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Law against the Rule of Law: Assaulting Democracy

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This article examines how authoritarian contenders use law to advance an agenda geared to exclusive state power in light of a paradigmatic case: the National Socialists' takeover of the German state apparatus in spring 1933. This case highlights two ways in which an office holder is able to expand his power in an authoritarian fashion through legal dispositions. A conjunctural *use of law for authoritarian purposes draws on legal statutes to undercut the political capacity of opponents and competitors, hollow out institutional checks, and crucially hamper civil freedoms. Taking advantage of constitutional provisions that make institutional subversion from within possible ('constitutional Trojan horses'), a* structural *use of legal statutes reorders the power structure by reallocating decisional rights. In both cases, law serves as a weapon against the rule of law. These considerations raise the question of the standards by which we are to judge the legality of such acts. Contemporary instances of democratic backsliding are cases in point.*

I. INTRODUCTION

The twentieth century witnessed the emergence of a type of authoritarian challenge in which contenders for exclusive state power framed their power bids in a legalist fashion. Leaders of nationalist and fascist parties theorized and implemented this technique of power conquest in the interwar period.[1] More recently, democratically elected officials have embarked on legalist

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1 J. J. Linz, *Crisis, Breakdown and Reequilibration* (1978) 76; I. Ermakoff, *Ruling Oneself Out* (2008) 20–21.

strategies of power expansion, crucially undermining the rule of law and the requirements for open electoral competition.[2] Law is front and centre stage in this type of authoritarian challenge. This basic observation motivates the following inquiry. How do authoritarian contenders use law to dismantle democratic institutions?

To tackle this question, this article draws on a paradigmatic case: the takeover of the German state apparatus by the National Socialist German Workers' Party (NSDAP) in spring 1933. National Socialist leaders systematically invoked legal statutes to suppress political liberties, hollow out the constitutional setting, trample individual rights, and, down the line, secure a monopoly over state power. Within a few months, they replaced parliamentary democracy with a one-party state and turned social relations upside down. Their revolution, so they claimed, did not breach the Weimar Constitution. Hence, it was 'legal'.[3]

The paradoxical and disturbing salience of law in this regime transition provides a priori a relevant lens through which to magnify the processes at play. Several observations stand out. (1) National Socialist leaders abandoned the project of acquiring state power through a coup when they realized that their organizations would be no match for those of the state. (2) As office holders, they drew on a wide range of legal acts – presidential decrees, an enabling bill, and governmental ordinances – to assert their political dominion. (3) Claims of legality provided a cover for targeted acts of intimidation and violence perpetrated in the name of the state. (4) Consequently, the assault on democratic institutions went hand in hand with an assault on the institutional and judicial safeguards of individual rights. Law in National Socialists' hands became an instrument directed at the rule of law. (5) The National Socialists relied on two basic modes of authoritarian power expansion through legal dispositions: coercive resources and redesigning the rules of the political game. (6) They took advantage of their opponents' commitment to legality by framing their power bid in legalist terms. Their legalism fostered irresolution and paralysis in their opponents' ranks.

From these observations can be inferred several conditional claims. (1) Authoritarian contenders are tactical opportunists. Concrete realpolitik appraisals motivate the choice of a legalist strategy. When authoritarian contenders encounter unexpected forceful resistance and counteraction, they are likely to back off since in their understanding of politics force is the ultimate argument worthy of consideration. (2) Office holders who embark on a strategy of authoritarian power expansion grab whichever legal device is available to increase their institutional leverage or create the conditions

2 J. Corrales, 'The Authoritarian Resurgence: Autocratic Legalism in Venezuela' (2015) 26 *J. of Democracy* 37, at 38–40; N. Bermeo, 'On Democratic Backsliding' (2016) 27 *J. of Democracy* 5, at 10–13; K. L. Scheppele, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Rev*. 545, at 561–563.

3 H. U. Thamer, *Verführung und Gewalt: Deutschland 1933–1945* (1986) 280.

for such an expansion. (3) Assessing claims of legality in such contexts cannot be strictly confined to formal criteria of validity. Insofar as threats and intimidation are an integral part of an authoritarian challenge, their occurrence makes formal legality superfluous. (4) The use of legal statutes to advance an authoritarian agenda inevitably undermines the rule of law if by this term we mean a legal system in which judicial and state practices safeguard individual rights according to standards that no one can a priori elude. (5) Two usages of law for authoritarian purposes can be distinguished. One is a *conjunctural* reliance on legal statutes to incapacitate opponents and competitors, deactivate institutional checks, and suppress civil freedoms. Law provides the official justification for coercive moves. The other usage can be termed *structural* insofar as it is geared to redesigning the rules of the political game. Of particular significance in this regard are provisions that provide authoritarian office holders with 'constitutional Trojan horses' – that is, legal statutes with which they can engage in strategies of institutional subversion from within. (6) Irrespective of whether an authoritarian office holder's policy decisions are marred by procedural flaws or dubious legal justifications, the legalist framing of these decisions is politically significant if it elicits mutual expectations of compliance among democrats.

The structure of this article elaborates these different points. The next two sections focus on the National Socialist leaders' tactical and legal moves. Section II documents their adoption of a legalist posture as they contended for public office. Section III traces the chronology of acts and ordinances that punctuated their takeover of state power in spring 1933 by examining the content of these legal statutes. Contrasting formal versus substantive criteria of legal validity, Section IV assesses the claim that the change of regime in Germany in 1933 was constitutionally 'legal'. Conceptualizing the rule of law as a set of mutually sustaining normative, institutional, and behavioural patterns, Section V outlines the scope of the assault on the rule of law perpetrated by National Socialist leaders and their agents. Section VI elaborates the distinction between a conjunctural and a structural usage of law as a political resource in the hands of an authoritarian contender. Section VII examines the impact of a legalist framing of power grabs on constituencies with a stake in the preservation of a constitutional order. Section VIII probes the empirical relevance of the distinction between a conjunctural and a structural use of law in contemporary cases of democratic backsliding. Finally, the conclusion considers the strategies that are available to counteract authoritarian assaults clothed in the language of law.

A few definitional clarifications are in order before we proceed. They relate, first, to the realm of law and legal practices and, second, to political contention and its institutional context. 'Law' in the following analysis designates governmental decrees, parliamentary bills, and judicial decisions. 'The rule of law' describes a legal system in which judicial and state practices safeguard individual rights according to standards that no one a priori can elude. A 'Rechtsstaat' is a polity in which the rule of law prevails. Hence, in

a Rechsstaat, (1) legal practices effectively shield basic individual rights from arbitrary power; (2) people cannot take advantage of their status to evade legal accountability; and (3) the system of government is grounded in the separation of legislative, administrative, and judicial powers.[4]

In the framework of this article, a 'power bid' designates an attempt to acquire executive or legislative decisional capacity. A power bid serves an authoritarian agenda when it is geared to exclusive control. 'Authoritarian contenders' are therefore political challengers and office holders who engage in authoritarian power bids. A 'regime' describes 'basic patterns in the organization, exercise, and transfer of government decision-making power'.[5] The defining characteristic of a democratic regime is the fact that power bids take place through electoral contests,[6] the outcomes of which are fundamentally uncertain.[7] By contrast, the absence of electoral contests, or their subversion, characterizes authoritarian regimes; bids for state power bypass, ignore, subvert, or simply forbid electoral sanctions.[8]

II. LEGALIST POSTURE

In the early 1920s, for the NSDAP leaders, 'violence seemed the obvious way to power'.[9] Their decision to play the game of institutional politics a decade later harked back to the resounding failure of the coup that they had attempted in November 1923 in Munich. From this failure, the National Socialist leadership concluded that the state apparatus of the Weimar Republic was too strong and well entrenched to be taken over through a direct assault. National Socialist troops were no match for the Reichswehr, the military organization of Germany since 1919. Furthermore, nothing indicated that, in the eventuality of a National Socialist assault on state institutions, the army would defect to the side of the insurgents, or that defections within the army would be so numerous that they would tip the balance.

Intermingled with these realpolitik considerations was the intention to take advantage of the resources and opportunities offered by parliamentary democracy. Formally endorsing the constitutional rules of the political game had the advantage of shielding the National Socialist party from state repression. Moreover, parliamentary representation provided significant

4 A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1915) 183–191; H. J. Berman, *Law and Revolution: The Formation of Western Legal Tradition* (1983) 294.

5 J. Higley and M. G. Burton, 'The Elite Variable in Democratic Transitions and Breakdowns' (1989) 54 *Am. Sociological Rev*. 17, at 18.

6 J. A. Schumpeter, *Capitalism, Socialism and Democracy* (1942) 269.

7 A. Przeworski, *Democracy and the Market* (1991) 10.

8 J. Gandhi, *Political Institutions under Dictatorship* (2008) 7; S. Levitsky and L. A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (2010) 5–6.

9 R. J. Evans, *The Coming of the Third Reich* (2004) 189.

benefits. Quite remarkably, Hitler and his lieutenants openly acknowledged that their legalist posture served a revolutionary agenda and were upfront about their tactical cynicism.[10]

Joseph Goebbels stated it plainly in an April 1928 editorial piece published in his newspaper, *Der Angriff* (*The Attack*):

> We enter the Reichstag [parliament] to arm ourselves with democracy's weapons. If democracy is foolish enough to give us free railway passes and salaries, that is its problem. It does not concern us. Any way of bringing about the revolution is fine by us.[11]

Hitler reiterated the motivation for a legalist strategy at the September 1930 trial of three army officers indicted for high treason because of their membership of the National Socialist party:

> The constitution gives us the ground on which to wage our battle, but not its aim.[12] We shall become members of all constitutional bodies, and in this manner make the party a decisive factor. Of course, when we possess all constitutional rights, we shall then mold the state into that form that we consider to be the right one.[13]

The possibility that National Socialists might be able to 'mold the state' became suddenly very concrete on 30 January 1933 when Marshall Hindenburg, acting as elected President of the Weimar Republic ('Reich President'), appointed Hitler to the post of Prime Minister ('Chancellor') at the head of a coalition government. National Socialists were numerically in the minority in this newly formed government. They held two out of ten positions: Wilhelm Frick at the head of the Ministry of the Interior, and Hermann Goering as minister without portfolio and National Commissioner holding the function of Minister of the Interior for the state of Prussia.

In terms of institutional politics, there was nothing irregular in the decision to appoint to the chancellorship the leader of the party with the highest number of seats in the Reichstag.[14] Assuming that Hitler and his lieutenants would act within the bounds defined by the Weimar Constitution, it was not absurd to view these political moves as attempts to resolve the deadlock that had gripped Germany since the previous summer.[15] The cabinet could not rely on a parliamentary majority. Yet appointing minority cabinets had been the presidential practice since autumn 1930. The appointment of the

10 K. D. Bracher, *Die Auflösung der Weimarer Republik: Eine Studie zum Problem des Machtverfalls in der Demokratie* (1964, 3rd edn) 375.
11 Reproduced in J. Goebbels, *Der Angriff: Aufsätze aus der Kampfzeit* (1935) 71.
12 Ermakoff, op. cit., n. 1, p. 95.
13 F. M. Watkins, *The Failure of Constitutional Emergency Powers under the German Republic* (1939) 53; J. E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (1991) 163.
14 Finn, id., p. 169.
15 E. Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (1941) 4; K. Loewenstein, 'Dictatorship and the German Constitution' (1937) 4 *The University of Chicago Law Rev*. 537, at 539.

Hitler cabinet could be interpreted as the continuation of this practice. Hitler's conservative allies in the cabinet were taking a gamble on their ability to manoeuvre him and check his political pretensions.

III. ACTS AND ORDINANCES

Once at the helm of their ministries, Hitler, Frick, and Goering did not waste time in pursuing the plan of remodelling the power structure to their advantage. They proceeded to do so in a legalist fashion by drawing on three types of legal act that allowed them to circumvent or deactivate the formal rules that could hamper their ability to have the upper hand: presidential decrees, a parliamentary bill of power devolution (enabling law), and governmental ordinances. Decrees countersigned by the Reich President were intended to curtail the opposition parties' ability to mobilize their constituents and compete effectively in the upcoming electoral contest. An enabling law allowed the Hitler cabinet to legislate and modify the constitution without the supervision of either the President or parliament. Legislation through ordinances redesigned the power structure and imposed ideological diktats upon social relations.

These three types of legal act were chronologically arrayed. Presidential decrees came first. They provided National Socialist ministers with extensive coercive resources. The Enabling Law of 24 March 1933 constituted a second, and decisive, moment in this chronology.[16] The passing of this bill amounted to an act of constitutional abdication. With this act, parliament relinquished the right to hold the Hitler cabinet accountable.[17] Legislation through governmental ordinances followed. Endowed with executive, legislative, and constitutional powers, the Hitler cabinet embarked on a series of government edicts that had the status of laws. In 1933, these ordinances revolutionized both political institutions and social relations. Subsequently, they became the *modus operandi* of the Third Reich.

3.1. Presidential decrees

Overriding the reservations of his conservative allies in the cabinet, Hitler requested from Hindenburg a decree dissolving parliament and calling for new parliamentary elections, to be held on 5 March 1933. This decree was in accordance with Article 25 of the Weimar Constitution.[18] A few days later,

16 In *Ruling Oneself Out*, I designated this law by reference to the date when parliament passed it (23 March 1933), since the focus of that inquiry was on the interactional and decisional processes leading to its passage through parliament. In this article, I adopt the convention of the legal scholarship, which refers to the date when the official law bulletin (*Reichsgesetzblatt*) published the text of the bill (24 March 1933).

17 Ermakoff, op. cit., n. 1, ch. 2.

18 'Verordnung des Reichspräsidenten über die Auflösung des Reichstags. Vom 1. Februar 1933' *Reichsgesetzblatt*, I, 7 February 1933, No. 10, p. 45.

Hindenburg endorsed an emergency decree, dated 4 February, which restricted the freedom of expression and of assembly.[19] The legal justification of this infringement on political rights rested on the reference to paragraph 2 of Article 48 of the Weimar Constitution, which ran as follows:

> If public safety and order in the German Reich are seriously disturbed or endangered, the President of the Reich may take the measures necessary to the restoration of public safety and order, and may if necessary intervene with the armed forces. To this end he may temporarily suspend, in whole or in part, the fundamental rights provided in Articles 114 (inviolability of person), 115 (inviolability of domicile), 117 (secrecy of communication), 118 (freedom of opinion and expression thereof), 123 (freedom of assembly), 124 (freedom of association) and 153 (inviolability of property).[20]

Since 1930, the formal distinction between regular and emergency decrees had lost much of its significance as successive governments used Article 48 to legislate in the absence of a parliamentary majority. Neither the formation of the Hitler cabinet nor the mix of regular and emergency presidential decrees on which the cabinet relied in the first seven weeks of its existence departed from this pattern. Between the formation of the cabinet and the passing of an enabling bill on 24 March 1933, the President's office issued 20 decrees justified by reference to Article 48.[21] Several concerned financial and economic issues. Others were coercive in character.

The sequence of coercive emergency decrees started with a 31 January 1933 decree transferring to the Vice Chancellor Franz von Papen the powers of National Commissioner in charge of executive power in Prussia.[22] Next in line were a 4 February emergency decree allowing the government to restrict the freedom of expression and of assembly[23] and a 6 February decree transferring the voting rights of the Prussian Prime Minister in collective executive and representative organs to von Papen, acting as National Commissioner.[24]

The National Socialist ministers ratcheted up their capacity for repression in unprecedented ways with two presidential decrees issued on 28 February in the immediate wake of the arson attack on the parliamentary building (on the night of 27 February). The first one ('Decree of the Reich President

19 'Verordnung des Reichspräsidenten zum Schutze des deutschen Volkes. Vom 4. Februar 1933' *Reichsgesetzblatt*, I, 6 February 1933, No. 8, pp. 35–40.

20 C. L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (1948) 31.

21 K. D. Bracher, 'Stufen der Machtergreifung' in *Die nationalsozialistische Machtergreifung: Studien zur Errichtung des totalitären Herrschaftssystems in Deutschland*, eds K. D. Bracher et al. (1962) 130.

22 'Verordnung des Reichspräsidenten über den Reichskommissar für das Land Preußen. Vom 31. Januar 1933' *Reichsgesetzblatt*, I, 1 February 1933, No. 7, p. 33.

23 'Verordnung des Reichspräsidenten zum Schutze des deutschen Volkes. Vom 4. Februar 1933', op. cit., n. 19.

24 'Verordnung des Reichspräsidenten zur Herstellung geordneter Regierungsverhältnisse in Preußen. Vom 6. Februar 1933' *Reichsgesetzblatt*, I, 6 February 1933, No. 9, p. 43.

for the Protection of the People and the State') suppressed individual, civil, and political rights, and entitled the police to arrest individuals, censor newspapers, disband associations, and ban public meetings without court supervision. In addition, Article 2 of this decree allowed the Hitler cabinet to take over state governments when these proved incapable of imposing public order.[25] The second 28 February decree ('Decree of the Reich President against Treason to the German Nation and against Traitorous Activities') identified spreading rumours and untrue information, incitement to strike in 'essential industries', and incitement to general strike as 'treasonable' acts amenable to jail sentences or the death penalty under certain circumstances.[26]

Along similarly repressive lines, two decrees dated 18 March and 21 March curtailed due process and the right of appeal.[27] The 21 March 'Decree of the Reich President on the Granting of Impunity from Prosecution' amnestied offences committed in 'the course of the struggle for national revival' – that is, those committed by National Socialist activists.[28]

3.2. The 24 March 1933 Enabling Law

The linchpin of the second period of the National Socialist takeover was the vote on a far-reaching enabling bill authorizing constitutional amendments. On 20 March, the cabinet publicly disclosed the content of a 'Law to Remove the Distress of the People and of the Reich'. This bill would enable the Hitler cabinet to issue ordinances including statutes modifying constitutional provisions without the supervision of the President or parliament. As the bill would open the door to constitutional amendments, it could not be passed without a two-thirds majority.

The Hitler cabinet submitted the bill to parliament on 23 March. The NSDAP and its governmental partner, the German National People's Party (DNVP), did not by themselves have the number of delegates required to muster a majority. The bill nonetheless passed thanks to the support of the Centre Party (Zentrumspartei) delegation.[29] The following day, the Federal

25 'Verordnung des Reichspräsidenten zum Schutz von Volk und Staat. Vom 28. Februar 1933' *Reichsgesetzblatt*, I, 28 February 1933, No. 17, p. 83.

26 'Verordnung des Reichspräsidenten gegen Verrat am deutschen Volk und gegen hochverräterische Umtriebe. Vom 28. Februar 1933' *Reichsgesetzblatt*, I, 28 February 1933, No. 18, pp. 85–87. Article 6 of this decree made any act of resistance against the government a crime of high treason.

27 'Verordnung des Reichspräsidenten zur Beschleunigung des Verfahrens in Hochverrats- und Landesverratssachen. Vom 18. März 1933' *Reichsgesetzblatt*, I, 22 March 1933, No. 23, p. 131; 'Verordnung des Reichspräsidenten über die Bildung von Sondergerichten. Vom 21. März 1933' *Reichsgesetzblatt*, I, 22 March 1933, No. 24, p. 136.

28 'Verordnung des Reichspräsidenten über die Gewährung von Straffreiheit. Vom 21. März 1933' *Reichsgesetzblatt*, I, 22 March 1933, No. 24, p. 134.

29 Ermakoff, op. cit., n. 1, ch. 8; 'Gesetz zur Behebung der Not von Volk und Reich. Vom 24. März 1933' *Reichsgesetzblatt*, I, 24 March 1933, No. 25, p. 141.

Council (Reichsrat) – that is, the representative assembly of the regional states (Länder) – endorsed the bill without any debate. The official law bulletin promulgated the law on the same evening. With this act, federal representative institutions legalized the prospect of Hitler's acquiring unrestricted state power.

3.3. Governmental ordinances

Armed with the legal mandates provided by the 28 February emergency decree and the 24 March Enabling Law, the Hitler cabinet issued a host of governmental ordinances that radically transformed Germany's institutional and constitutional landscape. The 'Law to Restore the Professional Civil Service' (7 April) stated the principle of racial anti-Jewish discrimination and legalized the dismissal of civil servants deemed politically unreliable.[30] Two governmental ordinances labelled 'Laws for the Coordination of the Länder with the Reich' (31 March and 7 April) prepared the ground for the suppressions of the regional governments. The first of these two laws (31 March) dissolved representative assemblies at the regional and local level, and reconstituted state assemblies by reapportioning seats in light of the 5 March electoral result and the exclusion of Communist delegates (Article 4).[31] The second 'coordination' law (7 April) instituted for each regional state except Prussia a Regent (Statthalter) to be appointed by the President on the Chancellor's advice. Regents would have the power to appoint the head of the state cabinet, dissolve the state legislature, prepare and issue state laws, appoint and dismiss state officials, and pardon offenders.[32] This reorganization of executive power at the regional level marked the end of the federal structure of the German state.[33]

In the second half of June, the government outlawed parties and organizations affiliated with the Left. Catholic and conservative organizations, for their part, disbanded voluntarily in order to avoid the same fate. Germany under the supervision of the Hitler cabinet had become a one-party state. Two weeks later, a law dated 14 July 'prohibited the formation of political parties'.[34] The disappearance of all political parties with the exception of the NSDAP had actually been in effect for several weeks. The 14 July law was therefore institutionalizing a state of fact. Germany was now officially a National Socialist dictatorship.

30 'Gesetz zur Wiederherstellung des Berufsbeamtentums. Vom 7. April 1933' *Reichsgesetzblatt*, I, 7 April 1933, No. 33, p. 175.
31 'Gesetz zur Gleichschaltung der Länder mit dem Reich. Vom 31. März 1933' *Reichsgesetzblatt*, I, 2 April 1933, No. 29, p. 153.
32 'Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich. Vom 7. April 1933' *Reichsgesetzblatt*, I, 7 April 1933, No. 33, p. 173.
33 A. Lepawsky, 'The Nazis Reform the Reich' (1936) 30 *Am. Political Science Rev*. 324, at 325.
34 'Gesetz gegen die Neubildung von Parteien. Vom 14. Juli 1933' *Reichsgesetzblatt*, I, 15 July 1933, No. 81, p. 479.

Thus, within five months the National Socialist leadership remodelled political institutions, transformed the power structure, terminated the federal system, systematically coerced or intimidated opponents and competitors, engaged in discriminatory policies on racial and political grounds, and acquired extensive control over the state apparatus. By July 1933, Hitler and his lieutenants de facto exercised a monopoly of state power. The change of regime had been as drastic and far reaching as it had been swift. Hindenburg's ability to check the National Socialists' political agenda was reduced to nil. Upon Hindenburg's death a year later, Hitler promulgated the Succession Act of 2 August 1934 whereby he assumed the positions of both Chancellor and President.[35]

IV. WHICH LEGALITY?

Hitler and his deputies attached great importance to the legalist framing of their claims.[36] They were 'anxious to claim the title of a constitutional government of its own right'.[37] Wrapping the assault on democratic institutions in the mantle of law, they 'obstinately upheld the version of the legality of the National Socialist revolution and insisted on the continuity of law'.[38] As Dannemann[39] and Dreier[40] point out, jurists and specialists in constitutional law lent credence to this view at the time. The 'national revolution' carried out by the Hitler cabinet, these jurists explained, had taken place without breaching the Weimar Constitution. Hence, these revolutionary developments had the stamp of legality.[41] How shall we assess this contention?

Two approaches to legality claims can be contrasted. The first is piecemeal and formalistic. It consists of assessing whether constitutional provisions or

35 K. D. Bracher, 'Nachwort und Ausblick' in eds Bracher et al., op. cit., n. 21, p. 968.

36 H. Schneider, 'Das Ermächtigungsgesetz vom 24. März 1933' in *Von Weimar zu Hitler 1930–1933*, ed. G. Jasper (1968) 426.

37 Loewenstein, op. cit., n. 15, p. 545.

38 O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (1961) 300.

39 G. Dannemann, 'Legale Revolution, nationale Revolution: die Staatsrechtslehre zum Umbruch' in *Staatsrecht und Staatsrechtslehre im Dritten Reich*, ed. E. W. Böckenförde (1985) 11–12.

40 H. Dreier, 'Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus' (2013) 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 10, at 21–22.

41 See for example H. Triepel, 'Die nationale Revolution und die deutsche Verfassung' *Deutsche Allgemeine Zeitung*, 2 April 1933, 1; R. Knubben, 'Die nationalsozialistische Revolution und ihre Legalität' (1934) *Reichsverwaltungsblatt und preußisches Verwaltungsblatt* 522; A. Diller, *Die Legalität der nationalsozialistischen Revolution* (1935). According to Diller, a revolution is 'legal' when it is 'derived' (*abgeleitet*) from the constitution of the old regime; cited by W. Sauer, 'Die Mobilmachung der Gewalt' in eds Bracher et al., op. cit., n. 21, p. 708.

legislative statutes duly justify each act punctuating the transition. Assessing legality from this perspective amounts to a formal investigation of validity – 'formal' in the sense that the focus is on explicitly stated rules and contents. The criteria of validity mobilized for this purpose are criteria of semantic and logical consistency. The second approach takes a more synoptic standpoint and pays attention to conditions of enactment. At issue is whether enactment is free of coercive pressures. The assessment is 'substantive' insofar as it is centred on the meaning of the act from the standpoint of those exposed to its implementation. I consider each conception in turn.

Commentators have made four objections to the claim that the regime change in 1933 was formally legal. First, the decrees of 31 January and 6 February invoked fallacious reasons for transferring the executive power and the voting rights of Prussia's Prime Minister in the Reichsrat to a National Commissioner. Lacking valid justifications, these decrees amounted to abuses of executive power and should be considered illegal. By way of consequence, the Reichsrat's vote on the Enabling Bill on 24 March was also devoid of legality; the Commissioner's representatives had usurped the voting rights of the Prussian Prime Minister.[42]

Second, in creating a permanent 'state of exception', the Hitler cabinet misused Article 48 of the Weimar Constitution, which explicitly stated the *temporary* character of the emergency powers on which the Reich President could draw to restore law and order. Hence, the 'arbitrary application of the emergency decree of February 28, 1933, which made a mandatory dictatorship absolute', amounted to a 'coup d'état'.[43]

Third, the Enabling Law enacted on 24 March lapsed at the end of June when Alfred Hugenberg, chairman of the DNVP and Minister of Nutrition and Agriculture, resigned. This objection refers to Article 5 of the Law, which stated: 'This Law … ceases to be in force when the present cabinet is replaced [*abgelöst*] by another'.[44] Hugenberg's resignation, so goes the objection, 'fundamentally' changed the 'political identity of the cabinet'. Hence, with this resignation, the Enabling Law 'lost … its legal justification'.[45]

Fourth, the 14 July law prohibiting the formation of new parties contradicted Article 2 of the Enabling Law: 'the national laws issued by the national cabinet can deviate from the Constitution insofar as they do not pertain to [*zum Gegenstand haben*] the institution [*Einrichtung*] of the Reichstag and the Reichsrat as such'.[46] The ban on political parties actually

42 A. Brecht, *Mit der Kraft des Geistes: Lebenserinnerungen. Zweite Hälfte 1927–1967* (1967) 280.
43 Fraenkel, op. cit., n. 15, pp. 4–5, p. 13.
44 'Gesetz zur Behebung der Not von Volk und Reich. Vom 24. März 1933', op. cit., n. 29.
45 Loewenstein, op. cit., n. 15, p. 544.
46 'Gesetz zur Behebung der Not von Volk und Reich. Vom 24. März 1933', op. cit., n. 29.

transformed the institution of the Reichstag since it meant that members of parliament could no longer be elected on lists competing with one another and the Reichstag could no longer operate as a representative assembly of the German people.[47]

All four points are amenable to disquisitions of various kinds. The first one would have required a judgement of the Supreme Constitutional Court on the duties of the Prussian executive office in situations of parliamentary stalemate. The second point could be challenged on the grounds that the determination of the length of a state of emergency was the responsibility of the Reich President. The third point is at odds with the wording of Article 5 of the Enabling Law, which mentions not a 'change in the composition' of the cabinet but its 'replacement'.[48] To the fourth point could be objected the fact that 'the institution of the Reichstag as such' was not the subject matter of the 14 July law prohibiting the formation of new parties.

From a formal standpoint, therefore, neither the legality nor the illegality of these acts was clear-cut. Ample disquisitions in one sense or the other are conceivable. The matter is different when we switch lenses and pay attention to the conditions of enactment of legal acts in February and March 1933; violence and intimidation perpetrated in the name of the state were flagrant. On 22 February, Goering, acting as Minister of the Interior for Prussia, authorized the enrollment of the members of the National Socialist paramilitary organization, the so-called 'Storm Division' (Sturmabteilung, SA), as auxiliary police.[49] The violence exercised by the SA members now had the seal of the state. They used it to intimidate opponents and political competitors of all stripes, democrats and conservatives alike. The electoral campaign thus took place in a repressive context.

In addition, threats and intimidation pervaded the immediate context of the vote on the Enabling Bill.[50] Nazi officials hinted at possible retaliations if party delegations failed to pass the bill. On 23 March, the Nazis demonstrated outside the Kroll Opera House, where the vote was to be held. Violence under the guise of constitutional legality was Hitler, Frick, and Goering's way of dealing with political actors who could hinder their march towards absolute state power. National Socialists targeted groups and individuals who, far from posing a threat to the constitutional framework of the Weimar Republic, were its most stalwart supporters.

47 Bracher, op. cit., n. 10, p. 299; Brecht, op. cit., n. 42, p. 307.

48 Carl Schmitt emphasized this point in his 1933 commentary on the Enabling Law: 'There is no doubt that individual changes in the composition of the cabinet do not constitute a dissolution or a different government'; C. Schmitt, 'Das Gesetz zur Behebung der Not von Volk und Reich' (1933) 38 *Deutsche Juristen-Zeitung* 457.

49 Bracher, op. cit., n. 10, p. 116; H. A. Winkler, *Der Weg in die Katastrophe: Arbeiter und Arbeiterbewegung in der Weimarer Republik 1930 bis 1933* (1987) 878.

50 Evans, op. cit., n. 9, pp. 352–353; Ermakoff, op. cit., n. 1, ch. 3.

V. LAW DEPRIVED OF ITS RULE

National Socialists' targeting of democrats discloses a distinctive feature of the political transition taking place in spring 1933: under the pretence of law, the National Socialist ministers were proceeding to destroy its rule. Spelling out this argument requires that we specify what we empirically mean by the 'rule of law'. The notion is actually difficult to conceptualize in a systematic fashion. Explicit discussions of the term cover a diverse range of considerations.[51] References to the notion have been indeed 'remarkably widespread'.[52] To disentangle these various threads and meanings, let us examine whether they can be subsumed under different rubrics or dimensions. The following remarks consider three of them: (1) mentions of fundamental individual rights and the need to protect them from arbitrary power point to the *normative* underpinnings of the rule of law; (2) arguments about the separation of executive, legislative, and judicial powers highlight its *institutional* dimension, and (3) claims that, in a system regulated by the rule of law, no one eludes its clutches underscore the practical significance of the notion in *behavioural* terms. If all three dimensions are to be conceived as constitutive of the rule of law, then the notion can be defined as the set of mutually sustaining normative, institutional, and behavioural patterns whereby judges, office holders, legislators, and constituents are committed to the protection of individual rights, make their actions accountable to legal statutes, and do not question the separation between executive, legislative, and judicial areas of competence.

Along the same lines, a Rechtsstaat designates a polity in which these three dimensions of the rule of law – the norms vested in fundamental individual rights, the accountability of judges, office holders, and constituents before the law, and the separation of power – regulate political and social interactions.[53] In a Rechtsstaat, individual rights have normative status. The practice of law is shielded from its instrumental use and manipulation for political purposes. When faced with legal requirements, constituents are on an equal footing irrespective of their wealth and status. Courts demonstrate their independence from office holders by enforcing the standards of judgement specified in legal statutes.[54]

These definitional criteria set empirical yardsticks to gauge the extent to which a realm of exchange and interaction in a given time period approximates the normative, behavioural, and institutional patterns distinctive of the rule of law. The extent to which these criteria are fulfilled determines the degree

51 D. Zolo, 'The Rule of Law: A Critical Appraisal' in *The Rule of Law: History, Theory, and Criticism*, eds C. Pietro et al. (2017) 19–29; R. L. Abel, *Law's Wars: The Fate of the Rule of Law in the US 'War on Terror'* (2018) ch. 1.
52 P. Costa and D. Zolo, 'Preface' in eds Pietro et al., id., p. ix.
53 H. Kelsen, *Pure Theory of Law* (1967) 313.
54 Dicey, op. cit., n. 4, pp. 183–191.

to which the rule of law can be said to be in effect. Overall, the Weimar Republic fitted the template. On the normative side, the Bill of Rights section of the Constitution – Articles 109 to 165 – 'included an impressive catalogue of individual liberties and rights'.[55] This section guaranteed equality before the law (Article 109). While the practice of dictatorial powers in a context of acute political or economic disruptions during the period from 1922 to 1924 tested the resilience of behaviours geared to the rule of law, this practice remained within constitutional bounds.[56] Moreover, magistrates demonstrated their independence from the executive by rendering judgements at odds with office holders' political interests.[57] Judicial, executive, and legislative decisions were indeed taking place in separate spheres.

It is these different modalities of the Rechtsstaat that National Socialist leaders and their agents assailed in spring 1933. The assault materialized immediately after Hitler's appointment to the chancellorship.[58] Having authorized the incorporation of SA members into police forces, Hitler and his lieutenants relied extensively on extrajudicial and arbitrary measures. They smashed individual rights, civil liberties, and habeas corpus,[59] dismissed civil servants whom they viewed politically unreliable,[60] interned opponents on a massive scale, and instigated or condoned material and physical violence targeting Jews.[61]

Along with this radical redrawing of state practices, Hitler publicly announced the end of the liberal understanding of individual rights. The repudiation was explicit in his 23 March 1933 speech to the Reichstag

55 Finn, op. cit., n. 13, p. 143.

56 A. McElligot, *Rethinking the Weimar Republic: Authority and Authoritarianism 1916–1936* (2014) 185–188.

57 A case in point is the verdict of the State Court (*Staatsgerichtshof*) challenging the validity of the presidential decree of 20 July 1932 dismissing the government of the state of Prussia and appointing a Reich commissar in its stead. See P. C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (1997) 166–169.

58 F. Irsfeld and B. Wittschier, *Widerstand und Verfolgung in Köln, 1933–1945* (1974) 36.

59 Brecht points out the key difference between the emergency decrees of 28 February 1933 and the 1922–1923 emergency decrees: the former did not refer to the Protective Custody Act, which set procedural constraints on authorities' ability to detain and prosecute detainees. The fact that the 28 February emergency decrees made no reference to the Protective Custody Act meant that 'there was no longer any limit to measures the National Socialists could take against their foes'; Brecht, op. cit., n. 42, pp. 292–293.

60 M. Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (1998) 2.

61 M. Burleigh and W. Wippermann, *The Racial State: Germany 1933–1945* (1991) 44. Adopting Sánchez-Cuenca's terminology, one could argue that the National Socialists' violence put 'brute power' – that is, 'power independent of constitutive rules' – in the service of 'institutional power'; I. Sánchez-Cuenca, 'Power, Rules, and Compliance' in *Democracy and the Rule of Law*, eds J. M. Maravall and A. Przeworski (2003) 78.

regarding the Enabling Bill: 'Not the individual, but the *Volk* must be the focus of legal concern. … In the future, state and national treason will be annihilated [*ausgebrannt*] with barbaric ruthlessness'.[62] Jurists soon theorized the normative principles undergirding the new legal order: abolition of fundamental rights, abolition of the principle of equality before the law, infusion of National Socialist values into judicial decisions, designation of the Führer's will as the foundation of law, and the interpretation of the law as the expression of the Führer's command.[63]

Last but not least, National Socialist officials crucially eroded the independence of the judiciary. They 'bent the judge to the will of the state … by making both appointment to and tenure of office dependent upon political reliability'.[64] The key law in this regard was the 'Law to Restore the Professional Civil Service' of 7 April 1933, which legalized the dismissal of judges viewed as politically unreliable. The judicial system was bound to serve the interests and the requests of the chancellorship. From an institutional standpoint, the contrast with the Rechsstaat could not have been greater. Whereas 'in the Rechtsstaat the courts control the executive branch of the government in the interest of legality', in the political regime that took shape in 1933 'the police power controls the courts in the interest of political expediency'.[65]

VI. SUBVERSION FROM WITHIN

Let us now step back and reflect on the modalities of the use of law in the context of an authoritarian challenge. The previous observations underscore the need to have a dynamic understanding of how authoritarian contenders invoke law for their own purposes. Actors who pursue an authoritarian agenda are tactical opportunists. They play the legal game of electoral contests when they expect to be crushed if they violently confront state organizations and their agents. They are most likely to make this assessment when they have already been routed in an open confrontation, or when the organizational

62 Quoted by R. D. Rachlin, 'Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror' in *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, eds A. E. Steinweis and R. D. Rachlin (2013) 65.

63 See the statements by Roland Freisler and Carl Schmitt. The latter titled his piece 'The Leader Protects the Law' ('Der Führer schützt das Recht') and commented: 'Law is no longer an objective norm but a spontaneous emanation of the "Führer's" will'; C. Schmitt, 'Der Führer schützt das Recht' (1934) *Deutsche Juristen-Zeitung*, cited by K. Loewenstein, 'Law in the Third Reich' (1936) 45 *The Yale Law J*. 779, at 805. Freisler stated: 'Fundamental rights that create free spheres for individuals untouchable by the state are irreconcilable with the totalitarian principle of the new state'; R. Freisler, *Jahrbuch des Deutschen Rechts* (1934) 32.

64 Loewenstein, id.

65 Fraenkel, op. cit., n. 15, p. 40.

strength of state organizations appears too formidable to be challenged head-on.

If authoritarian contenders accede to public office, they are unlikely to expose themselves to backlashes that could jeopardize their political capacity. Legal regulations operate for them as a constraint. In February 1933, for instance, actors with political leverage were likely to presume that illegal moves would elicit a backlash from state and non-state actors. Hence, even National Socialist leaders could not afford to disregard the need for legal justifications. The constitutional setting of the Weimar Republic remained the regulative frame of reference. It informed actors' expectations about what could happen in the short and medium terms.

Goering, Frick, and Hitler emancipated themselves from these constraints by using legal dispositions for two purposes. First, they made a conjunctural usage of constitutional provisions in order to gain short-term leverage over opponents and allies. Presidential emergency decrees were instrumental in this respect. Hitler's request to have the Reichstag dissolved and new parliamentary elections organized belongs to this conjunctural register. The goal was to obtain an absolute majority of NSDAP votes in parliament and, in so doing, remove the need for the support of conservative parties. Similarly, the 4 February emergency decree restricting the freedom of expression and of assembly was intended to curtail the visibility and mobilization capacity of opposition parties in the context of an electoral contest.

The second usage of legal statutes can be termed structural inasmuch as the goal was to change the power structure by altering the constitutional allocation of decisional mandates. The National Socialists did so by taking advantage of constitutional provisions allowing them to devise acts that were the legal and political equivalents of Trojan horses. The 24 March Enabling Law is a case in point. It entitled the Hitler cabinet to issue laws, including those with constitutional consequences, without the supervision of either the President or parliament. This was a radical change in the architecture of decisional capacities since, up to that point, the cabinet had not been entitled to submit a bill without the President's endorsement.[66] Hitler's conservative allies did not fail to grasp the implications of this reallocation of decisional rights, but they were unable to thwart it. This change in the power structure allowed the National Socialist leadership to dismantle the constitutional setting by 'turning off' articles of the Constitution that could hamper their capacity for action.

To carry the metaphor of constitutional Trojan horses one step further, the legalist strategy adopted by National Socialist ministers in the expansion phase of the power conquest consisted in setting up camp within the institutional and formal stronghold of the Weimar Republic, expelling its original defenders and turning the weaponry against both the latter and the

66 Ermakoff, op. cit., n. 1, pp. 39–42.

stronghold itself.[67] During the Third Reich, the state leadership did not erect a framework in lieu of the Weimar Constitution.[68] Rather, they formally grounded their legislation on two acts, which in effect acquired the status of foundational laws: the emergency decrees of 28 February 1933[69] and the Enabling Law of 24 March 1933.[70]

VII. ELICITING COMPLIANCE

For all those with a stake in the preservation of the constitutional order of the Weimar Republic, the legalist framing of National Socialist violence perpetrated in the name of the state was a farce. Yet, as I shall argue below, the language of law did have an impact. This claim takes on its empirical significance in light of the normative and strategic dilemmas that the legalist framing of the transition generated among three types of constituencies in February and March 1933: the members of the Social Democratic Party (SPD), the members of the Centre Party, and civil servants.

In the early days of the Hitler cabinet, the SPD's rank and file were ready to mobilize and fight. Party members, affiliates, and constituents were awaiting a call for action – for instance, a call for a general strike.[71] Its organizational capacity remained intact.[72] Social Democratic leaders were aware of the rank

67 On a similar line of argument, Loewenstein writes of 'constitutional amendment by way of dislodgment' and evokes a 'perforation pattern of constitutional amendment'; Loewenstein, op. cit., n. 15, p. 545, n. 27, p. 546, n. 28.

68 Stolleis, op. cit., n. 60, p. 13.

69 H. Mommsen, *The Rise and Fall of the Weimar Democracy* (1996) 54; T. Raithel and I. Strenge, 'Die Reichstagsbrandverordnung: Grundlegung der Diktatur mit den Instrumenten des Weimarer Ausnahmezustands' (2000) 48 *Vierteljahrshefte für Zeitgeschichte* 413.

70 Fraenkel, op. cit., n. 15, p. 3; J. Biesemann, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im nationalsozialistischen Staat* (1987) 294. In 1933 alone, the cabinet issued 218 ordinances justified by reference to the 24 March Enabling Law; R. Morsey, *Das 'Ermächtigungsgesetz' vom 24. März 1933: Quellen zur Geschichte und Interpretation des 'Gesetzes zur Behebung der Not von Volk und Reich'* (1992) 128. Fritz Morstein Marx called this Law 'the generative cell of all National Socialist constitutional legislation'; F. M. Marx, 'German Bureaucracy in Transition' (1934) 28 *The Am. Political Science Rev*. 467, at 475.

71 W. S. Allen, *The Nazi Seizure of Power: The Experience of a Single German Town, 1922–1945* (1984) 191; J. Felder, 'Erinnerungen an Weimar, die schwäbische Sozialdemokratie und Hitlers "Machtergreifung"' in *Von der Klassenbewegung zur Volkspartei: Wegmarken der bayerischen Sozialdemokratie 1892–1992*, ed. H. Mehringer (1992) 179–180.

72 J. Felder, 'Mein Weg: Buchdrucker – Journalist – SPD Politiker' in *Abgeordnete des Deutschen Bundestages: Aufzeichnungen und Erinnerungen*, ed. Bundestag, Abteilung Wissenschaftliche Dokumentation (1982) 35.

and file's collective resoluteness.[73] The possibility of counteraction lay in their hands.

Yet the SPD leadership never issued a call for resistance. They seemed 'paralyzed'.[74] Clearly, the failure of a general strike was a possibility with which they had to grapple. However, this consideration was not the only one at play. From the outset of the National Socialist offensive, the SPD leadership had restated their commitment to legality.[75] This commitment generated a normative disincentive against any type of collective action that could be branded as illegal. Among workers, the defence of the Constitution could hardly be a sufficient justification for engaging in risky collective action to boot.[76] As the days passed by and the National Socialists ratcheted up coercive measures, the lack of a call for collective mobilization gave way to the prospect of passive compliance.

A similar dynamic could be observed among the Catholic Centre Party's voters and constituents. The party leaders entered the February electoral campaign with the motto 'Truth, Law and Freedom'.[77] In March 1933, faced with the SA's acts of violence and usurpation of political power at the local level, Centre Party members and constituents were awaiting directives. From an electoral standpoint, the party had remained remarkably resilient during the contest. It represented one tenth of the electorate. Furthermore, party constituents could rely on a script of opposition to the state in the eventuality of a call for resistance; the collective memory of the Kulturkampf – the conflict between German Catholics and the central state inaugurated by Bismarck's anti-church policies in 1871 – was still vivid in their ranks. Yet the party leadership remained silent.[78] For those eager to figure out which collective stance to adopt given the political conjuncture, this silence was resounding.

These few observations point to two factors at play in the production of collective acquiescence. First, a public commitment to legality makes it difficult to embrace modes of action that can be publicly branded as illegal. Both the SPD and the Centre Party leadership had to cope with this dilemma.[79] The problem was one of normative dissonance. The second factor relates to the prospect of coordinated action.[80] Those exposed to SA violence

73 F. Stampfer, *Erfahrungen und Erkenntnisse: Aufzeichnungen aus meinem Leben* (1957) 262.
74 K. D. Bracher, *Turning Points in Modern Times: Essays on German and European History* (1995) 108.
75 Bracher, op. cit., n. 21, pp. 104–105; Mommsen, op. cit., n. 69, p. 538.
76 Theodor Leipart, leader of the General German Trades Union Federation (ADGB), made this point at the 5 February meeting of the SPD executive committee; H. Shulze, *Anpassung oder Widerstand?* (1975) 163.
77 Morsey, op. cit., n. 70, p. 105.
78 Ermakoff, op. cit., n. 1, pp. 223–225.
79 Brecht, op. cit., n. 42, pp. 270.
80 B. Weingast, 'The Political Foundations of Democracy and the Rule of Law' (1997) 91 *Am. Political Science Rev*. 245, at 247; Ermakoff, op. cit., n. 1, ch. 6.

could not be mistaken about the sham of ordinances condoning violence directed at the proponents of the rule of law. However, given the risks at play, they could not contemplate opposing this violence alone.

The behavioural stance adopted by civil servants devoted to the Weimar Republic lends itself to a similar diagnosis. Hitler's legalist stance deprived them of any obvious reason to oppose, or subvert, hierarchical requests. Claims of legality enabled Hitler to secure the obedience of the state apparatus.[81] Expectations of obedience and compliance explain in turn the swiftness with which National Socialist leaders were able to implement a party dictatorship.

This point applies in particular to the Prussian police. Most police officers in Prussia were committed to republican institutions. For years, they had fought anti-democratic groups on both the Left and the Right. Often, they were members of constitutionalist parties. Preserving the rule of law was part of their democratic ethos. In spring 1933, however, they acted as agents of the new power holders. Compliance on their part did not simply reflect legalist dispositions. It betrayed the realization that, in the absence of coordination and mutual trust, any act of opposition or subversion would be extremely costly.[82] Consider the following exchange reported by Friedrich Stampfer, a member of the SPD executive committee and editor of *Vorwärts*, the party newspaper. The day after the Reichstag fire, the Minister of the Interior ordered the Prussian police to interrupt the publication of *Vorwärts* and occupy the newspaper's offices. Stampfer, who witnessed the police's action, observed that 'many [police officers] apologized'. One of them explained to him: 'I have been a Social Democrat for 14 years. But what shall we do? Nowadays you cannot even trust your own brother.'[83]

VIII. PARALLELS AND CONTRASTS

Political developments in democratic regimes over the last two decades have drawn attention to the perennial possibility of democratically elected office holders legally undercutting institutional checks on their power and, in so doing, recasting the practice of state power in an authoritarian fashion.[84] Prime examples of 'autocratic legalism' include the political strategies and state practices adopted by the leaders of the United Socialist Party of

81 E. W. Böckenförde, 'Der deutsche Katholizismus im Jahre 1933. Eine kritische Betrachtung' (1961) 53 *Hochland* 215, at 218; Thamer, op. cit., n. 3, p. 280; Winkler, op. cit., n. 49, p. 906.
82 Brecht, op. cit., n. 42, p. 315.
83 Stampfer, op. cit., n. 73, p. 263.
84 Bermeo, op. cit., n. 2, p. 5; S. Levitsky and D. Ziblatt, *How Democracies Die* (2018) ch. 4.

Venezuela (PSUV), the Justice and Development Party (AKP) in Turkey, and the Fidesz party in Hungary.[85]

With regard to their timeframes and political outcomes, these cases do not compare with the National Socialist power conquest in Germany in spring 1933. The leaders of the NSDAP completed a takeover within a few weeks. State officials following the leads of Hugo Chávez and Nicolás Maduro in Venezuela, Recep Tayyip Erdoğan in Turkey, and Viktor Orbán in Hungary have engaged, or have been engaging, in 'incremental' power grabs over the course of several years.[86] In Germany in 1933, National Socialists substituted a full-fledged party dictatorship for parliamentary democracy. By contrast, political regimes implemented through the weakening of institutional checks are best described as instances of 'competitive authoritarian regimes'; formal democratic institutions are in place but state incumbents make elections non-competitive, endanger or curtail civil liberties, and systematically distort the playing field to their advantage.[87]

These contrasts notwithstanding, the dynamic and opportunistic use of legal statutes directed at political opponents, institutional checks, and the media justify the parallel with the legalist strategies of authoritarian expansion observed in Germany in spring 1933. For one thing, the swiftness with which these actors sought to alter the terms of the political game as soon as conditions seemed opportune is reminiscent of the National Socialist ministers' eagerness to set forth their pawns. One of Chávez's first administrative acts as president was to call for a referendum on a constituent assembly.[88] In Hungary, the Fidesz government moved to create political conditions conducive to the adoption of a new constitution as soon as it was formed.[89]

Second, as the National Socialists did in 1933, these political actors have relied on a wide range of legal tools, from the redesign of the penal code (in Turkey) to referendums, parliamentary legislation (in Venezuela), constitutional amendments, and the writing of a new constitution (in Hungary). While the tools are different, the reliance on law as a crucial political resource is similar.

Third, coercive measures have accompanied the formal endorsement of legality. In Germany in 1933, political parties, their affiliate organizations,

85 Corrales, op. cit., n. 2, p. 38; Scheppele, op. cit., n. 2, p. 548. These are not the only contemporary examples of democratic backsliding (for example, Russia since the early 2000s, Bolivia since 2006, Ecuador since 2006, Senegal in 2006–2008, and Nicaragua since 2007). However, due to the level of academic scrutiny that Venezuela, Turkey, and Hungary have received, my remarks will be primarily focused on them.

86 Bermeo, op. cit., n. 2, p. 14.

87 Levitsky and Way, op. cit., n. 8, pp. 5–13.

88 J. Corrales and M. Penford, *Dragon in the Tropics: Venezuela and the Legacy of Hugo Chávez* (2015) 17–18.

89 M. Bánkuti et al., 'Hungary's Illiberal Turn: Disabling the Constitution' in *The Hungarian Patient: Social Opposition to an Illiberal Democracy*, eds P. Krasztev and J. Van Til (2015) 39–40.

and their newspapers were prime targets. In contemporary cases of competitive authoritarian regimes, the 'debilitation' of democratic life – to use Bermeo's expression[90] – has taken the form of attacks on the judiciary, the media, and, at times, electoral commissions.[91]

Fourth, in making the judiciary an appendage of the majoritarian party, legalist autocrats crucially weaken activists', journalists', and citizens' ability to protect themselves from abuses of power.[92]

The fifth point pertains to the distinction between a conjunctural and a structural usage of constitutional provisions in the service of an authoritarian agenda. A conjunctural use of law seeks to exploit a legal disposition either to disable institutional bounds or to gain a comparative advantage vis-à-vis competitors and opponents. This usage is conjunctural insofar as its prime objective relates to an ongoing political confrontation. A structural usage of law for authoritarian purposes reorders the power structure through the reallocation of decisional rights. Provisions that make the redesign of a power structure along authoritarian lines possible operate like constitutional Trojan horses. Legalist autocrats have proven particularly deft at these two modes of power expansion, drawing alternatively on a conjunctural use to prepare the ground for a structural one, and vice versa. Whichever political chronology they adopt, redesigning the rules of the game is a centrepiece of their agenda.[93]

The sixth point concerns impact. In contradistinction with the leaders of the fascist parties in the interwar period, contemporary legalist autocrats do not publicly voice an authoritarian – that is, anti-democratic – ideology; rather, they 'befuddle their critics by pretending to support many of the same values their critics do'.[94] Their identification as would-be autocrats is therefore far from obvious until they reveal their hand. Furthermore, one cannot exclude the possibility that contenders for state power develop an interest in authoritarian practices after, not before, they accede to state positions. In either case, whether state rulers hide their agenda or elaborate it in the course of exercising state power, groups and individuals committed to the preservation of the rule of law are likely to be caught off guard. The legalist framing of power grabs compounds their political challenge.[95]

90 Bermeo, op. cit., n. 2, p. 5.
91 A. R. Brewer-Carías, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment* (2010) 58; M. Kornblith, 'Latin America's Authoritarian Drift: Chavismo after Chávez?' (2013) 24 *J. of Democracy* 47, at 56–57; Bánkuti et al., op. cit., n. 89, pp. 39–40.
92 B. Turam, 'Turkey under the AKP: Are Rights and Liberties Safe?' (2012) 23 *J. of Democracy* 109, at 111; Bánkuti et al., id., p. 40; Scheppele, op. cit., n. 2, pp. 575–578.
93 D. Landau, 'Populist Constitutions' (2018) 85 *The University of Chicago Law Rev*. 521, at 527–8; Scheppele, id., pp. 568–569.
94 Scheppele, id,. p. 562.
95 Corrales, op. cit., n. 2, p. 40.

IX. CONCLUSION

Arguments centred on strategies of democratic defence and consolidation – the so-called militant democracy perspective – have primarily concerned themselves with the 'accession phase' of authoritarian challenges – that is, the phase during which an authoritarian contender bids for state positions. The rationale is straightforward. Once an authoritarian contender holds an office, they have considerable leeway to deploy strategies of power expansion. Given the stakes, democrats are better off preventing contenders who harbour an authoritarian agenda from the very possibility of having access to public office. Hence, the militant democracy perspective has made a case for legislation hindering the demagoguery of anti-democratic movements[96] or barring them from electoral competition.[97] 'Typically, militant democracy is associated with the banning of political parties'.[98]

Without denying how appropriate these measures might be under specific conditions,[99] this article points to three further considerations. First, strategies intended to prevent authoritarian actors having access to public office are likely to miss the mark when they are dealing with actors who either do not disclose their agenda or elaborate it only after they are elected to an office.

Second – and relatedly – the notion of constitutional Trojan horses as previously defined underscores the importance of 'unamendable' constitutional provisions preventing amendments geared to authoritarian takeovers.[100] Provisions preventing constitutional Trojan horses help to check elected officials who elaborate an authoritarian agenda of their own after being elected. It is conceivable to ground these provisions by reference to a conception of democracy as 'self-correction' based on the argument that democracy cannot justify the irrevocable decision to abolish itself.[101]

Third, this article underscores the need to pay close attention to the factors conditioning the impact of legal claims when civil liberties and democratic institutions are at stake. For democrats, authoritarian bids for state power generate 'critical challenges' – that is, challenges marked by the prospect of

96 K. Lowenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 *The Am. Political Science Rev*. 417, at 430–431; O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (1961) ch. 4.

97 See for example Brecht, op. cit., n. 42, p. 255.

98 A. Ellian and B. Rijpkema, 'Introduction' in *Militant Democracy: Political Science, Law, and Philosophy*, eds A. Ellian and B. Rijpkema (2018) 2.

99 G. Capoccia, *Defending Democracy: Reactions to Extremism in Interwar Europe* (2005) 207.

100 Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (2017) 21; Scheppele, op. cit., n. 2, p. 563.

101 B. Rijpkema, *Militant Democracy: The Limits of Democratic Governance* (2018) ch. 3.

'critical decisions'.[102] We cannot understand the impact of legal acts without considering how the framing of these acts as 'legal' affects democrats' ability to resist them. Key in this regard is the process whereby those with a stake in the preservation of the rule of law envision the prospect of their collective action. The matter is not simply one of normative or ideological commitment. It reflects more broadly at critical junctures the need to coordinate on a collective stance. In generating equivocation and disarray among democratic organizations and their constituents, a legalist framing of authoritarian bids for state power has the potential to elicit processes of collective alignment undergirding large-scale compliance.[103]

102 Ermakoff, op. cit., n. 1, p. xi, p. xxvi, p. 332; I. Ermakoff, 'Frail Democracy' in *Militant Democracy: Political Science, Law, and Philosophy*, eds A. Ellian and B. Rijpkema (2018) 50–51.

103 Ermakoff, op. cit., n. 1, pp. 328–330; Ermakoff, op. cit., n. 102, pp. 53–56.