries of democratic experience in the modern world have since shown that concentrating executive power in one person gives that person the tools to create a shadow system and capture the institutions that are supposed to check and balance the executive. Concentrating executive power in one person is a recipe for ultimately concentrating all power in one person. The checks and balances of classic separation of powers theory are not enough to liberate humanity from the potential abuses of monarchy. Those checks and balances are fatally vulnerable to shifts in shared expectations that reconverge on the one true leader. Making one person the

163 See Jane Goodall, *The Chimpanzees of Gombe: Patterns of Behavior* (Harv UP 1986): ch 12 (‘Aggression’), 313–56 (especially 318–19, ‘Coalitions and Snowballing’), and ch 15 (‘Dominance’), 409–42 (especially 418–24, ‘Coalitions,’ 424–29, ‘Motivation and Alpha Status,’ and 429–36, ‘Loss of Rank’). cf Tian Chen Zeng, Joey T Cheng & Joseph Henrich, ‘Dominance in humans’ (2022) *Phil Trans R Soc B* 377.

164 Paine (n 150) 349.

165 3 *Records* (n 103) 132 (Letter James Madison to Thomas Jefferson, Oct 24, 1787).

166 ‘On the question for a single Executive <it was agreed to> Massts. ay. Cont. ay. N.Y. no. Pena. ay. Del. no. Maryd. no. Virg. ay. (Mr R and Mr. Blair no–Docr. Mc. Cg. Mr. M. and Gen W. ay. Col. Mason being no, but not in house, Mr. Wythe ay but gone home). N. C. ay. S.C. ay. Georga. ay. [Ayes–7; noes–3.]’ 1 *Records* (n 103) 97 (Madison’s notes, June 4, 1787).

167 Montesquieu (n 9) bk 11, ch 6, 151–62.

chief executive can amount to an anointing, a *de facto* coronation. The key to liberating humanity from the abuses of monarchy is power sharing. Today's democracies have mostly just not taken power sharing far enough. The delegates at Philadelphia who foresaw this and advocated against making one person the chief executive have been vindicated by two centuries of comparative constitutional experience. As one delegate later wrote: 'His Powers are full great, and greater than I was disposed to make them. Nor, Entre Nous, do I believe they would have been so great had not many of the members cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue. So that the Man, who by his Patriotism and Virtue, Contributed largely to the Emancipation of his Country, may be the Innocent means of its being, when He is lay'd low, oppress'd.'¹⁶⁸

5 The Promise of Power Sharing

When we see that constitutional capture involves growing a new *system*, we can expect that the process once well underway will become self-sustaining and very hard to stop. When we contemplate reforms to forestall capture, the sooner in the process they would have their impact, the better. Reforms that try to harden a constitutional democracy's countervailing institutions against capture¹⁶⁹ may slow down a capture process, perhaps creating breathing space for a populist would-be tyrant to become unpopular while the people can still remove them through ordinary politics. But such hurdles are likely to be surmountable or circumventable by sufficiently determined and well-situated capturers. As leading contributors to the literature and commentators on it have observed, bolstering checks and balances is not a silver bullet.¹⁷⁰

¹⁶⁸ 3 *Records* (n 103) 302 (Letter Pierce Butler to Weedon Butler, May 5, 1788).

¹⁶⁹ 'Some institutional designs are clearly more prone to capture than others. [...] [T]hree principles can help to make democratic constitutionalism more robust against the threat of erosion. Those principles are: (1) tiering, such that the democratic minimum core of the constitution is made especially resilient against anti-democratic forms of change, while other parts of the constitution are left to more flexible amendment rules; (2) sequencing, where change to core norms takes longer to carry out, creating speed bumps that can slow authoritarian projects; and (3) splitting, where authority over appointments to courts and other sensitive functions is fragmented.' Dixon and Landau (n 36) 178. See also Michael D Gilbert, Mauricio Guim and Michael Weisbuch, 'Constitutional locks' (2021) 19 *Intl J Const L* 865 (discussing obligatory waiting periods for constitutional amendment).

¹⁷⁰ 'There are as of yet no good solutions to the problem of liberal democratic degeneration. New wave scholars themselves recognize as much, conceding that the current generation of constitutional design has not innovated the tools to combat it, assuming it is even possible to rely on formal rules to discipline the exercise of political authority in regimes with weak traditions of the rule of law.' Albert (n 13) 62. 'Crafting a set of tiered constitutional protections that would fully protect the constitutional

Capture is more reliably stopped before it gets started. Some institutional designs turn out to be more prone to producing *capturers*. If we want to protect our constitutional democracies from capture, we cannot focus our efforts only on ways to make countervailing institutions less vulnerable to predation. We also need to make the executive less likely to become a predator.

Keeping out predators was of course what prompted Europe's prewar democracies to draw on the array of tactics that Karl Loewenstein called *militant democracy*.¹⁷¹ Those tactics included creating 'political police' to investigate subversive activity, suppressing subversive speech, and banning subversive political parties.¹⁷² Postwar Germany also adopted many of these tactics,¹⁷³ recognizing, as George Washington memorably observed in his farewell address,¹⁷⁴ that parties can 'become potent engines' for subverting democracy and establishing 'the absolute power of an individual.'¹⁷⁵ But the familiar measures of militant democracy are equal opportunity weapons that, in a tussle for control, can be turned back on those who initiate them.¹⁷⁶ And does not a vibrant democracy depend on the space for discourse and activism that freedom of association in parties helps provide? How can we enable parties to be vehicles for *ideas*, for policies that might promote the common good, without letting them become vehicles for *persons* to become tyrants?

We can protect democracy better by focusing on *structure* than on ideology, transposing our structural requirements for government across to groups who seek election to government. Constitutional law can let parties fully engage in the contest of ideas but impose rules for participating in elections that help stop parties becoming 'potent engines' for tyranny.¹⁷⁷ During the civil rights struggle in the American South,

structure is likely to prove impossible. No single provision is likely to prove decisive, since abusive constitutionalists have many ways to achieve the same goal.' Landau (n 41) 230.

171 Loewenstein (n 11) and Karl Loewenstein, 'Militant Democracy and Fundamental Rights Part 2' (1937) 31 Am Pol Sci Rev 638.

172 Loewenstein (n 171) 645-56.

173 See, e.g., Germany Const arts 9 § 2, 18, 21 § 2; Germany Criminal Code §§86, 86a 130; Germany Federal Constitutional Protection Act §3. For an example of German militant democracy in action, see Katrin Bennhold, 'Germany Places Far-Right AfD Party Under Surveillance for Extremism' (NY Times New York, 3 March 2021) <<https://www.nytimes.com/2021/03/03/world/europe/germany-afd-surveillance-extremism.html>> accessed 9 June 2025.

174 President George Washington's Farewell Address, first published in Claypoole's American Daily Advertiser on September 19, 1796.

175 *ibid.*

176 See, e.g., Dixon and Landau (n 36) 195 (citing examples where the power to ban political parties was used to undermine democracy rather than to promote it). cf *The Lives of Others* (*Das Leben der Anderen*) (Motion Picture 2006) (exemplifying the abuse of surveillance powers).

177 cf Ginsburg and Huq (n 19) 200: '[A] constitution might require a certain level of intraparty democracy before allowing a political party to compete in national polls. But alternatively, and not

American courts enforcing the United States Constitution looked behind legal forms and decided questions of fact about political parties' actual internal dynamics. American courts identified situations where shadow organizations were controlling parties' candidate selection.¹⁷⁸ American courts stopped those shadow organizations from discriminating by race.¹⁷⁹ A constitutional scheme that requires shared leadership in government could congruently require that parties competing for election to government must themselves share leadership, not just superficially but in substance. As a corollary of excluding singular leadership from our governing institutions, we could exclude it from the parties that compete to fill our governing institutions. Whether a party is being puppeteered by one true leader in the shadows can be judicially determined as a question of fact, no matter how many layers of pretense are placed between that leader and their candidates. Candidates found on the balance of probabilities to be followers of one true leader can be disqualified accordingly. A power sharing game is only for those who share power. That rule would just gatekeep our democratic government; it would not stop anyone from associating or speaking freely. They could even advocate the idea of having one true leader; they just could not actually have one and still compete for office, just as a group that believes in menacing voters at polling places cannot do that. And that rule – no candidate who is in fact beholden to one true leader – is a rule for which would-be tyrants have no use in a tussle for control while rules still matter, a rule that cannot be turned against the friends of democracy.

Discarding the one true leader model of executive leadership would surgically remove the feature of our democratic governments that most puts them at risk of capture. But does executive power sharing protect against capture as well in practice as it should in theory, and does it meet the requirements for the executive that proponents of singular leadership routinely articulate – energy, responsibility, dispatch?¹⁸⁰

necessarily consistently, a constitution might impose a candidate-selection mechanism that prevented charismatic populists from seizing a nomination and steering a nationally important party in a direction that imperils democracy, say by guaranteeing a controlling role to party insiders. [...] [W]e remain unconvinced that there is any general "best practice" when it comes to the constitutional treatment of intraparty democracy or candidate-selection measures.' On comparative experience and general principles, see Tom Ginsburg, Aziz Z Huq and David Landau, 'Democracy's Other Boundary Problem: The Law of Disqualification' (2023) 111 Cal L Rev 1633.

178 *Terry v Adams* (1953) 345 US 461. For historical context, see Pauline Yelderman, *The Jaybird Democratic Association of Fort Bend County* (Texian Press 1979).

179 'Here Jaybird nominees are not put on any ballot as Jaybird nominees; they enter their own names as candidates in the Democratic primary. This distinction is not one of substance but of form [...].' *Terry v Adams* (1953) 345 US 461, 465–66 n 1.

180 1 *Records* (n 103) 65 (Madison's notes, June 1, 1787) (James Wilson).

5.1 Plural Executives

Billionaire businessman Christoph Blocher's calls for Switzerland to cut back on immigration and keep its distance in international relations helped his Swiss People's Party win more votes than any other party in Swiss national elections.¹⁸¹ That success gave them many seats in the Swiss Federal Assembly and saw him elected by the Federal Assembly to Switzerland's national executive, the Federal Council.¹⁸² He and his party gained greater influence over Swiss governing *policy*. But his appointment gave him no way to stand out and become a focal point for following, no way to start changing *the system*.

Blocher was only one of seven. The Swiss Constitution requires the seven members of the Federal Council to act collegially in administering the nation together. Though each heads a government department, all major decisions are made collectively by the seven under conditions that keep them individually out of the limelight.¹⁸³

Why couldn't Blocher's party get majority control on the Federal Council, and then bend it to his will? Swiss democracy insists on proportional representation in the first chamber of the Swiss national legislature.¹⁸⁴ Every party that attracts significant support gets seats, even if they do not have the most support in any particular geographic area. That makes for many parties in the legislature and no party winning a majority of the seats.¹⁸⁵ As no party can gain control of the legislature, no party can gain control of the executive.¹⁸⁶ To be elected to the Federal

181 See Elizabeth Olson, 'A Billionaire Leads the Campaign to Keep Switzerland Apart' (*NY Times* New York, 24 February 2002) <<https://www.nytimes.com/2002/02/24/world/a-billionaire-leads-the-campaign-to-keep-switzerland-apart.html>> accessed 9 June 2025; 'Swiss Election Upsets Traditional Stability' Deutsche Welle, Oct 10, 2003; Mathieu von Rohr, 'A Limited Victory for Blocher' (*Spiegel* Hamburg, 22 October 2007) <<https://www.spiegel.de/international/europe/swiss-elections-a-limited-victory-for-blocher-a-512733.html>> accessed 9 June 2025 (reporting Blocher's successive electoral successes).

182 Switzerland Const arts 174–187.

183 Switzerland Const art 177. See Hanspeter Kriesi and Alexander H Trechsel, *The Politics of Switzerland: Continuity and Change in a Consensus Democracy* (CUP 2008) 76 (describing the operations of the Federal Council).

184 Switzerland Const art 149(2).

185 See Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Barbara and Robert North tr, CUP 1954); Douglas W Rae, *The Political Consequences of Electoral Laws* (CUP 1967); William H Riker, 'The Two-Party System and Duverger's Law: An Essay on the History of Political Science' (1982) 76 *Am Pol Sci Rev* 753–766 (each discussing the relationship between *how* we vote and *who* gets our vote). For a recent American proposal to introduce proportional representation, see Lee Drutman, *Breaking the Two-Party Doom Loop: The Case for Multiparty Democracy in America* (OUP 2020).

186 Switzerland Const arts 157, 175. The need for broad support promotes choosing moderate candidates: Kriesi and Trechsel (n 183) 80.

Council, candidates must enjoy multipartisan support in the Federal Assembly. Given the need for consensus candidates, the major parties agreed, many decades ago, on a ‘magic formula’ under which representatives from each major party are elected to the national executive.¹⁸⁷

Sharing power in the national executive frees political parties to focus on having good policy *ideas* for serving the Swiss people. The legislature, not the executive, is the dynamic center of major decision making.¹⁸⁸ Sharing power in the national executive frees the national legislature from gridlock because the system gives no legislator a reason to want Swiss government to fail; legislators are genuinely focused on getting to good policy outcomes, not on competing to win the executive. James Bryce, who memorably coined the ‘laboratories of experiment’ metaphor for policy initiatives in the American states,¹⁸⁹ observed that ‘strife for office and the sweets of office felt as always present in the background of debates in the assemblies of England, France, and other parliamentary countries, finds little place in the Swiss legislature.’¹⁹⁰

After one awkward term on the Federal Council,¹⁹¹ Christoph Blocher was not reelected. He declared himself ‘torn between relief, disappointment and outrage’¹⁹²

187 ‘The election of two Social Democrats to the Federal Council in 1959 established the so-called ‘Magic Formula’ 2-2-2-1, which meant two cabinet seats each for the Radicals, Christian Democrats and Social Democrats, and a single seat for the People’s Party. This arrangement remained stable for more than 40 years. [...] The growing power of the People’s Party in the past two legislatures has led to a realignment of the 2-2-2-1 system, with Christian Democrats having to cede one of their seats to the People’s Party after the 2003 elections.’ ‘One for seven, seven for one’ (SWI 26 May 2007) <<https://www.swissinfo.ch/eng/swiss-politics/one-for-seven-seven-for-one/371864>> accessed 9 June 2025. On the path to the magic formula, see Kriesi and Trechsel (n 183) 76–79.

188 ‘While Swiss institutions thus limit the power of any individual cabinet member and counteract monarchical or dictatorial tendencies, the separation of survival [...] liberates the assembly majority from the task of keeping the cabinet in office, so that different legislative coalitions can be formed on different issues.’ Steffen Ganghof, *Beyond Presidentialism and Parliamentarism: Democratic Design and the Separation of Powers* (OUP 2021) 24.

189 1 James Bryce, *The American Commonwealth* (Macmillan 1888) 468, echoed in *New State Ice Co v Liebmann* [1932] 285 US 262, 311 (Brandeis, J, dissenting).

190 1 James Bryce, *Modern Democracies* (Macmillan 1921) 347.

191 See, e.g., ‘Rifts appear in power-sharing government’ SWI, Oct 4, 2004 (describing conflict between Blocher and his colleagues on the Council) <<https://www.swissinfo.ch/eng/swiss-politics/rifts-appear-in-power-sharing-government/4127732>> accessed 21 July 2025.

192 Derek Scally, ‘Ousted politician leads party into Swiss opposition’ (*Irish Times* Berlin, 14 December 2007) <<https://www.irishtimes.com/news/ousted-politician-leads-party-into-swiss-opposition-1.991383>> accessed 10 June 2025. See also Nick Cumming-Bruce, ‘Swiss parties eject far-right leader Blocher from cabinet’ (*NY Times* New York, 12 December 2007) <<https://www.nytimes.com/2007/12/12/news/12iht-swiss.4.8716163.html>> accessed 10 June 2025 (reporting the Swiss legislature’s decision not to re-elect Blocher).

by the Federal Assembly's decision and took his party into 'opposition.' But that move proved ineffectual.¹⁹³ The system offered him no realistic route to replacing the government. Eventually his party agreed to nominate two people to fill a later vacancy on the Federal Council. One of them was Christoph Blocher. The Federal Assembly chose the other person. The system had seen him off.¹⁹⁴

Switzerland's plural executive protects Swiss constitutional democracy from capture because Switzerland's plural executive cannot itself be captured. Almost two centuries of Swiss experience prove its resilience.¹⁹⁵ Proportional representation in the legislature has proved adequate to prevent any one person pulling the executive's strings. Were we designing a plural executive from scratch, we could augment this safeguard by conditioning parties' participation in elections for government on having internal power dynamics that mirror those required of the government. We can ensure the no-one-true-leader principle permeates a system of government if we insist that this principle permeate the parties that compete for election to government.

But what of energy, responsibility, and dispatch?¹⁹⁶ Christoph Blocher was held responsible for his performance on the Swiss Federal Council when the Federal Assembly decided not to reelect him. Swiss experience shows that members of group executives can be held just as individually responsible for their contributions to decisions as are legislators and judges. And when compared with actual governance in European nations that have one person as chief executive, Swiss governance has not been especially inefficient.¹⁹⁷ Even faced with violent separatist agitation in one

193 See Clive H Church and Adrian Vatter, 'Opposition in Consensual Switzerland: A Short but Significant Experiment' (2009) 44 Govt & Opposition 412-37 (describing how the Swiss system thwarted Blocher's attempts to dominate it).

194 *ibid* 412, 423-26.

195 On the shortcomings of Uruguay's attempts to emulate aspects of the Swiss model, see David Altman, 'Collegiate Executives and Direct Democracy in Switzerland and Uruguay: Similar Institutions, Opposite Political Goals, Distinct Results' (2008) 14 Swiss Pol Sci Rev 483-520. '[T]he "back and forth" of collegial or semi-collegial governments in Uruguay has more to do with short-term political configurations than truly consociational arrangements, as seen in Switzerland.' *ibid* 509. See also José Batlle Y Ordóñez, 'A Collegial Executive for Uruguay' in Arend Lijphart (ed), *Parliamentary versus Presidential Government* (first published 1911, John M Carey tr, OUP 1992) 175 (making a pioneering argument for plural executive governance in the New World); Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale UP 1977) 212-16 (discussing versions of plural executive governance).

196 1 *Records* (n 103) 65 (Madison's notes, June 1, 1787) (James Wilson).

197 See, e.g., Kriesi and Trechsel (n 183) 81-83. '[I]n 1999, the situation in Switzerland was still better than in the majority of the fifteen EU member states: with regard to trust in government, Switzerland comes fifth in this comparison.' *ibid* 83. See also Thomas A Baylis, *Governing by Committee: Collegial Leadership in Advanced Societies* (State Univ of New York Pr 1989) (discussing both the Swiss plural executive and other operative versions of group leadership); Rolf Kieser and Kurt R Spillman (eds),

region, the Federal Council proved up to the task of managing the situation through democratic processes.¹⁹⁸

Government by committee provides a more *reliable* level of energy and speed. Singular leadership is far more vulnerable to vagaries of character and health that may compromise an executive's capacity for timely decision making. Committee members can help hold one another accountable in ways unavailable to presidents' and prime ministers' cabinets and staff. Committee procedures can be calibrated to needs for speed, with clear protocols for proceeding when particular members cannot participate.

Committee deliberation may lead to *better* decisions.¹⁹⁹ In Thomas Paine's words, a singular leader 'will have no person to consult with of a standing equal with himself, and consequently be deprived of the advantages arising from equal discussion. Those whom he admits in consultation will be ministers of his own appointment, who, if they displease by their advice, must expect to be dismissed.'²⁰⁰ True group deliberation pulls itself toward the common good, partly because it impels committee members to express themselves in those terms and partly because when we leave behind the ego trip of singular leadership, we find a different kind and caliber of leader.²⁰¹ In Socrates' words, '[t]hat city in which the destined rulers

The New Switzerland: Problems and Policies (1996) (discussing the Swiss system); Jan-Erik Lane (ed), *The Swiss Labyrinth: Institutions, Outcomes, and Redesign* (Routledge 2001) (discussing the Swiss system); Wolf Linder and Sean Mueller, *Swiss Democracy: Possible Solutions to Conflict in Multi-cultural Societies* (4th edn, Macmillan 2021), particularly 167–203. 'Institutionally, consensus democracy has proven its worth in stormy weather. Surveys show that consensus democracy gets rising popularity and is even more appreciated by ordinary citizens than by the Swiss elites [...] [I]n the near future, one should not expect the Swiss to be willing to abandon consensus democracy in favour of a majoritarian system with less direct democracy.' *ibid* 202–03.

198 See Michel Bassand, 'The Jura Problem' (1975) 12 J Peace Res 139–50 (discussing the separatist agitation); Carole Villiger, 'Political Violence: Switzerland, A Special Case?' (2013) 25 Terrorism & Pol Violence 672–687 (discussing Swiss success in resolving the Jura conflict); 'Separatist Swiss canton celebrates 30 years' (*SWI*, 24 September 2008) <<https://www.swissinfo.ch/eng/swiss-politics/separatist-swiss-canton-celebrates-30-years/6939862>> accessed 10 June 2025 (noting the durability of the conflict's resolution); 'Switzerland's German town votes to join French-speaking side' (*AFP* 28 March 2021) (reporting the ongoing success of Swiss democracy in resolving community conflict).

199 On the dynamics of committee decision making, see Kenneth C Wheare, *Government by Committee: An Essay on the British Constitution* (Clarendon Press 1955).

200 Paine (n 150) 347–48.

201 See, e.g., 'Politicians unite in calling to elect two more women to Federal Council' (*SWI* 30 September 2018) <https://www.swissinfo.ch/eng/politics/sunday-press_politicians-unite-in-calling-to-elect-two-more-women-to-federal-council/44437268> accessed 10 June 2025 (discussing the Swiss plural executive's inclusiveness). Switzerland Const art 174 cl 4: 'In electing the Federal Council, care must be taken to ensure that the various geographical and language regions of the country are

are least eager to rule, will inevitably be governed in the best and least factious manner.²⁰²

5.2 Divided Executives

Plural executives are not the only way to disrupt efforts to capture executive government. An existing literature draws on American state government experience to scrutinize the merits of *dividing* the executive.²⁰³ Dividing the executive differs from pluralizing it in that ultimate decision making may still be assigned to individuals rather than committees. For example, within a divided executive, decisions to prosecute may ultimately rest with an attorney general who is truly independent of the chief executive.²⁰⁴ The chief executive is not chief for all executive purposes – other individuals are chiefs for particular purposes. In contrast, a singular executive model makes other senior executive decision makers, such as the attorney general, subject to removal and therefore control by the chief executive.²⁰⁵ If the chief executive is intent on constitutional capture, having a legal right to control the whole executive fills his arsenal with weapons, such as the power to prosecute, that may be deployed to overcome resistance to capture.

American state government experience shows that divided executives can meet the criteria of energy, responsibility, and dispatch, though like singular executives, they vary in how well they do.²⁰⁶ When it comes to preventing capture, however, we have reason to rank divided executives as second-best behind plural executives. Divided executives, like singular executives, set up individuals as focal points for following, with personal apex control over their own hierarchies of

appropriately represented.’ Kriesi and Trechsel (n 183) 79 (discussing the range of ways in which Switzerland’s plural executive makes national leadership more inclusive).

202 Plato (n 146) 242.

203 See, e.g., Christopher R Berry and Jacob E Gersen, ‘The Unbundled Executive’ (2008) 75 U Chi L Rev 1385 (arguing the merits of a divided executive); Vikram David Amar, ‘Lessons from California’s Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General’ (2009) 59 Emory LJ 469 (discussing state experience under divided executives).

204 See, e.g., William P Marshall, ‘Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive’ (2006) 115 Yale LJ 2446; Laurence Claus, ‘The Divided Executive’ (2018) 13 Duke J Const L & Public Pol’y 25 (discussing the merits of insulating the attorney general from presidential control).

205 See, e.g., ‘Memorandum Opinion for the President: Proposals Regarding an Independent Attorney General’ (1977) 77-21 OLC 75, 77: ‘legislation establishing a definite term of office for the Attorney General and restricting the President’s power to remove him only for cause probably would be held unconstitutional.’

206 See (n 203).

officials – effectively a series of power pyramids rather than just one. Divided executives raise individual profiles much as singular executives do, allowing magnetic personalities to grow public popularity that may turn into a mass following through the psychological dynamic that Max Weber called charismatic authority.²⁰⁷ Those in command of enforcers, such as police or soldiers, may nurture within their commands a culture of personal loyalty that speeds shadow system construction.²⁰⁸ Competing personal fiefdoms may end up in a subversion race, as each recognizes first-mover advantage.²⁰⁹ Only plural executives can reliably deny salience to individuals.²¹⁰ Among divided executives is one frequent division that has been notoriously ineffectual at preventing capture – the division between head of state and head of government. All three Axis powers had separate heads of state when their heads of government turned them into tyrannies.

6 Conclusions

In opening his famous account ‘Of the Constitution of England,’²¹¹ Montesquieu wrote:

The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.²¹²

²⁰⁷ Weber (n 88) 46–62.

²⁰⁸ ‘The soldiers then began to recognize no one but their general, to base all their hopes on him, and to feel more remote from the city. They were no longer the soldiers of the republic but those of Sulla, Marius, Pompey, and Caesar. Rome could no longer know if the man at the head of an army in a province was its general or its enemy.’ Montesquieu (n 40) 91.

²⁰⁹ For example, ‘Mr. Saied’s office announced that he would set up a system under which he would essentially rule the country by decree, bypassing the Constitution. It said he would assume the power to issue “legislative texts” by decree and select the cabinet, even though the Constitution makes Parliament responsible for lawmaking and empowers the prime minister to appoint a cabinet.’ Vivian Yee, ‘As Tunisia’s President Cements One-Man Rule, Opposition Grows’ (*NY Times* New York, 27 September 2021, updated 29 September 2021) <<https://www.nytimes.com/2021/09/27/world/middleeast/tunisia-president-dictator.html>> accessed 10 June 2025.

²¹⁰ cf Switzerland Const art 168(1): ‘The Federal Assembly elects the members of the Federal Council, [...] and, *in times of war*, the Commander-in-Chief of the armed forces (‘the General’).’ (Emphasis added.) Even plural executive models run the risk of potentially subversive individual salience if those models are not plural enough. cf Orentlicher (n 129) (advocating a diarchy for the United States, which would empower two co-equal presidents who would decide everything together but would each have a bully pulpit).

²¹¹ Montesquieu (n 9) bk 11, ch 6, 151–62.

²¹² *ibid* 151.

For Montesquieu, this peace of mind was the great advance achieved through a separation of powers. Montesquieu argued that this peace of mind would be maximally achieved²¹³ through a system that involved many minds in legislating and many other minds in judging, but which let one person be chief executive.²¹⁴

More than two centuries of experience under constitutions that conform to Montesquieu's vision show that they do not take power sharing far enough to achieve their goal. A constitution with one person atop the executive readily lets that person grow a shadow system that captures the rest of government and returns its reality to a power pyramid in which *no one* has peace of mind. When capture makes governing ultimately all about one person's say-so, *everyone* is rendered corrosively insecure. All but the one true leader ultimately live in constant fear of the one true leader, and the one true leader ultimately lives in constant fear of the pressure cooker exploding into violent extralegal overthrow, the falling sword of Damocles.²¹⁵

How has human governance so often come to this mutually assured misery? The tension in human group dynamics that drives constitutional capture is the tension between our mature and primitive selves. We have matured enough to understand that the common good, the public interest, is more likely to be served by institutions that share power among many minds, and so we write constitutions that formally provide for that. Yet all too often we experience an emotional and atavistic tug toward charismatic individuals. We gravitate to putting our trust in them. Our civilizations live in the shadow of the warrior king. Following charismatic leaders was once our surest path to safety. Now it is not. True power sharing through the institutions of republican democracy is now our surest path to living together well. Yet we are still attracted to charismatic leaders, and that attraction endangers all that republican democracy can accomplish for us.

When we scrutinize the steps in particular constitutional captures, we find an array of constitutional 'reforms' that helped a would-be tyrant turn a constitutional democracy into a tyranny, such as packing institutions with followers who can be counted on to act inside those institutions in whatever ways best serve the leader, changing the

213 *ibid* ch 5, 151: 'One nation there is also in the world that has for the direct end of its constitution political liberty. We shall presently examine the principles on which this liberty is founded; if they are sound, liberty will appear in its highest perfection.' *ibid* ch 6, 162: 'It is not my business to examine whether the English actually enjoy this liberty or not. Sufficient it is for my purpose to observe that it is established by their laws; and I inquire no further. Neither do I pretend by this to undervalue other governments, nor to say that this extreme political liberty ought to give uneasiness to those who have only a moderate share of it.'

214 *ibid* ch 6, 156: 'The executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many.'

215 Marcus Tullius Cicero, *Tusculan Disputations* (Andrew P Peabody tr, Little, Brown and Company 1886) bk 5, 286-88 (telling the story of Dionysius and Damocles).

powers of uncaptured institutions to marginalize them, and changing electoral systems to reduce opponents' ability to affect who will govern. Yet changes of these kinds are matters of degree; no bright line exists between the details of change that prove dangerous and the details of change that look like ordinary democratic politics, in which competing parties vie for advantage. Appointing ideological allies and adjusting jurisdictions and electoral rules are familiar features of political life in real democracies and not necessarily mortal threats to democracy itself. Where to draw the line?

We can draw the line when we notice not just what is being done but who is doing it. History and contemporary experience tell us that it is the role of the one true leader that draws constitutional 'reforms' together into a synthesized instrument of capture. Constitutions are not captured for abstractions; *they are captured to empower particular people*. For all the ideological and programmatic rhetoric in today's constitutional captures, there is in each instance in fact one person playing leader and achieving changes that are ultimately about expanding the power of that person and expressing faith in that person. We can more surely stop constitutional capture not by bickering over whether any particular judicial appointment or jurisdictional change or electoral redistricting is tainted, but by tackling the feature that sets one person up to be the beneficiary of these myriad small steps. The way to stop constitutional capture is to remove the role that situates someone to capture – the role of chief executive.

When we notice how often democratic contests to be chief executive have turned ugly and imperiled democracy itself, we may ask why we are putting ourselves through this. How can we nurture power dynamics within our democracies that are truly 'representation-reinforcing'?²¹⁶ 'How can we so organize political institutions that bad or incompetent rulers can be prevented from doing too much damage?'²¹⁷ We can achieve these goals by recognizing the tension between republican democracy and charismatic leadership and changing our systems to protect the one from the other. Singular leadership creates the conditions for a charismatic person to shift expectations so that the legal system's rule of recognition becomes the will of the leader. Officials come to expect that their own prospects of doing well depend on serving the interests of the leader no matter how much that service distorts and corrupts their discharge of their formal roles.

Republican democracy shares power. Charismatic leadership concentrates power. Many people can become in thrall to a person. No one has ever been in thrall to a committee. Constitutional capture poses a formidable threat, but the solutions to stop it are well within sight.

²¹⁶ John Hart Ely, *Democracy and Distrust* (Harv UP 1980) 88.

²¹⁷ Karl R Popper, *The Open Society and Its Enemies* (4th edn, Routledge 1962) 121.