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## SYMPOSIUM

### **The Coming Demise of Liberal Constitutionalism?**

*Tom Ginsburg,† Aziz Z. Huq†† & Mila Versteeg‡*

#### INTRODUCTION

In the wake of World War II, liberal constitutionalism emerged as a default design choice for political systems across Europe and North America. It then diffused more widely across the globe as a whole.<sup>1</sup> This style of constitutionalism typically hinges on a written constitution that includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law. This commitment can be broadly understood as ensuring that administrative and adjudicative functions operate autonomously from, and potentially limit, powerful factions or leaders. While its details vary from one context to another, this is a form of constitutionalism that broadly seeks to protect

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<sup>1</sup> Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* 21 (Oklahoma 1991) (describing the Third Wave as “an almost irresistible global tide”).

democracy and limit power.<sup>2</sup> It is this bundle of institutional design choices that was once viewed as the default governance option at the “end of history,”<sup>3</sup> securely nestled in an “open and rule-based” liberal international order.<sup>4</sup>

To be sure, liberal constitutionalism has never been perfectly or universally implemented. In the democratic core of Europe and North America, large subaltern populations (often comprising distinct racial or ethnic minorities) were kept at arm’s length from full economic or political participation. What is more, when faced with national emergencies, these countries have been quick to ignore important constitutional limits.<sup>5</sup> Elsewhere, political leaders drafted documents containing the key elements of liberal constitutionalism without any genuine intention to implement them.<sup>6</sup> Still, the aspiration remained. Some minimal show of fealty, a crumb of notional genuflection to liberal democratic norms, was *de rigeur*.

By the end of 2016, however, it was not merely possible, but even en vogue for aspiring politicians to question the hegemony of liberal democracy.<sup>7</sup> Although warning signs aplenty might now be discerned, it is possible to single out the June 2016 Brexit referendum in the United Kingdom and the November

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<sup>2</sup> See, for example, Jethro K. Lieberman, *Constitutionalism*, in Michael T. Gibbons, ed, 2 *The Encyclopedia of Political Thought* 730, 730 (John Wiley & Sons 2014) (“Today the idea of constitutionalism comprises a cluster of particular jurisprudential and sociological attributes, summed up as ‘limited government under a higher law.’”), quoting David Fellman, *Constitutionalism*, in P.P. Wiener, ed, 1 *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas* 491 (Charles Scribner’s Sons 1973).

<sup>3</sup> Francis Fukuyama, *The End of History and the Last Man* 211 (Free Press 1992) (“At the end of history, there are no serious ideological competitors left to liberal democracy.”). See also Juan J. Linz and Alfred Stepan, *Toward Consolidated Democracies*, 7 *J Democracy* 14, 15 (Apr 1996) (describing the conditions under which democracy becomes “the only game in town”).

<sup>4</sup> G. John Ikenberry, *The Future of the Liberal World Order: Internationalism after America*, 90 *Foreign Aff* 56, 58 (May–June 2011).

<sup>5</sup> See, for example, Adam S. Chilton and Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 *J Legal Stud* 417, 446–48 (2015).

<sup>6</sup> See John W. Meyer, et al, *World Society and the Nation-State*, 103 *Am J Sociology* 144, 163–64 (1997). See also H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in Douglas Greenberg, et al, eds, *Constitutionalism and Democracy: Transitions in the Contemporary World* 65, 66 (Oxford 1993).

<sup>7</sup> Even at the apogee of liberal-democratic celebration, though, doubts were raised about how stable the liberal-democratic norm was. See, for example, David Held and Anthony McGrew, *Globalization and the Liberal Democratic State*, 28 *Govt & Opposition* 261, 264–66 (1993). For contemporaneous concern that democratization would compromise liberal norms, see generally Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 *Foreign Aff* 22 (Nov–Dec 1997).

2016 presidential election in the United States as marking, in different ways, globally resonant repudiations of the liberal-democratic norm.

In both contests, right-of-center populist positions hostile to international migration, international and supranational organizations, and the liberal tolerance of different ethnicities and faiths prevailed. Their triumphs were part of a wider, right-leaning “populist explosion” in Europe and Asia,<sup>8</sup> albeit one that trails an earlier left-leaning populist shift in Latin America.<sup>9</sup> Although they have typically ascended to power via democratic, electoral means, populists on both the left and right have departed from liberal-democratic norms in several ways. They have repudiated liberal norms of tolerance and openness, restricted press freedom, attacked institutional checks that promote the rule of law, and catalyzed constitutional and statutory transformations that promise to entrench populist coalitions beyond fresh democratic defeat.<sup>10</sup> At bottom, their political ethics track closely Carl Schmitt’s conception of the political as a confrontation with an enemy that can be resolved only by the latter’s complete subordination and even in extremis “physical killing.”<sup>11</sup> Importantly, these departures are neither subterranean nor marginal. Instead, they are central planks of the populist political agenda.

In other contexts, we have seen partial or full-blown moves toward authoritarianism. Across a range of different geopolitical contexts, an increasing number of countries can appropriately be characterized as “hybrid” democracies,<sup>12</sup> such as competitive authoritarian regimes and “democratorship[s].”<sup>13</sup> Even in the absence

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<sup>8</sup> See John B. Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* 99 (Columbia Global Reports 2016). See also Matt Golder, *Far Right Parties in Europe*, 19 *Ann Rev Polit Sci* 477, 479 (2016) (exploring the populist character of the European hard right).

<sup>9</sup> See Yannis Stavrakakis, et al, *Contemporary Left-Wing Populism in Latin America: Leadership, Horizontalism, and Postdemocracy in Chávez’s Venezuela*, 58 *Latin Am Polit & Society* 51, 52–53 (Fall 2016).

<sup>10</sup> Many of these can be ranked forms of “democratic backsliding.” See Nancy Bermeo, *On Democratic Backsliding*, 27 *J Democracy* 5, 5 (Jan 2016) (defining democratic backsliding as “the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy”).

<sup>11</sup> Carl Schmitt, *The Concept of the Political* 26–27, 33 (Chicago 2007) (George Swab, trans) (originally published 1932).

<sup>12</sup> Mark Tushnet, *Authoritarian Constitutionalism*, 100 *Cornell L Rev* 391, 395 (2015).

<sup>13</sup> Kim Lane Scheppele, *Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight)* \*4–5 (working paper 2016), archived at <http://perma.cc/Q266-MJEK>.

of a populist turn, at least some elemental fixtures of liberal constitutionalism are being unraveled in certain nations—including conventions for democratic rotation of officeholders and against corruption that are far easier to destroy than to create anew. In cases like Russia and Turkey, the very possibility of near-term rotation in political office no longer seems feasible. The formal accoutrements of elections and partisan competition persist largely as tattered facades masking increasingly authoritarian political formations.<sup>14</sup> Liberal constitutionalism, to an increasing degree, provides neither an aspirational lodestar nor an accurate description of the dominant constitutional style around the world today.

This Symposium brings together a diverse array of scholars to examine the contemporary challenge to liberal constitutionalism. Our modest aim in this Introduction is to make the case for the existence of the challenge, and then to offer what we hope are deliberately provocative comments on why it has largely escaped the attention of comparative constitutional scholars until quite recently. Although we gesture briefly at some potential causal hypotheses, we anticipate that readers will gain greater insight into the motivating mechanisms at work from the Essays in the Symposium itself.

Throughout, our focus is on a relatively modest vision of liberal constitutionalism, focusing on its component features described above, but not insisting on any particular substantive vision or content. So conceived, liberal constitutionalism in theory is compatible with a wide array of governmental arrangements and choices about basic values. It is not, however, compatible with a restriction on core liberal rights of association or speech, on political competition, or on the rule of law to oversee the democratic process.<sup>15</sup>

## I. IS LIBERAL DEMOCRACY HEGEMONIC?

We begin with some evidence that liberal constitutionalism reflects neither aspiration nor practice in an increasing array of nations and contexts. For reasons of space, we focus mainly on

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<sup>14</sup> See Lilia Shevtsova, *Forward to the Past in Russia*, 26 *J Democracy* 22, 30–33 (Apr 2015).

<sup>15</sup> See Aziz Huq and Tom Ginsburg, *How to Lose Constitutional Democracy*, 65 *UCLA L Rev* \*7–12 (forthcoming 2018), archived at <http://perma.cc/57P7-7JC7> (laying out a minimalist core of constitutional liberal democracy).

attitudes toward, and the practice of, democracy, liberal tolerance, and the rule of law.

Consider first some evidence of public attitudes toward liberal democratic values. It has long been the case that “there is generally no connection between specific constitutional choices and popular opinion.”<sup>16</sup> Rather than speaking to normative aspirations specific to particular populations, twentieth-century constitutions tend to adhere to more universal norms of liberal democracy.<sup>17</sup> More recently, however, data from the World Values Survey suggest some decline in support for liberal values and democracy. These data suggest that across North America and Western Europe, citizens are becoming “more cynical about the value of democracy as a political system, less hopeful that anything they do might influence public policy, and more willing to express support for authoritarian alternatives.”<sup>18</sup> Disturbingly, discontent with democracy is concentrated in certain jurisdictions (including the United States) among younger, more wealthy cohorts.<sup>19</sup>

The retreat of liberal constitutionalism is not confined to public attitudes. Between 1974 and 2008, there were fifty-three instances in which a democracy shifted either to a “hybrid” or an “authoritarian” regime, albeit “in many different ways and for many different reasons.”<sup>20</sup> The German Bertelsmann Foundation has developed a “transformation index” that measures the state and quality of democracy in many developing nations.<sup>21</sup> It found that the number of “highly defective democracies” doubled between 2006 and 2010, and that by 2010 some 53 of 128 countries analyzed were “defective democracies.”<sup>22</sup> Freedom House data from recent years also show an uptake in both authoritarian and hybrid regimes, with slight regression of the number of

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<sup>16</sup> Mila Versteeg, *Unpopular Constitutionalism*, 89 *Ind L J* 1133, 1137 (2014).

<sup>17</sup> See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 *U Chi L Rev* 519, 522 (1992).

<sup>18</sup> Roberto Stefan Foa and Yascha Mounk, *The Democratic Disconnect*, 27 *J Democracy* 5, 7 (July 2016).

<sup>19</sup> See *id.* at 13–14.

<sup>20</sup> Gero Erdmann, *Decline of Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy*, in Gero Erdmann and Marianne Kneuer, eds, *Regression of Democracy?* 21, 26, 35 (Springer VS 2011).

<sup>21</sup> See *Transformation Index BTI 2016* (Bertelsmann Stiftung), archived at <http://perma.cc/TNT9-RHJS>.

<sup>22</sup> Joshua Kurlantzick, *Democracy in Retreat: The Revolt of the Middle Class and the Worldwide Decline of Representative Government* 9 (Yale 2013).

democracies globally.<sup>23</sup> In contrast, the number of military coup d'états has declined in recent years.<sup>24</sup> Indeed, it is now more common for coups to occur in nondemocracies as opposed to derailing an ongoing democracy.<sup>25</sup> Democratic backsliding, then, occurs after the election of populist parties that use their mandate to neutralize the judiciary, dismantle respect for the rule of law, and restrict electoral competition.

These trends manifest across quite distinct geopolitical contexts. In Eastern Europe, for example, populist parties such as Hungary's Fidesz and Poland's Law and Justice Party have enacted legal and institutional changes that simultaneously squeezed out electoral competition, undermined liberal rights of democratic participation, and emasculated legal stability and predictability.<sup>26</sup> The wave of Bolivarian constitutions in Latin America and the partial reversal of democracy in Southeast Asia are characterized by many of the same kinds of tactics.<sup>27</sup> Finally, even as liberal constitutionalism has fallen back in some instances, it has failed to advance elsewhere. The failure of the Arab Spring, accompanied by a dizzying collapse into security-state authoritarianism (Egypt), or even fratricidal civil war (Yemen, Syria, Libya), has closed off any possibility of another imminent "wave" of democratization.

Finally, against widely shared expectations, authoritarian governments in China, Russia, and elsewhere have not rushed to embrace either liberalism or democracy. Rather than touting liberal credentials, they instead offer a competing discourse of

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<sup>23</sup> *Freedom in the World 2016* (Freedom House, 2016), archived at <http://perma.cc/LE3W-STW5>.

<sup>24</sup> See Jonathan M. Powell and Clayton L. Thyne, *Global Instances of Coups from 1950 to 2010: A New Dataset*, 48 *J Peace Rsrch* 249, 255 (2011) (Figure 1).

<sup>25</sup> See Clayton L. Thyne and Jonathon M. Powell, *Coup d'État or Coup d'Autocracy? How Coups Impact Democratization, 1950–2008*, *Foreign Pol Analysis* 192, 193 (2016) (arguing that coups increase democratization because "the bulk of coups do not happen within democracies"). There have been coups in democracies recently, including in Mauritania and Thailand. Turkey's 2016 imbroglio, by contrast, is a failed coup against democracy. See Adam Taylor, *Map: The World of Coups since 1950* (Wash Post, July 22, 2016), archived at <http://perma.cc/92QX-SA3Z>.

<sup>26</sup> For summaries, see Bojan Bugarič and Tom Ginsburg, *The Assault on Post-communist Courts*, 27 *J Democracy* 69, 72–75 (July 2016); Joanna Fomina and Jacek Kucharczyk, *The Specter Haunting Europe: Populism and Protest in Poland*, 27 *J Democracy* 58, 62–63 (Oct 2016).

<sup>27</sup> See David Landau, *Abusive Constitutionalism*, 47 *UC Davis L Rev* 189, 200–07 (2013) (discussing Colombia and Venezuela).

order and authority, or the promise of accelerated economic prosperity.<sup>28</sup>

## II. WHY IS LIBERAL DEMOCRACY'S STOCK IN DECLINE?

What explains this bear market in liberal constitutionalism? And what are the discrete mechanisms of its demise? There is a large set of causal hypotheses to consider, and our review here is necessarily superficial. Some tie democratic persistence to economic stability.<sup>29</sup> The recent financial crisis of 2008 has been blamed as a catalytic moment in the movement away from democratic practices.<sup>30</sup> From outside the state, the disruptive force of economic globalization—the global arrangements of financial flows, labor competition, and contagious economic disruption—has jolted states from Thailand to Greece to Iceland.<sup>31</sup> Another transnational phenomenon—terrorism—diffuses along new social and technological networks, provoking states to retrench and harden even as it shows the limits of state power. And, in a surprising reprise of an old story, *de facto* empires—American, Russian, and Chinese—protecting spheres of influence, have subordinated democratic constitutionalism to geopolitical ends.

Domestic politics also plays a necessary role. Elite polarization between nationalist and liberal factions has been identified as a necessary catalyst of backsliding in some national contexts,<sup>32</sup> and may well have played a major role in recent developments in the United States and the United Kingdom. In addition, scholars have also pointed to a correlation between inequality and autocracy.<sup>33</sup> The growing gap between the rich

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<sup>28</sup> Arch Puddington and Tyler Roylance, *The Freedom House Survey for 2016: The Dual Threat of Populists and Autocrats*, 28 *J Democracy* 105, 110–11 (Apr 2017).

<sup>29</sup> See José Alemán and David D. Yang, *A Duration Analysis of Democratic Transitions and Authoritarian Backslides*, 44 *Comp Polit Stud* 1123, 1143 (2011) (finding that “the best guarantor of democratic consolidation is a high level of socioeconomic development”); Adam Przeworski, et al, *Democracy and Development: Political Institutions and Well-Being in the World* 59–69 (Cambridge 2000).

<sup>30</sup> Judis, *Populist Explosion* at 109 (cited in note 8).

<sup>31</sup> See generally Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014).

<sup>32</sup> See, for example, Zsolt Enyedi, *Populist Polarization and Party System Institutionalization: The Role of Party Politics in De-democratization*, 63 *Probs Post-Communism* 210, 213 (2016).

<sup>33</sup> See Ethan B. Kapstein and Nathan Converse, *Poverty, Inequality, and Democracy: Why Democracies Fail*, 14 *J Democracy* 57, 61 (Oct 2008); Adam Przeworski, *The Poor and the Viability of Democracy*, in Anirudh Krishna, ed, *Poverty, Participation, and Democracy: A Global Perspective* 125, 129 (Cambridge 2008).



and the poor globally might therefore also be a catalyst for the erosion of liberal constitutionalism. Finally, the very practice of constitution-making itself can open up new cleavages that undermine the social preconditions of liberal constitutionalism.<sup>34</sup> Constitutions, that is, might be intended as devices for inclusion. But through the processes of their formation, they may set the stage for their own demise by operating as devices for exclusion and division.

The Essays in this Symposium explore these various possibilities by giving an account of the various challenges to liberal constitutionalism. To begin with, Professor Samuel Issacharoff examines the internal structure of democratic polities for clues as to the recent wave of backsliding.<sup>35</sup> While democracy may offer the most legitimate form of government, it is far from clear that it is superior in terms of performance. And key mechanisms that facilitate participation—political parties, legislative performance, and a sense of social cohesion—are all in serious and accelerating decline.<sup>36</sup> Professors Adam Chilton and Mila Versteeg focus on another core component of liberal constitutionalism—namely, the ability of courts to protect constitutional rights. This feature is often taken for granted, yet they suggest that courts are unable to offer much protection at all.<sup>37</sup>

Looking beyond institutional forces, Professors Rosalind Dixon and Julie Suk focus on economic inequality as a causal factor.<sup>38</sup> They contend that the primary mechanisms through which liberal constitutions address the issues, namely, rights to socioeconomic goods and nondiscrimination, are inadequate to the threat, but that structural responses are possible, as both a conceptual and empirical matter.<sup>39</sup> Professor Richard Epstein, in contrast, contests our (and their) account of liberal constitutionalism, arguing that it is failing because it is overambitious, not underambitious.<sup>40</sup>

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<sup>34</sup> For examples, see generally David Landau, *Constitution-Making Gone Wrong*, 64 Ala L Rev 923 (2013); Ben Schonthal, *Buddhism, Politics and the Limits of Law* (Cambridge 2016).

<sup>35</sup> See generally Samuel Issacharoff, *Democracy's Deficits*, 85 U Chi L Rev 485 (2018).

<sup>36</sup> Id at 488.

<sup>37</sup> Adam S. Chilton and Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U Chi L Rev 293, 313 (2018).

<sup>38</sup> See generally Rosalind Dixon and Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U Chi L Rev 369 (2018).

<sup>39</sup> See id at 377–81.

<sup>40</sup> Richard A. Epstein, *The Wrong Rights, or: The Inescapable Weaknesses of Modern Liberal Constitutionalism*, 85 U Chi L Rev 403, 405 (2018).

A series of contributions map the larger geopolitical coordinates of liberal constitutionalism's decline. First, Professors Ashi Bâli and Aziz Rana explore the role of American empire in both promoting liberal constitutional form during and after the Cold War, but also in shifting priorities in the other direction during the Global War on Terror.<sup>41</sup> In their account, there is a continuity in the period of American empire, in that liberal concerns are subordinated to global security, undermining some democracies in certain times and places.<sup>42</sup> Professor Gráinne de Búrca also examines the role of international forces, focusing on the European Union.<sup>43</sup> While itself purporting to advance the values of liberal constitutional democracy, Europe famously lacks a demos, and may have inspired the nationalist backlash now obtaining in many different countries.<sup>44</sup> Turning to the economic dimension of globalization, Professor David Schneiderman argues that the space for liberal democracy has been undermined by the constitutionalization of a neoliberal economic order.<sup>45</sup> Focusing on international investment law, he argues that the space of sovereign policymaking has been systematically reduced, putting pressure on political systems that they may not be able to withstand.<sup>46</sup> Finally, Professor Aziz Huq traces the role of global terrorism in triggering one or more pathways of democratic decline.<sup>47</sup> Demonstrating that the relationship between terrorism and democracy is more complex than it first appears, he contends that state responses to terror can lead to new configurations within the security apparatus, judicial control thereof, and the polity itself.<sup>48</sup>

A more fundamental conceptual challenge is posed by the religious revival in many countries, analyzed by Professors Ran Hirschl and Ayelet Shachar.<sup>49</sup> As they put it, "The rule of law

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<sup>41</sup> See generally Ashi Bâli and Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U Chi L Rev 257 (2018).

<sup>42</sup> *Id.* at 275.

<sup>43</sup> See generally Gráinne de Búrca, *Is Supranational Governance a Challenge to Liberal Constitutionalism?*, 85 U Chi L Rev 337 (2018).

<sup>44</sup> *Id.* at 351–52.

<sup>45</sup> See generally David Schneiderman, *Against Constitutional Excess: Tocquevillian Reflections on International Investment Law*, 85 U Chi L Rev 585 (2018).

<sup>46</sup> *Id.* at 588–89.

<sup>47</sup> See generally Aziz Z. Huq, *Terrorism and Democratic Recession*, 85 U Chi L Rev 457 (2018).

<sup>48</sup> *Id.* at 457–59.

<sup>49</sup> See generally Ran Hirschl and Ayelet Shachar, *Competing Orders: The Challenge of Religion to Modern Constitutionalism*, 85 U Chi L Rev 425 (2018).

and the rule of God appear to be on a collision course.”<sup>50</sup> Tracing the history of the interaction between these two forces, they emphasize the conceptual similarities but also the tensions as these two systems regulate the same space.<sup>51</sup>

Two Essays focus on modalities and mechanisms through which liberal constitutionalism gets eroded. Professor David Landau examines the role of formal constitutional change in undermining liberal constitutionalism.<sup>52</sup> After categorizing multiple pathways of democratic erosion, he suggests that formal amendment is an attractive tool when a regime seeks quick change and wants to make this change more durable.<sup>53</sup> In addition, he suggests that when existing provisions are drafted in detail, formal amendment might be required.<sup>54</sup> Finally, Professor Kim Lane Scheppele similarly explores the legal tools that allow liberal constitutionalism to be undermined from within.<sup>55</sup> The “new autocrats,” as she labels them, are masters at preserving democratic form without liberal content, presenting a severe and nimble set of challenges.<sup>56</sup>

### III. WHITHER LIBERAL DEMOCRACY?

The developments categorized in these Essays raise the question whether there are any constitutional features that can prevent the erosion of liberal constitutionalism. That is, are there some institutional forms that might be better positioned to resist the forces that are now on the horizon? Since the American Founding, after all, the field of constitutional design has been largely oriented to resisting tyranny, among other goals.<sup>57</sup> As James Madison famously stated, “You must first enable the government to controul the governed; and in the next place oblige it to controul itself.”<sup>58</sup> What tools, if any, do constitutional designers have at their disposal to prevent those in power from removing liberal constitutionalism’s constraints?

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<sup>50</sup> Id at 425.

<sup>51</sup> Id at 428–32.

<sup>52</sup> See generally David Landau, *Populist Constitutions*, 85 U Chi L Rev 521 (2018).

<sup>53</sup> Id at 523.

<sup>54</sup> Id at 536.

<sup>55</sup> Kim Lane Scheppele, *Autocratic Legalism*, 85 U Chi L Rev 545 (2018).

<sup>56</sup> Id at 571–81.

<sup>57</sup> See Eric Posner and Adrian Vermeule, *Tyrannophobia*, in Tom Ginsburg, ed, *Comparative Constitutional Design* 317, 321–22 (Cambridge 2012).

<sup>58</sup> Federalist 51 (Madison), in *The Federalist* 347, 349 (Wesleyan 1961) (Jacob E. Cooke, ed).

The Madisonian answer—namely, providing for separation of powers coupled with checks and balances—is less robust than meets the eye. Conceived before the advent of modern political parties, the Madisonian argument assumes that institutional incentives dominate over partisan ones. These incentives have proven to be weak in certain times and places, so that when one party controls all the various branches of government, the separation of powers largely disappears.<sup>59</sup> Some systems try to overcome this tendency by giving the opposition “governance rights,” such as the power to chair legislative committees, have representation in the judiciary, or hold some executive posts.<sup>60</sup> While these forms of power sharing can ameliorate the effect of partisan dominance, for the most part they are grounded in statute or custom rather than constitutional text. Moreover, they might do little in the face of a majority intent on pushing through its agenda by dismantling the checks.<sup>61</sup>

The nature of electoral systems might also guard against the erosion of liberal constitutionalism. In general, different electoral systems offer different kinds of political incentives to cooperate with or dominate others. Much of the work on electoral systems focuses on ethnic conflict, and identifies electoral institutions as a source of counterdemocratic potential but also as the institutional predicate for cross-ethnic alliances.<sup>62</sup> Many have argued for a system of proportional representation (PR) that might provide for superior representation of diverse interests and more robust democratic participation.<sup>63</sup>

Without plumbing this complex subject in depth here, we simply observe that PR systems also have significant downsides. While ensuring the representation of electoral minorities, PR systems can provide a platform for the very populist “anti-system

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<sup>59</sup> See Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2312, 2312–16 (2006). For a challenge to this claim, see generally David Fontana and Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U Chi L Rev 1 (2018) (arguing that commentators understate the effects of institutional loyalties).

<sup>60</sup> See David Fontana, *Government in Opposition*, 119 Yale L J 548, 571–81 (2009).

<sup>61</sup> For elaboration of this point, see generally Huq and Ginsburg, 65 UCLA L Rev (cited in note 15).

<sup>62</sup> See, for example, Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in Soujit Choudhry, ed., *Constitutional Design for Divided Societies: Integration or Accommodation* 3, 3–15 (Oxford 2008) (reviewing this literature).

<sup>63</sup> See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 303–05 (Yale 1999).

parties” that seek to disrupt liberal constitutionalism.<sup>64</sup> It is no accident that such parties first emerged in PR systems, such as Austria, the Netherlands, Belgium, and Denmark.<sup>65</sup> At the same time, because PR systems require coalition governments, populist sentiments may well be moderated through collaboration with establishment parties. This has not been so in winner-takes-all systems, such as the United States. These experiences suggest that PR might make it easier for antisystemic populist parties to play some role in national governance, but then may mitigate the possibility of their wholesale capture of state authority. The data are hardly conclusive, though, and more study is surely wanted.

Another common choice for liberty-enhancing constitutional design is federalism.<sup>66</sup> By dividing authority among multiple levels of government, federalism is thought to reduce the stakes of political competition at the national level, while increasing the number of governments that must be controlled to exercise complete authority. But federalism might not be the panacea that many believe. While it can facilitate local resistance to national-level authoritarian impulses, it can also immunize local *authoritarian* regimes from national-level democratic pressures. This was the history of the Jim Crow South in the United States, and has been also identified in countries like Argentina and Mexico.<sup>67</sup> A recent undemocratic turn in North Carolina provides a further illustration of this point.<sup>68</sup>

Federalism is also celebrated because it can facilitate the spread of democratically motivated policy ideas across state borders. Yet the effect is again symmetric: federalism can also

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<sup>64</sup> Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* 67 (NYU 1997) (finding PR inferior to double-ballot systems as a means of penalizing “anti-system parties”). See also generally Giovanni Capoccia, *Anti-system Parties: A Conceptual Reassessment*, 14 *J Theoretical Polit* 9 (2002).

<sup>65</sup> See Robert W. Jackman and Karin Volpert, *Conditions Favouring Parties of the Extreme Right in Western Europe*, 26 *British J Polit Sci* 501, 517 (1996) (“[E]lectorate proportionality and multi-partism are systemic factors that together facilitate parties of the extreme right.”).

<sup>66</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum L Rev* 543, 543–44 (1954) (noting that “federalism must appear to many peoples as the sole alternative to tyranny”).

<sup>67</sup> See Edward L. Gibson, *Boundary Control: Subnational Authoritarianism in Federal Democracies* 72–148 (Cambridge 2012).

<sup>68</sup> See Huq and Ginsburg, 65 *UCLA L Rev* at \*69–70 (cited in note 15); Andrew Reynolds, *North Carolina Is No Longer Classified as a Democracy* (Charlotte News & Observer, Dec 22, 2016), archived at <http://perma.cc/CLL6-6MLN>.

facilitate the diffusion of innovations in *antidemocratic* governance. For example, in the past decade, numerous US states introduced strict voter identification laws in a coordinated effort to dampen turnout among minority voters.<sup>69</sup> As a result, Justice Louis Brandeis’s famous notion, that states can serve as “laboratories of democracy,”<sup>70</sup> might better be rephrased to the more neutral “laboratories of governance.” Thus, whereas to our knowledge, there exists no empirical evidence of a federalism power-constraining effect, it is also not obvious that federalism ultimately enables liberal constitutionalism.

Another familiar candidate is a judicially protected bill of rights. By carving out a zone of interests free from policymaking, constitutional rights can serve to facilitate democracy, and indeed under many definitions are an essential component of it.<sup>71</sup> But as Professors Chilton and Versteeg have shown, certain constitutional rights often fail to constrain governments.<sup>72</sup> While democracies tend to protect constitutional rights more robustly than dictatorships, this seems to be *because* they are democracies. Rights like the freedom of expression, the freedom of movement, and the prohibition of torture are easily trampled on, even in democratic regimes.<sup>73</sup> Other rights, however—mainly those that are practiced collectively, such as the freedom of religion or the right to unionize—might serve as barriers against government crackdown, at least temporarily.<sup>74</sup> On balance, the empirical evidence suggests that constitutional rights are no silver bullet.

Perhaps the most trusted institution to protect liberal democracy is the judicial branch. In constitutional theory, judicial review is viewed as the ropes that, in Homer’s parable, bind Ulysses to the mast of his ship so that he can resist the singing of the Sirens.<sup>75</sup> Constitutional courts do so by invalidating laws

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<sup>69</sup> See Richard L. Hasen, *Race or Party?: How Courts Should Think about Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 Harv L Rev F 58, 61–63 (2014).

<sup>70</sup> *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting).

<sup>71</sup> See generally Michael Coppedge, et al, *Conceptualizing and Measuring Democracy: A New Approach*, 11 Persp Polit 247 (2011) (discussing conceptions of democracy).

<sup>72</sup> See Adam S. Chilton and Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 Am J Polit Sci 575, 586–87 (2016).

<sup>73</sup> See *id.* at 576.

<sup>74</sup> See *id.*

<sup>75</sup> See Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 88–95 (Cambridge 1984) (discussing precommitment to a constitutional order as the “Ulysses strategy” for avoiding democratic imprudence). For the story of Ulysses and the

and regulations that violate constitutional protections, thereby simultaneously guarding democracy against authoritarian backsliding and the tyranny of the majority.<sup>76</sup> However, courts cannot be assumed to serve as robust protectors of rights without an account of the incentives that judges have to provide such protections. One must ask why judges are likely to stand up to government and why it is that political actors and government officials obey the pronouncements of judges.

A long line of political science scholarship has come to argue that courts' enforcement of rights occur fundamentally at the margins.<sup>77</sup> The Symposium contribution by Chilton and Versteeg fits within this line of research, finding that courts do little to improve constitutional-rights protections.<sup>78</sup> While courts, because of the nature of their appointment processes, serve as a kind of lag on changes in a government regime, a sustained political coalition will inevitably be able to bend the judiciary to its overall agenda.<sup>79</sup> Even though it may be the case that, as Professor Issacharoff has written, the "transition to democracy is eased by the creation of a court system specifically tasked with constitutional vigilance over the exercise of political power,"<sup>80</sup> we do not yet have an account of how well courts can resist attempts to influence or sideline them after that transition is complete. Recent accounts from Hungary, Poland, and Turkey are not heartening.<sup>81</sup> Transitions to democracy seem to be accompanied by an expansion of judicial power, but transitions away from it often involve a contraction.

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Sirens, see Homer, *The Odyssey of Homer* 189–90 (Harper & Row 1967) (Richmond Lattimore, trans).

<sup>76</sup> See generally Richard H. Fallon Jr, *The Core of an Uneasy Case for Judicial Review*, 121 Harv L Rev 1693 (2008).

<sup>77</sup> See, for example, Lee Epstein, Jack Knight, and Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L & Society Rev 117, 127–31 (2001); Georg Vanberg, *The Politics of Constitutional Review in Germany* 93–94 (Cambridge 2005). For an institutional analysis of the failure of constitutional remediation in the US context, see generally Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 Duke L J 1 (2015).

<sup>78</sup> See Chilton and Versteeg, 85 U Chi L Rev at 313 (cited in note 37).

<sup>79</sup> Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J Pub L 279, 285–86 (1957).

<sup>80</sup> Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* 9 (Cambridge 2015).

<sup>81</sup> See Bugarić and Ginsburg, 27 J Democracy at 70 (cited in note 26). See also Chilton and Versteeg, 85 U Chi L Rev at 316–17 (cited in note 37) (discussing Turkish "constitutional reforms to alter the power and composition of the court").

In short, there is no foolproof constitutional design that can immunize liberal democracy from the pressures of backsliding. At best, constitutional design features serve as speed bumps to slow the agglomeration and abuse of political power; they cannot save us from our worst selves completely.<sup>82</sup> Empirical research instead hints that the most powerful brakes on transgressions of power might be extraconstitutional in nature, and come in the form of peaceful protests.<sup>83</sup> It is crowds marching the streets, and the people taking it upon themselves to enforce the social contract, that ultimately are the best protector of liberal constitutionalism.<sup>84</sup> Constitutional design features, by contrast, provide at best mere temporary protection for such mobilization.

#### IV. WHY HAVE COMPARATIVE CONSTITUTIONALISTS NOT (YET) ADDRESSED LIBERAL DEMOCRACY'S DEMISE?

There is something of a disconnect between our analysis and the prevailing mood in the comparative constitutional literature. By and large, the leading scholars in that field have been quite bullish on the prospects of liberal constitutionalism. Our view is deliberately more cautious. We believe that a misguided confidence in liberal constitutionalism's invulnerability can be dangerous, as it can cause us to underestimate the fragility of liberal constitutionalism. Further, we think the literature is characterized by some systematic blind spots as a consequence of research-design choices that have caused it to overestimate liberal constitutionalism's strength.

Optimism on behalf of liberal constitutionalism in part results from scholars' selective focus on a small set of high-profile countries, such as South Africa, Canada, India, and, more recently, Colombia.<sup>85</sup> For example, Professor Issacharoff's important book, which highlights the role of constitutional courts in protecting fledgling democracy, offers a wide array of examples from

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<sup>82</sup> James D. Best, *Constitutional Speed Bumps* (What Would the Founders Think?), archived at <http://perma.cc/ZBK3-VH9M>.

<sup>83</sup> See Erica Chenoweth and Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* 6–7 (Columbia 2011) (finding qualitative and quantitative evidence that nonviolent resistance deters autocratic backsliding).

<sup>84</sup> Turkuler Isiksel, *Prepare for Regime Change, Not Policy Change* (Dissent, Nov 13, 2016), archived at <http://perma.cc/BMY5-RP7X>.

<sup>85</sup> Choudry, *Constitutional Design* at 8 (cited in note 62) (“[The] literature . . . [is] oriented around a standard and relatively limited set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and to a lesser extent, India.”).



around the world, but largely focuses on cases in which courts seemingly made a difference.<sup>86</sup> In general, comparative scholars marveled at the Hungarian Constitutional Court's furiously striking down legislation in the early 1990s,<sup>87</sup> the Colombian Constitutional Court's preventing President Álvaro Uribe from running for a third term,<sup>88</sup> or the South African Constitutional Court's enforcement of socioeconomic rights.<sup>89</sup> By contrast, the literature has to date devoted scant attention to countries whose constitutions appear to have little impact on government behavior, or where rights-enforcing court rulings are ignored.<sup>90</sup> This case selection might explain why the literature is bullish on constitutional rights' prospects.

In addition, many studies focus on constitutionalism's impact on litigation rather than broader social change. For example, Professor Charles Epp's famous study concludes that constitutional rights bring about "rights revolutions" because they are continuously being litigated by civil-society groups and enforced by courts.<sup>91</sup> Implementation and the resulting shifts in governmental practice, however, fall outside his analysis.<sup>92</sup> This same focus on judicial behavior characterizes much of the literature.<sup>93</sup> While litigation is undoubtedly important, there is no guarantee that judicial enforcement of constitutional rights will actually change government practices. After all, courts' orders can simply be ignored or invite backlash. Indeed, Professor Gerald Rosenberg's famous study of the US Supreme Court shows

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<sup>86</sup> See generally Issacharoff, *Fragile Democracies* (cited in note 80).

<sup>87</sup> Kim Lane Scheppele, *Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments*, in Adam Czarnota, Martin Krygier, and Wojciech Sadurski, eds., *Rethinking the Rule of Law after Communism* 25, 44 (CEU 2005).

<sup>88</sup> Chris Kraul and Jenny Carolina Gonzalez, *Colombia Court Rules Out Any Uribe Bid for Third Term* (LA Times, Feb 27, 2010), archived at <http://perma.cc/TH7F-4Q3M>.

<sup>89</sup> See generally Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa* (John M. Olin Program in Law and Economics Working Paper No 124, 2001), archived at <http://perma.cc/M3GA-D78G>.

<sup>90</sup> For a critique on case selection in comparative constitutional law, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* 224–81 (Oxford 2014). See also generally Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am J Comp L 125 (2005). For notable exceptions, see, for example, Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 Colum J Transnatl L 285, 302–03 (2015); Landau, 47 UC Davis L Rev at 192–94 (cited in note 27).

<sup>91</sup> Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* 197 (Chicago 1998).

<sup>92</sup> See *id.* at 7–10.

<sup>93</sup> See generally, for example, David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC 2012).

that despite important rights-protecting decisions, the Court has often been ignored or been only of limited efficacy.<sup>94</sup> One does not have to dig deep to find similar tales in other countries.

The focus on a limited set of cases, and on litigation rather than social outcomes, might also explain why recent quantitative studies are substantially less optimistic about constitutionalism's prospects.<sup>95</sup> After all, quantitative studies include a wider range of countries and tend to focus on social outcomes, such as actual rights practices or social spending, rather than litigation rates. This aspect of the qualitative–quantitative divide has been well documented in related other fields, such as international human-rights law,<sup>96</sup> and might explain the divergent pictures painted on constitutionalism's prospect.

Of course, it is important to study judicial enforcement and to map and understand success stories, as these hold important lessons for how constitutionalism can succeed. But it is important to be aware that such successes might be fleeting—the exception rather than the rule. It is only when we take seriously the possibility of constitutionalism's failure that we can get serious about studying how it might survive.

#### CONCLUSION

It is by now reasonably clear that adherents to liberal constitutionalism as a set of normative values—and we count ourselves in that camp—face a new and unexpected set of challenges. The threats to liberal constitutionalism are quite literally closer to home than we had thought, and moving much faster than we might have hoped. We have started to spell those threats out here. The Essays in this Symposium further explore the causes and consequences of new threats to liberal constitutionalism. We hope their contributions resound not merely in scholarly terms, but also as interventions in a larger public debate that should concern us all about the nature of the polities in which we live.

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<sup>94</sup> See generally Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 1991).

<sup>95</sup> See Chilton and Versteeg, 44 *J Legal Stud* at 446–48 (cited in note 5); Chilton and Versteeg, 60 *Am J Polit Sci* at 586–87 (cited in note 72).

<sup>96</sup> See Emilie M. Hafner-Burton and James Ron, *Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes*, 61 *World Polit* 360, 363 (2009).