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**DEPARADOXING CONSTITUTIONAL DEMOCRACY**


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*Democracy can become more fragile as it becomes more complete. Socrates noticed this paradox three millennia ago. British parliamentary and American presidential systems of government established stable electoral patterns during the long formative periods when those systems were not as democratic as they are today. Elitist ways of selecting legislators stopped even the most popular prime ministers and presidents from fully controlling Parliament and Congress. When these systems have been emulated elsewhere with mass voting from the outset, they have often failed. Fuller democracy can enable a charismatic leader to transform a mass following into a disciplined party that can exploit transient popularity to control legislatures and turn democracy against itself. But this paradox is resolvable. Comparative constitutional experience shows that we can be fully democratic today and reliably stay fully democratic tomorrow by redesigning the way we vote for legislators and the way we structure executives.*

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# DEPARADOXING CONSTITUTIONAL DEMOCRACY

## INTRODUCTION

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

*Yes, it is their practice.*

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

– Socrates<sup>2</sup>

Democracy can become more fragile as it becomes more complete. *Constitutional* democracy seeks to keep democracy intact not only for today's elections but for future times too. Keeping up the democracy game depends on maintaining patterns of real repeat play in which today's winners never end the tournament and take power permanently. Both the United Kingdom's parliamentary system and the United States' presidential system established patterns of real repeat play during the long formative periods when those systems were less democratic than they are now. Their oligarchic, elitist features helped deepen the grooves of custom that secured voters' rights for the future. In particular, elitist methods of choosing legislators helped prevent prime ministers and presidents from controlling their legislatures. Those legislatures could not be completely captured through anyone's transient popularity.

When democracy really dawned, when the electorate widened to include the mass of ordinary citizens, a new route to power opened up, a route that much more readily and comprehensively concentrated power in one pair of hands. One true leader could attract a mass following and turn that following into a disciplined party that could capture control of legislatures and even amend constitutions. Temporarily concentrating so much power in one charismatic person puts a democratic system at risk of changing in ways that permanently concentrate power in one person and end democracy. When the British parliamentary and American presidential models have been emulated elsewhere with mass voting from the outset, we have often seen

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<sup>2</sup> PLATO, *THE REPUBLIC* 299 (bk. 8, 565) (John Llewellyn Davies & David James Vaughan, trans., 3<sup>rd</sup> ed., 1866).

them take this route to tyranny. These models often fail when transplanted,<sup>3</sup> just as Socrates predicted.<sup>4</sup>

How do we make democracy complete without setting it up to sabotage itself? How do we let everyone vote without exposing democracy to predation by demagogues who draw power from mass voting? How do we maintain the real repeat playing that is the lifeblood of *tomorrow's* democracy?

Courts can try. Constitutional strategies to self-maintain democracy include empowering courts and other supervisory institutions, such as electoral commissions, to enforce barriers to deep systemic change. The Indian Supreme Court's basic structure doctrine exemplifies such a strategy in action.<sup>5</sup> But such barriers are themselves vulnerable to critique as anti-democratic.<sup>6</sup> And such courts and other institutions can be captured by those they seek to constrain,<sup>7</sup> and often are.<sup>8</sup>

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<sup>3</sup> See, e.g., Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make A Difference?*, in 1 JUAN J. LINZ & ARTURO VALENZUELA (EDS.), *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 3-87 (1994); MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 40 (1992); Scott Mainwaring & Matthew S. Shugart, *Juan Linz, Presidentialism, and Democracy: A Critical Appraisal*, 29 *COMPARATIVE POLITICS* 449, 453 (1997). “The 2023 *V-Dem* report noted that the global level of democracy in 2022 had returned to its 1986 value. Over seventy-two percent of the world's population, 5.7 billion people, live in autocracy. ... Moreover, the tempo of de-democratization is increasing. Just within the last year, the number of autocratizing countries has increased by nine. The hope for the fourth wave of democratization, ignited by the Arab Spring in 2011, has been crushed, and a part of the third wave of democratization has been undone.” Katarína Sipulová & David Kosar, *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*, 24(8) *GERMAN L.J.* 1577, 1577–78 (2024).

<sup>4</sup> PLATO, *supra* note 2.

<sup>5</sup> See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Minerva Mills v. Union of India*, (1980) 3 SCC 625.

<sup>6</sup> See, e.g., Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, (1974) 1 SCC (Jour.) 45; Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in B. N. KIRPAL ET AL. (EDS.), *SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* 110 (2004).

<sup>7</sup> “Put a bit more strongly than is appropriate, IPDs are most likely to be successful just in the situations where they are least needed.” MARK TUSHNET, *THE FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY* 66 (2021). See also Rosalind Dixon & David Landau, *Abusive Judicial Review: Courts Against Democracy*, 53 *U.C. DAVIS L. REV.* 1313 (2020).

<sup>8</sup> “Dutifully performing its role in a highly-choreographed display of political theatre, Russia's highest court on Monday approved constitutional changes that opened the way for President Vladimir V. Putin

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We can both more fully *be* and more reliably *stay* democratic by stopping the executive from becoming a predator and a capturer. This article identifies promising and complementary ways to do that: proportional representation voting models that reduce the prospects of one person controlling a legislature and plural executive models, such as Switzerland's, that help prevent one person from controlling the executive.

### THE MAKINGS OF MODERN DEMOCRACY

The “paradox of democracy” is a phrase used by many authors to highlight puzzles, contradictions, and curiosities in and about democracy.<sup>9</sup> There is a basic tension in the idea of *self*-government, because governing a large group will involve some humans doing acts that lead and many humans doing acts that follow. *Leadership by all the followers* is not actually possible. But letting the followers keep deciding whom they will follow *is*. What if the followers vote for someone who ends voting? That was how Karl Popper read Socrates’

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*to crash through term limits and stay in power through 2036. With a dense 52-page ruling clogged with legalese, the Constitutional Court removed one of the last, albeit very flimsy potential obstacles to Mr. Putin effectively becoming president for life. ... Ekaterina Schulmann, a political commentator and former member of Mr. Putin's human rights council, mocked the Constitutional Court's ruling on Monday as evidence of how cravenly pliant Russia's nominally independent judicial system had become. 'It is rare that the spirit of slavery and intellectual cowardice express themselves with such fullness in a written text,' she said in a commentary posted on Facebook.” Andrew Higgins, Russia's Highest Court Opens Way for Putin to Rule Until 2036, N.Y. TIMES, Mar 16, 2020.*

<sup>9</sup> See, e.g., Richard Wollheim, *A Paradox in the Theory of Democracy*, in PETER LASLETT & W.G. RUNCIMAN (EDS.), *PHILOSOPHY, POLITICS AND SOCIETY* 71 (1st ed., 1962) (a true democrat can favor implementing a particular policy and favor implementing the policy that has democratic support, but the two may be antithetical to each other); Larry Jay Diamond, *Three Paradoxes of Democracy*, 1 J. DEMOCRACY 48 (1990) (democracy requires conflict but also consensus; government must be representative but able to govern the represented; there must be consent but also effectiveness); ZACH GERSHBERG & SEAN ILLING, *THE PARADOX OF DEMOCRACY: FREE SPEECH, OPEN MEDIA, AND PERILOUS PERSUASION* (2022) (free speech intrinsic to democracy can threaten democracy and cannibalize itself). See also, e.g., Stephen Holmes, *Precommitment and the paradox of democracy*, in JON ELSTER & RUNE SLAGSTAD (EDS.), *CONSTITUTIONALISM AND DEMOCRACY* 195 (1988); Robert A. Dahl, *A Democratic Paradox?*, 115 POL. SCI. Q. 35 (2000); Kevin Olson, *Paradoxes of Constitutional Democracy*, 51 AM. J. POL. SCI. 330 (2007); PAUL M. SNIDERMAN ET AL. (EDS.), *PARADOXES OF LIBERAL DEMOCRACY: ISLAM, WESTERN EUROPE, AND THE DANISH CARTOON CRISIS* (2014); BRUCE KAPFERER & DIMITRIOS THEODOSSOPOULOS (EDS.), *DEMOCRACY'S PARADOX: POPULISM AND ITS CONTEMPORARY CRISIS* (2019).

paradox of democracy.<sup>10</sup> What leads to that paradox is the one we now notice: the more democratic we are, the more likely we are to let someone end the democracy we have. The broader the franchise, the more precarious it is.

This paradox is resolvable. It exists only because we humans often let ourselves be led by charismatic individuals. Many people can become in thrall to a person. No one has ever been in thrall to a committee. If we create models of democratic governance that do not set up singular leaders as focal points for following, we can fix democracy's fragility, its precariousness. Almost two centuries of Swiss constitutional experience evidence this.<sup>11</sup> But if this diagnosis and prescription are correct, why has democracy survived for centuries in the United Kingdom and the United States, despite those nations having substantively singular chief executives? Two case studies from those prototype systems' infancy help explain why democracy's durability in the United Kingdom and the United States does not diminish the case for calling charismatic individual leadership the key threat to democracy now.

#### **A. WALPOLE AND BRITISH PARLIAMENTARY DEMOCRACY**

Robert Walpole came to the fore at a turbulent time.<sup>12</sup> The Glorious Revolution that ousted King James II had embarked England on a new constitutional era, reflected in the Bill of Rights of 1689, the Act of Settlement of 1701, and the union with Scotland in 1707. The seventeenth century's power struggles between the Stuart monarchs and Parliament had been a series of winner-take-all elimination games. The losers of each round lost more than office, sometimes even their lives. To restart the contest required revolution and risked more violence. Would the eighteenth century be any different?

Walpole's early experience was inauspicious. After his Whig faction lost electoral support, the new Tory government accused him of corruption, impeached him in Parliament, and imprisoned him in the Tower of London.

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<sup>10</sup> KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 581-82 (2013).

<sup>11</sup> See Part III, *infra*.

<sup>12</sup> For the historical context of these events, see particularly Sir John Plumb's two volume biography of Walpole: J. H. PLUMB, *SIR ROBERT WALPOLE: THE MAKING OF A STATESMAN* (1956) and J. H. PLUMB, *SIR ROBERT WALPOLE: THE KING'S MINISTER* (1961).

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But the political wind soon changed again. Queen Anne died before the Tories could prepare the nation to accept her exiled Catholic brother, James. When a more distant Protestant relative took the throne, Walpole's Whigs swept back into power.

In Parliament, Walpole led in attainting the Tory Viscount Bolingbroke for treason. The cycle of winner-take-all elimination seemed to be ongoing. Walpole also managed to situate himself to lead the nation so singularly and for so long that we now consider him the first British prime minister. He had qualities of personality and intelligence that set him up to lead, nurturing the kind of relationship to others that Max Weber called *charismatic authority*.<sup>13</sup> His wide support in Parliament made the new monarch dependent on him to get things done. The executive power delegated to him by the monarch included power to decide who would be appointed to other government offices, both high and low, and who would receive other forms of government patronage. That, in turn, strengthened his hold over other members of Parliament.

Yet something was changing about the ways those with power in England were able to wield it. Even as the emerging system's dynamics concentrated power in Walpole's hands, they also limited him in ways that the preceding century's winners had not been limited. Nothing illustrated this so starkly as the actual fate of his nemesis, Bolingbroke.

Through charm and bribery, Bolingbroke manoeuvred into the good graces of the monarch, who insisted that Walpole persuade Parliament to let Bolingbroke return from exile in France and own land in England.<sup>14</sup> On return, Bolingbroke did not stay quiet. He led in criticising Walpole's administration, both in person and in print.<sup>15</sup> His home became a centre of opposition. Among his distinguished visitors was a friend from France: Charles-Louis de Secondat, Baron de Montesquieu.<sup>16</sup>

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<sup>13</sup> Max Weber, *Theory of Social and Economic Organization*, in S. N. EISENSTADT, ED., ON CHARISMA AND INSTITUTION BUILDING: SELECTED PAPERS 46–62 (1968) (A. K. Henderson & Talcott Parsons trans., 1947).

<sup>14</sup> PLUMB, THE KING'S MINISTER, *supra* note 12, at 125–126.

<sup>15</sup> See ISAAC KRAMNICK, BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE 15–24 (1992).

<sup>16</sup> ROBERT SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 297–301 (1961); Robert Shackleton, *Montesquieu, Bolingbroke, and the Separation of Powers*, 3 FRENCH STUDIES 25–38 (1949).

Montesquieu could see that Bolingbroke was getting away with publicly opposing the government. Walpole could not just say “*will no one rid me of this turbulent priest?*”<sup>17</sup> and have Bolingbroke silenced. Bolingbroke had what Montesquieu called “*political liberty*,” which Montesquieu defined as “*a tranquillity of mind arising from the opinion each person has of his safety.*” Montesquieu opined that “[i]n order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.”<sup>18</sup> England’s eighteenth-century constitution did just that, Montesquieu argued, by separating three kinds of power and giving them to different people: the monarch, the members of Parliament, and the adjudicators in courts.<sup>19</sup>

Montesquieu could surely see that the monarch was helping to protect Bolingbroke.<sup>20</sup> Montesquieu contended that having one person as chief executive was consistent with a constitution of liberty and desirable “*because this branch of government, having need of despatch, is better administered by one than by many.*”<sup>21</sup> The danger to liberty would come, Montesquieu argued, from executive and legislative power being fused in the same people. “[I]f there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.”<sup>22</sup> The danger to Bolingbroke’s freedom would come, Montesquieu predicted, from the likes of Walpole ultimately controlling both the legislature and the executive. In Montesquieu’s eyes, danger to liberty lay in the emerging practice of responsible government that was concentrating power in Walpole – the monarch was delegating executive power to the person who had the most power in the legislature.

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<sup>17</sup> See W.L. WARREN, HENRY II 112, 508 (1977).

<sup>18</sup> 1 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, 151 (Thomas Nugent trans., orig. publ. 1748, 1900).

<sup>19</sup> *Id.* at 151-62; SHACKLETON, *supra* note 16, at 285, 297-301. “*The British constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal Bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged; so this great political critic appears to have viewed the constitution of England, as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered in the form of elementary truths, the several characteristic principles of that particular system.*” JAMES MADISON, THE FEDERALIST No. 47 (1788).

<sup>20</sup> MONTESQUIEU, *supra* note 18, at 156.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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When we consider how often parliamentary systems have turned into tyrannies, we can see that Montesquieu was not wrong to call the concentrated powers of prime ministership dangerous. To exemplify that, we need look no further than the governments of the three Axis powers that started World War II. Montesquieu's mistake was to see the danger in combining *kinds* of power, when it really lay in concentrating too much power in one person.

Combining kinds of power is inevitable. There was not really a separation of powers in England, but a sharing of powers. For example, the monarch had power to say no to new laws, and the Parliament had power to remove the monarch's officials. Montesquieu argued that these checks and balances existed to protect the institutional separation,<sup>23</sup> but as James Madison acknowledged at the American Founding,<sup>24</sup> checks and balances did more than defend institutional turf. The monarch's power to veto laws made the monarch a third chamber of Parliament, with leverage to negotiate for the laws the monarch wanted. And centuries of experience in constitutional democracies around the world have demonstrated that implementing existing law involves making more, both through executive regulations and through judicial decisions. Throughout the common law world and beyond, all three branches of government exercise both legislative and executive powers.<sup>25</sup>

The true source of English liberty was the power sharing that stopped any individual in government, including Walpole, from having the last word on the reach of their own powers.<sup>26</sup> Walpole had more influence than anyone else on what the executive did and on what the legislature did. He had both executive and legislative power. But neither was ultimately his alone. The

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<sup>23</sup> See, e.g., *id.* at 159: “The executive power . . . ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative.” *Id.* at 150: “[C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.”

<sup>24</sup> “On the slightest view of the British constitution we must perceive that the legislative, executive and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority.” JAMES MADISON, *THE FEDERALIST* No. 47 (1788).

<sup>25</sup> See Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUDIES 419 (2005).

<sup>26</sup> *Id.* at 425-26.

monarch's presence above him was one limitation on Walpole's power, but it was not the only one. The legacy of Parliament's successes in the power struggles of the seventeenth century was that a sufficiently united Parliament would ultimately get its way against the monarch. What limited Walpole most was that he could not sufficiently control Parliament.

Walpole had two ways to affect what Parliament did – persuasion and patronage. He was charismatic and shrewd enough to use both tools to great effect.<sup>27</sup> This attracted the criticism that Walpole was arrogating too much power by making the legislature dependent on the executive. David Hume countered that Walpole was really just maintaining an equilibrium between the branches that enabled effective governance. The right question, Hume argued, was not whether Walpole was making Parliament dependent on the executive, but “*what was the proper degree of this dependence, beyond which it became dangerous to liberty.*”<sup>28</sup> Some degree of dependence, Hume argued, just counter-balanced the executive's dependence on parliamentary support. Dangling carrots of preferment could take Walpole only so far, and less far as he aged and looked less likely to offer much more in the future. What he lacked were sticks.

Many members of Parliament, including erstwhile allies, had little reason to fear reprisal for not bending to Walpole's will, because he could not control the processes through which they held their seats. In one chamber, seats were hereditary. In the other chamber, members were chosen through longstanding, jealously cherished local and regional processes involving small numbers of privileged people.<sup>29</sup> Walpole could not completely capture candidate selection processes for the House of Commons because other powerful people had well-settled say in those processes. Many in these old enfranchised families had risked their lives in standing up to the Stuart monarchs. They were neither in awe nor afraid of Walpole. That actual dispersion of electoral power was what maintained the election cycle and preserved the freedom of speech and really stopped Walpole from becoming

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<sup>27</sup> See, e.g., PLUMB, THE MAKING OF A STATESMAN, *supra* note 12, at 52-61, 72-73, 78; PLUMB, THE KING'S MINISTER, *supra* note 12, at 307.

<sup>28</sup> David Hume, *Of the independency of Parliament*, in KNUD HAAKONSSON (ED.), HUME: POLITICAL ESSAYS 26 (1994). The virtue of mutual dependence had been a central claim of Walpole's defence against Bolingbroke's critique. See KRAMNICK, *supra* note 15, at 123-24.

<sup>29</sup> PLUMB, THE MAKING OF A STATESMAN, *supra* note 12, at 41-42.

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a dictator, not the formal separation of institutions that Montesquieu noticed.

Bolingbroke never regained public office. But he never lost his ability to speak out and influence others. Outsiders such as Montesquieu marvelled that England's new constitutional settlement enabled stable and successful governance to coexist with vocal, uninhibited opposition. Had some newfound *spirit* of liberty or democracy removed the risk of tyranny? When they saw opportunity, Walpole and Bolingbroke each tried to destroy the other. Their long coexistence resulted from circumstances not of their choosing and not intrinsic to constitutional democracy.

### **B. JEFFERSON AND AMERICAN PRESIDENTIAL DEMOCRACY**

Thomas Jefferson's candidacy for the presidency had long coattails. Members of his Democratic-Republican party won most of the seats in the House of Representatives, and as his presidency progressed, the party gained a majority in the Senate too. Only the judiciary remained undominated. The defeated Federalists had seen to that, creating new courts and a flurry of new appointments on their way out of office. When Congress convened, the Jeffersonians set about undoing the Federalists' handiwork. They repealed the recent judicial re-organisation, abolishing seats already occupied by Federalist appointees.<sup>30</sup> In the Senate, Gouverneur Morris complained that this made a mockery of the Constitution's promise, mirroring the English Act of Settlement, that federal judges would hold their offices "*during good Behaviour.*"<sup>31</sup> Could it really be that "*you shall not take the man from the office, but you may take the office from the man; you shall not drown him, but you may sink his boat under him*"[?]<sup>32</sup> A cowed Supreme Court nonetheless recognised the repeal.<sup>33</sup>

What of the Supreme Court Justices themselves? The Constitution clearly required the Court's existence, but could the Jeffersonians remove political opponents from its bench? When his party had acquired the Senate

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<sup>30</sup> Act to Repeal Certain Acts respecting the Organization of the Courts, 2 STAT. 132, March 8, 1802.

<sup>31</sup> U.S. CONST. art. III §1.

<sup>32</sup> 11 ANNALS OF CONGRESS 39 (United States Senate, January 8, 1802).

<sup>33</sup> *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). See Letter John Marshall to Samuel Chase, Jan. 23, 1804, reproduced in 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL, between 176 and 177 (1919).

supermajority needed to remove officeholders for “high Crimes and Misdemeanors,”<sup>34</sup> Jefferson decided to try. With his encouragement, the House of Representatives impeached Samuel Chase,<sup>35</sup> the Court’s most vociferous and intemperate critic of the Jeffersonians. At trial in the Senate, Chase’s counsel argued “*that the offence, whatever it is, which is the ground of impeachment, must be such a one as would support an indictment.*”<sup>36</sup> Yet the arch-Federalist Alexander Hamilton had argued in the Constitution’s ratification debates that the impeachment power gave Congress “*a complete security*” against “*judiciary encroachments on the legislative authority.*”<sup>37</sup> That seemed to suggest that Congress could remove judges for the way they were doing their jobs, even if the objectionable behaviour fell short of indictable crime.

Chase’s impeachment failed. Some of the Jeffersonian senators acquitted him on all charges.<sup>38</sup> Though we cannot be certain of their individual

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<sup>34</sup> U.S. CONST. arts. I § 3 cl. 6; II §4.

<sup>35</sup> The Articles of Impeachment reported to the House on March 26, 1804, concluded that the House of Representatives “*do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors.*” (13 ANNALS OF CONGRESS 1240) and alleged that Chase had lacked impartiality when presiding at trials and when supervising grand jury investigations in several cases against political opponents of the Adams administration, and that in 1803 he had delivered “*an intemperate and inflammatory political harangue*” to a grand jury in Maryland against the state government. (*Id.* at 1237-1240).

<sup>36</sup> 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453 (1836), which Elliot annotated with Joseph Story’s commentary: “*It seems to be the settled doctrine of the high court of impeachment, (the Senate,) that though the common law cannot be a foundation of a jurisdiction not given by the Constitution or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law; and that what are, and what are not, high crimes and misdemeanors, is to be ascertained by a recurrence to the great basis of American jurisprudence.*” (*Id.*)

<sup>37</sup> “[T]he supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.” ALEXANDER HAMILTON, THE FEDERALIST No. 81 (1788).

<sup>38</sup> See 3 SENATE JOURNAL 524-7 (March 1, 1805). On the Chase impeachment and its legacy, see WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 19, 22-23, 53-57, 98-

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motivations, their decision met the concern expressed by James Wilson at the Philadelphia Convention that “[t]he Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt.”<sup>39</sup> How could judicial independence stay real if impeachment hung over the heads of the federal judges like an ideological sword of Damocles?<sup>40</sup> How could constitutional limitations on the government stay real if a powerful president could purge the courts of those who might rule against him? A frustrated Jefferson later wrote to one of his Senate supporters that “*impeachment is a farce which will not be tried again.*”<sup>41</sup>

Jefferson could not get rid of Chase because many senators in his own party were not deeply beholden to him. They had their own power bases in their home states, whose legislatures had chosen them for six-year terms.<sup>42</sup> They were invulnerable to presidential vendettas. Like Walpole, Jefferson led a political faction that was overwhelmingly dominant. Yet like Walpole, Jefferson still could not completely control the legislature. Party discipline was just not that strong. Localised and elitist selection processes sidelined party leaders sufficiently to protect the integrity of the constitutional system.

Jefferson and Walpole could not get past inhibitions that fuller democracy has since loosened. What if they had led mass movements that turned into truly disciplined parties? What if the candidates from those parties had owed their seats to, and depended for their prospects utterly on, their leader? What if a passing burst of popularity had catapulted such a party into overwhelming dominance? What if a leader with such dominance had wanted to keep it forever? When we look closely, we can see that traditions of repeat playing leadership contests evolved in Britain and America through circumstances that were mostly not included in the packaging for export and are no longer present even in those nations now.

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113 (1st ed, 1992). See also Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 55-116 (1995).

<sup>39</sup> 2 MAX FARRAND (ED.), RECORDS OF THE FEDERAL CONVENTION 429 (1911) (Madison's notes, Aug. 27, 1787).

<sup>40</sup> 5 MARCUS TULLIUS CICERO, TUSCULAN DISPUTATIONS 286-88 (Andrew P. Peabody trans., 1886).

<sup>41</sup> Letter Thomas Jefferson to William Branch Giles, April 20, 1807, in 5 H.A. WASHINGTON, ED., THE WRITINGS OF THOMAS JEFFERSON 65, 68 (1854).

<sup>42</sup> U.S. CONST. art. 1 §3 cl. 1. (See now the Seventeenth Amendment.)

## THE CHALLENGE OF CHARISMATIC LEADERSHIP

Speaking in the Constituent Assembly about India's draft constitution, Dr. B. R. Ambedkar observed:

*A democratic executive must satisfy two conditions – (1) It must be a stable executive and (2) it must be a responsible executive. ... The American and the Swiss systems give more stability but less responsibility. The British system on the other hand gives you more responsibility but less stability. ... In England, where the Parliamentary system prevails, the assessment of responsibility of the Executive is both daily and periodic. The daily assessment is done by members of Parliament, through questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Addresses. Periodic assessment is done by the Electorate at the time of the election which may take place every five years or earlier. The Daily assessment of responsibility which is not available under the American system it is felt far more effective than the periodic assessment and far more necessary in a country like India. The Draft Constitution in recommending the Parliamentary system of Executive has preferred more responsibility to more stability.*<sup>43</sup>

Ambedkar's thoughtful analysis missed the way that party discipline under one true leader can flip the script on responsible government. Instead of the executive being accountable to the legislature, the legislature can become captive to the executive. Like American-style presidential systems, British-style parliamentary systems enable singular leaders to threaten democracy itself, perhaps even more readily.<sup>44</sup> *"Parliamentary systems with disciplined parties and a majority party offer the fewest checks on executive power, and hence promote a winner-takes-all approach more than presidential systems."*<sup>45</sup>

In defending the American founders' choice to build their system on Montesquieu's vision of separated powers,<sup>46</sup> Madison argued that their own

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<sup>43</sup> 7 CA DEB Nov. 4, 1948, 7.48 200. See also GRANVILLE AUSTIN, THE INDIAN CONSTITUTION 127 (1999) (*"members believed that with the separation of powers of the Swiss or American systems, the Executive would not be sufficiently subject to legislative control"*).

<sup>44</sup> *"We have identified twelve presidential regimes and twenty-one parliamentary regimes that have broken down in the twentieth century."* SHUGART & CAREY, *supra* note 3, at 40.

<sup>45</sup> Mainwaring & Shugart, *supra* note 3, at 453.

<sup>46</sup> *"The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying*

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self-interested ambitions would cause officeholders in all three branches to stand up to each other and prevent power from concentrating in one place.

*But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.<sup>47</sup>*

Madison's analysis, like Ambedkar's, missed the impact of party discipline under one true leader. If the party is the true source of its members' privileges and power, then party members' self-interested ambitions may be served by subordinating formal separations and supervisory responsibilities to the agenda of the party and ultimately, of its leader. The formal institutions of government may appear separated and subject to each other's checks and balances, but the real configuration of power relationships may be that which pertains within the ruling party. That may be a pyramid, with one person at the top, and when it is, the transient popularity that sweeps the party into power may give that person both temptation and opportunity to change the system and make their temporary power permanent.

A wealth of recent legal and political science scholarship documents the steps by which charismatic leaders of disciplined parties have succeeded in undermining constitutional democracy around the world.<sup>48</sup> In the leading examples of contemporary democratic decline that feature in this literature, one person ultimately pulled the strings that puppeteered party members and others in a process of degrading democracy.<sup>49</sup> Another rich political

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*and recommending it most effectually to the attention of mankind."* JAMES MADISON, THE FEDERALIST No. 47 (1788).

<sup>47</sup> JAMES MADISON, THE FEDERALIST No. 51 (1788).

<sup>48</sup> See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018); ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* (2021).

<sup>49</sup> See, e.g., Miklós Bánkúti, Gábor Halmi, & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138 (2012); Turkuler Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, 11 INT'L J. CONST. L. 702 (2013);

science literature shows that pyramid power structures with one person at the top are the natural shape of tyranny.<sup>50</sup> Why, then, when a people have the gift of full democracy, are they so often drawn to singular leadership, like moths to a flame?

We once needed it.<sup>51</sup> In the struggle to survive and thrive, groups that are well-coordinated outcompete groups that are not.<sup>52</sup> Charismatic authority,<sup>53</sup> the exhilarating psychological dynamic of inspiring leadership and devoted following, helped grow ancient human communities from small groups to

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Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37(2015).

<sup>50</sup> See, e.g., BARBARA GEDDES, JOSEPH WRIGHT, AND ERICA FRANTZ, HOW DICTATORSHIPS WORK: POWER, PERSONALIZATION, AND COLLAPSE 226 (2018) (“dictatorships led by somewhat collegial groups of officers (*juntas*) end sooner than other kinds of dictatorship”); MILAN W. SVOLIK, THE POLITICS OF AUTHORITARIAN RULE 55 (2012) (“the reasons for the emergence of personal autocracy are structural. ... [A]uthoritarian elites operate under distinctly hazardous conditions. They cannot rely on an independent authority to enforce mutual agreements, and violence is the ever-present, ultimate arbiter of their conflicts. These dismal circumstances ensure that any dictator’s aspiration to become the next Stalin is matched by the opportunity to do so. ... Rather than an accident of history, the emergence of personal autocracy is a systematic phenomenon.”).

<sup>51</sup> See, e.g., Joseph Henrich, Maciej Chudek & Robert Boyd, *The Big Man Mechanism: how prestige fosters cooperation and promotes prosocial leaders*, (2015) Phil. Trans. R. Soc. B 370. See also ELMAN R. SERVICE, ORIGINS OF THE STATE AND CIVILIZATION: THE PROCESS OF CULTURAL EVOLUTION (1975) (“modern ethnohistorical records argue powerfully for the presence around the world of varying developed chiefdoms, intermediate forms that seem clearly to have gradually grown out of egalitarian societies and to have preceded the founding of all of the best-known primitive states” *id.* at 15-16); TIMOTHY EARLE, HOW CHIEFS COME TO POWER: THE POLITICAL ECONOMY IN PREHISTORY (1997) (arguing that “the origin of states is to be understood in the emergence and development of chiefdoms” *id.* at 14).

<sup>52</sup> Cf. CHARLES DARWIN, THE ORIGIN OF SPECIES 153 (1859) (describing natural selection as preserving “variations in some way advantageous, which consequently endure” and observing that “any form represented by few individuals will, during fluctuations in the seasons or in the number of its enemies, run a good chance of utter extinction”). *Id.*, at 154: “The forms which stand in closest competition with those undergoing modification and improvement, will naturally suffer most. ... [E]ach new variety or species, during the progress of its formation, will generally press hardest on its nearest kindred, and tend to exterminate them.”

<sup>53</sup> Weber, *supra* note 13, 46–62. Weber opined that leadership likely emerged among early humans through their recognizing and appreciating some persons’ “exceptional powers or qualities. These are as such not accessible to the ordinary person, but are regarded as of divine origin or as exemplary, and on the basis of them the individual concerned is treated as a leader.” *Id.*, at 48.

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large nations with stable governments.<sup>54</sup> Charismatic authority is singular. It is an emotional bond to the *person* who is followed. It organises people who would otherwise be disorganised because they lack sophisticated systems of law and government. We live in large societies that were built with its aid. We are naturally drawn to the notion that we need it still. Its atavistic allure converges with the ambitions of would-be leaders<sup>55</sup> in gravitating constitutional design toward letting one person be the face of the nation. Charismatic leadership once rescued us from danger. But now it puts us in danger. It stops us from perfecting the power sharing that protects from tyranny. It leaves within our constitutional democracies a straightforward way for elected leaders to destroy them.

When constitutional designers articulate the case for a singular chief executive, emotions mostly go unmentioned. Instead, one person at the helm is said to be necessary for effective governance, governance that is energetic and responsible and speedy.<sup>56</sup> Yet Swiss experience shows that each of these needs can be satisfied by well-structured executive power sharing.<sup>57</sup> And for preserving liberty and democracy, power sharing matters as much inside institutions as between them. We have long recognised this when designing the other two branches in Montesquieu's schema – we share power among many minds in multi-member, multi-chamber legislatures and on multi-person judicial benches. Yet despite the sophistication of our modern legal systems, we have so often let one person be chief executive.

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<sup>54</sup> “[I]n every case, princely power and those groups having interests vested in it—that is, the warlord's following—strive for legitimacy as soon as the rule has become stable. They crave for a characteristic which would define the charismatically qualified ruler.” MAX WEBER, *ESSAYS IN SOCIOLOGY* 27 (H. H. Gerth & Wright Mills trans., 1st ed., 1946). “Genuine charisma rests upon the legitimation of personal heroism or personal revelation. Yet precisely this quality of charisma as an extraordinary, supernatural, divine power transforms it, after its routinization, into a suitable source for the legitimate acquisition of sovereign power by the successors of the charismatic hero.” *Id.*, at 39.

<sup>55</sup> Thomas Paine marvelled at post-Revolutionary France's brief success in bringing power sharing to its executive. He marvelled precisely because a design so untainted by ambition was so unusual. “Those who formed the Constitution cannot be accused of having contrived for themselves. The Constitution in this respect is as impartially constructed as if those who framed it were to die as soon as they had finished their work.” 3 MONCURE DANIEL CONWAY (ED.), *THE WRITINGS OF THOMAS PAINE* 349 (1895), reprinting Paine's 1797 pamphlet *The Eighteenth Fructidor*.

<sup>56</sup> See, e.g., 1 RECORDS, *supra* note 39, at 65 (Madison's notes, Jun. 1, 1787) (James Wilson) (“giving most energy dispatch and responsibility to the office”).

<sup>57</sup> See Part III, *infra*.

Through its powers to hire and fire and spend and command, the role of chief executive can enable its occupant to subvert the system and ultimately control everyone else. If we want to prevent all the reins of government ending up in one pair of hands, we need to share power inside our executives too.

## PERFECTING POWER SHARING

When billionaire businessman Christoph Blocher's Swiss People's Party won more votes than any other party in Swiss national elections,<sup>58</sup> the Swiss Federal Assembly elected him to Switzerland's national executive, the Federal Council.<sup>59</sup> But Blocher's elevation to the executive did not let him control it. He could not control the executive because he could not control the legislature. The Swiss people elect the first chamber of the Swiss national legislature through a voting method that ensures proportional representation.<sup>60</sup> All parties that attract significant support win seats, even parties that do not have the most support in any geographic area. A party that wins ten per cent of the national vote, spread thin across the nation, wins close to ten per cent of the seats. Under a districted, first-past-the-post voting model of the kind that applies in elections for the United Kingdom House of Commons and the United States House of Representatives, such a party would likely win no seats.

Proportional representation gives voters more real party choices.<sup>61</sup> Candidates have a real chance to win a seat even when they stay in small parties that more faithfully reflect the candidates' beliefs about what

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<sup>58</sup> See Elizabeth Olson, *A Billionaire Leads the Campaign to Keep Switzerland Apart*, N.Y. TIMES., Feb. 24, 2002, <https://www.nytimes.com/2002/02/24/world/a-billionaire-leads-the-campaign-to-keep-switzerland-apart.html>; *Swiss Election Upsets Traditional Stability*, DEUTSCHE WELLE, Oct. 10, 2003; Mathieu von Rohr, *A Limited Victory for Blocher*, SPIEGEL INTERNATIONAL, Oct. 22, 2007, <https://www.spiegel.de/suche/?suchbegriff=a%2Blimited%2Bvictory>.

<sup>59</sup> SWITZERLAND CONST. arts. 174-87.

<sup>60</sup> SWITZERLAND CONST. art. 149(2).

<sup>61</sup> See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (Barbara & Robert North, trans., 1954); DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (1967); William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753-766 (Dec. 1982).

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government should do. That helps keep parties more about advancing ideas than following leaders. And it helps stop any one party from winning a majority of seats in the legislature. As no party can gain control of the legislature, no party can gain control of the executive.<sup>62</sup> For election to the Federal Council, candidates must enjoy multipartisan support in the Federal Assembly. This long ago led the major parties in Switzerland to agree on a “magic formula” under which representatives from each major party are elected to the national executive.<sup>63</sup>

The seven members of the Federal Council are constitutionally obliged to act collegially in administering the nation together. Each member heads a department of the government, but all major decisions are made collectively by the seven in a way that prevents each of them from shifting the spotlight to themselves.<sup>64</sup> This executive power sharing lets Swiss political parties concentrate on promoting policy ideas in the legislature rather than on trying to capture the executive.<sup>65</sup> James Bryce, who famously coined the *laboratories of experiment* metaphor for policy initiatives in the American states,<sup>66</sup> observed

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<sup>62</sup> SWITZERLAND CONST. arts. 157, 175. The need for broad support promotes choosing moderate candidates. See HANSPETER KRIESI & ALEXANDER H. TRECHSEL, *THE POLITICS OF SWITZERLAND: CONTINUITY AND CHANGE IN A CONSENSUS DEMOCRACY* 80 (2008). See also THOMAS A. BAYLIS, *GOVERNING BY COMMITTEE: COLLEGIAL LEADERSHIP IN ADVANCED SOCIETIES* (1989); ROLF KEISER & KURT R. SPILLMAN (EDS.), *THE NEW SWITZERLAND: PROBLEMS AND POLICIES* (1995); JAN-ERIK LANE (ED.), *THE SWISS LABYRINTH: INSTITUTIONS, OUTCOMES, AND REDESIGN* (2001); WOLF LINDER & SEAN MUELLER, *SWISS DEMOCRACY: POSSIBLE SOLUTIONS TO CONFLICT IN MULTICULTURAL SOCIETIES* (4<sup>th</sup> ed., 2021).

<sup>63</sup> “The election of two Social Democrats to the Federal Council in 1959 established the so-called ‘Magic Formula’ 2-2-2-1, which meant two cabinet seats each for the Radicals, Christian Democrats and Social Democrats, and a single seat for the People’s Party. This arrangement remained stable for more than 40 years. ... The growing power of the People’s Party in the past two legislatures has led to a realignment of the 2-2-2-1 system, with Christian Democrats having to cede one of their seats to the People’s Party after the 2003 elections.” *One for seven, seven for one*, SWI, May 26, 2007. On the path to the magic formula, see KRIESI & TRECHSEL, *supra* note 62, at 76-79.

<sup>64</sup> SWITZERLAND CONST. art. 177. See KRIESI & TRECHSEL, *supra* note 62, at 76.

<sup>65</sup> “While Swiss institutions thus limit the power of any individual cabinet member and counteract monarchical or dictatorial tendencies, the separation of survival ... liberates the assembly majority from the task of keeping the cabinet in office, so that different legislative coalitions can be formed on different issues.” STEFFEN GANGHOF, *BEYOND PRESIDENTIALISM AND PARLIAMENTARISM: DEMOCRATIC DESIGN AND THE SEPARATION OF POWERS* 24 (2021).

<sup>66</sup> 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 468 (1888), echoed in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

that “*strife for office and the sweets of office felt as always present in the background of debates in the assemblies of England, France, and other parliamentary countries, finds little place in the Swiss legislature.*”<sup>67</sup>

Christoph Blocher did not fit in well on the Federal Council<sup>68</sup> and was unable to attract majority support in the Federal Assembly for a second term. He declared himself “*torn between relief, disappointment and outrage*”<sup>69</sup> by the Federal Assembly’s rejection and took his party into opposition. But Switzerland’s multipartisan, consensual executive proved resilient against that opposition. The popularity of Blocher’s party gave them clout in the legislature that could really affect governing policy, but not enough clout to upend the system and install Blocher as the one true leader or elect seven Blocher puppets.<sup>70</sup> Eventually, his party agreed to nominate two people to fill a later vacancy on the Federal Council. The Federal Assembly chose the person who was not Christoph Blocher.<sup>71</sup>

Switzerland’s plural executive deplatforms demagogues. Yet Swiss experience shows that a plural executive can govern with the energy, responsibility, and dispatch long attributed to singular executives.<sup>72</sup> Christoph Blocher was held responsible for his conduct on the Swiss Federal Council when the Federal Assembly chose not to reelect him. And judged by public satisfaction, Swiss governance compares favourably with that of other European nations.<sup>73</sup> Even when confronted with violent separatist

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<sup>67</sup> 1 JAMES BRYCE, MODERN DEMOCRACIES 347 (1921).

<sup>68</sup> See, e.g., *Rizts appear in power-sharing government*, SWI, Oct. 4, 2004.

<sup>69</sup> Derek Scally, *Ousted politician leads party into Swiss opposition*, IRISH TIMES, Dec. 14, 2007. See also Nick Cumming-Bruce, *Swiss parties eject far-right leader Blocher from cabinet*, N.Y. TIMES, Dec. 12, 2007.

<sup>70</sup> See Clive H. Church & Adrian Vatter, *Opposition in Consensual Switzerland: A Short but Significant Experiment*, 44 GOVT. & OPPOSITION 412-37 (2009).

<sup>71</sup> *Id.* at 412, 423-26.

<sup>72</sup> 1 RECORDS, *supra* note 39, at 65 (Madison’s notes, June 1, 1787) (James Wilson).

<sup>73</sup> See, e.g., KRIESI & TRECHSEL, *supra* note 62, at 81-83. “[I]n 1999, the situation in Switzerland was still better than in the majority of the fifteen EU member states: with regard to trust in government, Switzerland comes fifth in this comparison.” *Id.* at 83. See also LINDER & MUELLER, *supra* note 62, particularly at 167-203. “Institutionally, consensus democracy has proven its worth in stormy weather. Surveys show that consensus democracy gets rising popularity and is even more appreciated by ordinary citizens than by the Swiss elites ... [I]n the near future, one should not expect the Swiss to be willing to abandon consensus democracy in favour of a majoritarian system with less direct democracy.” *Id.* at 202-03.

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agitation in one region, the Federal Council was able to resolve the conflict in a democratic way.<sup>74</sup>

Would the Swiss model work in a more polarised polity? A plural executive was Switzerland's solution to the extreme polarisation of the modern nation's founding moment. In 1848, the Swiss were being torn apart by religious disagreements that amplified their ethnic and cultural differences. There was a civil war. The winners of the war imposed a new national constitution on the losers. That new constitution's plural executive freed the disparate inhabitants of Switzerland from having to tussle over whether someone from their tribe would be the one true leader. Removing the role took away that distraction from the actual business of governing. The first Federal Council included both Protestants and Catholics. It included members from the German-speaking majority and the French-speaking and Italian-speaking minorities.<sup>75</sup> It has been a vehicle for inclusion ever since.<sup>76</sup> The plural executive model has a *depolarising* influence on political dynamics that holds the key to its deparadoxing impact on constitutional democracy.

Swiss democracy is a *real* democracy, not an elitist precursor like the representative governments that Walpole and Jefferson led. Yet Swiss democracy keeps charismatic leaders at bay, unable to control government fully, even more effectively than elitism kept Walpole and Jefferson at bay. Swiss democracy is both real and *realistic*. Almost two centuries of Swiss experience show it is up to meeting the challenges of governance for which singular leadership was once thought necessary.

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<sup>74</sup> See Michel Bassand, *The Jura Problem*, 12 J. PEACE RES. 139-50 (1975); Carole Villiger, *Political Violence: Switzerland, A Special Case?*, 25 TERRORISM & POL. VIOLENCE 672-687 (2013); *Separatist Swiss canton celebrates 30 years*, SWI, Sept 24, 2008; *Switzerland's German town votes to join French-speaking side*, AFP, Mar. 28, 2021.

<sup>75</sup> For helpful background, see OLIVER ZIMMER, *A CONTESTED NATION: HISTORY, MEMORY AND NATIONALISM IN SWITZERLAND 1761-1891* (2003). See also CLIVE H. CHURCH, *THE POLITICS AND GOVERNMENT OF SWITZERLAND* (2003); MICHAEL BUTLER ET AL. (EDS.), *THE MAKING OF MODERN SWITZERLAND 1848-1998* (2000).

<sup>76</sup> See, e.g., *Politicians unite in calling to elect two more women to Federal Council*, SWI, Sept. 30, 2018. SWITZERLAND CONST. art. 174 cl. 4: "In electing the Federal Council, care must be taken to ensure that the various geographical and language regions of the country are appropriately represented." KRIESI & TRECHSEL, *supra* note 62, at 79.

## CONCLUSION

The separation of powers was Montesquieu's response to the orthodoxy of his time that insisted sovereignty was *indivisible*.<sup>77</sup> Montesquieu argued that power to govern could be sustainably divided by *kind*—legislative, executive, judicial.<sup>78</sup> The truth toward which his theory shone light is that power can be *shared*, regardless of its kind. Sharing the executive is just the final step in a process of power sharing that was already underway in England when Montesquieu visited. A century after Montesquieu published his account, Switzerland took that final step. The claim that executive government needs one true leader has been a lingering relic of the old indivisible sovereignty orthodoxy that Montesquieu began to debunk. Sovereignty can be shared sustainably. Swiss experience shows this is just as true for the executive as it is for legislative and judicial powers. Comparative constitutional experience shows how much our constitutional democracies need such sharing. As Socrates saw, singular leadership sets democracy up to slide into tyranny. The resolution of Socrates' paradox resides in a perfected power sharing that we now know is possible.

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<sup>77</sup> See, e.g., JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 52-55 (M.J. Tooley trans., orig. publ. 1576, 1955); THOMAS HOBBS, LEVIATHAN, ch. 18, ¶16 (orig. publ. 1651, 1981); SAMUEL VON PUFENDORF, AN INTRODUCTION TO THE HISTORY OF THE PRINCIPAL KINGDOMS AND STATES OF EUROPE 282 (8th ed., 1719); SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 679 (4th ed., 1729).

<sup>78</sup> MONTESQUIEU, *supra* note 18, at 151-62.