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2021

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#### Recommended Citation

Tom Ginsburg, "The Future of Liberal Democracy in the International Legal Order", Public Law and Legal Theory Working Paper Series, No. 778 (2021).

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# The Future of Liberal Democracy in the International Legal Order

Tom Ginsburg

From *Is the International Legal Order Unraveling?*  
(David L. Sloss ed., Oxford University Press, forthcoming 2022).

## Introduction

Liberal democracy is a feature of national political order that can be promoted, defended, or undermined by international legal institutions. It is not a feature of international legal order itself, nor can it be, given the inherent pluralism about ways of organizing government that is constitutive of the international legal system. But neither is it the case that any particular liberal democracy is an island; liberalism is itself a transnational ideology, and both the expansion and recession of democracy around the world have been the result of interdependent decisions made by states and other transnational actors.

Of particular importance has been the role of hegemons in the system, promoting particular kinds of governance, notably the United States in the post-World War II period. The liberal international order whose death has become a matter of conventional wisdom was largely a product of US empire. For this reason, the single biggest factor affecting the future of liberal democracy going forward will be the role of hegemons and large powers. For the near term, those are the United States, China, Russia and the EU, with India obviously a relevant player as well. As these powers interact, they will create conditions that will advance or retard liberal democracy.

We already see some trends under way that seem likely to continue, and they are not pretty. Liberal democracies have had their confidence challenged in recent years, and bureaucrats in Brussels and Geneva are favored targets. Liberal democracies are perceived to have delegated too much power upward, rendering them unable to deliver policies that people want. This has led some to turn away from the liberal brand. Certainly, the United States under President Trump gave up its role as chief promoter of democracy, ceding that role to the European Union and the United Nations. Whether Biden is able to reverse that course, or is instead, as Philip Cunliffe described him, a kind of “Brezhnev-like figure” for the liberal order, remains to be seen.<sup>1</sup> But authoritarian regimes have become skillful mimics of democratic forms at the national level, contributing to what some have called a democratic recession.

This chapter asks the question: what will the international law of democratic governance look like in 2050? The question reflects the fact that notwithstanding pluralism, there is much normative architecture supporting liberal democratic norms on the international plane. This architecture is

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<sup>1</sup> PHILIP CUNLIFFE, *THE NEW TWENTY YEARS’ CRISIS: A CRITIQUE OF INTERNATIONAL RELATIONS, 1999-2019* (2020).

not matched by equally expansive enforcement, but weak mechanisms do exist. This chapter speculates on alternative scenarios and what they might mean for the persistence of liberal democracy as a going concern, through the lens of international law.

## I. Definition and Trends

### A. The Architecture of Democracy

Preliminaries first. Aziz Huq and I define constitutional liberal democracy as having three essential elements: free and fair elections; core rights related to those elections, such as rights to speech, association and voting as well as a free press; and the bureaucratic rule of law, by which we mean independent courts and agencies that act according to law, especially when dealing with matters related to democratic governance.<sup>2</sup> This is a relatively thin definition, which helps in applying it across widely different cultural contexts.

The definition highlights that international law *has* made contributions to supplying norms, institutions, and ideas that can reinforce national actors in their democratic practice. The Universal Declaration of Human Rights guarantees citizens the right to participate in public affairs, and to vote in genuine and periodic elections using a secret ballot.<sup>3</sup> The International Covenant on Civil and Political Rights reinforces these norms in a legally binding treaty.<sup>4</sup> The United Nations, while recognizing the plurality of legitimate regime types, has also supported democratic practice in a variety of ways, including election monitoring and normative articulation. In a 2017 report, the Secretary-General of the United Nations noted that his organization had provided electoral assistance to roughly one-third of its member states.<sup>5</sup> And in the 1990s, the organization made democracy central to its mission. In 1996, UN Secretary-General Boutros Boutros-Ghali submitted *An Agenda for Democratization* to the General Assembly, seeking to clarify state practice, and emphasizing an independent judiciary, governmental accountability, the rule of law, and popular participation. Several other UN documents follow similar conceptions.<sup>6</sup>

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<sup>2</sup> TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

<sup>3</sup> Universal Declaration of Human Rights, art 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>4</sup> International Covenant on Civil and Political Rights, art. 5, Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>5</sup> United Nations, General Assembly, *Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization: Report of the Secretary-General*, U.N. Doc. A/72/260 (Aug. 1, 2017).

<sup>6</sup> In 1999, the UN Commission on Human Rights adopted a resolution entitled *A Right to Democracy*, E/CN.4/RES/1999/57, stating that democracy includes “the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; the right to freedom to seek, receive and impart information and ideas through any media; the rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; the right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; the right of political participation, including equal opportunity for all citizens to become candidates; transparent and accountable government institutions; the right of citizens to choose their governmental system through constitutional or other democratic means; and the right to equal access to public service in one's own country.” A later document added elements of pluralism. U.N. Human Rights Council Res. 19/36, Human rights, democracy and the rule of law, 19th. Sess., U.N.

Beyond these global documents, regional activity in Africa, Latin America and Europe has supported the spread and maintenance of democracy.<sup>7</sup> The Organization of American States and the African Union have each issued “democracy charters” entrenching democracy as a regional norm, as has the Economic Community of West African States.<sup>8</sup> The European Convention of Human Rights also has an architecture in this regard, as does the European Union. As international institutions devote more attention to promoting democracy, they reinforce the normative consensus around it. Evidence for the normative consensus is that even regional organizations that are composed mainly of non-democracies, such as the Association of Southeast Asian Nations, assert that they adhere to principles of democracy.<sup>9</sup>

This normative consensus has been accompanied with institutional structure as well, even if it has not been as expansive as the norms. The United Nations has promoted elections and constitutional reform, as well as providing technical advice. Human rights organizations and private foundations have also played a role. And regional courts, human rights commissions, and trade blocs have all encouraged countries to maintain and deepen democracy. They have done so through reports that expose practices falling short of democratic ideals; judgments sanctioning violations; threats of expulsion or outcasting; and occasionally through direct intervention or the threat thereof. To be sure, the record is mixed. However, international institutions can help resist democratic backsliding, in part by providing resources to democrats trying to advance their cause on the national level.

## B. Trends

This normative consensus, however, has not prevented democratic erosion and backsliding in practice. Indeed, democratic erosion is one of the great trends of our time. Consider some statistics. According to the influential Freedom House Survey, the number of democracies peaked

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Doc. A/HRC/Res/19/36, at para. 1 (2012) (“democracy includes respect for all human rights and fundamental freedoms, *inter alia*, freedom of association and of peaceful assembly, freedom of expression and opinion, freedom of thought, conscience, religion or belief, the right to be recognized everywhere as a person before the law and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote in a pluralistic system of political parties and organizations and to be elected at genuine, periodic, free and fair elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration and decision-making and free, independent and pluralistic media.”)

<sup>7</sup> Regional organizations with clauses related to democracy include the Council of Europe (CoE), the European Union (EU), the Andean Community, the Common Market of the South (Mercosur), the Central American Integration System (SICA), the Organization of American States (OAS), the Union of South American Nations (UNASUR), the African Union (AU), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Economic Community of West African States (ECOWAS).

<sup>8</sup> Organization of American States, *The Inter-American Democratic Charter*, Sept. 11, 2001, O.A.S.T.S; African Union (AU), *Charter on Democracy, Elections and Governance (ACDEG)*, Jan. 30, 2007; Protocol of the Economic Community of West African States (ECOWAS) on Democracy and Good Governance, Dec. 10, 1999; Olabisi D. Akinkugbe, *Towards an Analysis of the Mega-Politics Jurisprudence of the ECOWAS Community Court of Justice*, in *THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE* (JAMES THUO GATHII, ED., OXFORD UNIVERSITY PRESS) (2020).

<sup>9</sup> Preamble, in *THE ASEAN CHARTER* (ASEAN ed., 2008).

around 2006, and has declined since then. Other democracy indices show a similar decline in the number of liberal or full democracies (see Table 1). The quality of democracy has also declined: each year since 2006, more countries have suffered declines in democracy than have improved.

**Table 1**  
**Number of Democracies since 2006**

	2006	2010	2014	2019
Freedom House # Free countries	90	87	89	83
V-Dem # Liberal Democracies	41	45	43	37
Economist Intelligence Unit Full Democracies	28	26	24	22

These declines have affected even established democracies: between 2014 and 2019, for example, the Economist Intelligence Unit downgraded South Korea, Japan, and the United States from “Full Democracies” to “Flawed Democracies.” The decline has led us to a point where, for the first time in three decades, less than half of the countries in the world are considered to be even flawed democracies according to the Economist Intelligence Unit. Furthermore, more than half of the world’s population lives in non-democracies, whether true authoritarians, or “Hybrid” regimes that exhibit some democratic forms, such as elections, but do not have genuine competition for political power.

**Table 2**  
**Countries by Category, 2020**

	# countries	% countries	% world population
Full Democracies	23	13.8	8.4
Flawed Democracies	52	31.1	41.0
Hybrid Regimes	35	21.0	15.0
Authoritarians	57	34.1	35.6

Source: Economist Intelligence Unit

Many of these flawed democracies and hybrid regimes reflect the fact that backsliding does not involve a sudden collapse of democracy, but instead a gradual process of erosion.<sup>10</sup> This involves a series of steps that attack component parts of a democratic order, one at a time, so as to facilitate a takeover of the political system. Indeed, some of the leaders who have consolidated power in their own political systems enjoy a good deal of popularity. Narendra Modi, for example, has extraordinary charisma, and has consolidated his Bharatiya Janata Party’s control over national institutions, while eroding some of India’s liberal traditions. India was recently downgraded from “Free” to “Partly Free” in the Freedom House categorization, and characterized as an electoral autocracy in the V-Dem assessment. Victor Orban, though less popular, valorizes “illiberal

<sup>10</sup> Nancy Bermeo, *On Democratic Backsliding*, 27 J.DEM. 5 (2016); GINSBURG AND HUQ, *supra* note 2.

democracy” and has consolidated personal control over the Hungarian political system, assuming the ability to rule by decree without regard to law during the COVID-19 emergency.<sup>11</sup>

These trends toward illiberalism are beginning to affect international law in several ways, notwithstanding the stability of the *de jure* normative framework codified in the UN Charter and International Covenants. First, authoritarians are forming their own international organizations to cooperate across borders. Authoritarian cooperation has of course long been a feature of international law, going back to the Congress of Vienna, through the Axis bloc, the Warsaw Pact, and the COMINTERN. But as I have argued elsewhere, we are seeing a new level of sophistication in authoritarian use of international organizations, in which new norms to promote order and stability are being articulated.<sup>12</sup> Authoritarian international organizations are expanding in number, type, and ambition, enhancing their ability to dilute democratic norms. Some, like the Shanghai Cooperation Organization, sponsor election monitors and provide technical “assistance,” which dilutes the efforts by European institutions to ensure electoral integrity. By 2050, we may see authoritarian-dominated international organizations that sponsor their own “democracy charters” that pay lip service to democracy promotion, but function primarily to dilute the operation of the real deal. Election interference may become so subtle that it is hard to detect, in turn undermining public confidence in voting machinery.

Second, proto authoritarians are eroding the pro-democratic quality of governance in established international institutions. Central here are battles over the rule of law in the European Union. In late 2020, the self-described “illiberal democracies” of Hungary and Poland delayed the adoption of the European Union budget, and were able to dilute (though not eliminate) provisions reinforcing the commitment to the rule of law among member states. Both governments had engaged in systematic programs of taking over the courts in their countries, purging them of liberals, and promoting like-minded jurists who would advance the political agendas of the governing parties. At the international level, these countries have proven immune to discipline from the European Union or the Council of Europe. That a rich industrialized region could fall prey to democratic backsliding suggests that no country is immune, and also illustrates the weakness of the international mechanisms to enforce democratic norms in the face of strong and sustained political movements.

### C. Causes

The causes of this trend of democratic erosion are contested. Some blame the global financial crisis of 2008-2009. Technological change may also play a role, especially because it has eroded the

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<sup>11</sup> Each of these countries has experienced a decline over time in its democratic status. According to V-DEM, India was an electoral democracy consistently until the 2020 downgrade. Hungary was a liberal democracy through 2005, then was an electoral democracy in 2010; and it was downgraded to an electoral autocracy in 2018.

<sup>12</sup> Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221 (2020).

media as an authoritative gatekeeper of information. Disruption has allowed anti-democrats to flood the information environment with disinformation.<sup>13</sup>

The neoliberal economic order is a favourite target of critics. By hollowing out industrial workforces in the rich world, it resulted in both job insecurity and increased movement of people, leading to backlash in the rich democracies of the world.<sup>14</sup> The famous “Elephant graph” produced by Branko Milanovic purported to show that the era of globalization benefited a large majority of the global population, but hurt the members of the working classes in rich democracies. The argument was that these groups then rebelled against globalization. However, the data underlying this account is highly sensitive to which countries are included in the analysis, and Milanovic’s thesis has not generated consensus.<sup>15</sup> Perhaps we need to look elsewhere for a viable theory of democracy’s decline.

My view is that the key factors lie in the realm of culture and identity, rather than economy. Migration is critical here.<sup>16</sup> With the increased ability to move, massive numbers of poorer citizens contributed to the displacement of lower-class wage-earners in the rich world; the “Polish plumber” of the European Union was the “illegal immigrant” of California. Even though data seem to suggest that these immigrants raised the average wages of the natives, the sense of losing control provided rich soil for demagogues. Fear of cultural change, in other words, was a key dimension contributing to pressures on established democracies.<sup>17</sup>

Another factor in democratic decline has been the trajectory of certain authoritarian states, particularly Russia and China, that have accumulated material and symbolic power in recent years. Russia and China have become perhaps the most vocal defenders of the sovereigntist view of international order, and have attacked its liberal basis. They had very strong responses to the US policy of regime change, and dismemberment of sovereign states after the 1999 invasion of Kosovo. They thus perceived, accurately, a threat in the US-led world order. Their responses were measured, but the overall increased leverage that they enjoyed no doubt contributed to pressure on the liberal democratic model.

## II. Three Scenarios

In this section, I speculate on three different scenarios and explain how they matter for international law and institutions. One is authoritarian dominance; the second is democratic revival; and the

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<sup>13</sup> DAVID SLOSS, *TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM CHINESE AND RUSSIAN INFORMATION WARFARE* (2021).

<sup>14</sup> See Richard H. Steinberg, *The Rise and Decline of a Liberal International Order* (chapter 1 in this volume).

<sup>15</sup> Caroline Freund, *Deconstructing Branko Milanovic’s “Elephant Chart”*: Does It Show What Everyone Thinks?, *PIIE* (Nov. 30, 2016), <https://www.piie.com/blogs/realtime-economic-issues-watch/deconstructing-branko-milanovics-elephant-chart-does-it-show>.

<sup>16</sup> Jaya Ramji-Nogales, *Migration and International Legal Disorder* (chapter 14 in this volume).

<sup>17</sup> Milada Anna Vachudova, *Ethnopolitism and democratic backsliding in Central Europe*, 36(3) *E. EUR. POL.* 318 (2020).

third is a duopoly, in which the US and China come to a *modus vivendi*.

The single biggest change that will occur between now and 2050 is the dominance that China will exert over much of Eurasia, Africa, and the Pacific. Because China is extremely unlikely to liberalize or democratize, this means that an authoritarian power will play a central role in the world economy as well as regional—and perhaps global—security. China’s strategy to date has been to try to dilute and repurpose the language of liberal democracy, while embedding its own concepts in the United Nations and other fora. The rise of Xi Jinping since 2013 has been accompanied by a new language of international relations, including “win-win” (共赢- “gong ying”) foreign policy, “mutually beneficial cooperation,” and “a Community of Shared Future for Mankind.”<sup>18</sup> China is promoting these concepts at the United Nations, sponsoring resolutions and initiatives to provide legal imprimatur for its policies.<sup>19</sup>

The future of liberal democracy in the international legal order will depend very much on whether these trends continue, and how existing democratic powers react to them. The United States will play an outsized role in this regard, but lacks the weight to dictate responses unilaterally and so will need to work with other democratic powers. In this section, I outline three scenarios. The law, as always, follows power imperfectly, and so the enforcement of the existing norms will depend very much on the relationship between the United States and China as the world’s two largest economies, and the world’s most powerful democracy and autocracy, respectively.

Before launching into the three scenarios, it is worth identifying a fourth outcome that will surely not occur: a return to a Westphalian golden age. Westphalian sovereignty is an ideal type that international lawyers often use to locate principles like non-interference and sovereign equality, principles embodied in the United Nations Charter. Professor Gerry Simpson describes this system as embodying “Charter Liberalism”: just as in a liberal society, each individual is free to engage in any behavior that does not harm others, so in international society, each state is free to organize its internal affairs in whatever way it likes, so long as it does not abuse its citizens too much, or cause harm to another state.<sup>20</sup> And while powerful states have often contravened the principle of non-interference, it remains a touchstone of the international legal order. Practically, this means that countries are free to pick their regimes, whether an Islamic Republic, Communist dictatorship, or absolute monarchy. Nevertheless, the ideal of absolute autonomy is, and always has been, a fiction. Even the Treaty of Westphalia itself allowed for some international rules governing internal affairs of states.<sup>21</sup> And various forms of coercion to get states to adopt favored policies remain a feature of international life, exercised by the United States, Russia, the EU, and China. There is no return to an imagined past. Instead, the future of the international legal order will be

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<sup>18</sup> Congyan Cai, *THE RISE OF CHINA AND INTERNATIONAL LAW* 324–26 (2019).

<sup>19</sup> Gady Epstein, *In the UN, China uses threats and cajolery to promote its worldview*, *THE ECONOMIST*, Dec. 7, 2019.

<sup>20</sup> Gerry Simpson, *Two Liberalisms*, 12 *EUR. J. INT’L L.* 537 (2001).

<sup>21</sup> STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).



determined by how these powerful states, with their different visions for international law, interact in the coming decades.

The utility of these kinds of scenario-building exercises, which have been engaged in by national defense agencies, large oil companies and other actors, is to sharpen the alternatives to help inform strategic thinking. The scenarios are in some sense themselves ideal-types, and reality is invariably messier. Nevertheless, the three have starkly different predictions for the future of liberal democracy.

#### A. Authoritarian Dominance

Since the dawn of the reform and opening era under Deng Xiaoping, China has transformed from a bit player in global affairs to a major power in every field. The extraordinary shift has been driven by massive economic growth, and some political evolution, that has made the People's Republic more powerful and secure than at any time in its modern history. China's rise raises the question of whether liberal democracy will remain viable outside a core set of rich industrial democracies, such as South Korea, Japan and Western Europe.

China's relationship with international law during the period of the People's Republic has been consistently pragmatic, which is quite remarkable given the deployment of that law as an instrument of Western colonialism in Chinese history. International law facilitated the dismemberment of Chinese territory during the Opium Wars and after the Sino-Japanese War of 1895. It justified "Unequal Treaties," which reversed China's traditional hierarchical view of international order by positing white Europeans as the source of civilization. In the post-revolutionary era, the People's Republic was kept out of the United Nations until 1971.<sup>22</sup> Despite all this, China has engaged with international law since the 1950s, for example, by helping to convene the Bandung conference in 1955.<sup>23</sup> In the reform and opening era, it has joined many international regimes and signed many treaties, including the WTO and bilateral investment treaties that structure international economic law. It has become a major player at the UN and other international institutions. And in the face of American rejection of this architecture during the Trump administration, China has emerged as a leading defender of multilateralism.

China's approach is not fully evolved, but like domestic reform, more experimental and incremental, in keeping with Deng Xiaoping's famous aphorism "cross the river by feeling the stones." There is a mix of compliance and resistance to international norms, depending on the issue at stake.

China has, however, taken a consistent approach. It has been extraordinarily aggressive in pursuing its self-defined core interests. Detlev Vagts coined the term "hegemonic international law" to

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<sup>22</sup> Phil C. Chan, *China's Approaches to International Law since the Opium War*, 27 LEIDEN J. INT'L L. 859 (2014).

<sup>23</sup> BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava, Michael Fakhri & Vashuki Nesiya eds., 2017).

characterize the attitude of the United States in the early 21<sup>st</sup> century, in the midst of the Global War on Terror.<sup>24</sup> China has similarly sought to avoid obligations that impinge on its flexibility in areas of vital strategic importance, such as the South China Sea. In the face of the Philippines' victory in the arbitration over maritime delimitation there,<sup>25</sup> in which China refused to participate, economic coercion was swift and effective. China's aggressive tactics induced a complete change of course under the government of strongman Rodrigo Duterte. Any hint of recognition of Taiwan brings furious retaliation, and China has stepped up pressure on the island, even sabre rattling before the 2020 re-election of Tsai Ing-Wen. Its diplomats presented a list of 14 demands to Australian Prime Minister Scott Morrison in late 2020, in response to perceived slights committed by that country. It initiated a border clash with India in the high Himalayas, and has ended tolerance of political liberalism in Hong Kong.

The implications for the international legal order are significant. China has declared that reunification with Taiwan is a non-negotiable core goal. If it attempts to achieve reunification by using force, it would likely succeed. The fact that both countries agree that Taiwan is a part of China means that this may not itself be considered a violation of international law, although other states reacted to the Anti-Secession law of 2005 as if it were an international matter. The United States has retained a studied ambiguity on these questions, which presents a possibility of future conflict.

The “feelings of the Chinese people” has emerged as a rhetorical trump card. China acts like a thin-skinned bully on certain issues, and a confident superpower on others. This behavior may be self-defeating, and there is a school of thought that says China is acting too aggressively too early. Just as the concentration of power in the person of Mao Zedong led to massive errors, in the form of the Cultural Revolution, so the Xi Jinping era is seeing a single individual dominate the system, driving major shifts in behavior. If its aggressive approach, combined with international suspicion related to the novel coronavirus, leads to backlash, China may not end up dominating the twenty-first century. There are also internal sources of brittleness that may present challenges.<sup>26</sup>

However, there are forces at work that will be hard to avoid. China's economy continues to grow at a rapid clip. Its system of techno-authoritarianism means that there is strict control on internal criticism. It is likely to prove a resilient authoritarian.<sup>27</sup> Furthermore, every western strategy has failed to change China. The idea that the WTO would lead to internal liberalization has obviously not played out.<sup>28</sup> Embedding China in the rules-based international order has led to its takeover of some of that architecture. It has used the nominally private character of its firms to capture markets, even as western firms are kept out of the Chinese market. It has engaged in systematic programs

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<sup>24</sup> Detlev Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001).

<sup>25</sup> *The South China Sea Arbitration (Phil. v. China)*, 33 R.I.A.A. 153 (Perm. Ct. Arb. 2016).

<sup>26</sup> See Minxin Pei, *China's Coming Upheaval*, FOREIGN AFF., May-June 2020.

<sup>27</sup> See Andrea Kendall-Taylor, Erica Frantz, and Joseph Wright, *The Digital Dictators: How Technology Strengthens Autocracy*, FOREIGN AFF., Mar.-Apr. 2020.

<sup>28</sup> *But see* a nuanced account by Yeling Tan, *Disaggregating “China, Inc”: The Hierarchical Politics of WTO Entry*, 53 COMP. POL. STUD. 13 (2020).

of state-sponsored industrial espionage. Its investment in military capacity continues at a rapid clip. If engagement failed to domesticate China, neither does confrontation, as practiced by the Trump administration, appear to have paid off.

While China may be unlikely to become a true global hegemon, in the sense of being the dominant power in a unipolar world, that scenario is still a distinct possibility. Should it come to pass, China will act as hegemons do. It will be the single most powerful player in the global standards game, displacing Europe; the so-called Brussels effect may become the Beijing effect.<sup>29</sup> China will also work with other dictatorships to advance a specifically authoritarian international law.

In the first place, this law will be defensive, as we have already seen for example in the 2016 Russia-China Declaration on the Promotion of International Law.<sup>30</sup> While committing to the peaceful settlement of international disputes, the Declaration reaffirms the importance of consent and good faith, a position that “applies equally to all types and stages of dispute settlement.”<sup>31</sup> One might read this as requiring specific consent to each instance of inter-state dispute resolution. The Declaration also specifically mentions UNCLOS and the requirement of consistent application of its provisions, “in such a manner that does not impair rights and legitimate interests of States Parties”<sup>32</sup>—a thinly veiled reference to the South China Sea Arbitration. The Declaration also condemns terrorism, unilateral sanctions, and coercive measures outside the context of the Security Council process, while reaffirming state immunity. Though sounding in classical Westphalian sovereignty, the Russia-China Declaration is in fact more sophisticated; it reflects a good deal of learning and experimentation by authoritarian leaders, enabling them to extend their own rule and reinforce each other.<sup>33</sup> A changing balance of power in favor of authoritarians will give these countries greater weight in the formation of international law generally, as well as the ability to deploy specific strategies within the field.

China’s more active role would seem to belie its rhetorical emphasis on Westphalian norms of state sovereignty and non-intervention.<sup>34</sup> Yet, China has been consistent on one point. China’s brand does not include promoting a specific model of domestic governance, and I doubt that this will change in the future. Chinese authoritarianism is decidedly not ideological in terms of its external footprint.<sup>35</sup> This is not the Soviet Union, exporting global communism; nor even Saudi Arabia, whose subsidy of Wahhabism has colored the character of Islam in many parts of the world. China’s particular international profile takes Bandung seriously to some extent. China is

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<sup>29</sup> ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020).

<sup>30</sup> Kenneth Anderson, *Text of Russia-China Joint Declaration on Promotion and Principles of International Law*, LAWFARE (July 7, 2016), <https://www.lawfareblog.com/text-russia-china-joint-declaration-promotion-and-principles-international-law>.

<sup>31</sup> *Id.*, para 5.

<sup>32</sup> *Id.*, para 9.

<sup>33</sup> Kendall-Taylor et al, *supra* note 27.

<sup>34</sup> Yin He, *China’s Changing Policy on UN Peacekeeping Operations*, INST. FOR SECURITY AND DEV. POL’Y (July 2007), [http://isdpeu/content/uploads/publications/2007\\_he\\_chinas-changing-policy.pdf](http://isdpeu/content/uploads/publications/2007_he_chinas-changing-policy.pdf).

<sup>35</sup> Jessica Chen Weiss, *An Ideological Contest in U.S.-China Relations? Assessing China’s Defense of Autocracy*, 28 J. CONTEMP. CHINA 679 (2019).

perfectly willing to let national leaders be chosen through democratic or nondemocratic means. It simply asks those leaders not to cross certain red lines. Obviously, there are exceptions, such as Taiwan, which is considered to be a fundamental part of the national territory. But, to give just one example, China has tolerated multiparty democracy in Mongolia, over which it gave up claims in January 1946, for three decades. The massive Belt and Road Initiative (BRI) incorporates all kinds of regimes into the warm embrace of a Beijing-centered economic system. This might suggest that democracy in some form has a fighting chance in a China-centered world.

However, the importance of getting along with China may determine who gets elected in democracies. And China's need for certainty in its relations along the Belt and Road may push it to intervene on behalf of particular favored partners who can deliver. China has demonstrated its interest in picking winners in domestic politics in certain cases. For example, it openly backed the Rajapaksa regime in Sri Lanka, as it veered in a strongly authoritarian direction. Similarly, China openly backed the corrupt President Abdulla Yameen in the Maldives, though voters still threw him out of power in 2018. And China's ability to export the technology of repression, particularly in the digital realm, will make it an attractive partner to leaders with authoritarian aspirations.<sup>36</sup>

Thus, even without active promotion of authoritarian governance, there will be hydraulic pressures that will diminish the space of liberal democracy. Criticism of Papa Xi will be *de facto* forbidden in vast swaths of the earth, even as the International Covenant and national constitutions provide for freedom of speech. Other terms will be given new, thinner meanings. The rule of law will remain a powerful ideal, but its meaning will be transformed: it will mean that the rulers will act through laws, as in the "rule of law with Chinese characteristics."

At the same time, a China-dominated world may very likely be more peaceful than one led by the United States. The country has not fought a war, other than on its borders with Korea and Vietnam, since World War II. It is not going to use armed forces to export autocracy in the same way that the liberal United States has done for democracy, though it surely wants to make the world safe for dictatorship. Thus, we might predict that Chinese hegemony will reinforce the prohibition on the use of military force. Pro-democratic interventions, even those done by regional powers like ECOWAS, will be disfavored, except in the rare cases in which China for some reason favors it, or is not sufficiently interested to push back. Interstate war may still occur among small countries, but Beijing can play a mediating role. So far, its attempts to do so, for example between Sudan and South Sudan, have not been particularly effective. But it may learn.

International legal discourse will have completely internalized Chinese-promoted virtues and values: principles of amity, sincerity, dialogue, mutual benefit from "win-win" governance, and inclusiveness furthering a "community of shared destiny." The father of these terms, Xi Jinping, will celebrate his 97<sup>th</sup> birthday in 2050, just a few months after the PRC's centenary. Xi will be

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<sup>36</sup> Kendall-Taylor et al, *supra* note 27; SLOSS, *supra* note 13.

comfortably retired, but still highly influential in resolving disputes among his chosen successors, now in the “seventh generation” of leadership since the founding of the PRC.

Authoritarian international law tends to involve very thin commitments. Wary of unexpected costs, authoritarians are less likely to entrust matters to binding third-party dispute resolution. Their forms of cooperation tend to be informal, thin and flexible. Only in international economic law—the WTO and the network of Bilateral Investment Treaties (BITs)—have we observed systematic willingness to submit to third-party dispute resolution, and even here the approach has not been as open as some other countries, having retrenched since 2007.<sup>37</sup>

The model of the Belt and Road Initiative lays the groundwork for what authoritarian international law with Chinese characteristics might look like in years to come. The BRI features loose forms of economic cooperation, taking the form of framework agreements that allow for mutual adjustment over time. The BRI also has a hub and spokes quality, with each participant interacting bilaterally with Beijing, rather than through a multilateral forum in which smaller nations can cooperate with each other.<sup>38</sup> This approach allows China to maximize leverage vis-à-vis each participating country while minimizing the possibility that others will band together to make demands. Flexibility, a blurring of the public-private divide, and minimal use of third-party dispute resolution at a state-to-state level are key features of this model.

China has in recent years become a skilled player at the United Nations. The United Nations will remain at the center of international legal order, and in some areas, such as the use of force, its norms may be strengthened. China has been a major player, seeking to head off criticism of its internal practices and to promote its interests. A China dominated UN will be less of a force for human rights and democracy. In economic law, China will be quite willing to play by regional and multilateral rules that it has largely shaped, unless there is some reason to do otherwise. Whether the WTO is revived after the assault by the Trump administration, there is no doubt that a formally open trade regime is in China’s interest. At the same time, bilateralism rather than multilateralism tends to be its preferred approach for economic commitments, an approach that allows it to bring its full weight to bear vis a vis any particular partner.

Cyber law is one of the great areas in play at present. China has taken an approach to the internet that emphasizes national sovereignty and security, rather than the “free and open internet” pushed by democracies.<sup>39</sup> China’s prodigious technical capacities will be brought to bear here, establishing standards that can then be used to ensure its complete internal control, and possibly external control, of what gets seen where. Look for cyber-erasure of Taiwan, meaning the elimination of references to the jurisdiction, and possibly extraterritorial criminalization of “splittists” who sit in

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<sup>37</sup> Yuwen Li, and Cheng Bian, *China’s Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 NETH. INT’L L. REV. 503 (2020).

<sup>38</sup> Heng Wang, *China’s approach to the Belt and Road Initiative*, 22 J. INT’L ECON. L 29 (2019).

<sup>39</sup> Jack Goldsmith and Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, THE ATLANTIC, Apr. 25, 2020.

its government or call for independence. Even if Taiwan manages to remain independent for the next 30 years, it will have ever narrower scope for action

Human rights, of course, will remain a centerpiece of global rhetoric, but will be less rigorously enforced than ever. Here, China will be joined by a wide array of illiberal regimes, which have targeted LGBT individuals and religious minorities, in emphasizing national cultures rather than a homogeneous globalized one. Less well appreciated is China's pivot away from an internal policy that tolerated and indeed formally celebrated cultural pluralism. The erasure of internal cultural minorities, currently on display in Xinjiang, Inner Mongolia and Tibet, will proceed apace. This may have implications for foreign causes that sound in self-determination. The Western Sahara, Kurdistan, Palestine, and other causes will find less support as the forces of order dominate the forces of freedom. Instead, the recently articulated norms of the Shanghai Cooperation Organization against "extremism" and "separatism" will be globalized.

But none of this will mean the complete erasure of democratic discourse on the international plane. Liberal discourses of freedom and self-governance will continue to be popular among national publics. The world's prior hegemon, the United States, may selectively promote these discourses and could provide a counterweight for those fearing the yoke of repression, but its toolkit will be very limited. Democrats may retain the moral high ground, but the institutionalization of democratic norms will diminish on the international level.

In short, a China-dominated world will not be good for liberal democracy on the international plane. The rich normative architecture of democracy charters and human rights instruments will lay mostly dormant, further eroding protection for human rights and democratic norms.

To be sure, there are many roadblocks in the way of this scenario becoming a reality. There are many obstacles to Chinese hegemony, not least its aggressive behavior that, as of 2020, has soured many other nations on its approach. Hegemons, China is learning, are feared and not loved, and there is something of a backlash against China at this writing. And of course, American military power continues to be overwhelming. But even if China's global hegemony is not realistic, "authoritarian dominance" is certainly a realistic scenario. In this scenario, liberal democracy will gradually recede to a small group of core states, and authoritarianism will gradually expand in terms of the number of governments, their resilience, and their use of international law to cooperate with each other and to shape international norms.

#### B. Democratic Revival

The United States has just barely survived its experiment with authoritarian populism in the person of Donald Trump. Although the 1990s, when the liberal order seemed to be the only game in town, will never return, our recent "near miss" may trigger efforts to shore up America's political and economic vulnerabilities. This could lead to a renewal of liberal democracy at home and a return to a vigorous set of alliances abroad. One might even contemplate a revival of the idea of a "community of democracies," which as it stands is a relatively unimportant international

organization,<sup>40</sup> but could be a more deeply integrated set of alliances, linked by trade and common values. Perhaps the democracies will work with each other to achieve a partial decoupling from a prickly Chinese regime that has shown itself willing to use maximal leverage in response to fairly minor perceived slights. This implies a trade system that is less focused on the WTO and more focused on serving strategic interests. Groupings like the “Five Eyes” could expand from their focus on security and intelligence to encompass common liberal traditions and approaches.

If liberalism is to survive and thrive, the existence of current international laws and institutions that favor democracy may play an important role in preventing decline. The UN human rights machinery has lost credibility in some quarters because of its obsessive focus on Israel, while ignoring severe repression by dictatorships. But regional machinery has been more effective at both developing norms and enforcing them. Already we have seen a series of pro-democratic regional interventions. For example, the Organization of American States played a role in resolving the Honduran crisis of 2009, when President Manuel Zelaya was removed from office while in his pajamas and spirited out of the country. The OAS has had less success with Venezuela. But the other Bolivarian regimes of Ecuador and Bolivia have remained in the democratic camp. Similarly in Africa, the African Union and ECOWAS have conducted a series of regional interventions that have staved off would-be authoritarians. The African Union has gone further than other international organizations by specifically targeting unconstitutional changes in government, a category which includes not only coups and mercenary takeovers, but also manipulation of term limits by incumbent leaders.<sup>41</sup> Since most democracies these days die through incumbent takeover rather than military coup, this is a particularly important norm.

The return of a liberal order will not mean that every project of the 1990s is plausible. The International Criminal Court has suffered attacks on its capacity by the United States as well as African countries. The willingness of the ICC to indict national political leaders around the issue of electoral violence has produced backlash. But international criminal law is not an essential liberal democratic project.

At the same time, human rights will do much better in a liberal world. The machinery of the UN will remain ineffectual, but national level pressures from Europe and the Western powers will have a strong deterrent effect on the worst abuses in some smaller countries. Regional human rights bodies will revive and thrive. Their jurisprudence on rights of speech and association, which are at the core of the liberal project, will become definitive and will lead to national level compliance even by some hybrid regimes.

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<sup>40</sup> Formed as an intergovernmental organization in 2000, and with 31 current members, the group is based on the idea that democracies should self-consciously engage in collective action to defend common interests. See COMMUNITY OF DEMOCRACIES, <https://community-democracies.org/> (last visited \_\_\_)

<sup>41</sup> Lome Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI), July 12, 2000.

In this scenario, the European Union will eventually grapple with the presence of non-democratic Hungary in its midst. The Brexit experience will demonstrate that having a country leave the Union is feasible, and the Europeans will threaten to disband the entire Union and re-form it without Hungary, instituting large tariffs on Hungarian goods entering the new EU. The resulting economic pressures may eventually unseat Viktor Orban. The EU will allow Poland to remain in the EU after Polish voters reject the current illiberal government and a new liberal government is voted in.

The endurance of liberal democracy, giving substance to the rich normative architecture of democracy, does not mean that every country will become a democracy. The resurgence of liberal power will survive because it won't over-reach. Liberalism in the 1990s came crashing down on the shore of the Iraq war, and a global neoliberal regime that benefited wealthy elites on the promise of redistribution that never occurred. A revival of liberal democracy will, paradoxically, require recognizing that authoritarian powers have legitimate spheres of influence that should be respected. Chinese power in Asia is sure to rise. But it has already shown that it can co-exist with vital liberal countries such as South Korea and Japan. (Taiwan is, of course, a special problem.) Similarly, NATO will have to come to terms with Russia, an inherently authoritarian power. Russia's near abroad will be in its control but there may be opportunities for liberal advances in particular countries so long as they do not threaten Russia militarily. As I write, a liberal government has taken over in Armenia, but is remaining in the Soviet military sphere. These kinds of opportunities will require restraint on the part of large western powers.

Yet this scenario will also require aggressive policing when a country appears to be backsliding too severely. Refraining from unilateral "regime change" interventions is the first order of business for a chastened United States, but multilateral interventions may still be worth pursuing in some parts of the world to prevent coups and other sudden democratic collapses. In terms of the other more serious threat, the risk of slow erosion, international cooperation may be less effective. Deploying non-military resources, including economic access and soft power, can go a long way in the absence of the use of force. But at the end of the day the direction that democracies take will be determined by their citizens, and in our era of nationalism, liberalism is under threat in many countries.

International economic law will have adjusted to recognize a growing role for the state in national economies, in democracies as well as dictatorships. Rules for state owned enterprises and publicly subsidized markets will require sophisticated negotiations, but the collective market power of liberal democracies can be coordinated to keep rules from being abused by statist economies.

Liberalism's survival will require a robust engagement in the realms of cyber governance, artificial intelligence and other technological developments.<sup>42</sup> The precise shape of this engagement is not yet clear, but liberal states will need to agree on a common set of principles and approaches,

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<sup>42</sup> Jared Cohen and Richard Fontaine, *Uniting the Techno-Democracies: How to Build Digital Cooperation*, FOREIGN AFF., Nov.-Dec. 2020.



instantiated in technical standards, to ensure that technology does not erode democracy. It may involve a modus vivendi with large authoritarian powers. It probably involves engaging in a serious revisiting of the current free-market approach to companies like Facebook and Google, which have tremendous power to control political messaging. More vigorous antitrust enforcement is now in the works, although the tools of antitrust were not devised with platform economies in mind. Some solution to the political dominance of these small number of firms will be essential.<sup>43</sup> In turn, this will require transnational regulatory harmonization, and possibly even formal agreements, so that the platforms do not simply relocate to low-regulation jurisdictions.

If this scenario is to become a reality, it will require American leadership and cooperation from the couple dozen mature democracies around the world. Together they can help liberal democracy overcome its current malaise to develop enhanced capacity to coordinate regulatory approaches, while allowing relatively unrestricted flows of goods and services among democracies. The challenge of mass migration will have to be addressed as well.

### C. Duopoly

If the first two scenarios rely on the dominance of China and the United States, respectively, the third is based on the cooperation of the two. The international legal order is founded on sovereign equality, but some sovereigns are more equal than others. Many of the greatest problems facing mankind will require common action that can only be achieved if large powers coordinate their policies in areas of vital interests. The duopoly idea is that the United States and China come to a modus vivendi to accommodate each others' core interests.

In the security sphere, this will require accommodation of Chinese interests in the Western Pacific. This means a creative resolution of the Taiwan problem in a complex federation that allows permanent autonomy for the "renegade province," avoiding the mistakes of the now-failed Hong Kong experiment. The autonomy would be externally guaranteed, and the deployment of Chinese military forces on the island would be strictly limited. Other Western Pacific powers would have to reduce their cooperation with the U.S. military, perhaps being limited to strictly defensive postures.

International economic law will remain relatively open and markets will be competitive. China and the United States will continue to engage in interdependent economic relations, and WTO rules will remain a floor for global trade relations. At the same time, the WTO exception for free trade areas will allow for special spheres of economic influence by both major powers. The recently enacted Regional Comprehensive Economic Partnership, which brings in states from Australia to Japan, provides a framework, and may provide a multilateral counterpart to China's so-far bilateral approach.

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<sup>43</sup> Francis Fukuyama, Barak Richman, and Ashish Goel, *How to Save Democracy from Technology*, FOREIGN AFF., Jan.-Feb. 2021.

In this scenario, the very weak current rules of international environmental law are re-invigorated by US-China cooperation on the existential issue of climate change. A framework treaty is negotiated in the 2020s that effectively confronts problems of carbon leakage and uses the market power of the G-2 to ensure compliance by smaller states. Technological innovations in carbon sequestration allow the world to begin to remove carbon from the atmosphere, although the untold suffering of rising seas and weather-related disasters continues unabated. Still, close coordination of the two countries' scientific communities is facilitated by blockchain-based schemes that reduce levels of industrial espionage and ensure that dual-use technologies are restricted to their non-military usages. Furthermore, the two countries develop a common approach to the Law of the Sea that facilitates exploration of the deep seabed, while saving the world's fisheries from the collapse that was threatened earlier in the century. Finally, there is great potential for cooperation on global public health issues, something which the COVID-19 virus has made highly salient. The cooperation of the two largest powers helps tackle global problems.

In this scenario, liberal democracy stands a fighting chance. China is no friend of liberal democracy, but neither is it an implacable enemy, when practiced outside its own borders. The United States will surely have to accommodate China's preferences in its sphere of influence, and there may be tensions that arise for the democracies of the Western Pacific. But we could see a flourishing of liberal democracy in regions like Latin America and Africa. This outcome will depend on a particular approach from the United States and Europe, namely, not to be overly aggressive in pushing for regime change, but rather to let countries' internal dynamics play out. In this sense the outcome is not unlike that described above under the "democratic revival scenario," except that the relative sizes of the democratic and non-democratic spheres are more balanced. The US and China will need to have some rules of engagement in this regard, but given China's generally non-ideological stance, this should be feasible.

### **III. Prospects**

To summarize, I see three possibilities for global order going forward, each with its own implications for liberal democracy. The three can be arrayed in terms of the relative space for liberal democracy as a going concern around the world. In the event of liberal resurgence, liberal norms and international cooperation will thrive, not just in the core, but in a growing number of states. This, as noted, cannot take place at the barrel of a gun. But liberal democracies remain attractive places and contribute an outsized share to global culture. Their brand may be currently diminished, but democracies are capable of reinvention.

In the duopoly scenario, the United States and China will cooperate to solve global problems and agree to disagree about the others' systems of governance. This will require recognition of a

Chinese sphere of influence in much of Central Asia and the Western Pacific.<sup>44</sup> Countries within this sphere will move in an illiberal direction, in ways that are already being demonstrated in the Philippines and India. Global democracy promotion will not disappear, but for practical purposes it will be limited to the regions of Latin America and Africa and led largely by local institutions like the OAS and ECOWAS.

The scenario of authoritarian dominance will have profound implications for international law as a whole. Authoritarians, and especially China, do not emphasize thick forms of legally binding cooperation but instead utilize thinner forms of cooperation that are less intrusive, at least outside the economic sphere. They have no interest in enforcing human rights abroad, and fear the open discourse associated with liberal democracy. As it stands, they are developing tools to undermine democracies, though so far these have only been deployed around the margins. In this scenario, the number and quality of democracies will continue to diminish, and freedom will remain a dim hope for many of the world's citizens.

There are certain commonalities across the scenarios. There will continue to be some space for liberal democracy on the international legal plane in all of them: no one is going to retract the International Covenant on Civil and Political Rights, as it is too ineffectual to be worth dismantling. International norms related to democratic participation, human rights, and the rule of law will remain on paper, even if their practice is affected by global political developments. And in none of these scenarios does the UN become a significant actor, even as it is the authoritative keeper of many of the norms. Instead, the action of enforcement will turn on lower-level actors, at either the national, regional, or plurilateral level.

Of course, these three scenarios do not exhaust the possibilities. But they do capture alternatives that are sufficiently different to allow us to consider normative implications going forward. I take it as an assumption that the authoritarian scenario is worth avoiding, even though I do not have space to work out a complete normative evaluation of the other two. But it is worth noting that, whether duopoly or liberal resurgence turns out to better describe the world in 2050, the strategy for today's democratic leaders is similar. They should invest in the existing normative architecture and provide support for it by explicitly prioritizing liberal democracy in their international relations, including trade and investment. Unilateral use of force should be avoided, because much of the authoritarian backlash that has emerged in this century is a direct reaction to U.S. efforts to engineer regime change by military means. But regional entities that have intervened militarily to support democracy, such as ECOWAS, should be supported and reaffirmed, both materially and symbolically.

Liberal democracy is not the end of history, as developments in the last two decades have well shown. As my colleague Dan Slater put it in conversation, "democracy is a grind," requiring constant hard work in difficult conditions. It is not pretty, and there are missteps and severe

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<sup>44</sup> GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP?* (2017).

challenges. Being a citizen of a democracy can be depressing, as leaders continually come up short. But it is the least bad alternative at present among the forms of government on offer.