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ALTERNATIVES TO LIBERAL CONSTITUTIONAL DEMOCRACY

DAVID S. LAW*

ABSTRACT

The global appeal of liberal constitutional democracy—defined as a competitive multiparty system combined with governance within constitutional limits—cannot be taken for granted due to the existence of competing forms of government that appear successful along a number of practical dimensions and consequently enjoy high levels of public acceptance. Proponents of liberal constitutional democracy must be prepared to proactively explain and defend its capacity to satisfy first-order political needs. A system of government is unlikely to command popular acceptance unless it can plausibly claim to address the problems of oppression, tribalism, and physical and economic security.

Along these dimensions, the advantages of liberal constitutional democracy over the alternatives of social democracy of the type seen in Scandinavia, and bureaucratic authoritarianism of the type seen in parts of Asia, are not self-evident. Within Asia alone, seemingly functional alternatives to liberal constitutional democracy run the gamut from illiberal nondemocracy in China, to liberal one-party rule in Japan, to illiberal constitutional democracy in Singapore, to liberal constitutional nondemocracy in Hong Kong, to hereditary monarchy in Bhutan.

This is obviously a moment of both crisis and opportunity for the enterprise of comparative constitutional law. On the one hand, the feeling of

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global constitutional interdependency has never been stronger. Even casual observers are watching events in the United Kingdom, United States, and France for hints of whatever combination of *Zeitgeist* and Russian sabotage might tip the balance against NATO or the European Union.¹ It is hard to shake the feeling that a domino effect is at work. On the other hand, comparative constitutional law has always been a cosmopolitan project, and it does not feel very fashionable right now to be cosmopolitan. Descriptive arguments about the globalization of constitutional law run the risk of being disproven, while normative arguments about the desirability of such globalization are out of vogue in the political arena.² At a time when even the State Department finds itself under a form of house arrest,³ how can legal academia possibly press forward with a global agenda? Of course, it is precisely because the current environment is inhospitable to global engagement that global engagement is more imperative than ever. Nature abhors a vacuum, and if we do not fill it, someone else will.

The appeal and superiority of constitutional democracy (defined here as governance pursuant to competitive multiparty elections and within constitutional limits) cannot be taken for granted. Reflexive allegiance to constitutional democracy has not been the case in Latin America (with its history of squishy popular support for democracy as opposed to strongman rule),⁴ and it certainly cannot be assumed in Asia, where—as discussed at length in Part

1. See Aurelien Breeden et al., *Macron Campaign Says It Was Target of 'Massive' Hacking Attack*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/world/europe/france-macron-hacking.html>.

2. See Mattias Kumm et al., *The End of 'the West' and the Future of Global Constitutionalism*, in 6 GLOBAL CONSTITUTIONALISM 1, 3, 5 (2017) (noting the rise to power of “populist nationalist authoritarian movements” in various countries, including the United States, that count among their tenets the view that “inauthentic elites need to be prevented from following through on their basically treasonous globalist ideologies,” but ultimately taking the view that the “darkest pessimism” about the fate of “Global Constitutionalism” “is the result of a Western bias”).

3. See, e.g., P.J. Crowley, *Rex Tillerson, America's Low-Energy Top Diplomat*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/opinion/rex-tillerson-americas-low-energy-top-diplomat.html>; Nicole Gaouette, *State Department Silent While Other Countries Shape the Message*, CNN (Feb. 21, 2017), <http://edition.cnn.com/2017/02/21/politics/state-department-tillerson-press-silence/>; Gardiner Harris, *Where Is Rex Tillerson? Top Envoy Keeps Head Down and Travels Light*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/world/europe/germany-rex-tillerson.html>; Julia Ioffe, *The State of Trump's State Department*, ATLANTIC (Mar. 1, 2017), <https://www.theatlantic.com/international/archive/2017/03/state-department-trump/517965> (noting, *inter alia*, the lack of State Department participation in recent meetings with heads of state and the cancellation, for several months, of the State Department's once-daily press briefings).

4. See, e.g., Rodolfo Sarsfield & Fabián Echegaray, *Opening the Black Box: How Satisfaction with Democracy and Its Perceived Efficacy Affect Regime Preference in Latin America*, 18 INT'L J. PUB. OPINION RES. 153, 156 fig.1 (2005) (reporting, *inter alia*, that only thirty-six percent of Latin American respondents described themselves as “very” or “fairly” satisfied with democracy, while only fifty-five percent expressed a preference for democracy over authoritarianism).

III—single-party regimes⁵ and even full-blown monarchy⁶ have proven capable of commanding healthy levels of public support. This popular acceptance of nondemocratic regimes ought to give pause to proponents of constitutional democracy, given that Asia is home to sixty percent of the world's population and the primary engine of global economic growth.⁷

Scholarly fixation upon the “usual suspects” in Western Europe and the English-speaking world⁸—at the expense of paying due attention to other regions—carries considerable risks for the enterprise of comparative constitutional law as well as for the health of constitutional democracy. The consequences of neglecting other parts of the world are potentially dire. Doing so means not only that attractive competitors to constitutional democracy can sneak up on us, but also that we risk reverse contagion. Sooner or later, if we do not challenge alternatives to constitutional democracy on their own turf—if alternatives to constitutional democracy in Asia or elsewhere continue to flourish and gain credibility through association with rising prosperity—we can expect those alternatives to challenge us on our own turf.⁹ If waves of democratization can emanate outward from the world's democracies,¹⁰ so too can waves of non-democracy wash back in our faces from the world's non-democracies.

There are a few basic criteria against which systems of government are routinely, and reasonably, judged. Oppression, tribalism, lack of physical security, and lack of economic security are central and recurring problems

5. Singapore and China are examples of single-party regimes that enjoy meaningful public support, as discussed below in Part III.

6. In Bhutan, the transition from monarchy to “Democratic Constitutional Monarchy,” was forced by the King himself upon a highly skeptical, if not resistant, population. BHUTAN CONST. art. 1(2); see LYONPO SONAM TOBGYE, *THE CONSTITUTION OF BHUTAN: PRINCIPLES AND PHILOSOPHIES* 19–20 (2015) (describing the “surprise and disbelief” that met the 2001 royal “proclamation that Bhutan would embrace democracy” and adopt a written constitution to that effect); see also *Bhutan's Mock Election: Voting for the Thunder Dragon*, *ECONOMIST*, Apr. 26, 2007, at 50 [hereinafter *Voting for the Thunder Dragon*].

7. See Zeti Akhtar Aziz, *Asia's Resilience*, 51 *FIN. & DEV.* 22, 23 (2014) (noting that Asia accounts for 44% of global economic growth, 20% of global demand, and 60% of world population).

8. RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 4, 39 (2014) (critiquing the tendency of the comparative constitutional law literature to focus on a handful of unrepresentative “usual suspect” jurisdictions).

9. Granted, there are echoes here of the second Bush administration's neocon justifications for meddling in the Middle East, but we are not talking about a massive commitment of national blood and treasure—just a reshaping of the scholarly agenda. See, e.g., GEORGE W. BUSH, *DECISION POINTS* 396 (2010) (“[T]ake the fight to the enemy overseas before they can attack us again here at home.”); Keir A. Lieber & Robert J. Lieber, *The Bush National Security Strategy*, 7 *U.S. FOREIGN POL'Y AGENDA* 32, 32–33 (2012), <https://www.hsdl.org/?view&did=3468> (noting that preemptive action against potential threats on foreign soil was a central tenet of the second Bush Administration's national security strategy).

10. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 13–26, 290–93 (1991) (identifying three historical “waves of democratization”).

for governments everywhere. They are central in the sense that it is hard to justify any system of government that fails to address any of them head-on. If left unchecked, and especially if combined, they are enough to sink any regime. To address these problems is to satisfy the first-order needs of the population and to stand an excellent chance of survival. Conversely, a system of government that cannot lay serious claim to addressing any of these problems is probably going to look deficient and is unlikely to fare well in the global competition for hearts and minds.

Democracy purports, at least, to directly address the problem of oppression (hence its enduring attraction and appeal). If the people (or at least a majority of them) get to choose their own leaders and participate directly in government, they cannot easily argue that they are being oppressed. But even democracy does not solve the problem of oppression entirely. Mere democracy, in the form of unchecked majority rule, leaves the door open to oppression of minorities. It also might not do much to address the problems of tribalism and economic insecurity. Especially if compounded by ignorance at the popular level (misinformation, propaganda, fake news, not to mention sheer lack of knowledge), these two problems can lead to short-sighted, self-destructive, and/or deranged behavior at both the domestic and international levels. Domestically, economic insecurity and tribalism can lead majorities to prey upon minorities; internationally, they can lead to predation in the form of war (see, e.g., Nazi Germany). Ignorance, tribalism, and economic insecurity are collectively a recipe for popular and/or national sovereignty gone wild.

Constitutional law and international law (of the post-WWII variety) are responses of a broadly similar variety to the problem of sovereignty gone wild. *Constitutional* law is a response to *popular* democracy gone wild: its response is to limit the domain of popular sovereignty by making it hard or impossible for political majorities to do certain things. *International* law is a response to *national* democracy gone wild: its response is to prohibit nations from doing certain things, either to other nations or to their own subjects. The goal of both projects is what the Europeans call “constrained democracy.”¹¹

Both of these global “law as constraint on democracy” projects are susceptible to failure, to say the least. Both require us to place our faith in elites and in law. Their success rests on the ability of law-wielding elites to keep the pot from boiling over. First, by definition, constitutional law and inter-

11. See SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 276 (2015) (citing Jan Werner-Müller, *Beyond Militant Democracy?*, 73 NEW LEFT REV. 39, 44 (2012) and Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766 (2001)).

national law are elite-driven projects. These constraints can only be administered by elites who stand apart from the very forces they are supposed to constrain. In the case of constitutional law, the elites are lawyers and judges flying the banners of constitutionalism, rule of law, human rights, and so forth; in the case of international law, the elites are still more lawyers, government officials, diplomats, and bureaucrats.

Second, the success of both projects depends on the efficacy of law. This faith in law might not be justified. It may well be that trying to prevent mass atrocity via law is the equivalent of trying to cut down a tree with a spoon. Public lawyers and international lawyers are supposed to be the keepers of the faith, and the primary article of that faith is that the tools of law are up to the task. But lawyers, like others, are always at risk of succumbing to the law of the instrument: when you have a hammer, everything looks like a nail, and when you have a legal background, everything looks like a problem that can be solved with law, regardless of whether this is in fact the case.

So, the case for constitutional democracy as an answer to the problem of democracy gone wild seems a bit shaky. But what are the alternatives? Does constitutional democracy win by default? What other ways are there to prevent some combination of ignorance, tribalism, and economic insecurity from causing the cauldron to boil over and deranging the state? Let us survey three extant options that can at least claim to have solutions to some of these problems: liberal constitutional democracy, social democracy, and bureaucratic authoritarianism. These three options range along a spectrum in terms of the degree to which they seek to limit popular democracy. Liberal constitutional democracy imposes an intermediate degree of constraint; social democracy views constraint on popular democracy as unnecessary and therefore imposes little constraint; and bureaucratic authoritarianism curtails popular democracy sharply. Speaking in loose metaphorical terms, we might say that liberal constitutional democracy attempts to put a lid on the pot when it threatens to boil over; social democracy seeks to lower the temperature inside the pot; and bureaucratic authoritarianism aims to weld the pot shut.

I. LIBERAL CONSTITUTIONAL DEMOCRACY

Liberal constitutional democracy has rote responses to some of these problems. Its modus operandi is to heap restrictions on the state in order to maximize individual autonomy in the face of potentially hostile majorities. The rote solution of liberal democracy to the problem of minority oppression is constitutionalism (divide sovereignty among multiple actors so as to minimize the likelihood of dangerous concentration, plus guarantee constitutional rights that place certain decisions beyond the reach of popular majorities). The same solution is supposed to work for the problem of tribalism as well: constitutionalism imposes limits on what any one tribe can do to the

others via the mechanism of the state, which in the liberal view is the only agglomeration of power that needs to be restrained.¹²

A gap in the liberal state's rights-based approach to the protection of minorities that has become increasingly evident as of late is that some of the least popular and most scapegoated members of society are excluded from the community of rights-holders in ways that can be highly arbitrary and have nothing to do with whether one belongs to an unpopular minority in need of protection. Citizenship is a decisively important entitlement—it is nothing less than the “right to have rights”¹³—yet it is conferred or withheld for reasons that are undertheorized, to put it charitably.¹⁴ So much depends on accident of birth, or holding the wrong type of visa, or being on one side of the airport rather than the other and thus being only physically, and not legally, on American soil. *Jus soli* and *jus sanguinis*,¹⁵ blood and soil:¹⁶ this formula is tribalism in its primal form, and it lies at the beating heart of the concept of citizenship.¹⁷

This is no coincidence. Citizenship does not overcome tribalism but instead expresses and enshrines it; it is tribalism sanctioned by domestic and international law. And it is sanctioned as part of a two-pronged strategy for managing tribal conflict: international law separates the tribes by assigning them to specific plots of soil and prohibiting them from intruding upon the plots that belong to other tribes. But it is impossible to create a state for every

12. See Frank I. Michelman, *Constitutions and the Public/Private Divide*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 298, 305–06 (Michel Rosenfeld & Andrés Sajó eds., 2012) (observing that the “proto-liberal” ideas behind the rise of constitutionalism in eighteenth-century Europe included the notion that there must exist “constitutional” laws expressly designed for the purpose of controlling the state’s unique powers).

13. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1994).

14. See Ayelet Shachar, *Citizenship*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 12, at 1002, 1005 (observing that “[t]he vast majority of the world’s population acquires citizenship not on the basis of individual volition, choice, and consent,” as “liberal and democratic theory” would require, but rather “according to fortuitous circumstances that none of us control: where and to whom we are born”); *id.* at 1006, 1010 (describing the origins of *jus soli* citizenship in the feudal concept of “ligeance,” but noting that the *jus soli* principle nevertheless looks affirmatively “democratic and inclusive” compared to the *jus sanguinis* principle, which has heavy “exclusionary overtones” and can lead to “perpetual intergenerational exclusion”).

15. See *id.* at 1005 (noting that citizenship is conferred only by birth or naturalization, and that citizenship at birth “is governed in virtually all countries” by the two “dominant legal principles” of *jus soli* and *jus sanguinis*).

16. BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 27–31 (2007) (rooting the phenomena of genocide and ethnic cleansing in notions of group identity that revolve around a combination of blood ties and land use, and in a recurring preoccupation with “restoring purity and order” in “racial and geographical terms”); *id.* at 416–32 (discussing the central role that the concept of *Blut und Boden* played for the Nazis in defining German nationality and identity and justifying the mass extermination of those who lacked the requisite ties of blood and soil).

17. Shachar, *supra* note 14, at 1005.

tribe. There is simply not enough turf to go around, and barring ethnic cleansing, tribes are inevitably intermingled. Consequently, constitutional law is needed to complement the project of international law by limiting the ability of different tribes within the same territory to oppress each other. Liberal constitutional democracy must rely on the post-Westphalian international legal order to complete its work, and vice versa.¹⁸

The rote solution of liberal democracy to the problem of ignorance is robust guarantees of freedom of expression and a free press, which enable the truth to emerge victorious in the marketplace of ideas.¹⁹ But even assuming that the clash of opposing views does in fact advance the cause of truth—which may be optimistic as an empirical matter²⁰—it is worth asking what happens to Mill’s vaunted marketplace of ideas in the face of (a) rapidly falling barriers to entry, and (b) the existence of feedback loops between content consumers who prefer to hear certain things, and content producers who are economically incentivized to tell people what they want to hear. Back when large-scale content distribution required a more meaningful investment than signing up for a Facebook or Twitter account, higher barriers to entry and production costs meant that communications media required a larger revenue base to sustain themselves, which discouraged them from appealing solely to very narrow audiences (except, perhaps, the most affluent audiences), demanded a level of scale and investment conducive to professionalization and quality control, and made fly-by-night misinformation campaigns less feasible. By contrast, the inherent reliance of social media on preexisting social ties and membership in self-selected networks of affinity implies the tribalization of information flows: as reliance on social media for news continues to grow,²¹ both content and distribution will increasingly track preexisting tribal divisions.

18. See David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 162 & 162 n.27 (2016) (characterizing the post-Westphalian international legal order as one that divides sovereignty among nation-states, but also conditions their sovereignty upon adherence to norms of a transnational or universal character).

19. JOHN STUART MILL, ON LIBERTY 33–106 (James R Osgood & Co. 1871) (1859); see, e.g., *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) (arguing that a publisher “bids for the minds of men in the market place of ideas”).

20. The view that truth and/or agreement will emerge through discussion and deliberation is a frequent assumption of democratic theorists but questionable as an empirical matter. See, e.g., RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 174 (2003) (observing that “[d]eliberation, paradoxically, often drives [people] apart” due to the tendency of those in a group with the most extreme views to induce agreement); Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 34 (2006) (reporting experimental evidence that deliberation can diminish a group’s problem-solving ability).

21. Two-thirds of Facebook users rely on the site as a source of news, and nearly as high a proportion of Americans as a whole get news from social media. See Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016>.

Liberal democracy's response to the problem of economic insecurity was never that satisfying to begin with, even at a purely theoretical level, and looks increasingly counterfactual when paired with a global trade and investment regime that shifts jobs and capital around the world for the benefit of roughly the same elites who seek to restrain national and popular sovereignty through law.²² The story of how liberal democracy fixes economic insecurity, as best as I can identify it, leans on neoclassical economics and goes something like this: the economic dynamism that accompanies maximal freedom and minimal regulation or central planning is supposed to put resources to their highest and best use and grow the overall economic pie faster than a system that relies on central planning and/or extensive redistribution, and this growth will eventually benefit even the worst-off through some kind of trickle-down mechanism. Recent history does not inspire confidence in this chain of assumptions.²³ The problem of economic insecurity is the Achilles heel of liberal democracy.

II. SOCIAL DEMOCRACY

Social democracy: the siren song of Scandinavia. The insanity of Nazi Germany—the very thing that the constitutional law/international law project is supposed to prevent from recurring—happened in their backyard. But the Scandinavian response was not liberal constitutional democracy of the type described above. The way to prevent democracy from boiling over, they decided, is not to restrict popular sovereignty, but instead to invest in the people. Strike hard at economic insecurity, and the rest will follow. The internal narrative went something like this:

We could attempt to wall off certain choices from democracy using a combination of rights and courts and institutional design, like the Germans are doing. Or, we could instead invest in the people, and in turn, the people won't let us down. Rather than trying to use law and courts and rights to hold a lid over the bubbling cauldron, we could try to keep the pot from boiling over in the first place.

Rightly or wrongly, our confidence in our own people is not as shaken as it is over in Germany, because our historical narrative is that fascism was of external origins. So,

22. See, e.g., STEPHEN GILL, POWER AND RESISTANCE IN THE NEW WORLD ORDER 123–28, 131–35, 139–41 (2003) (characterizing “economic globalization” as a form of “oligopolistic neo-liberalism” that privileges corporate capital, constrains democracy, and widens social and economic inequalities); DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 2–3 (1997) (arguing that “globalization” is exposing a deep fault line between groups who have the skills and mobility to flourish in global markets and those who do not).

23. See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 544–96 (2014).

we have less reason to distrust either the people or the nation-state, and less need to try to tie ourselves to the mast with judicial review and unamendable provisions and whatnot.²⁴

Maybe the way to attack the problem of democracy gone wild is to apply the principle of Garbage In, Garbage Out: a populace that is hungry, angry, and/or scared is probably not going to make the best decisions. It is going to behave in deranged ways. So let's take the anxiety and fear out of everyday life. Let's socialize risk and go out of our way to provide for basic needs in a collective way. We won't be shy about income redistribution, which will simultaneously address both physical and economic insecurity: the rich will have less to fear from the poor, and the poor will have less to covet from the rich. In other words, let's fight totalitarianism through social policy rather than individual rights. Everything will be fine if we care for, and trust, the people.

Flash forward sixty-odd years, and Scandinavia looks pretty good. It is boring, it is expensive, and it is homogenous. The trains run on time (and have natural wood paneling to boot). It may not be everyone's cup of tea. But it certainly isn't a failure. At a minimum, Scandinavia's track record proves that deep aversion to judicial limits on democratic processes is perfectly compatible with high levels of human welfare.²⁵ One could argue that none of this generalizes very well beyond the setting of a sparsely populated and/or homogenous state. Ultimately, however, doubts about the generalizability of this model rest largely on speculation. And chances are that, given the choice, a lot of average folks would find this model very appealing.

24. See Johan Strang, *The Scandinavian Value Nihilists: The Crisis of Democracy in the 1930s and 1940s*, 19 NORDEUROPAFORUM 37, 39 (2009) (noting the post-WWII Nordic understanding of "democracy" as an "intrinsic part of Nordic cultural heritage" and "an integral part of the national culture," and of totalitarianism as "intrinsically 'foreign'"); *id.* at 62 (deeming it "striking that in Scandinavia, the rise of totalitarianism and the catastrophe of the Second World War did not lead to a rejection of positivistic thinking and relativistic moral theories").

25. See Ran Hirschl, *The Nordic Counternarrative: Democracy, Human Development, and Judicial Review*, 9 INT'L J. CONST. L. 449, 452 (2011) (observing that "the traditional Nordic resistance to judicial hyperactivism alongside the region's exceptional record on both the democracy and human development fronts provide ample material to assess the perception of judicial review as a necessary supplement to democracy and its supposed contribution to human development and good governance").

III. BUREAUCRATIC AUTHORITARIANISM

Some forms of government simply go out of fashion. This can occur even if they have proven capable of addressing first-order needs in a satisfactory way and there is no crisis or even criticism to speed their exit. Traditional monarchy is an example. In Bhutan, the century-long rule of the Wangchuck dynasty, which came to power via a written social contract with the people,²⁶ was hardly a reign of terror. But these days, it seems that even monarchs have doubts about the case for monarchy. The irony of Bhutan's transition to democracy is that it was the monarchy that made the case for constitutional democracy.²⁷ And it was met with considerable skepticism and reluctance from a population that remains deeply attached to the monarchy, continues to place greater trust in the monarchy than in democratic institutions and, in particular, views the monarchy as the far lesser of evils when compared to political parties.²⁸

This situation gave rise to the odd spectacle of two kings, *père et fils*, criss-crossing the country and, in one encounter after another, attempting to convince their subjects that hereditary absolute monarchy isn't actually such a great idea after all,²⁹ much as a slightly exasperated father might try to encourage his adult children to move out and get their own apartment. Father and son made familiar and reasonable arguments of the type one would expect from a constitutional scholar. They pointed out that, in a system of hereditary monarchy, all it takes is one bad roll of the genetic dice for things to go very bad in a way that is hard to correct. They stressed the importance of checks and balances in case something were to go awry in the palace, and of giving the people institutional mechanisms for removing problematic officials, including the king himself.

These arguments received grudging acceptance. Many remain skeptical; popular support for the monarchy remains strong. As one local shopkeeper explained to me: "If you want anything good done for the country, the royals have to do it." Why so? Because, in his view, elected politicians are either

26. See BHUTAN CONST. art. 2(3) (referencing "the inviolable and historic Gyenja" of 1907 as the instrument by which the Wangchuck family assumed the throne); LUNGTEN DUBGYUR, *THE WHEEL OF LAWS*, at v (2015) (likening the 1907 Gyenja that established the first king to a social contract); TOBGYE, *supra* note 6, at 12 (same).

27. The new constitution does explicitly retain some monarchical character and assigns the King a number of meaningful powers, including command of the armed forces. See, e.g., BHUTAN CONST. art. 1(2) (designating the state a "Democracy Constitutional Monarchy"); *id.* art. 28(1) (making the King the "Supreme Commander in Chief").

28. See *Voting for the Thunder Dragon*, *supra* note 6 (observing that King Wangchuck's "imposition of democracy" was, from the perspective of most Bhutanese, "unwelcome").

29. See TOBGYE, *supra* note 6, at 20, 44–46 (noting that the king's announcement of a draft constitution that would democratize the country "took the people by surprise and disbelief," and "that the fourth and fifth kings personally traveled the country in order to explain the draft constitution to the public").

incapable of doing what the country needs or care primarily about their own interests and maintaining their own grip on power—as opposed to, say, a hereditary prince or princess who can take his or her authority for granted, is therefore free to act in the best interests of the nation, and has benefited from the very best global education that money can buy (education that is far beyond the means of nearly all Bhutanese).

Bhutan may be atypical in many respects, but it does show that there are conditions under which reasonable people might choose autocracy over democracy. Even putting sentiment and tradition aside, it would by no means be irrational for calculating Bhutanese to retain the monarchy on the pragmatic grounds that “if it ain’t broke, don’t fix it.” Bhutan’s monarchs have by all accounts been competent, responsible, and well-liked. To have such leaders in a developing country of less than one million people is no small feat. The talent pool is simply not that deep. Highly skilled human capital is a relatively scarce resource. Running a full-on democracy requires human capital distributed among a relatively broad number of competing actors and institutions: it demands candidates for office, a multitude of legislators, and enough potential leaders with sufficient diversity of views to staff more than one party capable of assuming power, not to mention skilled administrators. In a country with only two-thirds the population of the Bronx and, until recently, no law school,³⁰ it cannot be taken for granted that there will be hundreds of people with the skills to run the country. A monarchical system that focuses on training a single family for public service is a plausible way of dealing with extreme scarcity of human capital. Given the popularity and perhaps even functionality of monarchical rule in Bhutan, the best explanation for its demise may simply be that this particular form of government has become too difficult to square with modern, global sensibilities.

What has not gone out of fashion, however, is authoritarianism. Some brands of authoritarianism feel sufficiently modern, and have proven sufficiently successful, to suggest themselves as plausible alternatives to liberal constitutional democracy. Authoritarian regimes can justify themselves in a variety of ways. Ideology and cult of personality can play a part; so too can tradition and religion. But they can also justify themselves in bureaucratic or technocratic terms. One way to modernize and legitimate authoritarian or undemocratic rule is to pair it with bureaucracy that lends itself to technocratic justification. Substituting expertise for electoral accountability is a fa-

30. See Kai Schultz, *Centuries of Buddhist Tradition Make Room for Bhutan’s First Law School*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/09/world/asia/centuries-of-buddhist-tradition-make-room-for-bhutans-first-law-school.html?ref=todayspaper> (discussing preparations for the opening of the Jigme Singye Wangchuck School of Law in 2017).

miliar justificatory move in administrative law. But there is no obvious reason why this move cannot be employed more broadly to justify an entire regime.

The concept of bureaucratic authoritarianism helps to make sense of Singapore. As scholars have noticed, Singapore poses a challenge to existing intellectual frameworks. On the one hand, it is hard to assimilate into the framework of constitutional democracy.³¹ There is a lot of form without function. The power of judicial review exists, but is not exercised in practice. Elections are held, but pursuant to rules that ensure the ruling party is never actually at risk of losing power.³² People can criticize the government, but face crippling (and legal) retaliation for doing so.³³

On the other hand, Singapore is difficult to dismiss or ignore because, along a number of dimensions that many people deem very important, it feels like a roaring success. There are the sparkling shopping malls, the lush crime-free parks, the luxurious public “swimming pools” that resemble amusement parks.³⁴ Imagine you are one of the eighty percent of Singaporeans who live in public housing (carefully planned and regulated, like everything else in Singapore; each housing block is designed to have a mix of at least six ethnicities, and to avoid an excessive concentration of any particular religion).³⁵ As part of their regular routine of housing upgrades for the sake of housing upgrades, the government replaces the existing, perfectly functional garbage chute with one that looks nicer but proves not to form as airtight a seal as the old one. You place a phone call to the town council, which not only fixes the problem by the end of the day but also leaves you several

31. Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73, 92–97 (Tom Ginsburg & Tamir Moustafa eds., 2008); Mark Tushnet, *Authoritarian Constitutionalism*, 100 *CORNELL L. REV.* 391, 448–54 (2015).

32. See Tushnet, *supra* note 31, at 410–13.

33. Libel and defamation suits brought by government officials against media outlets and individual critics are common and frequently successful. Foreign newspapers can publish articles critical of the government, but by law, their circulation can be slashed to arbitrarily low numbers that drive them out of business or out of the market (as in fact happened, for example, to the *Wall Street Journal*). See KEVIN Y.L. TAN, *CONSTITUTIONAL LAW IN SINGAPORE* §§ 519–21 (2011); Tushnet, *supra* note 31, at 406–07.

34. See Sport Singapore, *The Top 5 Public Swimming Pool for Families*, ACTIVESEG (Sept. 26, 2016), <https://www.myactivesg.com/read/2016/9/top-5-public-swimming-pool-for-families> (describing, *inter alia*, the “undeniably impressive and extensive range of water park facilities” available at the public Jurong East Swimming Complex, including “intertwining spiral water slides, stretching from 22 to 155 metres and 5.5 to 17.7 metres” and an “energetic wave pool”).

35. See Maisy Wong, *Estimating the Distortionary Effects of Ethnic Quotas in Singapore Using Housing Transactions*, 115 *J. PUB. ECON.* 131, 134–35 (2014), <https://doi.org/10.1016/j.jpubeco.2014.04.006>; Fareed Zakaria, *What America Can Learn from Singapore About Racial Integration*, *WASH. POST* (June 25, 2015), https://www.washingtonpost.com/opinions/from-singapore-lessons-in-harmony-and-diversity/2015/06/25/86fcbfa2-1b72-11e5-93b7-5eddc056ad8a_story.html.

voicemails apologizing for the previous choice of vendor and asking if the new garbage chute is to your liking.³⁶ This is a system of government that takes constituent service to a whole new level. It effectively substitutes customer service for electoral competition.

Needless to say, the trains in Singapore run on time (although, oddly, the buses do not).

Singapore's answer to the problem of popular sovereignty gone wild is paternalism writ large: the people are placed under the tutelage and micromanagement of technocrats groomed and promoted within a single-party regime that places a heavy premium on competence and rule-following. Life in this authoritarian Disneyland—like life in the land of Volvo and Lego—may not be for everyone, but the system itself cannot readily be described as a failure. The typical cab driver is genuinely happy with life in Singapore and with the government, and it is hard to say that this satisfaction is merely the product of false consciousness.³⁷ Certain freedoms are curtailed—censorship is routine; criticism of the government is fraught with peril³⁸—but the large part of the population is satisfied with the tradeoff or simply does not care that much about the freedoms in question. For the average Singaporean, crushing defamation suits against government critics are a small price to pay for sparkling swimming pools and efficient, corruption-free public services.³⁹ This is not a place where most people say to themselves, “Boo hoo, if only we had a truly competitive multi-party democracy characterized by regular alternation in power and vigorous judicial enforcement of constitutional constraints, we could finally be satisfied.” Instead, post-Trump, the idea of American democracy elicits a combination of disbelief, fear, and pity.

The “Singapore Model” can of course be cabined, or distinguished, or depicted as ungeneralizable beyond its very particular circumstances (e.g., this over-the-top nanny-state approach only works for a high-density island city-state; it is more of a Mayor Bloomberg “soda is bad for you” municipal

36. An anecdote about everyday life in Singapore public housing relayed by a colleague.

37. See *Singapore Tops Asia in Safety, Quality of Living Survey*, CHANNEL NEWSASIA (Feb. 23, 2016, 1:40 PM), <http://www.channelnewsasia.com/news/singapore/singapore-tops-asia-in-safety-quality-of-living-survey-8176190>.

38. See Silverstein, *supra* note 31, at 86–92; Adrienne Stone et al., *The Comparative Constitutional Law of Freedom of Expression in Asia*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 227, 238 (Rosalind Dixon & Tom Ginsburg eds., 2014) (observing that “no [ruling party] politician has ever lost a defamation suit” in Singapore, and that the damages awards in such suits are “crippling”).

39. See Nur Asyiqin Mohamad Salleh, *Singapore Climbs to 7th on Global Least-Corrupt Index*, STRAITS TIMES (Jan. 26, 2017, 5:00AM), <http://www.straitstimes.com/singapore/singapore-climbs-to-7th-on-global-least-corrupt-index>.

government⁴⁰ that has metastasized than an actual country). But the argument that the viability and appeal of technocratic authoritarianism are limited to Singaporean soil only goes so far. Singapore may be an extreme example of successful bureaucratic authoritarianism, but it is not the only example. The Chinese Communist Party (“CCP”) has, as a practical matter, staked its legitimacy on delivering a rising standard of living, and it is not crazy for many Chinese citizens to support the regime for this reason.⁴¹ Plenty of Americans vote on the basis of pocketbook issues, and no one blames them for doing so. The difference is that in the People’s Republic of China (“PRC”), the elites of Zhongnanhai will not allow the people to act on their economic anxieties by electing new leadership—much less an orange-faced, hate-mongering demagogue who embodies the worst of democracy simpliciter. And liberal democracy’s massive, unforced errors as of late make it that much easier for the PRC regime to argue that the Chinese people are prevented from voting for their own good.

Indeed, the more we look around Asia, the more we find that economic success and citizen satisfaction are not always so closely paired with constitutional democracy, and that a number of the region’s success stories fall somewhere on the continuum of “more bureaucratic than democratic.” Hong Kong, like Singapore, is difficult to square with the notion that constitutional democracy is the best or only way of satisfying first-order needs. Like Singapore, it is a constitutional regime, in the sense that government behavior complies with legal limits. But it is even less democratic than Singapore. There is not even a pretext that the executive or legislature is elected on the

40. See James Surowiecki, *Downsizing Supersize*, NEW YORKER, Aug. 13, 2012, at 36 (discussing New York Mayor Michael Bloomberg’s effort to combat obesity by banning soft drinks larger than sixteen ounces).

41. See, e.g., TERESA WRIGHT, ACCEPTING AUTHORITARIANISM: STATE-SOCIETY RELATIONS IN CHINA’S REFORM ERA 19 (2010) (observing that “popular support for the CCP-led political regime is strong, and public interest in liberal democratic change appears weak”); Bruce J. Dickson, *No “Jasmine” for China*, in THE CHINA READER 93, 97 (David Shambaugh ed., 6th ed. 2016) (“To the extent that middle class Chinese are able to enjoy the perks of prosperity, they credit the CCP’s reform and opening policies. . . . The CCP is promoting the interests of Chinese in the middle class in order to maintain their support for, or at least acceptance of, the status quo. So far, the strategy is working.”).

basis of a universal franchise: half of the legislature is reserved for “functional constituencies” stacked in favor of Beijing,⁴² while widespread agitation for an elected chief executive has made no headway whatsoever.⁴³ Yet it is just as prosperous as Singapore,⁴⁴ and significantly more liberal in terms of the freedoms that people enjoy. Hong Kong is that rarest of rare birds: a liberal nondemocracy.

The question one must confront in Hong Kong when it comes to the lack of democracy is: so what? How does Hong Kong’s lack of democracy actually affect life for the worse? It depends on who you are and whether you matter. If you act and express yourself in inconsequential ways that Hong Kong’s pro-establishment elites can continue to ignore without risking any disruption to business as usual, then the authorities can pride themselves on their respect for your rights by leaving you alone.⁴⁵ Thus, for example, if you are the type of law professor who simply writes law review articles (and has no administrative ambitions⁴⁶), then you are probably safe because, as we all know, legal scholarship wields no actual influence over real events and is

42. See PO JEN YAP, *CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA* 34–37 (2015); *How Hong Kong’s Version of Democracy Works*, *ECONOMIST* (Aug. 25, 2016), <https://www.economist.com/blogs/economist-explains/2016/09/economist-explains-1> (explaining how the “arrangement of functional constituencies and their weighting against the other seats ensures that pro-Beijing parties have held a majority” every single time).

43. See Michael C. Davis, *The Basic Law, Universal Suffrage and the Rule of Law in Hong Kong*, 38 *HASTINGS INT’L & COMP. L. REV.* 275, 294–96 (2015) (discussing the promise of universal suffrage in Hong Kong under the Basic Law and the subsequent moves by Beijing that have placed universal suffrage increasingly beyond reach).

44. See Courtney Subramanian, *Hong Kong Edges Out Singapore in Millionaire Wealth*, *TIME* (June 24, 2013), <http://newsfeed.time.com/2013/06/24/hong-kong-edges-out-singapore-in-millionaire-wealth>.

45. Whether routine and inconsequential expressions of dissent will continue to be ignored remains to be seen. At Beijing’s insistence, Hong Kong authorities may yet be forced into the position of prosecuting wholly symbolic displays of dissent, such as booing of the national anthem by spectators at athletic events. See Joanna Chiu, *China Mulls Three Years’ Jail for Anthem Disrespect*, *YAHOO! NEWS* (Oct. 31, 2017), <https://www.yahoo.com/news/china-disrespecting-national-anthem-could-mean-three-years-072127979.html> (noting that spectators at athletic events in Hong Kong have repeatedly booed and turned their backs on the PRC national anthem, and that the National People’s Congress has responded by moving to make expressly applicable in Hong Kong a mainland Chinese law that would entail sentences of up to three years imprisonment for behavior deemed “disrespectful” toward the anthem).

46. See Violet Law, *Academic Freedom at Risk? Prof. Who Backed Hong Kong Protests Denied Post*, *L.A. TIMES* (Sept. 29, 2015), <http://www.latimes.com/world/asia/la-fg-hong-kong-academic-freedom-20150929-story.html> (describing the decision by the governing council of the University of Hong Kong to reject the appointment of former law school dean Johannes Chan to the position of vice-provost as “a move widely seen as kowtowing to Beijing”); Shirley Zhao et al., *University of Hong Kong’s Council Votes 12-8 to Reject Johannes Chan’s Appointment as Pro-Vice-Chancellor*, *SOUTH CHINA MORNING POST* (Sept. 29, 2015), <http://www.scmp.com/news/hong-kong/education-community/article/1862423/surprise-move-chair-university-hong-kong> (reporting that the purported reasons for rejecting the former law dean included his lack of a PhD and his supposed failure to “send regards” to a council member who allegedly suffered a minor injury during a student protest).

read only by other legal scholars.⁴⁷ Indeed, even if I were to end this paragraph with a call for Hong Kong independence for the specific purpose of tweaking hypersensitive Chinese officials, I would more likely end up under surveillance than under arrest.⁴⁸

By contrast, if the increasingly thin-skinned authorities under the increasingly authoritarian Xi Jinping are concerned that you might wield actual influence, then expect the wheels of justice to grind you into fine dust, one way or the other. Thus, for example, if you are the type of law professor who writes newspaper columns and instigates mass nonviolent protests that have an actual impact on commerce, then expect slow-burning, unyielding ire from Beijing and its proxies.⁴⁹ Or, if you are a nonviolent student leader of the

47. We know this because Chief Justice Roberts has said so, and as all properly indoctrinated American lawyers know: judges have authority, higher-ranking judges have even more authority, and authority equals truth. Therefore, Chief Justice Roberts's observations must be true. Here, then, are his observations:

Pick up a copy of any law review that you see, and the first article is likely to be, you know, *The Influence of Immanuel Kant on Evidentiary Approaches in Eighteenth Century Bulgaria*, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar. . . . If the academy wants to deal with the legal issues at a particularly abstract and philosophical level, that's great and that's their business, but they shouldn't expect that it would be of any particular help or even interest to the members of the practicing bar or judges.

A Conversation with Chief Justice Roberts, C-Span (June 25, 2001 at 30:45), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts>.

48. But in the event that I disappear from my office at the University of Hong Kong and turn up on Chinese national television to offer a confession or apology for my sins and transgressions, know ye now, for the record and beyond any doubt, that the confession will have been coerced. See Michael Caster, *The Last Missing Bookseller: One Year on, the Anniversary of Gui Minhai's Abduction Demands Action*, HONG KONG FREE PRESS (Oct. 17, 2016), <https://www.hongkongfp.com/2016/10/17/the-last-missing-bookseller-one-year-on-the-anniversary-of-gui-minhais-abduction-demands-action> (describing the forced televised confession and continuing abduction of a Swedish citizen who sold books in Hong Kong laden with gossip about China's rulers).

49. More specifically, expect Beijing's proxies in Hong Kong to stay their hand for several years until they have anointed an unpopular, highly pro-Beijing candidate for chief executive, then immediately bring charges the following day—presumably in the hope that at least some people will be too stupid to notice such blatant manipulation and will fault the outgoing chief executive rather than the incoming one. See Benjamin Haas, *Hong Kong Elections: Carrie Lam Voted Leader Amid Claims of China Meddling*, GUARDIAN (Mar. 26, 2017), <https://www.theguardian.com/world/2017/mar/26/hong-kong-chooses-new-leader-amid-accusations-of-china-meddling> (describing Beijing's influence over the "heavily restricted election" that installed Carrie Lam as chief executive despite the fact that John Tsang led her in public opinion polls by a 26% margin); Jonathan Kaiman, *One Day After Pro-Beijing Chief Executive Is Elected, Hong Kong Arrests 9 Protest Leaders*, L.A. TIMES (Mar. 27, 2017), <http://www.latimes.com/world/asia/la-fg-hong-kong-occupy-20170326-story.html> (discussing the timing of the arrests); Catherine Lai, *Hong Kong Umbrella Movement Leader Benny Tai Says He May Plead Not Guilty to Public Nuisance Charges*, HONG KONG FREE PRESS (Sept. 18, 2017), <https://www.hongkongfp.com/2017/09/18/hong-kong-umbrella-movement-leader-benny-tai-says-may-plead-not-guilty-public-nuisance-charges> (describing the criminal charges against my colleague at HKU, Benny Tai).

pro-democracy movement who makes the cover of *Time* magazine and is capable of rallying people or serving as a beacon of hope,⁵⁰ then expect to land in maximum-security prison⁵¹ through the unrelenting efforts of (1) prosecutors who will appeal your initial sentence as too lenient (while indignantly denying any political motivation),⁵² and (2) judges who prattle on self-righteously about the “rule of law” (but with nary a word about how laws made by an unelected legislature and enforced by an unelected chief executive could possibly provide a basis for such sanctimony).⁵³ Likewise, if you are an elected opposition legislator whose vote is needed in order to prevent the structurally guaranteed pro-Beijing majority from ramming through “national security” legislation⁵⁴ (feel free to imagine what that might mean under

50. See Nash Jenkins, *8 Questions for Hong Kong Democracy Activist Joshua Wong*, TIME (May 11, 2017), <http://time.com/4776817/joshua-wong-hong-kong-democracy-teenager-superpower>.

51. See Tom Phillips, *Hong Kong Urged to Free Jailed Pro-Democracy Protesters in Open Letter*, GUARDIAN (Aug. 18, 2017), <https://www.theguardian.com/world/2017/aug/18/hong-kong-urged-free-jailed-pro-democracy-protesters-open-letter> (discussing the Hong Kong government’s successful appeal of the sentence imposed on a non-violent, pro-democracy activist for “unlawful assembly” and the subsequent transfer of the twenty-year-old youth in question to a maximum-security prison).

52. Compare Venus Wu & James Pomfret, *Critics Cry Foul as Joshua Wong and Other Young Hong Kong Democracy Leaders Get Jail*, REUTERS (Aug. 17, 2017, 4:30 AM), <https://www.reuters.com/article/us-hongkong-politics-verdict/critics-cry-foul-as-joshua-wong-and-other-young-hong-kong-democracy-leaders-get-jail-idUSKCN1AX0T3> (reporting that Hong Kong’s Secretary for Justice, Rimsy Yuen, overruled Hong Kong’s top prosecutors and ordered them to seek a harsher sentence for Joshua Wong, and quoting criticisms made by Human Rights Watch, Amnesty International, and others of the government’s “relentless and vindictive pursuit of student leaders using vague charges”), and Catherine Lai, *Hong Kong Justice Chief Defends Jailing of Democracy Activists; Slams Claims of Political Persecution*, HONG KONG FREE PRESS (Aug. 24, 2017), <https://www.hongkongfp.com/2017/08/24/hong-kong-justice-chief-defends-jailing-democracy-activists-slams-claims-political-persecution> (highlighting Rimsy Yuen’s efforts to mischaracterize criticisms of his own motivations as attacks on judicial independence, and to confuse the question of whether the harsher sentence was legal with whether the decision to seek the harsher sentence was politically motivated), with Rimsy Yuen, *Court of Appeal Decision: A Factual Account*, STANDARD (Aug. 24, 2017), <http://www.thestandard.com.hk/section-news.php?id=186647> (asserting that “[p]olitical considerations do not come into play” in government prosecutions, insisting that “any suggestion of ulterior motive on the part of the prosecution is simply groundless,” and calling upon “the public and the international community . . . to . . . refrain from making baseless attacks against the government”).

53. See *Secretary for Justice v. Wong Chi Fung* [2017] CAAR No.4 of 2016 (High Ct. Hong Kong Spec. Admin. Reg. Ct. App.); Chris Lau, *Court Finally Releases English Version of Judgment That Jailed Hong Kong Activists Joshua Wong, Nathan Law and Alex Chow*, SOUTH CHINA MORNING POST (Aug. 30, 2017), <http://www.scmp.com/news/hong-kong/politics/article/2108919/court-finally-releases-english-version-judgment-jailed-hong>.

54. See *Umbrellas Out*, ECONOMIST, Nov. 7, 2016, at 28 (noting the reiteration by Hong Kong’s Chief Executive of the need for adoption of “national security” legislation to respond to the rise of pro-independence activism); David Tweed & Ting Shi, *A Controversial Hong Kong Security Law Is Back on the Table*, BLOOMBERG (Nov. 8, 2016, 4:00 PM), <https://www.bloomberg.com/news/articles/2016-11-07/china-s-red-line-on-hong-kong-signals-increased-tensions-ahead>.

Chinese rule) or a curriculum aimed at “instilling patriotism and strengthening Chinese identity” among Hong Kong children⁵⁵ (ditto), expect to be not only disqualified from office (say, for taking the oath of office too slowly, or with the wrong intonation⁵⁶) but also forced into penury.⁵⁷ And if some constitutional law needs to be obliterated to make that happen, so be it.⁵⁸

55. Peace Chiu, *Is Chinese National Education Set to Make a Comeback in Hong Kong? It's Not If, but How, Experts Say*, SOUTH CHINA MORNING POST (Aug. 4, 2017), <http://www.scmp.com/news/hong-kong/politics/article/2105343/chinese-national-education-set-make-comeback-hong-kong-its> (discussing the proposed curriculum); see also Karen Cheung, *Will Hongkongers Be Able to Move or Blink During China's National Anthem? Lawmaker Urges Clarity on New Law*, HONG KONG FREE PRESS (Aug. 31, 2017), <https://www.hongkongfp.com/2017/08/31/will-hongkongers-able-move-blink-chinas-national-anthem-lawmaker-urges-clarity-new-law> (noting that a new law that Beijing intends to make expressly applicable to Hong Kong includes criminal punishment for “those who insult the national anthem,” without clarifying whether behavior such as sneezing or blinking during the anthem might count as a criminal offense).

56. See Elson Tong, *4 More Elected Pro-Democracy Lawmakers to Be Ousted Following Hong Kong Court Ruling*, HONG KONG FREE PRESS (July 14, 2017), <https://www.hongkongfp.com/2017/07/14/breaking-4-elected-pro-democracy-lawmakers-ousted-following-hong-kong-court-ruling> (describing the judicial disqualification of opposition lawmakers for such reasons as reading the oath of office too slowly, and speaking the word “country” in the oath with a “rising intonation”).

57. See Amy Nip & Sum Lok-kei, *Commission Is Likely to Sue Duo over Legco Cash*, STANDARD (Sept. 13, 2017), <http://www.thestandard.com.hk/section-news.php?id=187413> (reporting that Hong Kong's legislature intends to file suit against two disqualified legislators in order to recover from each of them HK\$834,393 for office operating expenses already incurred, and an additional HK\$95,180 each per month in salary, retroactive to the date that they took the oath as opposed to the subsequent date that they learned they were disqualified); Karen Cheung, *Hong Kong Legislature Seeks HK\$1.86 Million from Disqualified Lawmakers, as Youngspiration Duo Hit Legal Dead End*, HONG KONG FREE PRESS (Aug. 25, 2017), <https://www.hongkongfp.com/2017/08/25/hong-kong-legislature-seeks-hk1-8-million-disqualified-lawmakers-youngspiration-duo-hit-legal-dead-end> (reporting that the two disqualified legislators owe a combined HK\$12M in legal fees, in addition to the expenses and salary claimed by the legislature, and expect to go bankrupt).

58. See *Umbrellas Out*, *supra* note 54, at 28 (describing how the National People's Congress intervened by issuing an interpretation of the oath-taking requirement in Hong Kong's constitution that forced the disqualification of the elected opposition legislators, and observing that it had never before done so while judicial proceedings were already underway in Hong Kong); Cora Chan, *The Legal Limits on Beijing's Powers to Interpret Hong Kong's Basic Law*, HONG KONG FREE PRESS (Nov. 5, 2016), <https://www.hongkongfp.com/2016/11/05/legal-limits-beijings-powers-interpret-hong-kongs-basic-law> (noting that China is bound by a treaty with the British “to respect Hong Kong's autonomy until 2047,” and observing that the NPCSC uses its power to interpret Hong Kong's Basic Law with such lack of restraint that it has effectively claimed the power to amend the Basic Law without regard for the actual amendment procedure); Suzanne Sataline, *The People of Hong Kong vs. The People's Republic of China*, FOREIGN POL'Y (Nov. 11, 2016), <http://foreignpolicy.com/2016/11/11/the-people-of-hong-kong-vs-the-peoples-republic-of-china> (observing that the NPCSC's newly aggressive use of its power to interpret Hong Kong's Basic Law in order to ensure the ejection of opposition legislators undermines the “one country, two systems” framework established in 1997, under which Beijing is supposed to refrain from “blatant interference in Hong Kong local governance”).

In everyday life, however, there is little sense of government repression in the air, at least for now.⁵⁹ On the contrary, Hong Kong is not merely liberal, but *laissez-faire*.⁶⁰ Unlike Singapore or mainland China, there are no great firewalls, and there is no government censorship of the press. To turn on one's television or to walk into a shopping mall is to be spoiled for choice: hundreds of channels, thousands of shops. Better still, freedom and choice are matched by safety and security. The homicide rates in Hong Kong are among the lowest in the world (except for that time they doubled, because of a boating accident that was classified as criminal negligence).⁶¹ What, then, is so talismanic about the combination of constitutionalism with democracy? Even if the laws lack democratic legitimacy, why is that troublesome for the average inhabitant as long as the reach of those laws remains within constitutional limits? Might it be that constitutionalism by itself, without democracy, can successfully deliver what most people care most about?

Japan—another success story—has long claimed bragging rights to being Asia's oldest democracy, but a closer look suggests that its democratic credentials are also questionable. Hiroshi Itoh calls it a “benign elite democracy,” which might be closer to the mark but is arguably still on the generous side.⁶² The Japanese case is one of largely uninterrupted one-party rule for the last seventy-plus years. As competitive multiparty democracy goes, Japan has been about as competitive as Mexico through the 1980s, which is to say, not very.⁶³

Japan's ruling Liberal Democratic Party (“LDP”) is so entrenched that it has evolved mechanisms for controlling the bureaucracy that resemble

59. *But see supra* note 45 (noting the prospect that the PRC regime will insist upon the criminalization and severe punishment of behavior deemed disrespectful toward symbols of its rule).

60. The libertarian Cato Institute has for many years scored Hong Kong higher than the United States (or anywhere else) in terms of the freedom of its economy. *See* James A. Dorn, *Hong Kong: World's Freest Economy*, CATO INST. (July 28, 2004), <https://www.cato.org/publications/commentary/hong-kong-worlds-freest-economy> (“Since 1970, Hong Kong has ranked as the world's freest economy.”); Richard W. Rahn, *Hong Kong, an Aspirational Society to Emulate*, CATO INST. (Sept. 8, 2014), <https://www.cato.org/publications/commentary/hong-kong-aspirational-society-emulate>; *see also* Nash Jenkins, *The Unlikely Populist: John Tsang's Fight for Hong Kong's Top Job*, TIME (Mar. 23, 2017), <http://time.com/4710466/john-tsang-hong-kong-chief-executive-election> (quoting *laissez-faire* economist Milton Friedman's ode to Hong Kong as “the place to be” “to see how the free market really works”).

61. *International Homicides (Per 100,000 People)*, WORLD BANK, <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5> (last visited Nov. 9, 2017); *Hong Kong's Crime Rate Fell 3.5%*, HONG KONG BUSINESS (Sept. 26, 2013), <http://hongkongbusiness.hk/education/more-news/hong-kongs-crime-rate-fell-35>.

62. HIROSHI ITOH, *THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN* (2010).

63. *See* ETHAN SCHEINER, *DEMOCRACY WITHOUT COMPETITION IN JAPAN: OPPOSITION FAILURE IN A ONE-PARTY DOMINANT STATE* 22–28 (2006) (contrasting Mexico and Japan); Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 31, at 180, 182–83.

those of the CCP. The Chinese government is characterized by the existence of two parallel power structures: one structure is the formal institutional framework established by the constitution, while the other is the CCP, which deliberately matches each formal institution with an equivalent in the party to better facilitate CCP oversight and control of all governmental decision-making.⁶⁴ For similar reasons, the internal organization of the LDP contains institutional counterparts to the bureau of the various government ministries.⁶⁵

Nor do the echoes of bureaucratic authoritarianism end there. Recall what we said about Singapore: “The power of judicial review exists, but is not exercised in practice. Elections are held, but pursuant to rules that ensure the ruling party is never actually at risk of losing power.”⁶⁶ Check, and check. Between the world-leading passivity of the Japanese Supreme Court and an unconstitutional electoral malapportionment scheme that has never been fixed,⁶⁷ the same could be said of Japan. It may not be an authoritarian state in the same mold as Singapore or China, but it is not exactly a thriving multiparty democracy either.

In terms of trains, they run with such precision in Japan that in order to catch the one you want, you stand at the exact point painted on the platform where the doors for that specific train are supposed to open, and if the door does not open at exactly that point, you know it’s the wrong train. This enables multiple railways to run multiple trains to multiple destinations from the same platform within minutes of each other.⁶⁸

So if we’re keeping score, we have so far managed to “limit” the situations in which bureaucratic single-party rule (with or without overtly authoritarian tendencies) might prove appealing to:

- (a) small states, regardless of whether they are diverse (like Singapore) or homogenous (like Hong Kong);
- (b) large, diverse, developing states (like China); and

64. See QIANFAN ZHANG, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* 99 (2012); Wen-Chen Chang & David S. Law, *Constitutional Dissonance in China*, in *COMPARATIVE CONSTITUTIONAL THEORY* (Gary Jacobsohn & Miguel Schor eds., forthcoming 2019), <https://ssrn.com/abstract=2971724>.

65. Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 *LAW IN JAPAN* 168, 171, 185 (1986) (discussing how the LDP’s Policy Board, or “seimu chōsakai,” is organized into departments that parallel the bureaus located within government ministries); Cheng-Yi Huang & David S. Law, *Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China*, in *COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS* 305, 305 n.1 (Francesca Bignami & David Zaring eds., 2016) (noting the function of the Somukai).

66. See *supra* note 33 and accompanying text.

67. See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 *TEX. L. REV.* 1545, 1547–48, 1586–88 (2009).

68. See *Train Platform Markings and Symbols*, JAPAN RAIL PASS (June 2, 2014), <https://www.japan-rail-pass.com/japan-by-rail/travel-tips/platform-symbols>.

(c) large, homogenous, developed states (like Japan).

With exceptions like these, what remains of any supposed “rule” about the limited appeal or viability of bureaucratic authoritarianism? Why not “constrain” democracy all the way down to something approaching zero, if the people are happy with the results? What exactly does competitive multi-party democracy within constitutional limits offer that is better than what these regimes offer? How compelling is the response that we constitutional lawyers have, as keepers of the faith in liberal constitutional democracy, to the argument that democracy is inherently vulnerable to some combination of ignorance, tribalism, and fear? And if we cannot readily and convincingly explain what is so great about what we are peddling, what does that say about the long-term global viability of the elite-led project of constitutional law?

Put to the test of popular acceptance—which is not a test that any political system can afford to fail in the long run—it is not clear that liberal constitutional democracy always comes out on top everywhere. Given what we see in Europe, America, and Asia, is it really a foregone conclusion that the man in the street plumps for liberal constitutional democracy if allowed to choose? Or that liberal constitutional democracy is the best option for ensuring that the pot does not boil over again? What ought to give us pause is how difficult it is for us, collectively, to explain—in terms compelling to average citizens—why this is the case.

The answer, for many, may simply be to turn away from liberal constitutional democracy. No doubt many constitutional scholars might be entirely untroubled or even pleased by the alternative of social democracy. It would be at least somewhat ironic, however, for constitutional scholars to advocate for a system that could effectively put them out of business. As difficult as judicial review is to justify in a liberal constitutional democracy, the difficulty of the task only increases under social democracy. If the Scandinavian experience is any guide, social democracy would badly dent the importance and role of constitutional courts, lawyers, and scholars alike.

Constitutional lawyers ought to find bureaucratic authoritarianism much harder to swallow, given its lack of democratic pedigree. The problem is that a lot of people in many parts of the world are not nearly as troubled by the absence of democracy, and normative theory may not be the right tool for the job of convincing them that they ought to be more troubled than they actually are. Normative theory probably works best on normative theorists; in this sense, it is most effective where it is least needed. We can talk all we want about the moral or theoretical merits of democracy, but at the end of the day, there is no substitute for acceptance, and a big part of acceptance comes down to how people feel about their everyday lives. Why should average citizens embrace theoretical arguments about the merits of democracy when bureaucratic authoritarianism seems to do a perfectly good job of satisfying first-order needs on an everyday basis?

There are, of course, pragmatic arguments to be made on behalf of democracy. Churchill famously defended democracy on consequentialist grounds as the lesser of evils: “democracy is the worst form of Government,” he wryly observed, “except all those other forms that have been tried from time to time.”⁶⁹ For the millions of people who seem perfectly comfortable with bureaucratic authoritarianism, however, it is far from self-evident that Churchill was right.

69. WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7566 (Robert Rhodes James ed., 1974) (“No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time . . .”).