

Autocratic Legalism

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Buried within the general phenomenon of democratic decline is a set of cases in which charismatic new leaders are elected by democratic publics and then use their electoral mandates to dismantle by law the constitutional systems they inherited. These leaders aim to consolidate power and to remain in office indefinitely, eventually eliminating the ability of democratic publics to exercise their basic democratic rights, to hold leaders accountable, and to change their leaders peacefully. Because these “legalistic autocrats” deploy the law to achieve their aims, impending autocracy may not be evident at the start. But we can learn to spot the legalistic autocrats before autocratic constitutionalism becomes fatal because they are often following a script using tactics that they borrow from each other. This Essay explains the paths that these autocratic legalists take, the danger signals that accompany their legal reforms, and the methods they use to dismantle liberal constitutions. The Essay also suggests how the legalistic autocrats may be stopped.

INTRODUCTION

By now, we know the pattern: A constitutional democracy, flawed but in reasonably good standing, is hit by a transformative election. A charismatic new leader comes to power, propelled by the growing impatience that the electorate feels with things as they are. The leader promises to sweep away the dysfunctions of partisanship, gridlock, bureaucracy. He claims to call things by

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their right names and to speak the unspeakable. He rails against entrenched power, entrenched people, entrenched structure. He rallies the people by assuring them that the state belongs to them, only them. He wins an upset victory over the establishment forces and starts a constitutional revolution.

Around the world, liberal constitutionalism is taking a hit from charismatic leaders like these whose signature promise is to *not* play by the old rules. But such hits have been long foretold. In one constitutional democracy after another, publics have grown increasingly discontent with their political institutions.¹ This decline in public trust is particularly pronounced in countries that were hit hard by the global financial crisis of 2008 and after.² But while the Great Recession made matters worse, democratic decline was already underway because the number of countries that could call themselves democracies in good standing began to drop before the economic crisis hit.³ Democratic malaise has economic correlates, but the causes go beyond economics.⁴ Something even bigger must be going wrong with democracy across many countries at once.

The reasons for, and even the existence of, democratic decline are contested. Some claim that scholars overcounted democracies in the first place, so the drop in the number of democracies we are observing worldwide is just the reversion to type of countries that

¹ Taking the average of OECD countries, trust in public institutions declined from approximately 44 percent in 2009 to approximately 36 percent in 2013. See Esteban Ortiz-Ospina and Max Roser, *Trust* (Our World in Data, 2017), archived at <http://perma.cc/W5ET-R536>. But that is an average; particular countries record even more devastating declines. For example, in recent years, only about 10 percent of Americans have a “great deal/quite a lot” of trust in Congress, down from around 40 percent in the 1970s. *Confidence in Institutions* (Gallup, 2017), online at <http://news.gallup.com/poll/1597/confidence-institutions.aspx> (visited Oct 29, 2017) (Perma archive unavailable).

² Recent data from within the European Union shows a precipitous decline in trust in both EU institutions and national institutions since the global financial crisis and the Eurozone debt crisis. Trust in government in EU debtor countries declined from between 40 to 50 percent before the crisis to less than 20 percent in 2015. See Chase Foster and Jeffrey Frieden, *Crisis of Trust: Socio-economic Determinants of Europeans’ Confidence in Government* *12 (Harvard Working Paper, Feb 2017), archived at <http://perma.cc/43CK-BKJD>.

³ Every Freedom House democracy indicator has declined since 2006, and 105 countries suffered net declines in democracy indicators during the decade from 2006 to 2016. See Arch Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians* *3–5 (Freedom House, June 2017), archived at <http://perma.cc/DCK4-VVLL>.

⁴ See Marc F. Plattner, *Is Democracy in Decline?*, 13 *Democracy & Society* 1, 4 (Fall–Winter 2016), archived at <http://perma.cc/X29H-2NNR> (pointing to the causal role of “bad governance,” which “refers in the first instance to the failure of many new democracies to build well-functioning and effective states, which often leads to lagging economic growth, poor public services, lack of personal security, and pervasive corruption”).

were never really democratic in the first place.⁵ Others claim that even long-standing democracies have been falling apart in the last decade or so at a higher rate than ever before and that we are therefore witnessing a major democratic recession, in which even the democracies that have not failed are getting worse.⁶ On balance, I think that the “democratic decline” camp has the better case. What is particularly disturbing about this phenomenon, however, is not the sheer number of democracies that have proven vulnerable, but instead the *way* that a number of these failing democracies have retreated from their earlier standards. As I argue in this Essay, democracies are not just failing for cultural or economic or political reasons. Some constitutional democracies are being deliberately hijacked by a set of legally clever autocrats, who use constitutionalism and democracy to destroy both.

Buried in the story of decline, then, is a story of constitutional malice. New autocrats are not just benefiting from the crisis of confidence in public institutions; they are attacking the basic principles of liberal and democratic constitutionalism because they want to consolidate power and entrench themselves in office for the long haul. To outside observers who simply note that elections continue to occur and nothing illegal is going on in these places, it may seem that these democracies are in good (or good enough) health. But the autocrats who hijack constitutions seek to benefit from the superficial appearance of both democracy and legality within their states. They use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state. Because these autocrats push their illiberal measures with electoral backing and use constitutional or legal methods to accomplish their

⁵ See, for example, Steven Levitsky and Lucan Way, *The Myth of Democratic Recession*, in Larry Diamond and Marc F. Plattner, eds, *Democracy in Decline?* 58, 59 (Johns Hopkins 2015).

⁶ Professor Larry Diamond counts twenty-five specific cases of democratic breakdown in which he believes that misclassification is not the story. See Larry Diamond, *Facing Up to the Democratic Recession*, in Diamond and Plattner, eds, *Democracy in Decline?* 98, 102–04 (cited in note 5). See also Puddington, *Breaking Down Democracy* at 3, 5 (cited in note 3) (showing that there has been an across-the-board decline in the indicators that Freedom House uses to measure democratic health of nations and calling the period from 2006 to 2016 the “decade of decline”). Professors Tom Ginsburg and Aziz Huq distinguish sudden collapses of democratic governments, which they call reversions, from gradual erosion of constitutionalism, which they call retrogressions, and they document a growing number of the second in recent years. See Aziz Huq and Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L Rev* *13–16 (forthcoming 2018), archived at <http://perma.cc/G48G-6ZDB>.

aims, they can hide their autocratic designs in the pluralism of legitimate legal forms.

Constitutional democracy is indeed a pluralistic category. There is a wide but normatively justifiable variation in the institutional forms and substantive rules that one can find among constitutional-democratic states. Within those legitimate variations, some combinations of these forms and rules prove toxic to the continued maintenance of the liberal forms of constitutional democracy. And the new autocrats are finding those combinations. While democracy, constitutionalism, and liberalism once marched arm in arm through history, we now see liberalism being pushed out of the parade by a new generation of autocrats who know how to game the system. Intolerant majoritarianism and plebiscitary acclimation of charismatic leaders are now masquerading as democracy, led by new autocrats who first came to power through elections and then translated their victories into illiberal constitutionalism. When electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda, I call this phenomenon *autocratic legalism*.⁷

This Essay focuses on the particular cases of autocratic legalism within the general phenomenon of democratic decline. By attacking the very basis of a constitutional order while using the methods made possible by that constitutional order, the new illiberals may be cheered on at first by the adulating crowds who sought change, but those same crowds will find these illiberals impossible to remove once they have destroyed the constitutional system that could have maintained their democratic accountability over the long run.

To get a better sense for how the legalistic autocrats function, Part I turns to the question of how one can recognize them early on. Next, Part II shows how the weaknesses and complexities in the theory of liberal democratic constitutionalism itself can be used to undermine liberalism. Then, Part III traces the typical

⁷ Professor Javier Corrales first used this phrase to describe Hugo Chávez's rule in Venezuela. Corrales identified autocratic legalism with the "use, abuse and non-use . . . of law" to describe what Chávez did to consolidate political power and sideline competitors. Chávez *used* the law by pushing the parliament to pass new laws giving him new powers, *abused* the law by deliberately changing the interpretation of law on the books to suit his goals, and *non-used* the law by failing to enforce law that stood in his way. See Javier Corrales, *Autocratic Legalism in Venezuela*, 26 *J Democracy* 37, 38–45 (Apr 2015). My use of the phrase "autocratic legalism" is compatible with Corrales's formulation, because it also highlights the extraordinary attention that the new autocrats pay to law as a tool of power consolidation, but I differ from him in emphasizing the deliberate creation of new law as a way of consolidating political power.

script of the autocratic legalists to show precisely how they consolidate power under cover of law. The Essay concludes by asking what it would take to stop legalistic autocracy before it does irreparable harm to a liberal and constitutional democracy.

I. METHODS AND MADNESS

How does one recognize an autocratic legalist in action? One should first suspect a democratically elected leader of autocratic legalism when he⁸ launches a concerted and sustained attack on institutions whose job it is to check his actions or on rules that hold him to account, even when he does so in the name of his democratic mandate. Loosening the bonds of constitutional constraint on executive power through legal reform is the first sign of the autocratic legalist.

Hungary since 2010 has been my archetypal case. That year, the popularly elected government of Prime Minister Viktor Orbán won 68 percent of the seats in Parliament with 53 percent of the popular vote.⁹ Because the constitution permitted amendment with a single two-thirds vote of the unicameral parliament, Fidesz's constitutional majority allowed it to rewrite the 1989–1990 constitution and thousands of pages of new laws in Orbán's first term.¹⁰ Before benefiting from the election laws that his government drew up to guarantee that he would win another term in 2014,¹¹ Orbán's early legal initiatives attacked the independence

⁸ I use "he" here not to ignore gender but precisely to highlight that the classic cases so far have involved male leaders. Therefore, using "she" as a generic would be misleading.

⁹ See Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution*, in Armin von Bogdandy and Pál Sonnevend, eds, *Constitutional Crisis in the European Constitutional Area* 111, 111–12 (Oxford 2015).

¹⁰ *Id.* at 111–13. I call the 2010–2014 term Orbán's first term in office even though he had already been prime minister once before from 1998–2002. Though his autocratic tendencies were visible even then, the government of 1998–2002 was a coalition government in which Orbán's party, Fidesz, was the lead party. But because the other center-right parties with whom Orbán was in coalition failed to support Orbán's more radical initiatives, this earlier government was not operating purely on Orbán's script. After 2010, the Fidesz party, operating in close coordination with the Christian Democracy Party, held 68 percent of the seats in the parliament, giving Orbán a constitutional majority for his initiatives.

¹¹ See Kim Lane Scheppele, *Hungary: An Election in Question, Part 1: The Political Landscape* (NY Times, Feb 28, 2014), archived at <http://perma.cc/NB4R-UMWQ> (laying out the distribution of political forces that were the object of gaming in the election rules); Kim Lane Scheppele, *Hungary, an Election in Question, Part 2: Writing the Rules to Win—the Basic Structure* (NY Times, Feb 28, 2014), archived at <http://perma.cc/95M5-6573> (showing how a combination of gerrymandering and new rules awarding parliamentary seats tilted the election in the governing party's favor); Kim Lane Scheppele, *Hungary, an Election in Question, Part 3: Compensating the Winners* (NY Times, Feb 28, 2014), archived at <http://perma.cc/U39T-9VMP> (showing how the majority party turned its margin

of crucial institutions, such as the judiciary, the media, the prosecutor's office, the tax authority, and the election commission.¹² One of his first targets was the constitutional court, which nonetheless took three years to capture. Soon all other independent institutions were filled with party loyalists, including the ordinary judiciary, so that they were no longer independent of the governing party.¹³ Orbán removed opposition figures and neutral experts from public institutions, expanded the length of their successors' terms of office so that they would carry his influence beyond the usual term of a democratic government, and wrong-footed the opposition by changing parliamentary procedure so that opposition MPs could not even speak on the floor, let alone offer any amendments to government bills.¹⁴ With a constitutional supermajority that meant he could change any law in the system at will, including the constitution, Orbán carried out an autocratic revolution with exquisite legal precision.¹⁵

If this had happened only in Hungary, it might be dismissed as a freak occurrence. But Hungary was not alone. Orbán liberally borrowed some of his own illiberal tactics from autocratic legalists who had gone before him, and he has passed some of his

of victory into a supermajority result and interfered with the independence of the Election Commission); Kim Lane Scheppelle, *Hungary, An Election in Question, Part 4: The New Electorate (in Which Some Are More Equal than Others)* (NY Times, Feb 28, 2014), archived at <http://perma.cc/69HC-4XJ5> (showing how nearly half a million voters were disenfranchised and a different half million new voters were added to the voter rolls, while a clever system to divert minority votes to ethnic lists was designed to ensure that ethnic minorities would never gain any parliamentary seats); Kim Lane Scheppelle, *Hungary, An Election in Question, Part 5: The Unequal Campaign* (NY Times, Feb 28, 2014), archived at <http://perma.cc/63D5-9MST> (showing how the campaign rules and the election authorities themselves benefited the governing party). The election monitors agreed with most of these criticisms of the election system, concluding that “[t]he main governing party enjoyed an undue advantage because of restrictive campaign regulations, biased media coverage and campaign activities that blurred the separation between political party and the State.” See generally Office for Democratic Institutions and Human Rights, *Hungary, Parliamentary Elections, OSCE/ODIHR Limited Election Observation Mission Final Report* (Apr 6, 2014), archived at <http://perma.cc/54RZ-7Y6P>.

¹² See Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppelle, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 *J Democracy* 138, 139–44 (July 2012); Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppelle, *From Separation of Powers to Government without Checks: Hungary's Old and New Constitutions*, in Gábor Attila Tóth, ed., *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* 237, 238–39 (CEU 2012).

¹³ See Scheppelle, *Understanding Hungary's Constitutional Revolution* at 115–19 (cited in note 9).

¹⁴ See Bánkuti, Halmai, and Scheppelle, *From Separation of Powers to Government without Checks* at 239 (cited in note 12).

¹⁵ See Scheppelle, *Understanding Hungary's Constitutional Revolution* at 113 (cited in note 9).

own techniques on to others. Even before Hungary's fall from democratic grace, President Vladimir Putin in Russia had consolidated his power through law by, among other things, canceling elections of local governors and appointing his own handpicked candidates instead.¹⁶ Orbán copied Putin by first centralizing many local government functions in his new constitution and then handpicking all of the local government leaders to make them personally loyal to him.¹⁷ Both Orbán and Putin established a "vertical of power"¹⁸ (as the Russians call it) to give the national leader a direct line into the local governments to exercise detailed control of their actions without going through the national parliament.

Orbán also borrowed from the prime minister (now president) of Turkey, Recep Tayyip Erdoğan, who, among other things, managed to flummox critics by packing the Constitutional Court of Turkey with judges of his own choosing while simultaneously expanding their jurisdiction to handle many more cases, something that could be viewed as either a boost to or the destruction of the institution.¹⁹ Orbán did the same thing one year later, as he expanded the number of judges on the Constitutional Court of Hungary to give his party control over the court, but, at the same time, gave the court jurisdiction over constitutional complaints, individual petitions from those who claim that their individual rights are violated. This move was anticipated to flood the court with many politically insignificant cases, which would require

¹⁶ See Kim Lane Scheppele, "We Forgot about the Ditches": *Russian Constitutional Impatience and the Challenge of Terrorism*, 53 Drake L Rev 963, 1013–15 (2005).

¹⁷ See Bálint Magyar, *Autocracy in Action—Hungary under Orbán* (Heinrich Böll Stiftung, May 18, 2012), archived at <http://perma.cc/P7QM-4NUT>:

Finally, during the latest municipal elections in the autumn of 2010, Orbán replaced those old local Fidesz cadres [who] still enjoyed some independence with his vassals. It was no longer enough to be a loyal party member; in Fidesz, one had to be devoted to the party leader. Fidesz members know what happens when one questions Orbán's decisions or openly rebels against them. A slip of the tongue can end a party career. Those who are insubordinate are expelled, forever; there is no repose. Fidesz members were the first Hungarians to learn that "these guys mean business."

¹⁸ Scheppele, 53 Drake L Rev at 1013 (cited in note 16).

¹⁹ See Steven A. Cook, *How Erdogan Made Turkey Authoritarian Again* (The Atlantic, July 21, 2016), archived at <http://perma.cc/MVN9-HWGM> (showing how Erdoğan first liberalized Turkey and prepared it to join the European Union and then backtracked with reforms that allowed him to pack the courts with sympathetic judges; because the court-packing reforms also included liberalizing moves at the same time, critics did not know what to make of them).

more judges in order for the court to function properly.²⁰ So, was the expansion of the number of judges court packing or was it a sign that the leader intended to support the court by giving it the resources it badly needed? By adding judges, both Orbán and Erdoğan confused critics who could not tell if the courts were being politically compromised or judicially bolstered.²¹

Orbán did not just borrow *from* others; he also bequeathed his own tactics *to* others. After Orbán's success at foiling attempts by European institutions to halt the slide into autocracy,²² the new government in Poland began to travel down the same road

²⁰ See Scheppele, *Understanding Hungary's Constitutional Revolution* at 115–16 (cited in note 9).

²¹ American readers will no doubt think of President Franklin D. Roosevelt's 1937 court-packing plan as a parallel example. Facing repeated rejections of his New Deal agenda by the Supreme Court, Roosevelt proposed to add a new justice for every sitting justice over the age of seventy, a move that would have had the effect of allowing him to replace enough judges to generate a Court majority friendly to his programs. Like Orbán and Erdoğan, Roosevelt was well aware of how bad it would look to use court packing to achieve a particular substantive aim unless it were coated in a persuasive rationale. Roosevelt therefore undertook to dress up the proposed reform in a justification that had nothing to do with changing the decisions of the Court. Roosevelt pitched his move as necessary to maintain the vitality of an aging Court. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 S Ct Rev 347, 395.

While hiding the incapacitation of the peak court under cover of judicial reform makes the three cases of Roosevelt, Erdoğan, and Orbán sound familiar, there are still substantial differences among them. First, Roosevelt considered a plan to amend the Constitution to change the Court's composition, but this plan was abandoned because the outcome was hard to foresee, and it would have taken too much time in any event. *Id.* at 384–86. Roosevelt then turned to Congress to pass a law to pack the Court. *Id.* Roosevelt's plan ran aground on a resistant Congress whose upper chamber had the countermajoritarian institution of the filibuster to bolster minority opposition. See William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, a Second Death*, Duke L J 673, 681–84 (1985). Roosevelt failed not because his plan was so different but instead because the US constitutional order simply has more choke points that make seizing control of the courts difficult; Roosevelt was almost guaranteed to fail. In short, the US Constitution's defenses against constitutional capture worked.

By contrast, both Orbán and Erdoğan, as prime ministers with guaranteed parliamentary majorities governing under constitutions with easier amendment rules, saw their plans to pack their respective courts sail through. In Hungary, the unicameral parliament that had a supermajority of Fidesz supporters rubber-stamped Orbán's scheme to change the system for electing judges. See Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis*, 23 *Transnatl L & Contemp Probs* 51, 71–72 (2014). In Turkey, Erdoğan put the expanded number of judges to a one-off national referendum that amended the constitution, a far easier process of constitutional amendment than the American one. See Can Yeginsu, *Turkey Packs the Court* (NY Review of Books Daily, Sept 22, 2010), archived at <http://perma.cc/2VXW-5Y7X>. Orbán and Erdoğan lived in different constitutional systems from Roosevelt that made their capture of the peak court much easier.

²² For a detailed account of the way that European institutions attempted (and failed) to halt Orbán's seizure of the constitutional court, see Scheppele, 23 *Transnatl L & Contemp Probs* at 87–116 (cited in note 21).

using a map drawn by Orbán, starting with an attack on the Polish Constitutional Tribunal that centered on the appointment of judges before moving on to a full-scale assault on the ordinary judiciary.²³ Poland borrowed from Hungary the method of gaining control over the lower courts by seizing appointment power over the court presidents and, through changing the court leadership, gaining control over the court system. In Hungary, this had been done by lowering the judicial retirement age in a civil-service system in which the most senior judges had been promoted through long careers into the leadership positions, so that forcing early retirements opened up nearly half of the lower-court presidencies.²⁴ Poland did it slightly differently, by proposing in a bill to give the justice minister the power to fire the presidents of the lower courts within six months of the passage of a new law in summer 2017.²⁵ Protests ultimately led the president to veto two of the three proposed bills reforming the judiciary.²⁶ But just as Hungary had done before, Poland claimed that all of its judicial reforms borrowed the laws on the judiciary from some other (unnamed) member state of the European Union.²⁷ An even more direct borrowing of Hungary's style of judicial takeover occurred in Egypt, where the Muslim Brotherhood government of President Mohamed Morsi did precisely the same thing as Fidesz in Hungary,

²³ See generally Laurent Pech and Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 *Camb Yearbook Eur Legal Stud* 3 (2017).

²⁴ In Hungary, the move to lower judicial retirement ages was declared unconstitutional by the constitutional court in its waning days of independence, but the court did so in a way that made no difference at all. See Kim Lane Scheppele, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on the Judicial Retirement Age, Part I* (Verfassungsblog, Aug 9, 2012) (explaining the decision), archived at <http://perma.cc/3MES-6L6H>; Kim Lane Scheppele, *How to Evade the Constitution: The Constitutional Court's Decision on the Judicial Retirement Age, Part II* (Verfassungsblog, Aug 9, 2012), archived at <http://perma.cc/3SL5-4E99> (noting that the decision made no difference because the court failed to give the claimant "any meaningful relief," such as nullifying specific presidential orders through which the judges were fired).

²⁵ See Anna Sledzinska-Simon, *The Polish Revolution: 2015–2017* (I-CONnect, July 25, 2017), archived at <http://perma.cc/T2ZC-XVJK>.

²⁶ See Kinga Stanczuk, *Making Politics Possible Again* (Jacobin, Aug 12, 2017), archived at <http://perma.cc/85ZB-9EPC>.

²⁷ See Mehreen Khan, *Poland Rebuffs EU Concerns over Politicisation of Its Judiciary* (Fin Times, Aug 28, 2017), archived at <http://perma.cc/G36H-328C>. There is something to Poland's point that the country was meeting European standards. In Germany, the justice minister also presides over the process for appointing judges on all the high courts except for the constitutional court. But in Germany, there is a complex vetting process involving extensive consultation with many actors to depoliticize the process and ensure the quality of the judges. See Jenny Gesley, *How Judges Are Selected in Germany* (In Custodia Legis: Law Librarians of Congress Blog, May 3, 2016), archived at <http://perma.cc/SYD4-3ZPX>. These safeguards are missing in the Polish reforms.

proposing to lower the judicial retirement age to take over the most important positions in the judiciary.²⁸

On the other side of the world, the new autocratically legalistic revolutions in Latin America show that this phenomenon is not limited to right-wing or religious-nationalist leaders. Latin America also illustrates that ideas can spread from one legalistic autocrat to another. Hugo Chávez in Venezuela won the presidency in 1998 by mounting an insurgent campaign from outside the two dominant political parties.²⁹ Because his new victorious party had little toehold in the other branches of government, he launched a concerted attack on the constitutional system he inherited, summoning a new constituent assembly to write a constitution that suited his new rule.³⁰ He designed the rules for election of representatives to this constituent assembly in a way that gave his party 95 percent of the seats in the assembly with 60 percent of the popular vote.³¹ The new constitution that resulted from a convention full of *chavistas* (as Chávez supporters were called) gave Chávez substantial power to push through his autocratic program. Among other things, it established a strong presidency and eliminated the senate, which had been an important constraint on executive power before that time.³²

Rewriting a constitution to design a system suitable for an ambitious new leader was an idea that spread. Winning a presidential election in 2006 on a revolutionary platform, President Rafael Correa of Ecuador copied Chávez by convening a constituent assembly to write a new constitution more to his liking.³³ Correa's new constitution was approved in a referendum in 2008 with 64 percent public support. It mixed "hyperpresidentialism with an expanded list of rights,"³⁴ a mix that is a signature element of the new autocrats who confound their critics by adding to toxic constitutional change ideas that seem like constitutional advances. Both Chávez and Correa may well have given Orbán the idea that a new constitution would give him the opportunity to sweep away the power of the opposition if he could control the

²⁸ See David Risley, *Former President Morsi's Attacks on the Judiciary, and Judicial Backlash* (Egypt Justice, June 10, 2015), archived at <http://perma.cc/75FP-BF3G>.

²⁹ See David Landau, *Abusive Constitutionalism*, 47 UC Davis L Rev 189, 203 (2013).

³⁰ Id at 204–06.

³¹ See David Landau, *Constitution-Making Gone Wrong*, 64 Ala L Rev 923, 941–42 (2013).

³² Corrales, 26 J Democracy at 38 (cited in note 7).

³³ See Carlos de la Torre, *Technocratic Populism in Ecuador*, 24 J Democracy 33, 34 (July 2013).

³⁴ Id at 36.

process, which he then did to produce a constitution that was supported only by his own party.³⁵

I don't mean to overstate the degree of similarity among legalistic autocrats. Not all of these governments followed precisely the same trajectory even though they were heading in the same direction. For example, only some of the legalistic autocrats started to attack the constitution itself immediately while others waited for some time before doing so. While Chávez, Correa, and Orbán changed their constitutions entirely as soon as they came to power, both Erdoğan and Putin were in office for years before it was clear that they planned to make structural changes to the organization of their governments to put liberal constitutional democracy in danger.³⁶

After more than a decade of autocratic consolidation, Russia and Venezuela seem to have fallen completely out of the family of global democracies,³⁷ and Venezuela is showing signs of being a failed state.³⁸ It seems to take a bit more than a decade after these sorts of reforms begin before the pretense of democratic and constitutional government disappears entirely and the force underlying the system becomes openly visible. But not all states that start down this path of autocratic legalism necessarily end in a democratic death spiral. Some states pull back from the brink. For example, Ecuador seems to have avoided autocratic consolidation for now because Correa accepted the failure of his attempt to extend the length of his term and then permitted an election to

³⁵ See Kim Lane Scheppele, *Unconstitutional Constituent Power* *32–36 (unpublished manuscript, 2018), archived at <http://perma.cc/3DG2-RTXX>.

³⁶ Both Russia and Turkey tried at first to appeal to Western values. Suat Kınıkhoğlu, *Turkey and Russia: Aggrieved Nativism Par Excellence* (Turkey Analyst, May 10, 2017), archived at <http://perma.cc/6CVR-LUVN>:

While the reasons behind their turn toward aggrieved nativism differ in Turkey and Russia, it is nevertheless noteworthy that their regressions were preceded by liberal and open eras. In fact, both Erdoğan and Putin tried to cooperate and to move their countries closer to the West. While Putin sought a framework where he could work with [NATO] and be part of an enlarged Europe, Erdoğan aggressively pursued accession negotiations with the [European Union]. Both leaders embarked on the path of aggrieved nativism after their attempts had failed.

³⁷ Freedom House now ranks Venezuela and Russia as “not free.” Both showed large declines in freedom scores over the preceding ten years. See Freedom House, *Freedom in the World 2017* *6, 10 (2017), archived at <http://perma.cc/BT7J-HUAX>.

³⁸ See William Finnegan, *Venezuela, a Failing State* (New Yorker, Nov 14, 2016), archived at <http://perma.cc/VF9M-QFZX>.

go forward that resulted in a relatively peaceful transfer of leadership, though the post of president went to Correa's protégé.³⁹ While Poland looks dire as I write, it is also clear that there is an active and well-organized opposition to the Kaczyński government, along with at least some remnants of a pluralistic media and active civil society.⁴⁰ It may have a better chance of pulling out of the tailspin than Hungary, where the media has been monopolized, civil society has been neutralized, the "democratic" opposition (that is, opposition parties not including the far-right Jobbik party) has been completely ineffective, and more than half a million people have left the country.⁴¹ It certainly seems that not all autocratic legalist regimes have the same end point or move the same speed along a preordained path.

It is important to remember that we are identifying a trend as it is emerging, and so we are evaluating many of these regimes *in medias res*, while they are still developing. While we can therefore see how these regimes start, we do not yet have a detailed map of how these experiments end. Some regimes labeled as autocratic now may have a democratic rebirth later. Other regimes that are declining may fall into the abyss of authoritarianism. The phenomenon is still important, and worrying, even if it is only temporary. While autocrats consolidate power, things are bad enough. Moreover, liberal deconsolidation is serious enough to warrant an attempt to understand how autocratic legalism works.

We can spot the legalistic autocrats while they are still consolidating power because they have ambitions to monopolize power and tend to use the same toolbox of tricks. It is the overreaching aspiration and the legalistic tools of the trade that turn the leaders I consider here into legalistic autocrats, not their relative success or failure in the end. Legalistic autocrats may be foiled and their illiberal reforms reversed. They may also turn into full-blown dictators. But first one must see them for what they are. They come to power and justify their actions through elections and then use legal methods to remove the liberal content from constitutionalism.

³⁹ See Soledad Stoessel, *The Left Won Ecuador's Presidential Election: Cue Right-Wing Revolt* (The Conversation, Apr 17, 2017), archived at <http://perma.cc/EZ8Z-3JAP>.

⁴⁰ See Stanczuk, *Making Politics Possible Again* (cited in note 26).

⁴¹ See generally Hungary: *Democracy under Threat* (International Federation for Human Rights, Nov 2016), archived at <http://perma.cc/2LG4-BMTZ>; Justin Spike, *More Than 600,000 Hungarians Could Be Living in Other EU Countries* (Budapest Beacon, Sept 1, 2017), archived at <http://perma.cc/UTP3-YLF4> (noting the "probable number of Hungarians living in the EU was pushed slightly above 600,000").

II. LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY—AND THOSE WHO SPEAK IN THEIR NAME

Legalistic autocrats operate by pitting democracy against constitutionalism to the detriment of liberalism. This is not hard. Democracy and constitutionalism are famously in tension when what the people want at any given moment is (or should be) overridden by constitutional principles that thwart that desire. Democracy is a political system in which leaders are accountable to the people; constitutionalism is a political system in which leaders and the people together are additionally accountable within a system of constitutional constraint to uphold basic values that transcend the moment. Democracy and constitutionalism may come into conflict when publics fail in their constitutional obligations and elections produce a majority for unconstitutional change. Or the tensions between constitutionalism and democracy may create a crisis when elites offer choices to democratic publics that put liberalism on the line. Legalistic autocrats know this and use a simplistic idea of democracy—what any particular election happens to have produced—to rail against any constitutional constraint that stands in the way of what the people electorate said they wanted. The end result when such a ploy succeeds is simple majoritarianism, which can lead quickly to illiberalism. Of course, the tension between democracy and constitutionalism can be also resolved in a liberal manner.

Democratic constitutionalism resolves the tension between democracy and constitutionalism by baking into constitutionalism the requirement of a *self-sustaining democracy*, a system in which the people can *continue over time* choosing their leaders, holding them to account, and rotating power when leaders disappoint.⁴² The temporary frustration of a democratic majority in the name of a longer-term commitment to ensuring that democratic majorities can continue to choose their leaders into the future can be justified by taking the dignity and liberty of individuals—including minorities now, as well as future persons later—as central obligations of constitutional governance.⁴³ Short-term democratic frustration can be justified in the name of providing longer-term democratic guarantees.

⁴² For a similar argument, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 101–04, 116–20 (Harvard 1980) (justifying judicial review as necessary to reinforce democratic representation and the equality of the vote on which it should rely).

⁴³ See id at 101–04.

In its simplest form, a constitutional commitment to self-sustaining democracy prohibits an elected leader from simply abolishing future elections. In its more complicated form, a constitutional commitment to self-sustaining democracy requires that leaders be prohibited from hampering the institutional prerequisites for free and fair elections, among which are a pluralistic media, a range of effective parties, an independent judiciary, recognition of a legitimate and loyal opposition, neutral election officials, a system of representation that does not unduly dilute the powers of minorities, and legally accountable police and security services, as well as a free and active civil society—all of which should have constitutional protection for a democracy to be considered self-sustaining. In its even more substantive varieties, democratic constitutionalism is bound to honor what democratic publics *should* want if they were able to follow liberal theoretical commitments through from beginning to logical end point.⁴⁴ Starting from liberal premises, it is possible to construct the arguments for both constitutionalism and democracy together.

Liberal constitutionalism is democracy reinforcing because it binds all branches of government to two forms of constitutional constraint: (1) requirements that the state protect and defend the dignity and liberty of individuals so that they may sustain, among other things, the capacities to be democratic citizens; and (2) requirements that all sources of public power be subject to binding legal checks that, among other things, ensure that leaders stay within legal limits and guarantee the orderly rotation of leadership in response to shifting democratic majorities. If democratic constitutionalism ensures that the continued responsiveness of leadership to electoral choice remains a higher-order value such that the winner of an individual election cannot displace it, then liberal constitutionalism sustains the institutional channels through these choices as they occur and are translated into state action, and it provides continuing guarantees that the dignity and liberty of electoral and other minorities are accorded respect and protection. Because liberalism plays such a large role in this story of constitutional hijacking, it is worth recalling what liberalism is and is not. I use the term “liberal” as a description of a family of political philosophies, which does not mean—as it does in everyday speech in America—that politicians are, or should be, on the Left. Liberalism grows from the Enlightenment struggle for the

⁴⁴ See John Rawls, *A Theory of Justice* 195–200 (Belknap 1971) (defending a specific set of political values that liberals should want, among which are liberty and equality, and specific ways of reconciling the conflicts between the two).

recognition of the rights of individuals, including their right to be governed under self-limiting and checked authority, authority that has as its normative touchstone legitimation through democratic means.⁴⁵ The era of democratic and liberal constitutionalism began in the late seventeenth and early eighteenth century in political thought, picked up normative steam in actually existing politics with the birth of self-made government in the French and American Revolutions, was the aspiration behind many failed efforts to cast aside monarchies in the nineteenth and early twentieth centuries, and became normatively dominant in the “First World” after World War II.⁴⁶ With the collapse of the Soviet Union (the “Second World” against which the “First World” had defined itself) and with the emergence of democratic governments first in Latin America and then in Africa, liberal and democratic constitutionalism has become the normative model for virtually all states emerging from autocratic rule.⁴⁷ Liberalism as a governing political philosophy has both left and right variants, but it can be identified by its core commitments to the dignity and liberty of individuals and their democratic governance by self-limiting and accountable political power. I use “liberal” in this sense throughout this Essay. The destruction of liberalism in nominally democratic and constitutional governments is a big deal.

Liberalism animated the “rise of world constitutionalism.”⁴⁸ After the waves of democratization that started in the 1970s, liberal and democratic constitutionalism came to be taken for granted as the end point of the evolutionary trajectory of the modern state.⁴⁹ Holding elections, writing constitutions, guaranteeing the integrity of these constitutions through judicial review, establishing the multi-institutional protection of rights, and ensuring checked and balanced powers of government became such an automatic script for new democracies that “the end of history” seemed to have arrived.⁵⁰ Francis Fukuyama gave voice to the

⁴⁵ See Alan Ryan, *The Making of Modern Liberalism* 23–38 (Princeton 2012).

⁴⁶ See generally Kim Lane Scheppele, *The Agendas of Comparative Constitutionalism*, 13 L & Cts 5 (Spring 2003).

⁴⁷ See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va L Rev 771, 772 (1997).

⁴⁸ Id.

⁴⁹ See Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* 3–15 (Johns Hopkins 1996) (describing the process of the consolidation of democratic states through three waves of democratization in Southern Europe, Latin America, and then Eastern Europe, though admitting that these new democracies might at some point break down).

⁵⁰ Francis Fukuyama, *The End of History?*, 16 Natl Interest 3, 3–4 (Summer 1989). Fukuyama’s essay seems like such a touchstone of this new era because it captured a

view that liberal and democratic constitutionalism was “the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”⁵¹ And there was no turning back. The associated political science concept of the “consolidated democracy” cooked into its definition that democracy would be “the only game in town.”⁵²

And so it seemed, after so many authoritarian regimes were rejected in the last decades of the twentieth century, that democratic and liberal constitutionalism was the fate of the world. *Democratic* constitutionalism honored democracy by channeling it through institutions that would enable it to be self-sustaining. *Liberal* constitutionalism honored the rights of individuals by setting limits on what governments could do in the name of majorities and requiring that the institutions of a democratic state remain accountable and limited. Democratic and liberal constitutionalism put democratic electorates in charge of their own destiny, with political power controlled and checked in ways that would guarantee the continued respect for individuals and their ideas about self-governance.

Until recently, illiberal leaders rejected liberalism, constitutionalism, and democracy as a package. The classic twentieth-century dictators opposed “liberal democracy” in favor of invocations of “peoples’ democracies” steered by a “vanguard party.”⁵³ Some encouraged the belief that they alone could channel “the people,”

widespread sense that the one true model of government had arrived, a model that guaranteed human freedom. But in saying this, Fukuyama repeated a theme that had been devised and refined throughout the Enlightenment, starting with Kant’s positing of freedom as existing outside of time, through Hegel’s belief that freedom existed at the end of history, through Marx’s mirror-image belief that freedom lay at the end of a process of historical class struggle. Continental political thought was long animated by the belief that history could be described by a narrative of progress, at the end of which was human freedom. See John McCumber, *Time and Philosophy: A History of Continental Thought* 19–21, 46–49, 57–76 (Routledge 2003). It seemed to many observers in 1989 that this moment had actually arrived despite its always having been a fictional construction.

⁵¹ Fukuyama, 16 *Natl Interest* at 4 (cited in note 50).

⁵² Linz and Stepan, *Problems of Democratic Transition and Consolidation* at 5 (cited in note 49).

⁵³ Vladimir Lenin developed the idea of the vanguard party and called his preferred form of government Social Democracy. See Vladimir Lenin, *What Is to Be Done?* *23, 55, 70–81 (Marxists Internet Archive 1902) (Chris Russell, ed), archived at <http://perma.cc/7XFU-R5PE>. The term “people’s democracies” replaced Lenin’s term after World War II as the field of scientific communism became a school subject in Soviet-inflected states. For one early statement of its tenets, see generally *The Character of a “People’s Democracy,”* 28 *Foreign Aff* 143 (1949).

surrounded by adoring masses because they were self-evidently articulating the popular will.⁵⁴ There was no need for free and fair elections when the people spoke either through a vanguard party representing their interests or through a leader who was their emanation. In the name of “the people,” dictators openly engaged in mass human-rights violations to remove enemies. They attacked constitutionalism and its valorization of self-limiting government power.⁵⁵

Political orientation in such a black-and-white world used to be easy. Liberals were in favor of constitutionalism and democracy, and illiberals were against both. One could therefore reliably guess that a democratic and constitutional government would necessarily be liberal in practice. But that is precisely what autocratic legalism changes.

It has been said that hypocrisy is the tribute that vice pays to virtue,⁵⁶ so it was only a matter of time before the normative consensus around liberal and democratic constitutionalism fell under the sway of new and clever leaders who embraced the outer appearances of both democracy and constitutionalism while hollowing out their liberal content. The new legalistic autocrats enthusiastically support elections and use their electoral victories

⁵⁴ Young theologian Dietrich Bonhoeffer coined the term *Führer Princip* to characterize Adolf Hitler’s hold on the German public. In a radio address on February 1, 1933, only two days after Hitler became Chancellor of Germany, Bonhoeffer spoke on “The Younger Generation’s Altered View of the Concept of *Führer*.” The radio broadcast was cut off in midstream by censors. The closest text we have to Bonhoeffer’s account of the *Führer Princip* is a draft that approximates the one read on the radio in which Bonhoeffer noted: “This leader, arising from the collective power of the people, now appears in the light as the one awaited by the people, the longed-for fulfillment of the meaning and power of the life of the Volk.” Dietrich Bonhoeffer, *The Führer and the Younger Generation*, in Carsten Nicolaisen and Ernst-Albert Scharffenorth, eds, 12 *Dietrich Bonhoeffer Works, Berlin: 1932–1933* 268, 278 (Fortress 2009).

⁵⁵ Professor Stephen Kotkin summarized Lenin’s views. Stephen Kotkin, 1 *Stalin: Paradoxes of Power, 1878–1928* 410 (Penguin 2014):

Lenin railed against the idea that every society was made up of multiple interests that deserved competitive political representation and balancing as naively inviting in the “wrong” interests (“bourgeois” or “petit bourgeois”). He repudiated any separation of powers among executive, legislative, and judicial branches as a bourgeois sham. He rejected the rule of law as an instrument of class domination, not a protection against the state. He dismissed the self-organization of society to hold the state in check. The upshot was a brutal intensification of tsarism’s many debilitating features: emasculation of parliament, metastasizing of parasitic state functionaries, persecution and shakedowns of private citizens and entrepreneurs—in short, unaccountable executive power, which was vastly enhanced in its grim arbitrariness by a radiant ideology of social justice and progress.

⁵⁶ The maxim is from François duc de La Rochefoucauld, *The Maxims of La Rochefoucauld* 73 (Random House 1959) (Louis Kronenberger, trans).

to legitimate their legal reforms. They use constitutional change as their preferred vehicle for achieving the unified domination of all of the institutions of state. Like the hypocrite, the legalistic autocrats befuddle their critics by pretending to support many of the same values their critics do. And, like the hypocrite's misleading statements, their deployment of public values is meant to disguise that they intend just the opposite.

Prime Minister Orbán in Hungary may be perhaps the least hypocritical among the new legalistic autocrats because he has openly embraced the "illiberal state,"⁵⁷ but President Putin in Russia, President Erdoğan in Turkey, Jarosław Kaczyński in Poland, and President Chávez in Venezuela share a family resemblance with Orbán and his embrace of constitutional forms and democratic legitimation to hide something more deeply illiberal. They, too, insist that the majorities—real or apparent—that brought them to power can justify anything that they do, that minority rights merely reflect illegitimate political correctness, that checked and balanced powers give unwarranted strength to their opponents who (after all) were losers, and that constitutional accountability and limited government are unnecessary when so much has to be done. Rather than rejecting the language of constitutionalism and democracy in the name of a grand ideology as their authoritarian forebears did, the new legalistic autocrats embrace constitutional and democratic language while skipping any commitment to the liberal values that gave meaning to those words.

Instead of operating in the world of liberalism, then, autocratic legalists operate in the world of legalism. Liberal, democratic constitutionalism as a normative political theory is committed to the protection of rights, to checked power, to the defense of the rule of law, and to liberal values of toleration, pluralism, and equality. By contrast, legalism's requirements are simply formal: law meets a positivist standard for enactment as a technical matter when it follows the rules laid down, regardless of the content

⁵⁷ Csaba Tóth, *Full Text of Viktor Orbán's Speech at Băile Tușnad (Tusnádfürdő) of 26 July 2014* (Budapest Beacon, July 29, 2014), archived at <http://perma.cc/2N4Q-5N35>:

[The] Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead.

or value commitments of those laws.⁵⁸ Laws that meet the test of legalism are enacted according to law; laws that meet the test of constitutionalism must substantively comply with the principles of a liberal legal order. When legality undermines constitutionalism, it is because the values of the new laws have superseded the values of constitutionalism rather than the other way around, as constitutionalism itself requires. The cure for laws that violate constitutional values is to nullify them as unconstitutional, which is one reason why some of the autocratic legalists begin their power grabs by disabling constitutional courts.⁵⁹ But even when legalism undermines constitutionalism, it provides a backhanded tribute to the very constitutionalism it undermines. If making laws in a proper way were not so important for generating political legitimacy, the autocrats would not have bothered being so legalistic. Instead, they are trying to capitalize on the normative force of formal constitutional procedures in order to justify their actions.

To maintain liberal, democratic constitutionalism, however, a constitutional system must be able to separate the rules of the game from the game, so constitutional structures themselves must be protected outside the playing field of normal politics. There are many ways to do this—for example, creating high-bar amendment rules for constitutions,⁶⁰ entrenching strong forms of

⁵⁸ Perhaps the best account of legal positivism and its limits can be found in the Hart-Fuller debate of 1958. See generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv L Rev 593 (1957) (defending the insistence of positivist jurisprudence to distinguish the law as it is from the law as it should be); Lon L. Fuller, *Positivism and Fidelity to Law—a Reply to Professor Hart*, 71 Harv L Rev 630 (1957) (criticizing Hart's distinction of what the law is and what the law ought to be).

⁵⁹ The constitutional court was the first target in both Hungary and Poland. See notes 24–25 and accompanying text. See also Pech and Scheppele, *Illiberalism Within* at *3–4 (cited in note 23).

⁶⁰ A surprising number of constitutions feature “eternity clauses” that prevent certain features from ever being amended. See Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 5–7 (Oxford 2017) (describing various kinds of clauses that themselves restrict how constitutions can be amended, leading to the phenomenon of the unconstitutional constitutional amendment). But at a minimum, constitutional amendment typically requires supermajorities, time delays, and other rules designed to slow down and make more difficult the process of changing constitutional norms. Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 Wake Forest L Rev 913, 922–23 (2014).

judicial review,⁶¹ or nurturing a political culture that keeps politics within bounds.⁶² Within the purview of liberal, democratic constitutionalism, democratically elected leaders may not legitimately attack these constraints, even citing a democratic mandate, unless supermajorities over a sustained period support the changes and respect the views of those who disagree.⁶³

In what I have just argued, however, the careful reader will have noticed a certain lack of specificity about what precise norms and institutions a liberal constitutional democracy must contain. Instead, you will find a proliferation of versions of what a liberal constitutional democracy could be. It is fiendishly difficult to come up with a one-size-fits-all account of liberal constitutional democracy that has concrete purchase when one considers actually existing constitutional orders. There are many variants of the phenomenon with very different institutional and legal specifications. The United Kingdom has traditionally had little separation of powers, with the Parliament (itself not entirely democratically elected) not only exercising control over the functional executive but also having the last word against the intrusions of courts.⁶⁴ The United States has rather a lot of separation of powers, with an elected president and separate electoral bases for each house of Congress, accompanied by strong judicial review.⁶⁵ And yet both the United Kingdom and the United States are liberal, constitutional democracies. The variation extends to rights: Germany famously and constitutionally criminalizes not only hate speech but also Holocaust denial, while the US constitutionally defends both.⁶⁶ Italian constitutional law protects the statute of limitations as a substantive right while other European

⁶¹ Professor Mark Tushnet distinguishes between “strong form” judicial review that cannot be overridden by parliaments and “weak form” review that can. See Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* ix–xi, 18–42 (Princeton 2008).

⁶² “Political constitutionalism” describes a constitutional system that relies on political culture lodged in a supreme parliament to keep constitutional culture intact instead of relying on judicial review lodged in courts. See Marco Goldoni, *Constitutional Reasoning According to Political Constitutionalism: Comment on Richard Bellamy*, 14 Ger L J 1053, 1053–62 (2013).

⁶³ I have developed my theory of legitimate constitutional change. See generally Scheppele, *Unconstitutional Constituent Power* (cited in note 35).

⁶⁴ Not only does the prime minister have to gain and keep the confidence of the Parliament, but no court may nullify an act of the Westminster Parliament for unconstitutionality. See A.W. Heringa and Ph. Kiiver, *Constitutions Compared: An Introduction to Comparative Constitutional Law* 37–38 (Intersentia 3d ed 2012).

⁶⁵ *Id.* at 28–30.

⁶⁶ See Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 4 Ger L J 1, 11–14 (2003).

constitutional systems see time limits on the prosecution of crime as a procedural protection that can be overridden when the substance is sufficiently important.⁶⁷ And yet all are liberal, constitutional democracies. In the abstract, these systems share common values at some deeper level; in practice, they vary a great deal in the particular institutional forms as well as in the detailed constitutional doctrines that ensure the realization of these values, so much so that difference seems even larger than commonality up close. With regard to liberal, democratic constitutionalism, then, one might reverse the famous aphorism of Karl Marx: “All that is air melts once it becomes solid.”⁶⁸

Therein lies an opportunity, which the legalistic autocrats know full well. They have learned to speak the language of democratic constitutionalism while identifying its resonant-frequency points of tension and complexity in order to reverse its effects. When one points out that the legalistic autocrats have gutted liberalism in their defense of democracy, they point to examples in which some other constitutional democracy has done the same thing on some particular point without being attacked as a failed democratic or constitutional state. For example, the US engages in rampant gerrymandering,⁶⁹ yet few think it is not a democracy or a constitutional one at that.⁷⁰ Yet the Hungarian government

⁶⁷ See Federico Fabbrini and Oreste Pollicino, *Constitutional Identity in Italy: European Integration as the Fulfilment of the Constitution* *11–14 (European University Institute Working Papers, June 2017), archived at <http://perma.cc/DD29-WBBD> (describing the *Taricco* litigation at the European Court of Justice and the conflict between the Italian rules on statutes of limitations and European norms).

⁶⁸ The original quote is “All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses his real conditions of life, and his relations with his kind.” Karl Marx and Frederick Engels, *Manifesto of the Communist Party* (Marxist Internet Archive, 2000) (Samuel Moore, trans), archived at <http://perma.cc/526D-9ZHK>.

⁶⁹ See Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 *Stan L Rev* 1263, 1267–69 (2016).

⁷⁰ Elections are, of course, flawed. See Office for Democratic Institutions and Human Rights, *United States of America—General Election, 8 November 2016: Statement of Preliminary Findings and Conclusions* *1 (Nov 9, 2016), archived at <http://perma.cc/5XKY-M2PL>:

The 8 November general elections were highly competitive and demonstrated commitment to fundamental freedoms of expression, assembly and association. The presidential campaign was characterized by harsh personal attacks, as well as intolerant rhetoric by one candidate. Diverse media coverage allowed voters to make an informed choice. Recent legal changes and decisions on technical aspects of the electoral process were often motivated by partisan interests, adding undue obstacles for voters. Suffrage rights are not guaranteed for all citizens, leaving sections of the population without the right to vote. . . . While districts generally ensure equality of the vote, many [Election Observer Mission] interlocutors reiterated longstanding concerns that redistricting is a largely partisan

gerrymandered the whole country before the 2014 election and also rewrote the whole system of election rules that appear to mimic those rules in good democracies.⁷¹ The overall result was to rig the election so that the governing party could maintain its two-thirds parliamentary supermajority on an even smaller number of the votes,⁷² which made Hungary more autocratic than democratic.

Worse yet, the legalistic autocrats may be right about the logic of comparison. They can point to the one feature they copied from a good country to bad effect while omitting from their reforms the supporting features that the other system used to compensate for the flawed feature they borrowed. Yes, the United States engages in gerrymandering, but it does so for national elections in fifty different state processes (rather than in the whole country at once), with a requirement of near-equality in district sizes (unless one of a few compelling reasons to deviate can be demonstrated). These rules provide some limits to gerrymandering,⁷³ backed by some judicial review to rein in most egregious cases.⁷⁴ Yes, the Germans have wide variation in the size of their electoral districts, permitting up to 15 percent variation above and below the mean district size, but strict proportional representation in the distribution of the party list seats in the parliament

process, which has led to a number of uncompetitive contests. In these elections, 28 candidates for the House ran unopposed.

⁷¹ See Scheppele, *Hungary, an Election in Question, Part 2* (cited in note 11).

⁷² “Orbán’s two-thirds victory was achieved through legal smoke and mirrors. Legal. But smoke and mirrors.” Kim Lane Scheppele, Miklós Bánkuti, and Zoltán Réti, *Legal but Not Fair (Hungary)* (NY Times, Apr 13, 2014), archived at <http://perma.cc/WL22-NQ5M>.

⁷³ The Supreme Court had occasion to revisit the equal-district-size standard recently in the context of reviewing a nonpartisan commission’s plan. See *Harris v Arizona Independent Redistricting Commission*, 136 S Ct 1301, 1306 (2014) (citations omitted):

The Fourteenth Amendment’s Equal Protection Clause requires States to “make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as is practicable.” . . . The Constitution, however, does not demand mathematical perfection. In determining what is “practicable,” we have recognized that the Constitution permits deviation when it is justified by “legitimate considerations incident to the effectuation of a rational state policy.” . . . In related contexts, we have made clear that in addition to the “traditional districting principles such as compactness [and] contiguity,” . . . those legitimate considerations can include a state interest in maintaining the integrity of political subdivisions, . . . or the competitive balance among political parties.

⁷⁴ See Wang, 68 Stan L Rev at 1270–80 (cited in note 69). As I write, the US Supreme Court has before it *Gill v Whitford*, a case that raises the question of how overt and skewed partisan gerrymandering can be before it becomes unconstitutional. For a summary of the arguments presented to the Court, see Amy Howe, *Argument Preview: The Justices Tackle Partisan Gerrymandering Again* (SCOTUSblog, Sept 26, 2017), archived at <http://perma.cc/3SDQ-Z6DT>.

makes the overall result match the national distribution of the public support for parties.⁷⁵ If a legalistic autocrat strings together US gerrymandering with the permitted German variation in district sizes, however, then he can steal an election.⁷⁶ Legalistic autocrats become adept at culling the worst practices from liberal democracies to create something illiberal and monstrous when stitched together.⁷⁷

In addition to adopting the worst practices from tolerably good systems, autocratic legalists have learned how to undermine liberalism itself by pressing on the points of tension between different theories of liberalism. Liberal values do indeed at times come into conflict. For example, some legalistic autocrats defend their own anti-liberal views by arguing that their opponents believe in illiberal political correctness, while only they defend truly liberal free speech. For example, Orbán perfected this sort of argument to claim the high ground on rights: “[P]olitical correctness transformed the European Union into a kind of royal court where everybody must behave well. . . . Liberalism today no longer stands for freedom but for political correctness, which is antithetical to freedom.”⁷⁸

In this, Orbán is not alone. His fellow legalistic autocrats sing the same song.⁷⁹ They mistake the conflict between two values—

⁷⁵ See *Germany: Delimiting Districts in a Mixed Member Proportional Electoral System* (ACE Electoral Knowledge Network, 2012), archived at <http://perma.cc/72MR-H852>.

⁷⁶ See note 11 and accompanying text. See also Scheppele, *Hungary: An Election in Question, Part 1* (cited in note 11).

⁷⁷ See generally Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 *Governance* 559 (2013).

⁷⁸ Éva Balogh, *Trump and Orbán on Political Correctness* (Hungarian Spectrum, Dec 2, 2016), archived at <http://perma.cc/76NF-DXGL>. Éva Balogh usefully summarized the evolution of Orbán’s uses of “political correctness”: In 2012, Orbán blamed political correctness for blocking discussion of “things that are essential to the very core of our civilization.” Then a year later, he said that “the long-term decline of Europe” could not be “debated openly” due to political correctness. By 2014, Orbán identified political correctness with liberal democracy, which he said was “a political system riddled with taboos.” In 2015, he said that political correctness was responsible for Europe’s inability to defend itself against the incoming wave of refugees. And then he claimed that the entire Hungarian public was politically incorrect: “The Hungarian people by nature are politically incorrect, i.e., they haven’t lost their sanity. They are not interested in bullshit [duma], they are interested in facts. They want results, not theories.” *Id.*

⁷⁹ One of the Kremlin’s favorite journalists, Dmitry Kiselev, recently wrote: “East and west appear to be trading places. In Russia we now take full advantage of freedom of speech, whereas in the west political correctness, or political expediency in the name of security, have become arguments against freedom of speech.” Dmitry Kiselev, *Russia and the West Are Trading Places on Freedom of Speech* (The Guardian, Apr 10, 2014), archived at <http://perma.cc/GK6K-Q8XF>.

freedom of speech and respect for the dignity of others—for a fight between liberalism and illiberalism.

Autocratic legalists claim their legitimacy from having won elections (as constitutional liberals do), but then autocratic legalists leverage the power of their resulting parliamentary majorities to silence the opposition. The Polish government elected in 2015 has claimed it is entitled to rid all branches of government of the “postcommunists” (where “postcommunist” identifies the center-left opposition and is, in their usage, a code for *former* communists).⁸⁰ They even have a campaign against the previous prime minister as a postcommunist traitor, despite the fact that he is president of the European Council, an unlikely position for a dangerous communist.⁸¹ We’ve seen a similar logic as the advocates of Brexit (known as Brexiteers in the United Kingdom) have used some of the same strategies as the autocratic legalists by invoking the results of a deeply unclear plebiscite to prevent meaningful debate either about what the first plebiscite meant or about whether a second plebiscite would be a worthwhile endeavor, claiming the superior democratic authenticity of the first and shouting down all who have the temerity to disagree.⁸²

When they rewrite constitutions, autocratic legalists invoke their electoral (and therefore, in their view, democratic) legitimacy as they create an illiberal state. They develop a constitution-making process justified in the name of the majority, without including any views of the minority, and voilà! A new constitutional

⁸⁰ *Poland’s Government Is Putting the Courts under Its Control* (The Economist, July 22, 2017), archived at <http://perma.cc/7E5W-6MKV>.

⁸¹ *Poland Has Reinforced Its Position as Europe’s Problem Child* (The Economist, Mar 16, 2017), archived at <http://perma.cc/8UAH-4FP2>.

⁸² For example, the pro-Brexit online magazine *Spiked* minced no words. Citing George Orwell on language, the deputy editor of the journal began his article attacking the British proponents of a second Brexit referendum: “We can’t let the enemies of democracy pose as its guardians.” Tom Slater, *No, a Second Referendum Would Not Be More Democratic* (Spiked, Aug 10, 2017), archived at <http://perma.cc/98GF-9QCP>. Critics of the Polish PiS government have been similarly attacked when the government asserts that the democratic public has spoken through the last election and therefore no one may question what the public wanted. For example, according to the president of a major civil-society foundation in Poland, speaking of the PiS government: “Their attitude is that every four years there are elections, but afterwards the party that has won the election should have full power, practically unlimited.” Rick Lyman and Joanna Berendt, *As Poland Lurches to Right, Many in Europe Look on in Alarm* (NY Times, Dec 14, 2015), online at http://www.nytimes.com/2015/12/15/world/europe/poland-law-and-justice-party-jaroslav-kaczynski.html?_r=0 (visited Oct 30, 2017) (Perma archive unavailable).

order is born. Orbán, Chávez, and Correa all wrote new constitutions soon after they took office.⁸³ Erdoğan waited years and amassed power gradually through a series of constitutional referenda, amending the Turkish constitution repeatedly to steadily concentrate executive power in a newly refurbished presidency. Finally, Erdoğan put to a popular referendum in April 2017 a set of constitutional amendments that consolidated immense power in the presidency whose incumbent would have the ability to stay in office until 2029, and perhaps even to 2034.⁸⁴ The 2017 referendum proposals eliminated the position of prime minister and gave all executive power to the president, including the power to issue wide-ranging decrees with legal effect.⁸⁵ The power of the parliament to act in cases when the president would object to its direction was also reduced, and the amendments also bolstered the president's legal ability to control the appointment of judges.⁸⁶ Erdoğan's constitutional program passed by 51 percent to 49 percent.⁸⁷ The autocratic legalists often make a giant public show of being governed by and governing within the law, changing the law and even the constitution itself with impeccably legal (if illiberal) methods. But underneath the legal reforms carried out in the name of democracy is the illiberal sensibility of the autocrat and the steady consolidation of power in fewer and fewer hands.

As this evidence reveals, liberal constitutionalism becomes endangered when the rules of the game are themselves gamed. This can occur, and often does, even before a charismatic leader's campaign to sweep away "all that" becomes powerful enough to win elections. Alexis de Tocqueville's explanation of the French Revolution is generalizable: for a revolution to topple the *ancien régime*, the *ancien régime* must have already been hollowed out from within.⁸⁸ A revolution, in Tocqueville's account, is therefore the final and not the first stage of political transformation. The modern legalistic autocrat who can quickly disable a liberal, democratic, constitutionalist political order is generally simply

⁸³ See Scheppele, *Understanding Hungary's Constitutional Revolution* at 111–13 (cited in note 9); Landau, 47 UC Davis L Rev at 203 (cited in note 29); de la Torre, 24 J Democracy at 34 (cited in note 33).

⁸⁴ See Sinan Ekim and Kemal Kirişci, *The Turkish Constitutional Referendum, Explained* (Brookings, Apr 13, 2017), archived at <http://perma.cc/8KAL-UR4G>.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ See Kareem Shaheen, *Erdoğan Clinches Victory in Turkish Constitutional Referendum* (The Guardian, Apr 16, 2017), archived at <http://perma.cc/UX5P-V9CW>.

⁸⁸ See Jon Elster, ed, *Tocqueville: The Ancien Régime and the French Revolution* 170–85 (Cambridge 2011) (Arthur Goldhammer, trans).

taking in the political harvest others have planted. Or, he is taking advantage of structural weaknesses that exist in many complex constitutional systems that give him the possibility of exploiting contradictions in the system for his own benefit. Bringing down a healthy constitutional, democratic, liberal order is not so easy unless the system is already weakened before the attempt.

Revolutions in the name of democracy can sweep away desiccated illiberal constitutional orders, as occurred in the late eighteenth-century revolutions. But sometimes revolutions in the name of democracy can sweep away desiccated liberal constitutional orders, as well. Trying to stop the masses with appeals to constitutionalism does not always work because the restraints of liberalism are not always democratically appealing when there seems to be a crisis—of events, of confidence, of an approaching enemy. Democracy without liberal constitutional constraint can degenerate quickly into pure majoritarianism, in which the rights of minorities are not recognized and in which leaders convert transient majorities into permanent authorizations to rule. Illiberal revolutions can be very powerful. They can destroy fragile liberal and constitutional principles in a spasm of apparent democracy.

Within the general phenomenon of democratic decline, then, some cases are particularly challenging because they pit a purely majoritarian conception of democracy harnessed to formally legal change against a more complex and often internally contradictory liberal constitutional order. The new autocrats, to be sure, are not liberals. Their anti-liberalism can come from the right (Orbán in Hungary and Kaczyński in Poland), from the left (Chávez and his successor Nicolás Maduro in Venezuela, and Correa in Ecuador), and from some combination of religiosity and nationalism (Putin in Russia and Erdoğan in Turkey). Regardless of the source of their anti-liberal political views, however, these new autocrats are similar in that they use their democratic mandates to dismantle constitutional constraints. Professor Jan-Werner Müller has called this phenomenon “constitutional capture”⁸⁹ because the new autocrats precisely target the features of the constitutional order that will ultimately stand in the way of their domination of the political space.

⁸⁹ According to Müller, “Constitutional capture aims at systematically weakening checks and balances and, in the extreme case, making genuine changes in power exceedingly difficult.” Jan-Werner Müller, *Rising to the Challenge of Constitutional Capture* (Eurozine, Mar 21, 2014), archived at <http://perma.cc/NWB7-ZVKW>.

Because the legalistic autocrats deploy the rhetoric of democracy and the methods of the law, observers find it hard to see the danger until it is too late. The next Part turns to the question of how we might identify legalistic autocrats in time to limit the damage they can do.

III. THE TACTICS OF THE LEGAL AUTOCRATS

How do the new autocrats get away with transforming liberal democratic constitutionalism into pure majoritarian legalism? This Part shows precisely how the new autocrats hide what they are doing under the cover of conforming rhetoric and how they use liberal methods to achieve their illiberal results. The combination disarms their critics and allows them to entrench their rule.

The first trick of the new autocrats involves reliance on stick-figure stereotypes about illiberalism that are in people's heads. The catastrophic twentieth-century authoritarianisms are customarily portrayed in particular ways, and many people are educated into these particular narratives of what counts as a danger signal that authoritarianism is on the horizon. Legalistic autocrats then do something very different to consolidate their power so that they can say that they are not authoritarians. In a world in which the villains of the twentieth century come prepackaged in particular narratives, the new villains of the twenty-first century go out of their way to avoid the unflattering comparison.

There's the Hitler scenario:⁹⁰ A leader motivated by an overwhelming ideology comes to power and arranges to have a state of emergency declared, perhaps because of a transformative event (for example, the Reichstag fire) that the leader's supporters may well have staged.⁹¹ The emergency provides cover for disabling the guardians at the barricades of constitutionalism. Rights are suspended and parliamentary power usurped. Paramilitaries take over from the normal civilian institutions of state.⁹² The leader blames a domestic enemy and soon scapegoats part of the population as an excuse for depriving that group of its rights.⁹³

⁹⁰ The scenario is summarized from the narrative in Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 29–74 (Transaction 2002) (originally published 1948) (blaming Hitler's rise to power on the unconstrained use of emergency powers).

⁹¹ *How Hitler Consolidated Power 1933–1934* (BBC, 2014), archived at <http://perma.cc/BY25-AU92>.

⁹² See Rossiter, *Constitutional Dictatorship* at 43 (cited in note 90).

⁹³ *Id.* at 61–62.

The threat of internal enemies mobilizes the rest of the population to withdraw support from their fellow citizens, who then become vulnerable to even more extreme rights violations. Eventually, the leader leads the country into war.⁹⁴ The war provides cover for genocide and other massive violations of human rights, portrayed as the reason why the authoritarian wanted power in the first place.

Then there's the Stalin scenario: A leader motivated by another overwhelming ideology fights his way to the top using "ideology, trickery, and violence."⁹⁵ He ruthlessly sidelines all rivals; he consolidates control first over the Party, then over the country.⁹⁶ The entrenchment of his regime kills millions while the imprisonment, torture, and execution of dissidents occurs on a truly vast scale.⁹⁷ He destroys the preexisting institutions and governs ruthlessly without limit by capturing the state for repressive purposes.⁹⁸ Freedom is extinguished, and rights are honored only in the breach.

In both stick-figure scenarios, the concentration of power is brutal, complete, and completely obvious. Both narratives feature leaders who justify what they are doing in the name of a strong authoritarian ideology. The onset of authoritarianism is accompanied by the violent takeover and destruction of the previous political institutions. The agents of destruction are irregular paramilitaries, secret police, and party organs who come from outside the system to crush it. Authoritarian leaders reduce those around them to puppets, brook no dissent, and leave no opposition standing. They monopolize power and destroy all semblances of pluralism as well as all claims to rights. Authoritarianism's signature is the violation of human rights on a mass scale. When these things happen, you know you are in trouble.

Of course, history is more complicated than either scenario, and that is precisely the point. The bite-sized takeaway lessons

⁹⁴ Id at 31–32, 49–50. See also *Who Was to Blame for WW2?* (BBC, 2014), archived at <http://perma.cc/CVF4-CCNU>.

⁹⁵ This narrative draws from the popular summary provided by the BBC in its history program for British schools. See *Stalin's Takeover of Power* *3 (BBC, 2014), archived at <http://perma.cc/8TVC-XABG>.

⁹⁶ See id at *1–2.

⁹⁷ See *Stalin—Purges and Praises* *1 (BBC, 2014), archived at <http://perma.cc/DS3G-KQ86>.

⁹⁸ *Stalin—Collectivisation* (BBC), archived at <http://perma.cc/MSK5-GDCF>; *Stalin—the Five-Year Plans* (BBC), archived at <http://perma.cc/KXR9-D57H>; *Stalin—Monster or Necessary Evil?* (BBC), archived at <http://perma.cc/383D-JMAD>.

from the two signature authoritarianisms of the twentieth century constitute the modern repertoire of signals that the public will recognize as dangerous. These standard lessons learned from a complex history are often quite simple, and that leaves a lot of room to repeat history using some of the less well-known subplots. The bite-sized takeaway lessons from the two signature authoritarians of the twentieth century constitute the modern repertoire of signals that the public will recognize as dangerous. The problem is that people overlearn the simple lessons and believe that unless those precise things happen, the danger is not very great.

The new autocrats know this and avoid repeating those well-known scenarios that will attract immediate and overwhelming reaction. They take a kinder, gentler, but, in the end, also destructive path. They masquerade as democrats and govern in the name of their democratic mandates.⁹⁹ They don't destroy state institutions; they repurpose rather than abolish the institutions they inherited.¹⁰⁰ Their weapons are laws, constitutional revision, and

⁹⁹ As President Erdoğan himself said on the one-year anniversary of the attempted coup that caused him to introduce an enduring state of emergency:

Since its rise to power in 2002, the Justice and Development party (AKP), which I lead, has implemented reforms to empower elected officials at the expense of certain groups within the military. In doing so we have been able to restore the Turkish people's confidence in public institutions. . . . This connection between the people and their government is the ultimate measure of our democracy's resilience, and the strongest guarantee of its survival.

Recep Tayyip Erdoğan, *Turkey, a Year after the Attempted Coup, Is Defending Democratic Values* (The Guardian, July 15, 2017), archived at <http://perma.cc/649S-KHDL>.

And then, without the slightest trace of irony, he added that the popular uprising against the coup-plotters was a sign that democracy worked: "The thwarting of the coup marked a turning point in the history of democracy; it will be a source of hope and inspiration for all peoples who live under dictators." *Id.*

¹⁰⁰ Prime Minister Orbán established control over the ordinary judiciary in Hungary by *creating* a new body, the National Judicial Office (NJO), to appoint, promote, demote, discipline, reassign, and dismiss judges. The NJO replaced the prior body, the National Judicial Council, with a name so similar that most people did not realize that the institution was wholly different. Moreover, despite the collective name, the new NJO consists of one person—the best friend of the prime minister's wife and the wife of the man who led the team that drafted the new constitution. Unless someone were watching very closely, nothing would have appeared to have changed even as the judicial selection process came under direct political control. For a description of these judicial reforms, see Kim Lane Scheppele, *First Let's Pick All the Judges* (NY Times, Mar 10, 2012), archived at <http://perma.cc/W57G-6ATF>. For condemnations of this arrangement, see generally International Bar Association's Human Rights Institute, *Courting Controversy: The Impact of Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary* (Sept 2012), archived at <http://perma.cc/5Z3P-SJXE>; Venice Commission, *Opinion on the Cardinal Acts on the Judiciary That Were Amended following the Adoption of Opinion CDL-AD(2012)001* (Oct 12–13, 2012), archived at <http://perma.cc/VFM4-4AC4>.

institutional reform.¹⁰¹ Their ideology is often flexible.¹⁰² And they leave just enough dissent in play that they appear to be tolerant. Instead of a scorched-earth policy that obliterates all opponents, one will find in these autocratically legalistic regimes a handful of small opposition newspapers, a few weak political parties, some government-friendly NGOs, and perhaps even a visible dissident or three (albeit always denigrated in the government-friendly media with compromising information—real or fake—so that hardly anyone can take these dissidents seriously).¹⁰³ There is no state of

¹⁰¹ In summer 2017, the PiS government in Poland launched an assault against the judiciary in a very legal manner, through passage of a package of laws in the parliament. The laws left intact all existing institutions, but removed all of their sitting occupants. See Anna Sledzinska-Simon, *The Polish Revolution* (cited in note 25). The first law gave the government the power to appoint presidents and vice presidents of all courts, dismissing all those currently in place. The second bill fired the entire bench of supreme court judges, plus the entire professional staff of the court, to give the government the power to appoint all new judges. Finally, the third bill fired everyone in the council that appoints judges, permitting the government to appoint its loyalists.

In the end, Polish President Andrzej Duda vetoed the two most controversial laws that would have had the effect of firing all of the supreme court justices at once and giving the government control over appointing authority for selecting new judges, but he signed the law that allowed the Justice Minister to fire all of the court presidents below the level of the supreme court. See Michał Broniatowski, *Polish President Andrzej Duda to Veto Controversial Court Laws* (Politico, July 24, 2017), archived at <http://perma.cc/BV36-7CLY>. Duda then countered with a draft law for capture of the supreme court that would result in only 40 percent of the supreme court being removed immediately. See Paul Flückiger, *Poland's Judicial Reform: Andrzej Duda's Rash Proposal and Pullback* (Deutsche Welle, Sept 25, 2017), archived at <http://perma.cc/N7QM-AVWK>. While it is clear that there is some division within the PiS party on the way to accomplish the takeover of the judiciary, the supreme court would not remain independent under any of the current proposals.

¹⁰² In fact, sometimes such leaders deny that they have any ideology. After President Trump's election in 2016, Orbán said:

The world has always benefited whenever it has managed to release itself from the captivity of currently dominant ideological trends In my view, this is what has happened just now in the United States. This also gives the rest of the Western world the chance to free itself from the captivity of ideologies, of political correctness, and of modes of thought and expression which are remote from reality: the chance to come back down to earth and see the world as it really is.

UK, Hungary Premiers Agree on Principle of Reciprocity (Hungary Today, Nov 10, 2016), archived at <http://perma.cc/WMJ4-LD7P>.

¹⁰³ Hungary has mastered the art of keeping just enough dissent and pluralism in play to not appear to be completely autocratic. But nonetheless democracy monitors have noticed. While the broadcast media are nearly completely controlled by the government and the largest circulation newspaper that printed news critical of the government was closed without warning in 2016, a few opposition newspapers survive. Freedom House now reports the Hungarian media scene as only “partly free.” *Freedom of the Press 2017: Hungary Profile* (Freedom House, 2017), archived at <http://perma.cc/5D65-7ZUJ>. Political parties that might challenge the Fidesz government are weak and disorganized, one reason why Freedom House demoted Hungary from the category of “consolidated democracy” to the category of “semi-consolidated democracy” in 2015, as all scores related to Hungary’s democratic health continue to decline precipitously. See *Nations in Transit 2015, Hungary*

emergency, no mass violation of traditional rights.¹⁰⁴ To the casual visitor who doesn't pay close attention, a country in the grips of an autocratic legalist looks perfectly normal. There are no tanks in the streets.

The new autocrats achieve the look of normality by steering clear of human-rights violations on a mass scale, at least those human rights that have been entrenched in international conventions and many national constitutions. Instead, the new autocrats eliminate their opponents by pressuring them differently: they drive their opponents out of the country rather than jail them, and they punish those who defy them through economic measures that might easily be confused with bad luck in free markets.¹⁰⁵

Country Profile (Freedom House, 2015), archived at <http://perma.cc/SJ7F-QCJR>; *Nations in Transit 2017, Hungary Country Profile* (Freedom House, 2017), archived at <http://perma.cc/6YSK-BW8W>. Civil-sector organizations critical of the Orbán government have been subjected to waves of attacks. See *Timeline of Governmental Attacks against Hungarian Civil Society Organisations* (Hungarian Helsinki Committee, Apr 7, 2017), archived at <http://perma.cc/E7CL-YTFU>. And yet, with all of these changes, Freedom House still ranks Hungary overall as a “free” country because it has maintained just enough of all of the key elements to keep its place in the highest category. *Freedom in the World 2017: Hungary Profile* (Freedom House, 2017), archived at <http://perma.cc/5FJD-PHL2>.

¹⁰⁴ That said, emergencies are not completely absent from the tools of governance in these legalistically autocratic states. Turkey declared a state of emergency after the 2016 attempted coup and remains in that state as I write in January 2018. See Gabriela Baczyńska, *Europe Rights Watchdog Says Turkey's Emergency Laws Go Too Far* (Reuters, Oct 6, 2017), archived at <http://perma.cc/Z94J-WU89>. Hungary declared a “migration state of emergency” in 2015 that remains in force and gives the police extra powers to search homes and create cordon zones, an emergency it keeps extending. *Hungary Extends State of Emergency Due to Migrant Crisis* (Star Tribune, Aug 30, 2017), archived at <http://perma.cc/A57C-CD3H>. Venezuela has resorted to a state of emergency as the political crisis under President Maduro has worsened. See *Venezuela Crisis: Maduro's State of Emergency 'Constitutional'* (BBC, May 20, 2016), archived at <http://perma.cc/FD5T-WCDA>. But in all of these cases, the states of emergency came late in the consolidation of power and was not one of the first tools used to put in place the new autocratic system.

¹⁰⁵ See, for example, Kim Lane Scheppele, *Hungary and the End of Politics* (The Nation, May 6, 2014), archived at <http://perma.cc/S9GZ-YJXG>:

Since Fidesz came to power, critics of the Hungarian government have been losing their jobs at an astonishing rate. The first to be fired were people who worked in the state sector. Jobs always change hands as governing parties come and go, but the civil service is typically protected from widespread political retaliation. Not so in Hungary. As one of its first acts in office in May 2010, the Fidesz government altered the labor law that applied to the civil service. Suddenly, state workers who once had substantial job protections could be fired for any reason—or no reason at all. The thousands of state workers who lost their jobs in the aftermath of this legal change were disproportionately those who opposed the governing party. . . . By May 2011, the state sector had been almost completely purged of opposition supporters. . . .

Since the first year of massive job losses, firings have spread beyond the state sector. Private businesses that sought government contracts were told in a whisper campaign that they had to purge all government opponents from their workforces in order to be eligible contractors. This rule applied to projects funded by

Opponents are fired from their jobs,¹⁰⁶ denied social benefits for technical reasons, and evicted from their buildings because of small and technical violations.¹⁰⁷ Owners of businesses that the government wants to seize in order to redistribute to its own allies are given offers that they cannot refuse.¹⁰⁸ None of these measures amount to serious rights violations because economic security, the right to housing, the right to operate a business free of government inspections, the right to a free university education, or the right to a basic income through either social welfare or pension programs are not rights one can successfully claim in most courts.¹⁰⁹ Instead, the rights recognized by constitutions and transnational human-rights instruments are the rights violated by the great twentieth-century authoritarians who engaged in

the [European Union] as much as to ones supported by Hungarian taxpayer money. Since roughly 50 percent of GDP is taken in and redistributed through the state in Hungary, either through public-sector employment or public contracts to private businesses, the insistence by the Orbán government that all private-sector businesses fire opposition supporters to make themselves eligible for state contracts spread the economic pain far beyond the boundaries of the state.

¹⁰⁶ See, for example, *id.*

¹⁰⁷ For example, in Russia, the European University of St. Petersburg was closed in a swarm of technicalities. See Fred Weir, *Why Is Someone Trying to Shutter One of Russia's Top Private Universities?* (Christian Science Monitor, Mar 28, 2017), archived at <http://perma.cc/S5WK-AXV7>:

Within weeks, 11 different agencies descended on the university to carry out snap inspections, and they logged 120 violations of various rules and regulations. None concerned the curriculum, and most were minor flaws in staff documentation, building code infractions, the lack of a stand displaying anti-alcohol information, and no fitness room for the staff. At the same time, the local real estate authority filed a lawsuit demanding cancellation of the university's rental permit over alleged failure to comply with some contract clauses.

¹⁰⁸ See, for example, Bálint Magyar, *Post-Communist Mafia State: The Case of Hungary* 185 (CEU 2016):

Businessmen familiar with economic life in Hungary say that Fidesz has gained control of three to four hundred private companies by force and blackmail since it came to power. . . . [A]n alarming phenomenon has descended upon the world of business activities, as the owners of prospering Hungarian businesses are approached by lawyers claiming affiliation to Fidesz, making an offer for the purchase of the company at a fraction of its real value, achieved often at the cost of decades of hard work. The stealing of these companies, structurally supported by the authorities can already mean a threat to family businesses with a turnover of a few hundred million forint, any downtown restaurant and better visited hotel among them. If the owner does not wish to give up their business with a major loss, the authorities soon make an appearance and make it impossible to manage with various measures. Whether the offer is accepted is only a matter of time.

¹⁰⁹ See Tushnet, *Weak Courts, Strong Rights* at 170–72 (cited in note 61) (arguing that weak rights are not guaranteed to be directly enforceable in court).

genocide, political killings, imprisonment without trial, incommunicado detention, torture, censorship, seizure of property without compensation, show trials, and searches of private homes.¹¹⁰

The new autocrats aim to capture and exercise unconstrained power, but they have realized that they don't need to annihilate their opponents to do so. Rather, the reverse applies. In keeping with their concern to maintain a legitimate public appearance, it is positively useful for the new autocrats to appear to have some democratic openness precisely so that they can claim that they are not authoritarians of the twentieth-century sort.¹¹¹ They therefore tolerate a weakened opposition and other democratic signs of life, such as a small critical press or a few opposition NGOs, to demonstrate they have not completely smothered the political environment with their autocracy.¹¹²

¹¹⁰ See Samuel Moyn, *The Last Utopia: Human Rights in History* 44–45 (Belknap 2010) (showing how the current conception of human rights emerged from a Cold War dynamic in which the signature violations of the Soviet Union were the primary target).

¹¹¹ See, for example, Dimitry Trenin, *Russia Is the House that Vladimir Putin Built—and He'll Never Abandon It* (The Guardian, Mar 27, 2017), archived at <http://perma.cc/KPM7-XMFF>:

An autocrat with the consent of the governed, Putin has preserved the essential personal freedoms that the Russian people first earned with the demise of the Communist system. People can worship and travel freely; Facebook and Twitter are essentially unrestricted; there are even a few tolerated media outlets overtly in opposition to the Kremlin. Political freedoms, however, are more tightly circumscribed, so as to leave no chance to potential “colour revolutionaries” or politically ambitious exiled oligarchs. For the bulk of the population, this matters little; the relatively few activists have a choice of taking it—or leaving.

¹¹² After detailing the methods through which the Fidesz Party in Hungary and the PiS Party in Poland managed to consolidate their hold over the major media outlets while leaving a few small venues for opposition views, Jakub Dymek and Zsolt Kapelner noted:

It is important to remember that all of this is happening not in far-away dictatorships or military autocracies. These are democratic countries, members of the European Union, that ostensibly maintain the same standards as the UK or the United States. Since the fall of communism, Poland in particular has presented itself as a beacon of democracy and poster child for market reforms. Its rapid backtracking on free expression reveals how quickly democracy can be hollowed out even as its formal structures remain in place. Press freedom in Hungary and Poland is suppressed not by decrees nor by threat of imprisonment or execution, but by financial machinations, legislative maneuvers, and political pressure . . .

The threat here is not so much that the propaganda's message takes root instantly, although its effects are notable. The “effectiveness” of these moves is measured more in how many can be fatigued into silence. The regime wins not just when there is majority support for its agenda, but when the majority lacks the interest, energy, or dedication to voice dissent . . . Illiberal governments triumph by making all media weaker, for their ultimate goal is to eliminate debate—not necessarily to win popular support.

Of course, it is a sign of progress that the new autocrats steer clear of mass human-rights violations and tolerate limited opposition; the human-rights movement has succeeded in many ways. But the new autocrats have found new pressure points to sideline their opponents that are clearly understood as coercive by those targeted but that are not protected by constitutional rights. New autocrats have learned that they can consolidate their power if they can simply get their opponents to give up and go away, or stay home and mind their own business. They don't need to imprison or kill those who object to autocracy; they simply need to get them to tolerate the diminished freedoms on offer.

The new autocrats will therefore not look like your father's authoritarians who want to smash the prior system in the name of an all-encompassing ideology of transformation. Portraying themselves as democratic constitutionalists is absolutely essential to their public legitimation; what is missing in the new democratic rhetoric is any respect for the basic tenets of liberalism. They have no respect for minorities, pluralism, or toleration. They do not believe that public power should be accountable or limited. In short, liberalism is gutted by the new autocrats while they leave the facades of constitutionalism and democracy in place. Election opponents may be harassed with nuisance criminal charges, but they do not wind up in jail, or at least not for long.¹¹³ Civil-society groups may be defunded, but they are not closed by the government.¹¹⁴ The press that supports the opposition is not censored, but it may be starved of advertising and then bought

Such subtle methods of oppression, manipulation, and domination are becoming the norm rather than the exception amid the nationalist and populist surge in Eastern Europe today.

Jakub Dymek and Zsolt Kapelner, *It Doesn't Take a Dictator to Smother a Free Press* (Dissent, May 3, 2017), archived at <http://perma.cc/D2B6-MWBV>.

¹¹³ See, for example, David M. Herszenhorn, *Aleksei Navalny, Putin Critic, Is Spared Prison in a Fraud Case, but His Brother Is Jailed* (NY Times, Dec 30, 2014), online at <http://www.nytimes.com/2014/12/31/world/europe/aleksei-navalny-convicted.html> (visited Sept 11, 2017) (Perma archive unavailable) (describing the Russian government's treatment of opposition figure Aleksei Navalny, who was jailed for failing to get permits for his demonstrations and was eventually charged with the more serious but unrelated crime of embezzlement; while he was given a suspended sentence in the end, his brother was arrested on apparently trumped-up charges, leading Navalny's supporters to charge that the Russian government was taking hostages).

¹¹⁴ See, for example, Aleksandra Eriksson, *Hungary and Poland Risk Losing €1bn in Norway Aid Row* (EU Observer, May 3, 2017), archived at <http://perma.cc/HMR6-ATKD> (describing Hungary's and Poland's efforts to divert European Economic Area grant funding from organizations supporting human rights, women, gay people, and the homeless to organizations that support the government).

out by oligarchs connected to the winners.¹¹⁵ The elections that keep the new autocrats in power are rigged in technical ways behind the scenes rather than through obvious tactics that can be spotted by observers, such as ballot-box stuffing.¹¹⁶ Through these nonviolent means, democracy is transformed into brute majoritarianism. The rigged elections—rigged in ways that election monitors cannot see—even prove that the public supports the autocrat!

What causes liberal constitutional democracies to fail? Tocqueville's diagnosis of what makes revolutions succeed is still apt: liberal constitutionalism must have been ill long before the disease became fatal, if it can be toppled so quickly. Critics can disagree about when the illness began and what caused it, but perhaps we can agree on what has accompanied the loss of support for both liberalism and constitutionalism: radical political polarization,¹¹⁷ the rise of increasingly bad electoral choices,¹¹⁸ the inability of party systems to handle shifts in voter preferences,¹¹⁹

¹¹⁵ See, for example, Kim Lane Scheppele, *Hungary's Free Media* (NY Times, Mar 14, 2012), archived at <http://perma.cc/YKR2-4VC9> (describing how after the 2010 election, the government, which was the biggest media advertiser, pulled its ads from opposition media and pressured private advertisers to follow suit by threatening the loss of government contracts). Or the media are seized by oligarchs related to the governing party. See, for example, Andrew Byrne, *Hungary's Largest Independent Newspaper Closed Down* (Fin Times, Oct 8, 2016), archived at <http://perma.cc/2NNP-8D3K>.

¹¹⁶ While in-person voter fraud and ballot-box stuffing can be caught by observers, the new election rigging often occurs through manipulation of vote-counting software, invisible to election observers. See, for example, *Venezuela's Shameless and Colossal Vote-Rigging* (The Economist, Aug 3, 2017), archived at <http://perma.cc/833M-QXYP> (explaining that the government inflated turnout numbers to give the impression its new constitution was more widely supported); Scheppele, *Hungary, an Election in Question, Part 2* (cited in note 11) (noting that Hungary's government nationalized the previously independent company that developed the software for vote counting amid claims of a rigged election). My Princeton colleagues Ed Felten and Andrew Appel have demonstrated how relatively easy it is to hack the software in voting machines. See Ben Wofford, *How to Hack an Election Machine in 7 Minutes* (Politico, Aug 5, 2016), archived at <http://perma.cc/Z8X8-UTF2>.

¹¹⁷ See Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* 1–16 (MIT 2d ed 2016). See also Emilia Palonen, *Political Polarisation and Populism in Contemporary Hungary*, 62 *Parliamentary Aff* 318, 321 (2009) (arguing that polarization is a political tool in Hungary that presents a problem for democracy, and was so even before Orbán's election in 2010). For Turkey, see E. Fuat Keyman, *The AK Party: Dominant Party, New Turkey and Polarization*, 16 *Insight Turkey* 19, 21 (Spring 2014).

¹¹⁸ See Zsolt Enyedi, *Populist Polarization and Party System Institutionalization: The Role of Party Politics in De-democratization*, 63 *Probs Post-Communism* 210, 211 (2016).

¹¹⁹ See generally Robin E. Best, *How Party System Fragmentation Has Altered Political Opposition in Established Democracies*, 48 *Govt & Opposition* 314 (2013).

the resistance of economic policy to the rotations of ordinary elections,¹²⁰ political fallout from traumatic economic shocks,¹²¹ the politicization of the judiciary,¹²² corrupt agreements among political elites,¹²³ and more.

Eventually—and this is the story in many of the places where the new autocrats eventually win elections—a dysfunction in the party system allows a mainstream political party to be captured¹²⁴ or, alternatively, some rupture in the world (an economic crisis, a political scandal, a national trauma) leads to the sidelining of established political parties because they are blamed for longstanding problems.¹²⁵ Many voters who become cynical after too many failed promises—and who already voted repeatedly for moderate change only to get no change at all—will then opt for illiberalism.¹²⁶ A tsunami of an election finally tips a weakened constitutional structure into collapse. This is how charismatic autocrats ascend to power.

But the casualty here is liberalism, even as the external appearance of democracy and constitutionalism remain in place.

¹²⁰ “Neoliberal authoritarianism” describes the inability of elected leaders to escape neoliberal economic policy, no matter what those leaders’ own political views are. Michael A. Wilkinson, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14 *Ger L J* 527, 528, 550–51 (2013). See Ian Bruff, *The Rise of Authoritarian Neoliberalism*, 26 *Rethinking Marxism* 113, 113–14 (2014). For the effects of neoliberal economic policy on democratic publics, see generally Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (Russell Sage 2d ed 2016).

¹²¹ See Hanspeter Kriesi, *The Political Consequences of the Economic Crises in Europe: Electoral Punishment and Popular Protest*, in Nancy Bermeo and Larry M. Bartels, eds, *Mass Politics in Tough Times: Opinions, Votes and Protest in the Great Recession* 297, 297–98 (Oxford 2014).

¹²² See, for example, Matthew Taylor, *The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez*, 46 *J Latin Am Stud* 229, 248–56 (2014) (explaining how the Chávez government undermined the judicial independence of the Venezuelan high court). See also James Melton and Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 *J L & Cts* 187, 190 (2014) (concluding that judicial independence decreases when either the appointment or removal powers of judges are in political hands).

¹²³ See Martin J. Bull and James L. Newell, *Political Corruption in Europe*, in José M. Magone, ed, *Routledge Handbook of European Politics* 669, 679–80 (Routledge 2015).

¹²⁴ While state capture by a political party is different than party capture by a particular faction within a party, the two are often found together. See, for example, Abby Innes, *The Political Economy of State Capture in Central Europe*, 52 *J Common Mkt Stud* 88, 92–94 (2012).

¹²⁵ For an example from Venezuela, see Jason Seawright, *Party-System Collapse: The Roots of Crisis in Peru and Venezuela* 1–2 (Stanford 2012) (discussing the collapse of the previously stable two-party system in advance of the Chávez election).

¹²⁶ See generally Béla Greskovits, *The Political Economy of Protest and Patience: East European and Latin American Transformations Compared* (CEU 1998). For an update of his argument, see Béla Greskovits, *The Hollowing and Backsliding of Democracy in East Central Europe*, 6 *Global Pol* 28, 35–36 (Supp June 2015).

The problem is that ordinary lawmaking by democratic majorities requires limits set by liberalism. Process and debate must be respected to ensure that minorities are not trampled. The loyal opposition must be treated as standing inside rather than outside the circle of constitutional protection and must retain some role in the lawmaking process. Liberal constitutions require other ground rules, too. Rights of speech and assembly, the independence of institutions like courts, media, and the civil sector, as well as the guardianship of the constitution by an independent checking body like a constitutional court, must be protected, even from democratic majorities. Against these liberal limits, the new legalistic autocrats argue that they cannot be constrained because they speak for the people. They summon legal and popular authority as a way to justify everyday political decisions. They jettison liberalism.

IV. WHAT IS TO BE DONE?

This Essay has shown that a new generation of autocrats has learned to govern by appealing to electoral legitimacy while using the tools of law to consolidate power in few hands. The new autocrats can and do win elections—often repeated elections—but, after their first victory, they stay in power by weakening the opposition support structures like parties and NGOs, by monopolizing the broadcast media to limit public debate, by harassing critics, and by tinkering with the election rules. They rewrite constitutions to make what was once unconstitutional into something constitutional. They do not, as a first resort, call out the tanks or declare a state of emergency; they do not enter office with a phalanx of soldiers. Instead they come to power with a phalanx of lawyers. The new autocrats look like democrats playing hardball,¹²⁷ not like dictators playing softball.

The move from hardball democrat to legalistic autocrat is achieved by undermining constitutionally entrenched checks on executive power, often (as we have seen) by changing the constitution so that what was once unconstitutional is no longer. By

¹²⁷ Professor Tushnet has usefully called attention to the practice of “constitutional hardball,” by which he means “political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings.” He shows how taken-for-granted understandings underpin a constitutional order until the moment that they don’t. At that point, the constitutional order is weakened, sometimes to the point of effective collapse. Mark Tushnet, *Constitutional Hardball*, 37 *John Marshall L Rev* 523, 523, 549–53 (2004).

consolidating power under the guise of legality (often constitutional legality), the autocrats set the stage for snapping the trap of democratic pretense when the tide of public opinion turns against them. Once the public loses the chance to change its leaders when the romance wears off, autocracy is complete. But it is too late to use constitutional appeals to fight autocracy at that point because the constitution has become a hollow shell.

By now it should be clear that many of the changes that result in the de-liberalization of constitutional systems are highly technical and therefore hard for the ordinary citizen to understand. How many people in the general public grasp the importance of differences in complex rules about judicial appointments, or see the implications of jurisdictional tweaks to a court's previous operating rules? How many people really comprehend that changing rules of parliamentary procedure or altering the structural composition of independent commissions or fiddling with the arcane processes for drawing electoral district boundaries are crucial to the maintenance of liberal constitutionalism? Most people see only that there is a constitution still proclaimed in the name of "we the people." They see that the same institutions they knew before are still standing—the constitutional court, the parliament, the central bank, the election commission. What could have gone so badly wrong when so much looks the same?

The takeaway lessons of the twentieth century prepare people for different sorts of threats to liberalism: pervasive ideological appeals that justify the destruction of institutions, the invocation of total emergency, mass violations of human rights, and tanks in the streets. By contrast, the new autocrats come to power not with bullets but with laws. They attack the institutions of liberal constitutionalism with constitutional amendments. They carefully preserve the shell of the prior liberal state—the same institutions, the same ceremonies, an overall appearance of rights protection—but in the meantime they hollow out its moral core. Constitutional institutions survive in the same buildings, but their liberal souls have been killed. How many people can really see this until they themselves need constitutional protection and find themselves defenseless? By then it is too late.

With the rise of autocratic legalism, we are witnessing new political technologies designed to accomplish the goals of autocracy without its usual telltale signs. Autocrats can accomplish this because the democratic publics in these places were trained to look for the wrong signs of danger. As the new autocrats get

more and more clever, deploying law to kill off liberalism, constitutionalists need to educate ourselves and democratic publics about liberal constitutionalism.

First, those of us who work in the field of constitutional law have to stare into the face of the new autocracy to track in detail how it works. We need to learn to recognize the new signs of danger, which means that we need to get better at documenting the trouble cases and learning from them.

Then, we need to educate others. Civic education needs to teach people to recognize the new signs of danger. *Under what circumstances* is it safe to trust the appointment of judges to a political process? *When* is presidentialism a sign of danger? *How* can the discretionary use of public power for economic intimidation be curbed? *Why* is the call to draft a new constitution alarming? People beyond the educated elite need to know why these questions matter, and they need to learn how to think about answering them.

Law is too important to leave only to the lawyers. A citizenry trained to resist the legalistic autocrats must be educated in the tools of law themselves. Liberal and democratic constitutionalism cannot remain an elite ideal that has no resonance in the general public; that leaves this public ripe for autocratic legalists to sweep them away in the last remaining exercises of democratic power that the public may possess. In the days when dictators came to power through military force, civil defense courses provided training for publics to resist with arms. In the days when dictators come to power with law reform as their primary tool, civil defense requires citizens to be empowered with law. Citizens need to be trained as constitutionalists—to understand the point of constitutionalism, to recognize threats to self-sustaining democracy, and to care about defending liberal values.

Liberal and democratic constitutionalism is worth defending, but first we need to stop taking for granted that constitutions can defend themselves.