

Washington International Law Journal

Volume 28 | Number 2

4-1-2019

Breaking the Equilibrium: From Distrust of Representative Government to an Authoritarian Executive

Gábor Attila Tóth

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Gábor A. Tóth, *Breaking the Equilibrium: From Distrust of Representative Government to an Authoritarian Executive*, 28 Wash. Int'l L.J. 317 (2019).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol28/iss2/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

BREAKING THE EQUILIBRIUM: FROM DISTRUST OF REPRESENTATIVE GOVERNMENT TO AN AUTHORITARIAN EXECUTIVE

Gábor Attila Tóth[†]

Abstract: Although contemporary populist authoritarians have not entirely abandoned the aims and methods of their ancestors, authoritarianism has been undergoing a reinvention in recent years. Behind a façade of constitutionalism, new authoritarianism claims to abide by democratic principles. Populist authoritarians legitimize themselves through popular elections and maintain the entire set of formal institutions associated with constitutional democracy, using them as both an appearance of representation and a tool of authoritarian imposition.

The article focuses on the concepts of trust and distrust of representative government to afford a better understanding of populist authoritarianism. The paper describes two rival theoretical conceptions of government, known as Hobbesian (sovereign government) and Lockean (limited government). The Hobbesian conception rests on the idea of an effective and efficient executive that is able to protect the safety of the people and avoid anarchy. In contrast, the Lockean tradition requires checks and balances in the constitutional design in order to prevent the rise of a tyrannical executive. In the former conception, trust in the authority is a substitute for constitutional constraints, whereas in the latter, constitutional limitations presuppose that public officials and institutions should be distrusted.

The article argues that constitutionalism is better served when the characterizing traits of the two theories are balanced. A comparison of some of the elements of modern constitutionalism supports the idea that under certain circumstances, a relatively stable equilibrium between trustful constitutional cooperation and constitutional mechanisms of distrust can be achieved. However, the executive may gain unrestrained power when a constitutional system loses this balance. The article shows how a divergence from equilibrium can be a marker of populist authoritarianism.

Cite as: Gábor Attila Tóth, *Breaking the Equilibrium: From Distrust of Representative Government to an Authoritarian Executive*, 28 WASH. INT'L L.J. 317 (2019).

I. THE RISE OF POPULIST AUTHORITARIANISM

In the twenty-first century, more than half of the countries in the world are far from what we would consider “normal” constitutional democracies.¹

[†] Alexander von Humboldt Senior Fellow at Humboldt University in Berlin. Versions of this paper were presented at the workshops *Illiberal Democracy? Poland in Comparative, European Perspective*, St. Antony's College, University of Oxford; *Constitutionalism, Dissent, and Resistance*, Humboldt University and Princeton University, Berlin; and *Resurgence of Executive Primacy in the Age of Populism*, Academia Sinica, Taipei. The author thanks participants in those intensive discussions for insightful comments and suggestions.

¹ See Michael J. Abramowitz, *Freedom in the World Report 2018: Democracy in Crisis*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2018> (last visited Nov. 8, 2018) (creating categories—rule of law, electoral process, political participation, form of government, fundamental rights, civil society—evaluated as separate entities. The results are weighted according to the importance of

Outdated dictatorships still exist and so do war-torn countries or failed states like Syria or Yemen. Old-fashioned dictatorships can be characterized by a single-party system or a complete ban on political parties, the use of terror, censorship, and a strong mobilizing ideology. Such systems, e.g., North Korea, Saudi Arabia, or, to some extent, China, are exceptional today.

In the majority of autocracies, leaders gain power peacefully and legitimize themselves through popular elections and referendums. Regular multiparty elections are held, and elected officials make laws in a legislative body. Controlling constitutional institutions remain formally in place. Blatant human rights violations, explicit prohibitions and outright censorship are relatively rare, as other more subtle techniques are used to effectively entrench power, dominate and intimidate political opposition and secure victory in future elections.² This is the main reason why such antidemocratic systems are more difficult to discover and identify properly. The pattern repeats itself worldwide. In contrast with the earlier waves of democratization that spread across the globe, more recent trends have led to the disintegration of democracies. Not only Russia (probably the first regime of this kind) and Turkey, but also Hungary and Poland (two European Union Member States), and many other countries epitomize this phenomenon. The countries in question adopt—apparently in a democratic manner—a legal setting that moves them ever further from, rather than toward, democratic principles.

the different categories; rates are then aggregated; and, finally, the status of the country—free, partly free, not free—is calculated according to a combined average of the ratings); Bertelsmann Stiftung, *Transformation Index*, TRANSFORMATION INDEX BTI, <https://www.bti-project.org/en/home/> (last visited Nov. 8, 2018) (applying a similar methodology in its analysis and evaluation – whether and how developing countries, and countries in transition, are steering social change toward democracy. As a result of an aggregated rating process, the countries may receive one of the following statuses: democracy in consolidation, defective democracy, highly defective democracy, moderate autocracy, or hardline autocracy). See also *Worldwide Governance Indicators Project*, WORLD BANK, <http://info.worldbank.org/governance/wgi/#home> (last visited Nov. 8, 2018) (reporting on countries for different dimensions, e.g., rule of law, accountability, and control of corruption. The Cato Institute's *Human Freedom Index* presents the state of human freedom in the world based on a broad measure that encompasses personal, civil, and economic freedom); *The Human Freedom Index*, CATO INSTITUTE, <https://www.cato.org/human-freedom-index> (last visited Nov. 8, 2018). See, e.g., Dalibor Rohac, *Hungary and Poland Aren't Democratic. They're Authoritarian*, FOREIGN POLICY (Feb. 5, 2018), <https://foreignpolicy.com/2018/02/05/hungary-and-poland-arent-democratic-theyre-authoritarian/> (showing a scholarly use of rating indexes) (Rohac argues that Central Europe's anti-establishment rebels are increasingly authoritarian, and their geopolitical allegiances are to Moscow, not the West).

² See Gábor Attila Tóth, *Authoritarianism*, MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Rainer Grote et al. eds. 2017), <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e205> (last visited Nov. 8, 2018) (the approach of this article is slightly different from my *Authoritarianism*). See also Gábor Attila Tóth, *Constitutional Markers of Authoritarianism*, 11 HAGUE J. ON RULE L. (forthcoming 2019), <https://doi.org/10.1007/s40803-018-0081-6>.

Countries ranging from Azerbaijan to Venezuela demonstrate that when a populist executive gains concentrated power, a reshaped constitution may serve autocratic aspirations.³ As the Trump administration in the United States shows, even a country with a long pedigree of democratic traditions may not be entirely immune to the creep of authoritarian ideas and practices. Thus, anti-democratic tendencies affect not only the periphery of democracy, usually considered more vulnerable, but also the countries traditionally regarded as its core.

The rise of authoritarianism has of course attracted considerable academic attention. The literature is vast, appearing across many disciplines from political science to comparative constitutional law. Beyond countless journal articles we mainly find edited volumes from constitutional, political science, or multidisciplinary perspectives.⁴ Political theorists and scholars of the history of political thought have produced important monographs.⁵ Apart from crucial collected volumes,⁶ constitutional scholarship is engaged in country analyses, typically from a comparative perspective.⁷

Scholars warn that the twenty-first century could become a century of authoritarianism as a result of the institutional erosion of democracy.⁸ There seems to be a consensus that, while the new regimes differ in some respects, they share key characteristics with their predecessors: aversion to principles of constitutional democracy, intolerance toward vulnerable minorities, and a flourishing oligarchy around the head of the regime.⁹ The new competitor to constitutional democracy has begun to take shape as self-proclaimed majoritarian in political form, nationalist in ideology, and capitalist in

³ David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521 (2018) (explaining how recent populist autocrats have either replaced existing constitutions entirely or adopted sweeping packages of amendments).

⁴ See, e.g., Tom Ginsburg & Alberto Simpser, *Constitutions in Authoritarian Regimes* 1–20 (U. of Chicago, Public L. Working Paper No. 468, 2014); STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* (2010); WOLFGANG MERKEL, HANS-JÜRGEN PUHLE ET AL., *DEFEKTE DEMOKRATIEN. BAND I: THEORIE* (2003).

⁵ See, e.g., MARINA OTTAWAY, *DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM* (2003); ANDREAS SCHEDLER, *THE POLITICS OF UNCERTAINTY: SUSTAINING AND SUBVERTING ELECTORAL AUTHORITARIANISM* (Laurence Whitehead ed. 2013); YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (2018).

⁶ See, e.g., MARK A. GRABER ET AL., *CONSTITUTIONAL DEMOCRACY IN CRISIS?* (2018); CASS R. SUNSTEIN, *CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA* (2018).

⁷ See, e.g., WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN: FREEFALL 2015-2018* (2019); ANDREI P. TSYGANKOV, *THE STRONG STATE IN RUSSIA: DEVELOPMENT AND CRISIS* (2014); ANDRÁS L. PAP, *DEMOCRATIC DECLINE IN HUNGARY: LAW AND SOCIETY IN AN ILLIBERAL DEMOCRACY* (2018).

⁸ *AUTHORITARIANISM GOES GLOBAL: THE CHALLENGE TO DEMOCRACY* (Larry Diamond et al. eds., 2016).

⁹ See *infra* notes 12–14.

economics (though the case of Venezuela shows that it can be socialist). Moreover, the ideas and practices of the emerging regimes in question are far from independent of each other, as demonstrated by the extensive use of phrases like “nationalist international” and “autocratic international.” Apart from the scholarly consensus on some characteristics, we may distinguish two widespread and influential approaches.

The first approach places great emphasis on historical analogies. It claims that the current erosion of constitutionalism can be better understood if the transformation is compared to the interwar period and the rise of fascism in Europe and beyond. Among defining features, we can find political polarization in constitutional matters, xenophobic nationalism as a means of mobilizing ideology, rejection of international cooperation, restrictive immigration policies, stigmatized “enemies of the people,” and arbitrary use of emergency powers.¹⁰ The philosopher Jason Stanley points out the similarities among ultranationalist autocratic regimes by giving extensive examples of how they use for their purposes, among others, mythical past, fears, corruption, and economic inequality.¹¹ The former U.S. Secretary of State, Madeleine Albright, suggests that we should examine the careers of Hitler and Mussolini if we want to understand Chávez, Erdogan, Orbán, and Putin.¹² Timothy Snyder’s work goes further, offering new insights into the historical roots of today’s autocracies.¹³

The objective of the second approach, in contrast, is to highlight the original quality of the transformation. Its main argument is that contemporary autocrats use the very constitutional institutions of democracy to transform it into a kind of despotism. What is happening today is the self-destruction of liberal democracy through democratic procedures and the rule of law. In this way, the second approach underscores the significant difference between the interwar democratic decline and the current transformation. One good example of this approach is a book by Steven Levitsky and Daniel Ziblatt.¹⁴ Although they offer many lessons from modern history that reveal the “rhymes of history,” the authors argue that democracy is dying in an

¹⁰ Notably, the Jacobins used at the outset the phrase “enemy of the people” against anybody who opposed them and codified crimes punishable by death. In the twentieth century, both the Bolsheviks and the Nazis returned to the term serving as a label meaning death.

¹¹ JASON STANLEY, *HOW FASCISM WORKS: THE POLITICS OF US AND THEM* (2018).

¹² MADELEINE ALBRIGHT, *FASCISM: A WARNING* (2018).

¹³ TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* (2018).

¹⁴ STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

unprecedented way: peacefully, slowly, legally.¹⁵ Kim Lane Scheppele's works belong to the best constitutional accounts of the approach that seeks original features. She labels it "autocratic legalism," when electoral mandates combined with legal change push through an illiberal agenda.¹⁶ In her account, the new system is illiberal, anti-constitutionalist, and autocratic, but meets the criteria of legality and democracy at least in a formal way.¹⁷ Scheppele has dubbed this phenomenon the "*Frankenstate*," in which legalistic autocrats selectively choose and stitch together the worst practices from liberal democracies to create something illiberal and monstrous.¹⁸ We may add that this approach shows—in quasi-Hegelian terms—how accumulated quantitative changes can lead to a qualitative change.¹⁹

Each approach has its outstanding merits. I think, however, that it would be a grave error to simply treat contemporary authoritarianism as a revival of twentieth century autocracies. Clearly, we should learn from the lessons of history and understand the roots of new authoritarianism. Several cases demonstrate that contemporary populist authoritarians have not entirely abandoned the aims and methods of their ancestors. Yet, authoritarianism has reinvented itself in recent years. Its most salient new feature is that, behind a façade of constitutionalism, it claims to abide by democratic principles.

The second approach, while contributing to the understanding of legalistic techniques used by autocrats, still does not seem fully satisfactory either. It has its shortcomings: it emphasizes the similarities between constitutional democracies and modern autocracies in their democratic roots or legal institutions, while underplaying their fundamental differences. Nor does this approach distinguish between unavoidably imperfect institutions of constitutional democracies and eminently harmful authoritarian institutions. Many questions arise here: Do the people in emerging authoritarian states exercise their democratic voting rights? Can we uphold the claim that new autocrats take actions as a matter of form in a legal and democratic manner? Is the Russian State Duma a democratically elected body? Why do many political leaders from Turkey to Poland need constitutional justices, judges,

¹⁵ *Id.* at 7–9.

¹⁶ Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 545–48 (2018).

¹⁷ See Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 3, 11 (2017) (In this analysis, the authors put the rule of law backsliding into the center.).

¹⁸ Kim Lane Scheppele, *The Rule of Law and the Frankenstate*, 26 GOVERNANCE 559, 559–62 (2013).

¹⁹ GEORG FRIEDRICH HEGEL, *THE SCIENCE OF LOGIC* 776–78 (1969) (the idea was introduced by Aristotle and Heraclitus, developed by Hegel, and reformulated by Engels).

and public prosecutors who are ready to obey their authority? If we maintain that constitutional procedures and institutions are just a fig leaf designed to show democratic legitimacy and to cover something else, we should understand what is being covered up, and how.

I think we cannot insist that the new autocratic rise is formally legal and democratic. I argued elsewhere that—contrary to the popular view—new authoritarianism is undemocratic and illegal development whose mechanisms can be understood better as pretenses of democracy.²⁰ We can better distinguish today's authoritarianism from its predecessors if we understand the new mechanisms that create the pretense of democracy. Pretense here means essentially that the new type of system behaves *as if* it were a constitutional democracy; as if it gave preference to democratic values, principles and institutions.²¹ Authoritarianism claims, first, that it has obtained democratic authorization from the majority of the people, and second, that it is respecting the formal rules of democracy. In my view, both claims are false.

In the next chapter, I will outline the defining elements of populist authoritarianism.²² Then, I will bring the concepts of trust and distrust of representative government into focus. My aim is to show the importance of both trustful constitutional cooperation and mechanisms of distrust in constitutionalism. Populist authoritarian executives break this balance and gain unrestrained power. The divergence from equilibrium can be a marker of populist authoritarianism.

²⁰ Tóth, *supra* note 2.

²¹ A crucial conceptual difficulty here is that in some significant respects, there are considerable overlaps between the constitutional mechanisms of advanced democracies and authoritarian regimes. For example, attacking the independent judiciary; manipulating electoral rules so as to favor one party; curtailing civil liberties and freedom of the press; and introducing arbitrary emergency measures cannot be simply seen as indicators of an authoritarian government because those practices exist in functioning constitutional democracies, too. I believe, however, that there is a meaningful difference between authoritarian pretense of democracy and imperfection of functioning constitutional democracies. Authoritarian pretense of democracy is calculated, systematic and institutionalized as to its democratic functioning and credentials, but also in terms of the way it constructs and articulates the rule of law. In functioning democracies, in contrast, what one may call pretense is either sporadic or an activity of key political players, but far from a consistent strategy of constitutional institutions orchestrated by a political leader. That kind of shortcomings in a constitutional democracy can be considered as unavoidable imperfection or, in more serious cases, signs of authoritarian tendencies.

²² For earlier versions of my account on defining elements of populist authoritarianism, see Tóth, *Constitutional Markers of Authoritarianism*, *supra* note 2, n.3; see also GÁBOR ATTILA TÓTH, F.L. JUST. & SOC'Y, *THE AUTHORITARIAN'S NEW CLOTHES: TENDENCIES AWAY FROM CONSTITUTIONAL DEMOCRACY* (2015).

This piece limits itself to a descriptive, comparative, and evaluative constitutional analysis.²³ However, it would be misleading to think that mechanisms of trust and distrust in constitutional transformation are purely legal or constitutional issues. Nevertheless, I can by no means hope to give an exhaustive explanation. I must specifically omit economic, socio-cultural, and psychological factors without which the causes, motives, and purposes can be understood to a limited extent only.

II. DEFINING ELEMENTS OF POPULIST AUTHORITARIANISM

A. *Pseudo-Constitution*

The constitutional texts in authoritarian systems are often not fundamentally different from those found in constitutional democracies. The difficulty, however, is that authoritarian constitutions do not follow a regular pattern.²⁴ In some countries, constitution making starts early. Some examples of this include the rapid adoptions of the constitutions of Venezuela and Ecuador, or the Hungarian Fundamental Law.²⁵ The case of Turkey is an example of an alternative method: the Constitution has been amended several times so as to change the system gradually and completely.²⁶ In other cases, political practice rather than constitutional modification as such makes the difference. For instance, the 1993 Russian Constitution is not fundamentally different from the 1958 French Constitution whose presidential form of government it has adopted, yet it functions entirely differently.²⁷ In exceptional cases, nothing has changed at the constitutional level. In Poland,

²³ Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 9 (2004) (I share the view that descriptive meaning of constitutional concepts "cannot be peeled off from evaluative force because the former depends on the latter in that way.").

²⁴ ANDREW ARATO, *THE ADVENTURES OF THE CONSTITUENT POWER BEYOND REVOLUTIONS?* 76 (2017) (offering a new paradigm on origins, methods and models of constitutional design).

²⁵ Kriszta Kovács & Gábor Attila Tóth, *Hungary's Constitutional Transformation*, 7 EU. CONST. L. 183, 197 (2011) (For example, the 2011 Hungarian Fundamental Law was adopted within two months. The draft text was released on March 14 and the Law was promulgated on April 25. The parliamentary agenda ensured five days for the plenary debate about the concept and four days about the details. That meant nine days from start to finish.). See also David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013), for a comparative perspective

²⁶ Ahmet Erdi Öztürk & İstar Gözaydın, *Turkey's Constitutional Amendments: A Critical Perspective*, 2 RES. & POL'Y ON TURK. 210 (2017).

²⁷ See TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* (2018) (De Gaulle and Yeltsin, the founding fathers of the two constitutions respectively, aimed to weaken the constitutional role of the parliaments and broaden the executive president's competences. During the last six decades, the French constitutional system remained democratic, allowing fair and peaceful changes in executive power, whereas the Russian Constitution established an authoritarian rule. On the Russian system from a comparative and historical perspective.).

an authoritarian system in the making, the ruling party lacks a qualified majority; therefore, it cannot abolish the Constitution and adopt a new one in a way that conforms to the law. It can be said, however, that the Constitution of Poland is a dead letter or *de facto* invalid because it is disregarded systematically by ordinary laws.²⁸

Perhaps the only common feature of the authoritarian constitutions is that they do not serve as normative benchmarks. Loewenstein calls a “normative constitution” one that is real, living, effective, and enforced; one that “actually governs the dynamics of the power process instead of being governed by it.”²⁹ In this sense, a normative constitution is the ultimate legal instrument of control on political processes. This concept is equivalent to Sartori’s “*garantiste* constitution,” which puts an obstacle in the way of arbitrary governmental power and ensures limited government.³⁰ Today, Dieter Grimm calls it an “achievement of constitutionalism” when constitutions rule out any absolute or arbitrary power of man over man.³¹

In contrast to the normative constitution, an authoritarian constitution today is a combination of a descriptive “map of political powers”³² and a “façade” constitution.³³ I call this a pseudo-constitution. As a predecessor of contemporary pseudo-constitutions, we may consider Loewenstein’s semantic constitution. It is a mere description of the governmental system; in the author’s words:

[It] is nothing but the formalization of the existing location of political power for the exclusive benefit of the actual power holders. . . . Instead of serving for the limitation of political power, it has become the tool for the stabilization and perpetuation of the grip of the factual power holders on the community.³⁴

²⁸ Wojciech Sadurski, *How Democracy Dies (in Poland): A Case-Study of Anti-Constitutional Populist Backsliding* (U. Sydney L. Sch. Legal Stud. Research, Paper No. 18/01, 2018).

²⁹ KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 148–49 (1957).

³⁰ Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962) (*Garantiste* constitutions are defined by Sartori as proper, congruent with the 19th century consensus, which limit arbitrary government power and ensure limited government.).

³¹ DIETER GRIMM, DIE ZUKUNFT DER VERFASSUNG 31 (2002); Dieter Grimm, *Types of Constitutions*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 104 (2012).

³² ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 6 (1998).

³³ Sartori, *supra* note 30, at 861.

³⁴ LOEWENSTEIN, *supra* note 29, at 149–50.

The semantic constitution is, thus, not an honest instrument but a means by which an autocratic government disguises its true character. Lowenstein saw the Constitution of the Soviet Union as a clear case of semantic constitution.³⁵

Sartori identifies another type of fake constitution, which he calls “façade constitution.” It appears to be a true constitution, compatible with the values and principles of normative constitutionalism, from checks and balances to multi-party elections. However, these principles “are disregarded at least in their essential *garantiste* features.” As far as liberty and equality rights are concerned, they are dead letter.³⁶

In the pseudo-constitutions of contemporary authoritarianism, there is a significant overlap between components of semantic and façade constitutions. They are partly descriptive and partly sham. Consider the Fundamental Law of Hungary. On the one hand, it describes the existing representative, executive, and judicial institutions, and gives information about the state’s non-secular commitment and anti-asylum-seeker attitude.³⁷ On the other, it basically presents a façade by proclaiming that the state is democratic under the rule of law, that the government respects human rights, and that no one’s activities shall be aimed at the exclusive possession of power.³⁸

Authoritarians adopt pseudo-constitutions because today the constitution is globally approved as a pattern of legitimation. However, the text of a pseudo-constitution is typically inconclusive because some parts are effective in a descriptive sense only, while others are systematically disregarded. In other words, such constitutions lack normative relevance

³⁵ LOEWENSTEIN, *supra* note 29, at 150.

³⁶ Sartori, *supra* note 30, at 861.

³⁷ See Gábor Attila Tóth, *Hungary*, in CONSTITUTIONAL LAW OF THE EU MEMBER STATES 773–835 (2014) (The Preamble (“National Avowal”) of the Fundamental Law was written in the spirit of the Catholic faith. This is what the reference to Saint Stephen and the Holy Crown (of St. Stephen) implies: “We are proud that one thousand years ago, our King Saint Stephen established the Hungarian State on solid foundations and led our country to become part of Christian Europe” and “we acknowledge the nation-preserving role of the Christian faith”. The National Avowal explicitly mentions “the Holy Crown, which embodies the constitutional continuity of the state and the unity of the nation” and the historical constitution. In this way the Fundamental Law not only recalls the historical role of Christianity in founding the Hungarian State, but expresses that present Hungarian constitutionalism is based upon the traditional Christian faith. In the Fundamental Law, the right to asylum is granted only “if neither their country of origin nor another country provides protection” for the asylum-seeker (Art. XIV(3)).).

³⁸ See GÁBOR ATTILA TÓTH, CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY’S 2011 FUNDAMENTAL LAW (2012), for a comprehensive critical analysis.

because all political power resides with the leader of the ruling party. For this reason, in order to understand how an authoritarian system is really governed, the actual practice must be examined, in addition to the constitutional text.³⁹

B. *Hegemonic Voting Practices*

Today, many authoritarian systems constitutionally retain multiparty elections and provide scope for activities of opposition movements. What makes them distinctive is that the election is managed so as to deny opposition candidates a fair chance. Legal norms and practices ensure the dominance of the ruling party. The governing party may enjoy undue advantage because of partisan changes in election law, unequal suffrage, gerrymandering of electoral districts, restrictive campaign regulations, and biased media coverage that blurs the separation between political party and the state, thus preventing an independent assessment of the election (e.g., Hungary).⁴⁰ Modification of voter identification and registration laws may result in de facto disenfranchisement (e.g., Zimbabwe under President Mugabe). Electoral laws may unfairly promote voting by the diaspora (e.g., Senegal), or hinder the voting ability of émigrés (e.g., Venezuela under Chavez).⁴¹ Even landslide victories for authoritarian leaders, or their parties, may be attributed to a range of tools at the disposal of incumbents, such as manipulation of the public by mass media (e.g., Russia) or strategic delays to scheduled elections (e.g., Lebanon).⁴²

Authoritarianism, apparently, implements a first-past-the-post voting method (the candidate with the most votes in the electoral district wins) or a

³⁹ Andrew Arato & Gábor Attila Tóth, *The Multifaceted Sovereign: Domestic and International Actors in Constitutional Regime Changes*, in CONSTITUTIONAL ACCELERATION WITHIN THE EUROPEAN UNION AND BEYOND 73–96 (2018) (Arato and I argue that prior to the adoption of a constitution, international advisory and monitoring bodies legitimately take part in the national constitution-making procedure. After the adoption of a constitution, international courts may legitimately review the process of national constitution-making and constitutional norms on the basis of universal human rights and constitutional standards.).

⁴⁰ LEVITSKY & WAY, *supra* note 4; SCHEDLER, *supra* note 5, at 105–07. *But see* Toth, *Constitutional Markers of Authoritarianism*, *supra* note 2 (I think, however, that the “electoral authoritarianism” tag is misleading because the elections in the authoritarian regimes are far from free and fair.).

⁴¹ Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1702 (2015).

⁴² Samantha Bradshaw & Philip N. Howard, *Challenging Truth and Trust: A Global Inventory of Organized Social Media Manipulation*, THE COMPUTATIONAL PROPAGANDA PROJECT (2018), <https://comprop.oii.ox.ac.uk/research/cybertroops2018/> (last visited Nov. 8, 2018) (A new research has revealed the impact of strategies and techniques used by government cyber troops, and that their activities violate democratic norms. For example, Russia made significant efforts in 2016 and 2017 to disrupt elections around the world, and also political parties spread disinformation domestically. The growth of cyber troop activity from 2017 to 2018 has demonstrated that these strategies are circulating globally.).

hybrid voting system with predominant majoritarian elements, where not so much the results of the elections but rather legal norms and practices—that is, the system as a whole—guarantee the dominance of the ruling party.⁴³ Thus, an authoritarian system appears to be a majoritarian one backed by the electorate, with authoritarian leaders claiming exclusive moral representation of the people. The rejection of political pluralism and fair deliberative procedures does not belong among the defensible conceptions of democracy. In short, democracy is where the authorities arrange elections; authoritarianism is where the authorities arrange the elections and the results.

C. *Weakening Institutional Checks*

Contemporary populist authoritarianism maintains the entire set of formal institutions associated with constitutional democracy,⁴⁴ using them as both a façade of democratic representation and a tool of authoritarian imposition.⁴⁵ Although the constitutional structures of authoritarian states inevitably consist of the three main parts—the legislative, the executive, and the judicial branches of government—they are not based upon the principles of separation of powers. Some transforming systems reportedly replace the role of the constitutional judiciary with “parliamentary sovereignty” (e.g., Poland).⁴⁶ In practice, constitutional and statutory regulations, as well as constitutional conventions, are “reformed” and result in politically expedient modifications to the constitutional courts’ personal composition (“court packing”), competences, and institutional and financial independence.⁴⁷ By way of example, this is precisely how the Hungarian and the Polish Constitutional Courts were neutralized.⁴⁸ Decisions of the constitutional

⁴³ See Venice Commission, Report on Electoral Systems: Overview of Available Solutions and Selection Criteria (EC) No. 250/2003 of Feb. 4, 2004.

⁴⁴ See JÁNOS KIS, CONSTITUTIONAL DEMOCRACY ix–x (2003) (Democracy can be labelled as both “liberal” and “constitutional” democracy. The former term puts the emphasis on a set of values and principles: liberty, equality, autonomy, collective self-governance, equal participatory rights in political decision making. The latter term refers to institutional preferences: the constitution enjoys the highest rank both procedurally and substantially; free and fair elections are held periodically; elected representatives of the people make laws; and judiciary enforces civil liberties.).

⁴⁵ SCHEDLER, *supra* note 5, at 54–56.

⁴⁶ Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11 HAGUE J. RULE L. (forthcoming 2019), <https://doi.org/10.1007/s40803-018-0078-1> (for the latest developments).

⁴⁷ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 194 (2013); Mark Tushnet, *Authoritarian Constitutionalism* 100 CORNELL L. REV. 391, 426 (2015).

⁴⁸ Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*, 51 COMMUNIST & POST-COMMUNIST STUD., 189, 189–200

justices, appointed according to the will of the authoritarian leader, may contribute to the reinforcement of the system. The only exception is Kyrgyzstan, where the Constitutional Court was abolished with the adoption of the Constitution of 2010, transferring some of its powers to the Supreme Court.⁴⁹

As the record of the Valery Zorkin-chaired Russian Constitutional Court demonstrates, altered but not abolished tribunals may serve as a tool of authoritarian imposition. Vladimir Putin deployed constitutional review to help centralize and consolidate his authoritarian power.⁵⁰ Moreover, authoritarians occasionally tolerate painful judgments to construct a façade of constitutionalism, provided that the judiciary does not threaten the core of authoritarian institutional design (as was the case with the judiciary in Egypt under President Mubarak).⁵¹ Invariably, the aim behind such constitutional changes is to safeguard and promote the interests of a particular political force without constitutional balances.⁵²

Populist authoritarian leaders often invoke the “will of the people” to undercut the role of the constitutional judiciary, the institutional safeguard to protect the rule of law and individual freedoms. Weaker legal ties mean, however, that it is not only the judiciary but also other democratic institutions that are undermined. It becomes possible to sidestep representative government if the popular will is not legally constructed or channeled, but rather the echo chamber of a dominant leader. Consequently, populist

(2018); *see also* Kriszta Kovács & Gábor Attila Tóth, *Hungary’s Constitutional Transformation*, EUR. CONST. L. REV. (2011), 183, 183–203 (2011) (discussing the first authoritarian steps in detail).

⁴⁹ Venice Commission, Opinion on the draft Constitution of the Kyrgyz Republic (EC) No. 582/2010 of June 4, 2010, ¶¶ 57–59, 69.

⁵⁰ Valery Zorkin, “Буква и дух Конституции” [The letter and spirit of the constitution], *Rossiyskaya Gazeta*, No. 7689 (226) Oct. 9, 2018, <https://rg.ru/2018/10/09/zorkin-nedostatki-v-konstitucii-mozhno-ustranit-tochechnymi-izmeneniami.html> (visited Nov. 8, 2018) (most recently, Valery Zorkin argued in a think piece in Russia’s official newspaper, *Rossiyskaya Gazeta*, for “drastic reforms” to the constitution. For the sake of pretense, he criticized the current text for having insufficient checks and balances. More importantly, he warned against “outmoded liberal models of democracy,” and advocated a “more effective model of popular rule” and “traditional values against globalization.” In Zorkin’s account, “the European Court of Human Rights is increasingly divorced from reality, imposing its position on countries and forcing people to defend themselves.”).

⁵¹ Varol, *supra* note 41, at 1691.

⁵² *Id.* at 1689.

authoritarian leadership emerges at the expense of not only constitutional judiciary but also of parliamentarianism.⁵³

D. Superior Executive

Structurally or in practice, constitutional powers are utterly unbalanced in these types of governments. The executive branch—especially the head of the executive: the president (e.g., Turkey and Russia), the prime minister (e.g., Hungary), the monarch (e.g., Saudi Arabia), or the *de facto* head of the government (e.g., Poland under Kaczynski)—is not only superior in power, but also enjoys unchecked power. Formal and actual power may differ significantly, as in Russia under the presidency of Medvedev, or formal governmental dominance may be subordinate to informal party dominance, as in Poland.⁵⁴

The constitutional struggle against authoritarianism, particularly in Africa and Latin America in recent decades, has often focused on the introduction of presidential term limits and the attempts of autocrats to have these term limits removed by constitutional reform or by reinterpretation of the term limit by the constitutional court (e.g., Peru). This scheme has been used in Burundi and Rwanda, where controversial third terms entrenched the position of the incumbent presidents.⁵⁵

Clearly, constitutional democracy may take various institutional forms. It may be a monarchy or a republic; it may have a presidential or a parliamentary system; it may be a federal or a unitary state. Nonetheless, comparative surveys of governmental systems reveal that some presidential

⁵³ See in a theoretical context, JUAN J. LINZ, TOTALITARIAN AND AUTHORITARIAN REGIMES 209–17 (2000) (As another alternative to representative democracy, several earlier authoritarian forms of government preferred corporatism to competitive multiparty systems. Although authoritarianism has never availed itself exclusively of a corporatist model, and corporatism has never been exclusively an authoritarian attribute, non-democratic constitutional systems granting many cases a representative constitutional function to large interest groups such as business corporations, professional organizations, churches, or trade unions. A famous example of corporative structures is the Mussolini-regime.).

⁵⁴ Gábor Attila Tóth, *Căi constituționale spre autocrație? Studii de caz privind situațiile din Ungaria și Polonia* [Constitutional Roads to Autocracy? Case Studies from Hungary and Poland], 2 NOUA REVISTA DE DREPTURILE OMULUI [NEW REVIEW OF HUMAN RIGHTS] 3–15 (2016).

⁵⁵ Gábor Attila Tóth, *Authoritarianism*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (2017), <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e205> (last visited Dec. 23, 2018) (in Burundi, according to a contra-textual interpretation of the Constitution, Art. 96, in Rwanda, Art. 101 of the Constitution).

systems have difficulties sustaining democratic practices.⁵⁶ Under a range of cultural and social conditions, a parliamentary system is more democratically robust than a presidential one. Depending on political traditions, culture, and the electoral system, the transformation of the executive and legislative branches into a presidential system may lead to authoritarianism, yet this is not necessarily always the case. To illustrate: although both the 1958 French and the 1993 Russian Constitutions were seen as reactions to parliamentary paralysis, with aspirations for a strong executive, French political and constitutional practice managed to maintain constitutional democracy over the long term; whereas, by contrast, since the relatively liberal beginnings of Yeltsin era Russia, the country has moved dramatically toward the authoritarian practices of the post-Glasnost era under Putin, although there have been minimal changes to the constitutional text itself.⁵⁷

An important stepping stone to authoritarianism seems to be broad or ill-defined powers, including emergency powers, of the executive, the “guardian of the Constitution.” In an advanced constitutional democracy, a state of emergency should provide only temporary conditions for exercising otherwise legitimate power.⁵⁸ A temporarily modified constitutional democracy means that some constitutional rights are restricted, but the main purpose of the state of emergency is to restore the democratic legal order and the full enjoyment of human rights.⁵⁹ In a regime that seeks to distance itself from liberal democracy, the ruler’s declaration of a state of emergency serves to institutionalize an arbitrary executive power unhampered by legal constraints, thus creating a long-standing special power beyond the rule of law. As the constitutional developments in Turkey show, by referring to terrorist threats and other imminent dangers, the head of the executive can

⁵⁶ JUAN J. LINZ, *THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN AND REEQUILIBRATION. AN INTRODUCTION* (1978); SEYMOUR MARTIN LIPSET & JASON M. LAKIN, *THE DEMOCRATIC CENTURY* 38–48 (2004).

⁵⁷ TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* (2018) (Snyder shows that President Putin follows ideas of Ivan Ilyin, a Russian philosopher who once imagined “Russian Christian fascism,” and borrowed ideas from Carl Schmitt (for example, politics is the art of identifying and neutralizing the enemy). Snyder argues that the constitutional system of the Russian Federation today resembles the Russian Empire of the late nineteenth century. Both systems reject the rule of law as the principle of government. Law today is almost the same as “произвól,” the arbitrary rule by autocratic tsars.).

⁵⁸ David Dyzenhaus, *State of Emergency*, in *OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 442–61 (András Sajó & Michael Rosenfeld eds., 2012).

⁵⁹ Kriszta Kovács, *The State of Exception: A Springtime for Schmittian Thoughts?*, 17 *DIRITTO E QUESTIONI PUBBLICHE* 163, 179 (2017).

successfully initiate a wide-ranging constitutional amendment, leading to a sovereign-led authoritarian system.⁶⁰

E. Restriction of Fundamental Rights

Many authoritarian constitutions formally declare fundamental rights for their citizens, but these are rarely legally enforceable. A common tactic is to construct a constitutional catalog of fundamental rights, ostensibly based upon the international standards arising from the United Nations Universal Declaration of Human Rights and regional human rights treaties. Yet, the constitution will, in fact, contain a number of sections in direct contradiction with international human rights law, typically recognizing certain fundamental rights only to the extent that these rights serve the interests of the ruling political group or class.

Authoritarian leaders tend to restrict freedom of speech by *de facto* capturing an immense part of the mass media and by *de jure* takeover of public media. Although criminal prosecution is still a tool for authoritarianism (see Turkey), political leaders often opt for a less blunt approach. Instead they sue journalists and civil rights activists for defamation to silence dissent rather than resorting to imprisonment, blatant prohibitions, or the suppression of journals, books, films, or websites.⁶¹ Freedom of speech and of the press can be denied or restricted in the name of the ruling class, the dominant religion, or the protection of the head of state. It seems clear that, where restrictions on free speech protect the ruler in particular, or the executive in general, or indeed members of the majority (citing, for example, the dignity of the nation, country, or dominant ethnic group), instead of members of vulnerable social groups, such regulations constitute one aspect of an authoritarian approach. In this way, the general public is subject to systematic manipulation by the government.

⁶⁰ See ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY 223–68 (2016) (for a detailed analysis).

⁶¹ *Freedom of the Press 2017: Press Freedom's Dark Horizon*, FREEDOM HOUSE <https://freedomhouse.org/report/freedom-press/freedom-press-2017> (last visited Dec. 23, 2018); Elana Beiser, *2018 World Press Freedom Index*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/ranking> (last visited Dec. 23, 2018); See *Record Number of Journalists Jailed as Turkey, China, Egypt pay scant price for repression*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 13, 2017), <https://cpj.org/reports/2017/12/journalists-prison-jail-record-number-turkey-china-egypt.php> (on criminal prosecution in Turkey, China and Egypt).

Similarly, racial or ethnic exclusions, as well as repression of the civil society are among the characteristics of authoritarian constitutional systems. Although civil society organizations are rarely prohibited, many regimes from Algeria to Venezuela have adopted discriminatory, inflexible, and costly requirements for the registration and reporting of civil society groups.⁶² Likewise, “foreign agent” laws have been used as a tool of authoritarianism; their primary aim is to curb cooperation between international and domestic NGOs (non-governmental organizations) (e.g., Belarus, Hungary, Israel, Russia).⁶³ Moreover, in many regimes, government-organized non-governmental organizations (GONGOs) have been set up and/or financed by the executive in order to imitate civil society, promote authoritarian interests, and hamper the work of legitimate NGOs (e.g., Egypt, Hungary, Russia, Syria, Turkey).⁶⁴

F. Populism

The decay of liberal democracy and the rise of authoritarianism are often associated with the spread of populism across the globe.⁶⁵ Contrary to conventional wisdom, I think, populism—as a political concept, ideology, and worldwide tendency—is not only anti-elitist or anti-liberal, but also anti-democratic.⁶⁶ While many authoritarian systems appear to be majoritarian backed by the electorate through popular vote or referendum, they are likely based on one-sided modifications to the constitution and electoral laws, and subsequently, on unfair elections. By rejecting political pluralism, deliberative procedures of democracy, and institutional checks, populist leaders claim exclusive moral representation of “the people.” If a populist achieves the

⁶² Varol, *supra* note 41, at 1706–07, 1714–15

⁶³ See, e.g., European Commission for Democracy Through Law [Venice Commission], *Opinion on Federal Law N. 121-FZ on Non-Commercial Organizations (“Law on Foreign Agents”), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code (“Law on Treason”) of the Russian Federation* 13–14, 716-717/2013 (June 27, 2014) [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2014\)025-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2014)025-e).

⁶⁴ See, e.g., Moises Naim, *What is a GONGO: How Government-Sponsored Groups Masquerade as Civil Society?*, FOREIGN POLICY (Oct. 13, 2009), <https://foreignpolicy.com/2009/10/13/what-is-a-gongo/>.

⁶⁵ JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 54–58 (2016); David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 521 (2018).

⁶⁶ William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT’L L. 193, 234 (2012); Cas Mudde & Cristóbal Rovira Kaltwasser, *Populism*, in THE OXFORD HANDBOOK OF POLITICAL IDEOLOGIES 493–512 (2013) (distinguishing democratic and antidemocratic populisms).

desired aim—a strong executive power, unhindered by legal constraints—the system will unavoidably become an authoritarian state.⁶⁷

III. TRUST AND DISTRUST OF GOVERNMENT: THE HOBBSIAN AND LOCKEAN CONCEPTIONS

We need to examine the mechanisms of trust and distrust of a representative government to obtain a better understanding of populist authoritarianism. Trust can be defined as the firm belief that someone or something is reliable, truthful, or possesses the means or skill to do something.⁶⁸ It is first and foremost an interpersonal and communal relationship, and much of human social life relies on it. We give our word to each other, we rely on each other's word, and we expect others to behave in this and not another way. Most aspects of our social lives and interactions with individuals take the existence of trust for granted; without it, life would be difficult, if not inconceivable.⁶⁹ Beyond trust in individuals, we may talk about trust in social structures and political institutions. The question arises whether political relations are or should be built on trust, too. One might argue that establishing constitutional institutions that grant individuals enforceable rights presupposes that we cannot trust each other. Similarly, once we establish constitutional institutions, there is no longer a need for trust.⁷⁰ But this simple rejection does not seem satisfactory. The correlation between political institutions and trust is more complex.

Modern constitutionalism can be described as a dichotomy of two rival theoretical conceptions of constitutional government. Protection against cruel, oppressive, and unreasonable use of governmental power is considered the core aim of constitutionalism. U.S. Supreme Court Justice Louis Brandeis pointed out that the constitutional guarantees of limited governments are not

⁶⁷ Jean Cohen, *Populism and the Politics of Resentment*, *JUS COGEN: A CRITICAL JOURNAL OF THE PHILOSOPHY OF LAW AND POLITICS* (forthcoming 2019) (Jean Cohen argues, first, that when civil societies become deeply divided, and segmental pluralism maps onto party political polarization, social solidarity is imperiled, as is commitment to democratic norms, social justice and liberal constitutionalism; and second, that populist political entrepreneurs excel in fomenting social antagonisms by framing shifts in the forms of social pluralism in ways that foster deep political polarization, generalized distrust and a politics of resentment against “the establishment” and “outsiders”).

⁶⁸ ADRIAAN T. PEPPERZAK, *Trustworthy Constitutions*, in *TRUST: WHO OR WHAT MIGHT SUPPORT US?* 54 (2013) (see constitutionalism in its Chapter “Trustworthy Constitutions?”).

⁶⁹ JONATHAN WOLFF, *AN INTRODUCTION TO POLITICAL PHILOSOPHY* 198 (3d ed. 2016).

⁷⁰ *Id.*

present to promote efficiency, but to prevent autocracy and arbitrary power.⁷¹ However, a well-functioning legal system requires not only institutional limits of power, but also effectivity and efficiency. This two-fold character of constitutionalism goes back to the two rival traditions of constitutionalism originating from Thomas Hobbes and John Locke.

The Hobbesian conception, which is a historical predecessor of Locke's views, rests on a powerful justificatory idea of sovereign government: an effective and efficient executive that is able to protect the safety of the people and avoid anarchy.⁷² In contrast, the Lockean tradition provides justification for a limited government.⁷³ To Locke, the state of nature "is a condition in which the need or demand for rational trust hopelessly exceeds the available supply."⁷⁴ Checks and balances are required in the constitutional design in order to prevent the emergence of a tyrannical executive. In the Hobbesian conception, constitutional constraints are substituted by trust in the sovereign authority, whereas in the Lockean conception, constitutional limitations presuppose that public officials and institutions should be distrusted. Hobbes teaches us that too many checks may paralyze the government and lead to disintegration and anarchy, whereas Locke warns us that too much trust in public authorities may lead to an arbitrary government. In other words, we can learn from Hobbes why trust in effective civil government is needed, and from Locke why distrust is justified and, as a consequence, why it requires constitutional limits on the government. This is the core of the dichotomy between the Hobbesian and Lockean conceptions of constitutionalism.

⁷¹ *Myers v. United States*, 272 U.S. 52, 293 (1926); See Martin Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares*, in *GETTING TO THE RULE OF LAW* 50, 78–81 (2011) (for reasons that arbitrary power is unacceptable).

⁷² See DAVID DYZENHAUS AND THOMAS POOLE, *HOBBS AND THE LAW* (2012) (on Hobbes as a legal and constitutional thinker); See JOHN BOWIE, *HOBBS AND HIS CRITICS: A STUDY IN SEVENTEENTH CENTURY CONSTITUTIONALISM* (1952) (on the reception and varied readings of Hobbes' political ideas by his contemporaries); See also Royce MacGillivray, *Thomas Hobbes's History of the English Civil War*, 31 *THE J. FOR THE HISTORY OF IDEAS* 179, 184–85 (1970); See, e.g., QUENTIN SKINNER, *HOBBS AND REPUBLICAN LIBERTY* (2008) (for the predominant interpretation of Hobbes); NORBERTO BOBBIO, *THOMAS HOBBS AND THE NATURAL LAW TRADITION* (Daniela Gobetti trans., 1993); Martin Loughlin, *The Political Jurisprudence of Thomas Hobbes*, in *HOBBS AND THE LAW* (2012); *Id.* at 5–21.

⁷³ See generally Jean-Fabien Spitz, *Locke's Contribution to the Intellectual Foundations of Modern Constitutionalism*, in *CONSTITUTIONS AND THE CLASSICS: PATTERNS OF CONSTITUTIONAL THOUGHT FROM FORTESCUE TO BENTHAM* 152–68 (2014).

⁷⁴ John Dunn, *What Is Living and What Is Dead in the Political Theory of John Locke?*, in *INTERPRETING POLITICAL RESPONSIBILITY* 9, 24 (1990).

The Lockean view often becomes influential during transitions from an authoritarian regime to democratic constitutionalism.⁷⁵ Roughly speaking, democratic opposition movements echo Locke's view that human beings are "by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent."⁷⁶ Most seem to agree with the Lockean belief that, on the one hand, no one is born to rule or to be ruled and, on the other hand, that the right to life, liberty, and property belong to all. Some of the political players (conservative parties, religious groups with different political leanings) may follow the classical natural law theory by referring to God, while others, who do not share this religious view, appeal to equal dignity as the highest humanistic principle.

Countries in democratic transition are not, of course, in a state of perfect freedom and equality. On the contrary, the political society has suffered under single-party political oppression. This is why the people seek an institutional order wherein the legislative and executive powers do not systematically violate, but rather maintain and promote, individual rights. Moreover, it is a common claim that legal disorder, namely the arbitrary administration and adjudication of law according to the demands of the ruling party, should be replaced by a legal system under the procedural and substantive guarantees of the rule of law. Locke, again, is found to be a teacher of the rule of law by a limited government: "[T]he legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice, and to decide the rights of the subject by promulgated, standing laws, and known authorized judges."⁷⁷

As Locke, or Montesquieu, the other inventor of limited government, might have said, legitimate political institutions are meant to create certain foreseeable legal rules or to serve as checks upon abuses of law-making and law-enforcing authorities.

The Hobbesian approach provides a powerful justificatory idea when a representative government is paralyzed.⁷⁸ The cold civil war and the anarchy-

⁷⁵ See, e.g., JÁNOS KIS, *L'ÉGALE DIGNITÉ: ESSAI SUR LES FONDEMENTS DES DROITS DE L'HOMME* (1989) (another influential normative theory for democratic oppositions has its roots in Kantian philosophy).

⁷⁶ John Locke, *The Second Treatise, of the Beginning of Political Sciences in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 141, § 95 (Ian Shapiro ed., 2003).

⁷⁷ *Id.* at 160, § 136.

⁷⁸ When the confrontation between the monarch and parliamentary obstruction increases inexorably, there remains no alternative for both sides but go to—cold or hot—civil war. Today, constitutional theory

like state (*bellum omnium contra omnes*) may revive a Hobbesian view of constitutionalism. Advocates of transition from constitutional democracy cite Hobbes: a strong central authority is needed in order to triumph over the evils of disorder.⁷⁹ As Hobbes might have said, the governing person or body (the *Sovereign*) can be empowered by a social contract that will afford people a life other than what was available to them in the previous period. To ensure escape from legal disorder, people should renounce their rights and establish an effective law enforcement system headed by the Sovereign, which enforces whatever rules and restrictions it wishes. From a Hobbesian perspective, in populist authoritarian systems the parliamentary majority is led by a person in charge—the party leader, the president, or the prime minister—who is the highest legal power, a kind of Sovereign. Since the majority of voters have given this entity the authority to enact laws, everybody should obey the imposed regulations, regardless of disrespected individual interests or moral rights.

Hobbes, in the manner of any magnificent thinker, is of course highly complex.⁸⁰ Hobbes is not the precursor of totalitarianism. Nor is he a founding father of liberal constitutional democracy. It is true that we can find a path from Hobbes to liberal theorists and the modern rule of law.⁸¹ It is a way that leads, first, from a sovereign King to a sovereign Parliament, and then to a limited parliamentarianism, firmly established by Albert Dicey⁸² and developing in the contemporary jurisprudence.⁸³ However, the predominant view of Hobbes, as an interpretation by Carl Schmitt reveals,⁸⁴ may go to

and political science identify a successor to this, the cold civil war, a cycle of escalating constitutional brinkmanship. See an explanation in DEBORAH BAUMGOLD, *HOBBS'S POLITICAL THEORY* 71 (1988).

⁷⁹ THOMAS HOBBS, *LEVIATHAN* 3 (John Charles Addison Gaskin ed., 1996).

⁸⁰ On the reception and varied readings of Hobbes' political ideas, see John Bowie, *Hobbes and His Critics: A Study in Seventeenth Century Constitutionalism*, 67 *POL. SCI. Q.* 610, 610–12 (1952).

⁸¹ David Dyzenhaus, *Hobbes's Constitutional Theory*, in *LEVIATHAN* 452–80 (Ian Shapiro ed., 2010) (David Dyzenhaus argues that Hobbes is an early member of the rule of law tradition. For Hobbes, order is legal order, in which the sovereign rules not merely by law, but also in accordance with the rule of law.); David Dyzenhaus, *How Hobbes Met the Hobbes Challenge*, 72 *MODERN L. REV.* 488–506 (2009); Thomas Poole, *Hobbes on Law and Prerogative*, in *HOBBS AND THE LAW* 68–96 (2012) (Thomas Poole examines the tension in Hobbes's legal theory between the sovereign's legal authority (creating laws as a stable framework for social interaction) and his prerogative authority (deciding extra-legally what is best for the safety of his subjects). In Pool's interpretation, that tension does not make Hobbes's system unstable, but rather holds it together.).

⁸² ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 145–53 (1982).

⁸³ JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (1999).

⁸⁴ CARL SCHMITT, *DER LEVIATHAN IN DER STAATSLHRE DES THOMAS HOBBS: SINN UND FEHLSCHLAG EINES POLITISCHEN SYMBOLS* (1995); MICHAEL J. OAKESHOTT, *HOBBS ON CIVIL ASSOCIATION* (2000).

extremes to justify an authoritarian or tyrannical legal system which prefers not only efficient but also arbitrary central government (see the “Sovereign Dictator”) to individual liberties.⁸⁵

IV. TRUST IN PARLIAMENTARY SOVEREIGNTY IN THE UNITED KINGDOM

Traditionally, the foundation of the United Kingdom’s constitution is the doctrine of parliamentary sovereignty. For theorists such as Hobbes, Austin, and Dicey, it was assumed that constitutional authority derives from the people: the people are the *source* of sovereignty. The unlimited *bearer* of sovereignty is, however, the representative.⁸⁶ In a constitutional sense, the people exist only in their representatives. In this model, the progress gradually leads from the Hobbesian theory of the sovereign king to the idea of organic unity (king-in-parliament), and later to the hegemony of the House of Commons (parliamentary sovereignty).

Explaining the nature of parliamentary sovereignty, Dicey emphasizes:

The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.⁸⁷

The idea of checks and balances is inconsistent with the pervading principle of English constitutional law.⁸⁸ The grotesque expression of Jean-Louis de Lolme, an advocate of the constitutional form of balanced government and critic of the parliamentary supremacy, has become

⁸⁵ STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 50 (1993) (Holmes argues that in his *Leviathan*, Schmitt pretends to be liberal); see also Johan Tralau, *Introduction: Thomas Hobbes, Carl Schmitt, and three conceptions of politics*, in THOMAS HOBBS AND CARL SCHMITT: THE POLITICS OF ORDER AND MYTH 3–14 (2011) (for a more critical perspective).

⁸⁶ John Austin, *The Province of Jurisprudence Determined*, *THE EXAMINE* 497–98 (1995 ed. 1832).

⁸⁷ DICEY, *supra* note 82, at 87.

⁸⁸ MONTESQUIEU, *DE L’ESPIRIT DES LOIS* 162 (Gonzague Truce ed., 1961) (Famously, Montesquieu misunderstood on this point the English constitution. He thought that both the executive and the judicial branches were separated from the legislative body.); See also DICEY, *supra* note 82, at 211; See Laurence Claus, *Montesquieu’s Mistakes and the True Meaning of Separation* 25 *OXFORD J. LEGAL STUD.* 419 (2005) (for a critical perspective).

proverbial: “Parliament can do everything but make a woman a man and a man a woman.”⁸⁹

In this model, constitutional *conventions* consisting of customs, practices, and maxims constitute limitations.⁹⁰ Conventions of the constitution are not recognized or enforced by the courts; instead, they make up a body of constitutional morality. By way of an example, a government minister who has lost the confidence of the House of Commons is obliged to resign. Similarly, the government can exercise its discretionary powers to take action without parliamentary approval. Both political morality and the force of public opinion (but not the courts) require that constitutional institutions obey conventional rules. To put it simply, the *trust* in the fairly-elected legislative body and the resilience of conventions lies at the center of this constitutional theory. The Parliament is entrusted with the power to make whatever laws it pleases.⁹¹

However, the legally unlimited parliament is not the only foundation of English constitutionalism. Even Dicey acknowledges that sovereign power is bound by external and internal limits. “The *external limit* to the legal power of a sovereign consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws.”⁹² It means that the authority, even that of a despot, depends upon willingness of his subjects to obey his instructions. The *internal limit* to the exercise of sovereignty arises from the nature of the sovereign power itself. It is limited from within, because the legislature is the product of a certain social condition and is determined by whatever defines the society that it governs. “If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.”⁹³

More importantly, Dicey also argues that the *supremacy of the rule of law* also forms a fundamental principle of the constitution. This enunciation has three meanings. First, the absolute supremacy of regular law as opposed to the influence of arbitrary power. Second, equality before the law, or equal

⁸⁹ JEAN-LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND 132 (Oxford. J. of Legal Stud. ed., 1807).

⁹⁰ DICEY, *supra* note 82, at 244.

⁹¹ WALTER BAGEHOT, THE ENGLISH CONSTITUTION 34 (Paul Smith ed., 2001) (Another classic author, Bagehot also gives an account on the respectful relationship between the queen and the cabinet.).

⁹² DICEY, *supra* note 82, at 102–04.

⁹³ LESLIE STEPHEN, SCIENCE OF ETHICS 143 (2d ed. 2011).

subjection of all classes to the ordinary law of the land administered by the ordinary courts. Lastly, the rule of law mandates that the laws of the constitution are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.⁹⁴ In this way, the rule of law empowers the courts to take part in determining the law of the constitution: the law can only include those rules which are recognized and enforced by the courts.

Last but not least, it is well known that the constitutional architecture of the United Kingdom has undergone a considerable transformation in recent decades. An element of this transformation has been the adoption of the Human Rights Act 1998 (HRA) which incorporates the European Convention on Human Rights (ECHR) into U.K. law and promotes the enforcement of European human rights by the U.K. courts.⁹⁵ Parliament is required by the HRA to take into account any relevant Strasbourg case law.⁹⁶ The *declaration of incompatibility* by apex courts is considered as a crucial institutional mechanism in harmonizing the domestic legal system with the ECHR.⁹⁷ As Lord Bingham put it in the case of *R (Ullah) v. Special Adjudicator*, “while such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court.”⁹⁸ In *R (Jackson) v. Attorney General*, Lord Hope argued that “Parliamentary sovereignty is no longer, if it ever was, absolute. . . . Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.”⁹⁹ More importantly, Lord Bingham mentioned that “checks and balances [are] inherent in the British constitution.”¹⁰⁰ This process of transformation also involves reforms to the House of Lords, such as the abolition of judicial functions and the introduction of resignation, the establishment of an independent Supreme Court, which has

⁹⁴ DICEY, *supra* note 82, at 145–53.

⁹⁵ Howard Davis, *Human Rights Law Directions* (4th ed. 2016).

⁹⁶ Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act*, 73 MODERN L. REV. 887 (2010).

⁹⁷ *R v. Horncastle & Others*, [2009] UKSC 14, [10] (appeal taken from [2009] EWCA Crim. 9640, Eng.); *see also* *Al-Khawaja & Tahery v. The United Kingdom*, App. Nos. 26766/05 & 22228/06 (Eur. Ct. H.R. 2011) (Grand Chamber) (A declaration of incompatibility by a court means that a statute or part of a statute is incompatible with the ECHR. It does not invalidate the statute, but the government can use a rapid procedure to ensure that Parliament amends the statute.).

⁹⁸ *R v. Special Adjudicator ex parte Ullah (FC)* [2004] UKHL 26, [20] (appeal taken from Eng.).

⁹⁹ *Jackson v. Her Majesty's Attorney General* [2005] 1 A.C. (H.L.) 262, [104] (appeal taken from Eng.).

¹⁰⁰ *Id.* at 41.

already produced extensive human rights case-law,¹⁰¹ and the expansion of democratic self-governing competences in Northern Ireland, Scotland, and Wales. These developments show that this model, based upon the Hobbesian interpretation of constitutionalism, borrows important elements from the Lockean tradition.

Dicey's constitutional ideas of parliamentary sovereignty have been subject to criticism in recent decades. Eric Barendt, reconsidering on the one hand the concept of parliamentary sovereignty and rule of law and, on the other, the new constitutional developments, has claimed that Dicey's conceptions are misleading.¹⁰² I think Dicey would have argued that the rule of law, the *de facto* external and internal limits, and the constitutional conventions constitute instruments of balance between the trust in parliamentary supremacy and the distrust towards the government. Barendt and Lord Bingham would possibly reply that the equilibrium requires a thorough revision of the idea of parliamentary sovereignty.

V. CHECKS AND BALANCES AS MEANS OF DISTRUST IN THE UNITED STATES

The birth of U.S. constitutionalism can be described as a materialization of *distrust* towards the British government. The *Declaration of Rights and Grievances* enunciated that "his majesty's" liege subjects in these colonies are entitled to all the inherent rights and privileges of his natural born subjects" within the kingdom.¹⁰³ Therefore, imposed taxes were seen as violations of the English constitution. Echoing the theories of Locke and Montesquieu, the *Declaration of Independence* went further by proclaiming that, to secure unalienable rights, "Governments are instituted among Men, deriving their just powers from the consent of the governed" and that "it is the right of the people to alter or to abolish the government" whenever it becomes destructive of these ends.¹⁰⁴

¹⁰¹ See generally ANDREW LE SUEUR ET AL., BUILDING THE UK'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES (1st ed. 2004); STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (1st ed. 2013); Mark Tushnet, *The Rise of Weak-Form Judicial Review*, in COMPARATIVE CONSTITUTIONAL LAW 321, 326 (Tom Ginsburg & Rosalind Dixon eds., 2011).

¹⁰² See BARENDT, *supra* note 32, at 88–89. See in more detail in ERIC BARENDT, DICEY AND CIVIL LIBERTIES (1985). See also Goldsworthy, *supra* note 78 (reinterpreting parliamentary sovereignty).

¹⁰³ *Declaration of Rights and Grievances* (1765).

¹⁰⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The distrust towards the government is based not only on bitter colonial resentment but also on a banal anthropological presupposition. As James Madison famously formulated in *The Federalist Papers*, No. 51:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁰⁵

This is the human condition which makes constitutional checks and balances imperative. Again, “ambition must be made to counteract ambition.”¹⁰⁶ Constitutional devices to control the abuses of government are “reflections on human nature,” Madison writes, “but what is government itself, but the greatest of all reflections on human nature?”¹⁰⁷ It is not an exaggeration to say that U.S. constitutionalism has typically identified with the Madisonian notion of limited government. Checks and balances, vertical and horizontal separation of powers, and even constitutional review, as evidenced in *Marbury v. Madison*,¹⁰⁸ go back to the original idea of the founders.

However, the one-time debate between the *Federalists* and *Antifederalists* reminds us that this model of constitutional architecture aims at a restrained but efficient government. The Federalists advocated in favor of a more efficient central government, while the Antifederalists distrusted federal power. Under the pen name Brutus, one of the authors of the Antifederalist Papers warned that a federal system headed by a president

¹⁰⁵ THE FEDERALIST NO. 51 (James Madison).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ [“T]he particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (emphasis original); *see also*, THE FEDERALIST PAPERS NO. 78 (Alexander Hamilton).

might degenerate into despotism. Today it is important to remember Brutus's point, quoting Montesquieu, that:

[I]n a large [federal system], there are men of large fortunes, and consequently of less moderation; there are too great deposits to trust in the hands of a single subject; an ambitious person soon becomes sensible that he may be happy, great and glorious by oppressing his fellow citizens, and that he might raise himself to grandeur, on the ruins of his country.¹⁰⁹

Analyzing the debate, Hannah Arendt argues that what the founders of the federal American Constitution “were afraid of in practice was not power but impotence,” because of the history of defects and the paralysis of the Confederacy, as well as the belief of Montesquieu that republican government was effective only in relatively small territories. Accordingly, “the true objective of the Constitution was not to limit power but to create more power, actually to establish and duly constitute an entirely new power center, destined to compensate the confederate republic.”¹¹⁰ In sum, the inspiring principle of the U.S. Constitution was the dualism between liberty and efficiency; in other words, a strong yet still limited union.

It is apparent that this constitutional model aims to prevent leaders from concentrating and abusing public power. Nonetheless, it would be a gross simplification to conclude that a public power limited by a written constitution, separation of powers, and the system of checks and balances are the only characteristics of U.S. constitutionalism. If there were only constitutional checks, an efficient federal government would be impossible.

Similar to U.K. constitutionalism, this model also relies on unwritten constitutional conventions, often called “usages.”¹¹¹ In their most recent book, Steven Levitsky and Daniel Ziblitz write that two conventions stand out as fundamental to the system: *mutual toleration* and *institutional forbearance*. The former refers to the idea that “as long as our rivals play by constitutional rules, we accept they have an equal right to exist, compete for power, and

¹⁰⁹ George Clinton, *Antifederalist No. 14*, in *THE ANTIFEDERALIST PAPERS* 37 (Morton Borden ed., 1965) (1787).

¹¹⁰ HANNAH ARENDT, *ON REVOLUTION* 153–54 (1990).

¹¹¹ Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 *U. ILL. L. REV.* 1847, 1847–70 (2013).

govern.”¹¹² In short, political opponents are not enemies. Institutional forbearance is closely related to mutual toleration. It can be thought of as “avoiding actions that, while respecting the letter of the law, obviously violate its spirit.”¹¹³ The text of the Constitution does not prohibit that constitutional institutions use their competences to the hilt. A president could govern unilaterally by issuing executive orders, proclamations, and executive memoranda without the endorsement of Congress. A president could similarly bypass the judiciary by refusing to enforce court judgments or by extensive exercise of the power to issue a presidential pardon. The Senate could prevent presidents from appointing justices or members of the executive. Legislative minorities and even individual senators could obstruct legislation by indefinitely prolonging the debate.¹¹⁴ Such unwritten conventions may prevent constitutional institutions and decision makers from reaching an impasse and causing a crisis.

VI. COMPARATIVE ASSESSMENT

Constitutionalism is better served when the elements of rival Hobbesian and Lockean theories are balanced. A comparison of the rival models of constitutionalism may support the idea that under certain circumstances, a relatively stable equilibrium can be maintained between constitutional cooperation and of the proclivity to distrust governments. Competition and fight for governmental power do not necessarily exclude mutual respect and partnership.¹¹⁵

Nonetheless, scholars have long warned that democracy is in danger in the United States. This is a time when politics are polarized.¹¹⁶ Many

¹¹² LEVITSKY & ZIBLAT, *supra* note 14, at 102.

¹¹³ LEVITSKY & ZIBLAT, *supra* note 14, at 106.

¹¹⁴ See GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* (2010).

¹¹⁵ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 26 1957, 2 BvG 309 (361) (Ger) (For a comparison of vertical separation of powers, see the term *Bundestreue* designating a federal-friendly attitude in Germany. Both the federal governmental branches and the States are obliged to cooperate *bona fide* and contribute to the preservation of the interests of the Federation and its members.); see also Fabian Wittreck, *Die Bundestreue*, in 1 HANDBUCH FÖDERALISMUS (Ines Hartel ed.); GRUNDLAGEN DES FÖDERALISMUS UND DER DEUTSCHE BUNDESSTAAT 497–525 (2012); HARTMUT BAUER, *DIE BUNDESTREUE, ZUGLEICH EIN BEITRAG ZUR DOGMATIK DES BUNDESSTAATSRECHTS UND ZUR RECHTSVERHÄLTNISLEHRE* (1992) (providing a detailed analysis).

¹¹⁶ Cf. RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* (2008) (presenting an early diagnosis with suggestions for tackling this problem and identifying and defending core constitution principles (equal value of human life and personal autonomy as responsibility) that all citizens can and should share).

Americans distrust governmental institutions.¹¹⁷ The established forms of toleration and institutional self-restraint are challenged.¹¹⁸ First, as a result of mutual distrust, constitutional checks have been used excessively and a number of longstanding conventions have been broken. Second, the following impasse has given rise to an authoritarian presidential administration with a tendency to disrespect constitutional checks and balances.¹¹⁹ The United Kingdom's withdrawal from the European Union can be also seen as a clear sign of disintegration. It represents the distrust towards supranational institutions. The idea of preferring democracy on the domestic level to supranational development goes hand in hand with other proposed constitutional changes. Among the proposals, we find the repeal of the Human Rights Act, withdrawal from the ECHR, and a preference for appointed peers to elect representatives in the Parliament.¹²⁰ These tendencies echo the then-conventional and now-revitalized scholarly view that Parliament has the final say in matters of the constitution and human rights. It is far from evident that trust in a single constitutional body under the rule of a pure majority, no matter how deeply rooted, would serve the values and principles of constitutional democracy better than a pluralistic and cooperative approach to constitutional justice.¹²¹

¹¹⁷ For example, in the 1970s, about forty percent of American citizens had a “great deal/quite a lot” of trust in Congress; in recent years, this rate has dropped to about ten percent. Gallup, *Confidence in Institutions*, GALLUP (Nov. 8, 2018), <http://news.gallup.com/poll/1597/confidence-institutions.aspx>; see also Stephen Breyer, *Making Our Democracy Work: The Yale Lecture*, 120 YALE L.J. 999 (2011) (describing an early constitutional account).

¹¹⁸ See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018) (providing a comparative perspective and arguing that prospects of liberal democracy depend less on institutions than on political leadership, popular resistance, and party politics).

¹¹⁹ See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2018) (laying out a deeper analysis of institutional pathologies) (modified from Bruce Ackerman, *Tanner Lecture on Human Values*, TANNER LECTURES (Nov. 8, 2018) https://tannerlectures.utah.edu/_documents/a-to-z/a/Ackerman_10.pdf); see also SUNSTEIN, *supra* note 6 (raising the provocative question, can it be a dictatorship in the United States?).

¹²⁰ See, e.g., CONSERVATIVE PARTY, *PROTECTING HUMAN RIGHTS IN THE UK: THE CONSERVATIVES' PROPOSAL FOR CHANGING BRITAIN'S HUMAN RIGHTS LAWS*, https://www.conservatives.com/~media/files/.../human_rights.pdf (last visited Dec. 22, 2018); EUROPEAN UNION COMMITTEE, *THE UK, THE EU AND A BRITISH BILL OF RIGHTS 2015, 2015–16*, H.L. at 139, U.K., <https://publications.parliament.uk/pa/ld201516/ldselect/ldcom/139/139.pdf>.

¹²¹ See, e.g., *CONSTITUTION IN CRISIS: THE NEW PUTNEY DEBATE* (Denis J. Galligan ed., 2017) (collecting different views) (The UK constitutional transformation has of course attracted distinguished scholarly attention).

Many studies reveal that a gradual loss of trust in public institutions has occurred on an almost global scale over the past two- or three decades.¹²² In constitutional democracies, citizens are increasingly dissatisfied with their political institutions.¹²³ In these times we are witnessing that the loss of trust in democratic representative government is contributing to the rise of populist authoritarianism.

We need to look for the reasons behind this loss of trust; we can find them in several forms. Economic reasons are easy to find as economic prosperity causes public satisfaction, whereas economic decline erodes citizens' trust in the government. In the European Union, new data shows that people who have suffered more from difficult economic times are more likely to have lost confidence in democratic governments and in the EU institutions. Distrust towards democratic institutions is at its worst in the economies that have struggled the most.¹²⁴ The phenomenon, however, seems more complex. Perhaps it is better to say that severe financial and social shocks, such as bank crises, corruption, social injustice, social polarization, mismanagement of migration, and terrorist threats may contribute to widespread social distrust.¹²⁵ An important role has also been played by institutional factors ranging from unaccountable political leaders to structural shortcomings of the constitutional institutions.

Thus, social confidence in the democratic government and political institutions are strongly associated with each other. Social trust can help build effective institutions which consolidate into well-performing governments and this, in turn, encourages confidence in constitutional institutions.¹²⁶

¹²² See, e.g., JOSEPH S. NYE, JR. ET AL., *WHY PEOPLE DON'T TRUST GOVERNMENT* (1997); PIPPA NORRIS, *CRITICAL CITIZENS: GLOBAL SUPPORT FOR DEMOCRATIC GOVERNMENT* (1999); MARK E. WARREN, *DEMOCRACY AND TRUST* (1999).

¹²³ See Scheppele, *supra* note 16, at 546 n.1 (referring to the OECD countries, where trust in public institutions decreased in average from approximately 44% to 36% between 2009 and 2013); See also Esteban Ortiz-Ospina & Max Roser, *Trust*, *OUR WORLD IN DATA*, <https://ourworldindata.org/trust> (last visited Nov. 8, 2018),

¹²⁴ Recent European Union data shows a decline in trust in both EU institutions and national institutions. Trust in government in EU debtor countries declined from between 40 to 50% to less than 20% between 2008 and 2015. Chase Foster & Jeffrey Frieden, *Crisis of Trust: Socio-economic Determinants of Europeans' Confidence in Government*, 18 *EUROPEAN UNION POLITICS* 511 (2017). The authors argue that citizens with more education and higher levels of skills trust government more than those educational and occupational groups that have benefited less from European integration.

¹²⁵ See SUSAN J. PARR & ROBERT D. PUTNAM, *DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES?* (2000).

¹²⁶ See Kenneth Newton & Pippa Norris, *Confidence in Public Institutions: Faith, Culture or Performance?*, in *DISAFFECTED DEMOCRACIES*, *supra* note 126, at 178.

Conversely, complex social tendencies and institutional shortcomings may anticipate a progressive erosion of the trust in democratic institutions and constitutionalism.¹²⁷ Remember the archetypal case of the Weimar Republic: the fall of constitutional democracy and the rise of totalitarianism.¹²⁸ It is true that the economic calamity of the Great Depression proved fatal for the constitutional democracy in Germany. But the consequences of the Versailles Treaty, internal threats from political extremists, and failed cooperation of moderate political parties also played a role in the fall of the Weimar Constitution.¹²⁹ The political institutions were unable to deal with the economic, social, and political crisis.

Similar schemes seem to work worldwide today. Putin's and Erdogan's dominance in Russia and Turkey respectively are the consequence of distrust towards political institutions. Both leaders pulled off the customary trick of offering a solution to instability largely of their own making. Authoritarians usually point to different signs of crisis justifying a popular mandate in their favor to deal with the issue unboundedly.¹³⁰ As a result, the Parliament changes the constitution and apex courts alter the reading of the constitutional text to support an executive president with increased powers.¹³¹ Similarities can be detected in many other countries, notably Hungary, where populist authoritarianism has triumphed over constitutional democracy. The rather rosy story of post-communist constitutional transformation has been gradually

¹²⁷ See NYE ET AL., *supra* note 122; Pippa Norris, *Institutional Explanations for Political Support*, in CRITICAL CITIZENS, *supra* note 122, at 217.

¹²⁸ ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (2017); FRANZ NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933–44* (1944); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1958) (Among the best pioneering works you may find are Fraenkel's *Dual State*, Neumann's *Authoritarian State*, and Arendt's *Origins of Totalitarianism*). See also FRANZ NEUMANN, *DEMOKRATISCHER UND AUTORITÄRER STAAT. STUDIEN ZUR POLITISCHEN THEORIE* (Herbert Marcuse ed., 1967).

¹²⁹ Franz Neumann, *The Decay of German Democracy*, in, *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER* 9, 41 (William E. Scheurman ed., 1996) (originally appeared in *The Political Quarterly* 4, no. 1 (1933)). For a comparison of different views, see Arthur J. Jacobson & Bernhard Schlink, *WEIMAR: A JURISPRUDENCE OF CRISIS* (Arthur J. Jacobson & Bernhard Schlink eds., Belinda Cooper trans., 2000) (collecting a comparison of different views).

¹³⁰ See Vladislav Surkov, *Dolgoye gosudarstvo Putina*, NEZAVISIMAYA GAZETA (Feb. 11, 2019), http://www.ng.ru/ideas/2019-02-11/5_7503_surkov.html (Vladislav Surkov, ideologist and senior adviser to Russian President Putin, advocating national sovereignty and strong presidential authority and emphasizing that in the Putin-regime military and police functions are decisive, rather than representative or judicial branches of government.).

¹³¹ See generally CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* (2018) (regarding the decreasing relevance of law and increasing importance of discipline in China). China is a more recent example of the abolition of term limits. In March 2018, the National People's Congress adopted a constitutional amendment that abolished term limits for the presidency. In this way, Xi Jinping may hold the position indefinitely. *Id.*

spoiled. During a period of decline, observers of Hungarian politics and law have witnessed a cold civil war characterized by paralyzed legal institutions and distrust towards the old constitution. Several empirical studies have revealed that an overwhelming majority of the Hungarian society distrusted legal institutions such as the Parliament, governmental bodies, and courts.¹³² According to a comparative survey, two decades after 1989, the “*annus mirabilis*,” seventy-seven percent of Hungarians were dissatisfied with the way democracy was working in the country.¹³³ Approval for changing from a single-party system to a democracy had decreased by eighteen percent.¹³⁴ Finally, the cold civil war ended in a landslide election victory for the political right, paving the way for the total transformation of the legal system that resulted in the adoption of the 2011 Fundamental Law and its amendments.¹³⁵

VII. CONCLUSION

In sum, representative governments in several countries cannot cope with legal and extra-legal difficulties. Poor democratic traditions, weak civil society, and imperfect legal institutions may all make the constitutional systems vulnerable. When a representative government is paralyzed because of fundamental disagreement, and legal stability crumbles because of a disintegrating constitutional system, the public finds itself wishing for an effective and efficient executive. This path may lead towards populist authoritarianism.

Contemporary tendencies show that the executive power may gain unrestrained power when a constitutional system fails to maintain the balance between trust in the legitimate government and the impulse to distrust it. A divergence from equilibrium can be a sign of populist authoritarianism. Although modern authoritarianism refers to principles and aims of

¹³² THE PEW GLOBAL ATTITUDES PROJECT, TWO DECADES AFTER THE WALL’S FALL: END OF COMMUNISM CHEERED BUT NOW WITH MORE RESERVATIONS 32 (2009), pewglobal.org/files/2009/11/Pew-Global-Attitudes-2009-Pulse-of-Europe-Report-Nov-2-1030am-NOT-EMBARGOED.pdf; See also Chung-Si Ahn & Won-Taek Kang, *Trust and Confidence in Government in Transitional Democracies: South Korea in Comparative Perspective*, 11 J. KOREAN POLITICS (2002) (comparing South Korea and its neighboring countries).

¹³³ TWO DECADES AFTER THE WALL’S FALL, *supra* note 132.

¹³⁴ *Id.* at 1.

¹³⁵ DEMOS, NOTHING TO FEAR BUT FEAR ITSELF: SUMMARY REPORT (2017), <https://www.demos.co.uk/wp-content/uploads/2017/02/Nothing-to-Fear-but-Fear-Itself-final-short.pdf> (The level of distrust in the Polish national government is also high, around 60%. Polish citizens have far more trust in the European Commission than their constitutional institutions.); See Susan Rose-Ackerman, *Beyond Electoral Mandates—Oversight and Public Participation*, VERFASSUNGSBLOG (Nov. 13, 2018), <https://verfassungsblog.de/beyond-electoral-mandates-oversight-and-public-participation/> (analyzing this attitude).

democracy, it introduces mechanisms that diverge from those of democratic institutions. When authoritarianism calls for a constitutional change so as to create a more dynamic and efficient executive, it is misusing constitutional institutions. The lesson may be that an effective and efficient government is impossible when only constitutional checks work and, conversely, an authoritarian executive may emerge when constitutional checks do not work at all.