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The Possibility of Illiberal Constitutionalism?

Erratum
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DUNWODY DISTINGUISHED LECTURE IN LAW

THE POSSIBILITY OF ILLIBERAL CONSTITUTIONALISM?

*Mark Tushnet**

Abstract

This Essay examines the possibility of an illiberal constitutionalism in which some citizens have “second-class” status – protected against arbitrary government action but with restricted rights. Drawing on scholarship dealing with “dual states” and federalism, the Essay argues that illiberal constitutionalism is possible conceptually but may be quite difficult to sustain over time in the face of the openness of even illiberal polities to demographic and similar changes.

The revival of interest in comparative constitutional law over the past generation or so was provoked in substantial part by the transition from authoritarian rule to liberal constitutionalism in Latin America, Central and Eastern Europe, and South Africa.¹ This shift may have dichotomized the conceptual space for comparison between liberal constitutionalism and authoritarianism. Even the proliferating literature on “adjectival constitutionalism” seems to deal mostly with varieties of liberal constitutionalism.² In recent work, studies of abusive constitutionalism deal with the use of the forms made available within liberal constitutions that enable a transition from liberal constitutionalism (back to) authoritarianism.³

This Essay begins an exploration of an alternative to both liberal constitutionalism and authoritarianism, in an attempt to discover whether we can expand the conceptual space for comparative

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1. Cf. David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 *YALE J. INT’L L.* 1, 46 (2011) (referring to the events of 1989 as influencing the revival of interest in comparative constitutional law).

2. Mark Tushnet, Editorial, *Varieties of Constitutionalism*, 14 *INT’L J. CON. L.* 1, 1 (2016).

3. David Landau, *Abusive Constitutionalism*, 47 *U.C. DAVIS L. REV.* 189, 191 (2013); see also David S. Law & Mila Versteeg, *Sham Constitutions*, 101 *CALIF. L. REV.* 863, 870–71 (2013).

constitutionalism.⁴ It does not take the position that illiberal constitutionalism, were it possible, would be normatively attractive, but only that there might be systems worth studying that are constitutionalist but not liberal.⁵ This Essay begins with several observations about the project, all of which have the effect of emphasizing the question mark in the Essay's title—that is, it may be that the conceptual space actually can only be dichotomized into liberal constitutionalism and authoritarianism, with no possibility of illiberal constitutionalism.⁶

First, what is *liberal* constitutionalism? For the purpose of this Essay, it refers to a set of political principles with two components.⁷ Liberalism assumes the equality of all people—or, for present purposes, the equality of all citizens.⁸ In addition, it assumes, in political

4. There is a literature on illiberal *democracy*, which deals with polities in which voters freely choose policies that are inconsistent with liberal commitments along some dimensions. See, e.g., Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFFAIRS (Nov. 1, 1997), <https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy>. That literature is relevant to this inquiry, but only indirectly, because illiberal democracies generate illiberal outcomes without taking illiberal principles as a foundation of their constitutionalism. Put another way, critics of an illiberal policy generated in an illiberal democracy can point to principles embedded in the nation's constitution as the basis for arguing that the policies are unconstitutional. Such arguments would be unavailable in illiberal constitutional systems, because the illiberal principles are themselves embedded in the constitution. In an earlier work, I examined what I called “authoritarian constitutionalism,” which at the time of writing I considered a system committed to principles like free and fair elections and freedom of expression, but with sufficient restrictions on the implementation of those principles to place them near the low end of the range of liberal constitutionalism. See Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 393, 396 (2015). On the idea of a range of liberal constitutionalism, see *infra* text accompanying notes 7–10.

5. This Essay uses stylized examples rather than real-world ones to define the conceptual terrain. It should be noted that some national constitutions may approach illiberalism; these include Hungary and (controversially) Israel.

6. The difficulty in even figuring out what illiberal constitutionalism might look like suggests that it might in fact not be possible.

7. I suspect that on further reflection I will conclude that the two components are actually versions of a single principle. For example, political philosopher Charles Taylor describes illiberalism as the majority saying to the minority, “Your *view* is not as valuable, in the eyes of this polity, as that of your more numerous compatriots.” CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 57 (1994) (emphasis added). Here, the minority is not equal, and it is not equal because of the priority the polity gives to a specific view of the good. *Id.*

8. Restricting the component to “citizens” raises questions about the principles of immigration policy a liberal polity must adhere to. This Essay is not the place for a full discussion, but it appears that most liberal constitutionalists adhere to the view, associated with Professor Joseph Carens, that liberalism in principle requires open borders, and that that requirement can be compromised for contingent, mostly political reasons, such as the risk that open borders will flood social welfare states with immigrants, and concern that too-rapid rates of immigration and the sometimes-associated cultural change will disrupt the stability of the nation's commitment to liberalism. For overviews, see generally JOSEPH H. CARENS, THE ETHICS

philosopher John Rawls's terms, the priority of the right over the good, ruling out the possibility that a liberal state could be committed to more types of perfectionism.⁹ This Essay focuses on the first component. The illiberal polities this Essay will discuss reject the equality premise, where "equality" refers to something like "equality with respect to aspects of being a person that are relevant to governance."¹⁰

Second, what is *constitutionalism*? Sometimes one runs across relatively "thick" definitions of constitutionalism. Such definitions build liberalism into the definition: A system is a constitutional one only if it robustly protects civil liberties such as freedom of expression, for example. Such a definition of constitutionalism would rule out the possibility of illiberal constitutionalism at the outset. For some purposes, of course, doing so is perfectly sensible, but this Essay cannot do so (if it did, it would end here).

There is another difficulty with equating constitutionalism with liberal constitutionalism. Consider the following polities: the United States before the adoption of the Nineteenth (women's suffrage) Amendment, the United States between the end of the Civil War and the civil rights era of the twentieth century, and the United States today. Should those polities be considered non-liberal because (in order) women lacked the right to vote, African-Americans were effectively denied the right to vote, and African-Americans are denied civic equality along many dimensions? If we do consider them non-liberal, liberal constitutionalism becomes something like an aspiration or a goal—again, a perfectly acceptable account for some purposes, but not helpful in assessing whether real polities are liberal constitutionalist ones or not.¹¹ Perhaps, though, one could contrast aspirational liberal constitutionalism with illiberal constitutionalism by showing that illiberal constitutionalism abandons one or more of the aspirations of liberal constitutionalism; perhaps the inquiry this Essay pursues might be understood in those terms.

Without liberalism built into the definition of constitutionalism, this Essay's inquiry requires some independent definition of

OF IMMIGRATION (2013) (discussing the practical problems immigration poses on Western democracies); Rainer Bauböck, *Migration and Citizenship: Normative Debates*, in THE OXFORD HANDBOOK OF THE POLITICS OF INTERNATIONAL MIGRATION 594–613 (Marc R. Rosenblum & Daniel J. Tichenor eds., 2012). Related but somewhat different questions arise in connection with long-term resident noncitizens, and in particular guest workers. Again, those questions are outside the scope of this Essay, but I hope to say something about them in the larger project.

9. John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 252 (1988).

10. This is the meaning of the principle in the Declaration of Independence, that "all men are created equal."

11. It might be helpful if supplemented by some metric by which one could assess the degree to which polities fell short of the aspiration to "full" liberal constitutionalism.

constitutionalism. At present, and pending further reflection, this Essay defines constitutionalism as requiring, first, that government officials not act arbitrarily; or, seen from the other side, constitutionalism requires that officials act pursuant to some general principle. Again, this must be qualified. No system can guarantee complete compliance with its regulative principles, so no matter what sometimes officials will act arbitrarily. We need some idea of what I have elsewhere called “shortfalls,” failures of compliance that are sufficiently isolated or infrequent that they do not undermine the claim that the system is constitutionalist.¹² In addition, a shortfall exists when a system fails to live up to its aspirations—fails fully to implement a policy that it acknowledges as normatively valuable. Rejection of one or more liberal rights *in principle* is not a shortfall.¹³

Legal philosopher Lon Fuller famously offered an extremely thin definition of the rule of law, as requiring eight attributes: generality, publicity, prospectivity, clarity, consistency, and practicability, with some degree of stability over time and with relatively few shortfalls.¹⁴ If we define constitutionalism as no more than non-arbitrariness, it may be no different from the “mere” rule of law.

Beyond the “mere” rule of law, constitutionalism may require what this Essay calls “thin” constitutionalism. Such a constitutionalism preserves some space for civil society and, concomitantly, offers some protection to expression. Further, government decisions are rooted in a process that is in some sense consultative, whether through elections or other methods of ascertaining the public’s preferences. In that sense, thin constitutionalism rests on the consent of the people.

12. For the language of shortfalls, see ANTONI ABAT I NINET & MARK TUSHNET, *THE ARAB SPRING: AN ESSAY ON REVOLUTION AND CONSTITUTIONALISM* 15 (2015).

13. Can shortfalls within a constitutionalist system be *systematic*, for example, concentrated on a distinct subpopulation in the country? The answer is likely “no”: A nation with systematic arbitrariness as to a subpopulation is either an illiberal constitutional nation or an authoritarian one.

14. LON L. FULLER, *THE MORALITY OF LAW* 33–38 (1969). Some, and perhaps Fuller himself, believe that a system that satisfies Fuller’s eight criteria will (almost) inevitably satisfy thicker requirements associated with liberalism.

Finally, what is the *possibility* of illiberal constitutionalism? My observation that *liberal* constitutionalism might be an aspirational ideal suggests that *illiberal* constitutionalism is similarly aspirational, though of course in the other direction. And, as this Essay's treatment of aspirational liberal constitutionalism suggests, there should be some real-world—rather than purely conceptual—ways of identifying these systems. And, in the real world, illiberal constitutionalism may be possible if illiberal systems persist or are relatively stable over some reasonable period, a period comparable to the length of time over which liberal constitutional systems persist or are relatively stable.¹⁵

With all these preliminaries out of the way, I offer a sketch of a polity in which illiberalism might be sensible and non-arbitrary. Consider a polity with several ethnic or religious groups. One group has, say, fifty-five percent of the population, another twenty-five percent, and the third twenty percent; the second group holds a slight majority of the nation's wealth, and the third has strong ties with a relatively wealthy diaspora. These groups have frequently been in violent conflict. For contingent historical reasons, the three groups cannot separate into distinct nations; they *must* somehow exist within a single polity. Realizing that achieving civil peace is a great value,¹⁶ they agree to a constitution dividing power among them. The peace pact they reach shares political power equally among all three groups, the hope being that the two minority groups' access to different sources of wealth will bring material prosperity. The national constitution dividing power is illiberal because not all citizens are treated equally with respect to political power: A vote cast by a member of the majority group counts less than a vote cast by a member of either minority group. On the face of things, this is not an obviously unattractive arrangement.¹⁷

This Essay leaves this possibility aside for now, returning to it at the conclusion, and turns to a substantially less attractive example: a polity in which ethnonationalism is constitutive. Suppose, then, that Hungary defines itself in its constitution as a nation for people of Hungarian ethnicity. Those of other ethnicities—such as Polish or Romany—are

15. The period for liberal constitutionalism is almost certainly longer than the well-known “nineteen years” as the average duration of national constitutions, because that figure includes the large number of cases in which one liberal constitution replaces a prior liberal constitution. For the figure, see ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 2 (2009).

16. That realization underlies the Hobbesian–Lockean account of liberal constitutionalism. See Steven Forde, *John Locke and the Natural Law and Natural Rights Tradition*, NAT. L., NAT. RTS., & AM. CONSTITUTIONALISM (2011), <http://www.nlprac.org/earlymodern/locke>.

17. For a discussion of whether the arrangement can be stable, see *infra* pp. 1381–82.

second-class citizens of Hungary. Can such a polity be constitutionalist even though it is illiberal in denying the equality of all citizens?¹⁸

This Essay approaches that question from two directions: from underneath, so to speak, by examining how some obviously illiberal systems deal with the existence of second-class citizenship in a *non-constitutionalist* way, and then from above, using federalism as a way of thinking about the possibility of systemic unequal treatment.

The émigré scholar Ernst Fraenkel described Nazi Germany as a “dual state.”¹⁹ He observed that large swathes of law were administered in a straightforward way, completely compliant with the requirements of the rule of law. For example, disputes over ordinary commercial contracts between “Aryan” Germans or property disputes among them were handled by the courts in a way indistinguishable from how they had dealt with similar disputes in the years before the Nazis took power. But, he also noted, there was another “legal” system, dealing with disputes involving Jews and other non-Aryans. In that—the “dual”—system, the stated legal rules, those satisfying the rule of law, went out the window. So, for example, in a commercial dispute between an Aryan and a Jew, the court would utterly disregard the clear language of a contract provision if that language pointed to a legal victory of the Jew and find in favor of the Aryan. The outcomes were arbitrary from the point of view of the rule of law, though of course they were completely predictable.

In a dual state, we find first- and second-class citizens, with the dividing line drawn by ethnonationalism. Aryans in Nazi Germany and whites in apartheid South Africa were first-class citizens, entitled to the full complement of liberal rights and the other attributes of liberal constitutionalism, including, importantly, freedom of speech and freedom of movement.²⁰ In contrast, the second-class citizens—non-Aryans in Germany and what were known as coloureds in South

18. This Essay puts to one side systems like the Ottoman one in which citizens are subject to different rules of personal law (especially family law) depending on their religious affiliation or ethnicity. Problems of boundary drawing do arise in such systems as a result of intermarriage and other forms of what this Essay describes as porosity, but the limited domain of the special rules distinguishes them from the systems of interest in this Essay.

19. ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* 46 (1941). Fraenkel’s analysis was later applied to apartheid South Africa by sociologist Pierre van den Berghe, PIERRE VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 101 (1967) (describing “*herrenvolk* democracy”), and political scientist Jens Meierhenrich, JENS MEIERHENRICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652–2000* (2008).

20. MEIERHENRICH, *supra* note 19, at 1652–2000. As the Essay discusses below in connection with federalism, issues can arise about the content of specific liberal freedoms, but the key is that first-class citizens enjoy rights specified in ways that keep the specifications within the range available in liberalism.

Africa—were subject to purely arbitrary governance. The dual state described by Fraenkel is illiberal but not constitutionalist because the second-class citizens are subject to arbitrary governance because the law as applied has no relation to the stated law.

For my purposes, then, I modify the concept to investigate a (quasi) dual state in which the first-class citizens get full liberal constitutionalism, and in particular rather robust freedoms, and the second-class citizens get rule-of-law and thin constitutionalism. Consider a stylized account of contemporary Hungary, which is at least moving in the direction of ethnonationalism. Assume that ethnic Hungarians are the first-class citizens, and Hungarians of Polish ethnic origin are the second-class citizens. A Hungarian of Polish ethnicity is the tenant of an ethnic Hungarian, and they get into an ordinary landlord–tenant dispute. The existing law favors the tenant on a dispositive issue. The dispute is resolved favorably to the tenant. But, immediately, the government modifies landlord–tenant law on the issue. The new law does not single out Hungarians of Polish ethnicity for special treatment, for that would be incompatible with the rule of law. Rather, the new law’s provisions, while facially neutral as to ethnicity, have, and are known to have, a substantially disproportionate adverse impact on tenants of Polish ethnicity without having a similar impact on ethnic Hungarian tenants. Or, the new law leaves room for executive and judicial discretion in enforcement and interpretation, which will predictably be exercised against the disfavored group.²¹ Hungary, on this account—again, quite stylized—is a quasi-dual state in which ethnic Hungarians get liberal constitutionalism and Hungarians of Polish ethnicity get rule-of-law constitutionalism. On these definitions, Hungary is an illiberal constitutionalist state.

But, of course, this is a stylized and therefore imaginary state. Could it be realized in practice? In practice, a quasi-dual state may well run into serious problems of stability, of movement from a quasi-dual state to a true dual state and so from illiberal constitutionalism to illiberalism without constitutionalism.²²

21. Thanks to Professor Brian Bix for suggesting this formulation.

22. There might be difficulties of implementation as well. For example, in the example of the landlord–tenant dispute developed in the text, will it be possible for the government’s lawyers to devise new provisions in the law of tenancy that have the necessary disparate effect? Implementation difficulties of this sort could be overcome by talented (though of course a- or immoral) lawyers, at least often enough to keep the system within the bounds of constitutionalism. There may be other kinds of implementation difficulties that “good” lawyering cannot overcome. And, perhaps an illiberal constitutionalist regime will be unable to recruit enough “good” lawyers to keep it from degenerating into a non-constitutionalist one. Roughly, the thought is, the regime will find itself saying, in effect, that it is too difficult to sustain constitutionalism so it might as well abandon constitutionalism and become a true dual state.

Consider initially the second-class citizens. One can imagine that they would *not* be a source of a substantial threat to the regime's stability. They might be substantially outnumbered, so that political resistance is, so to speak, futile, and they might lack access to the resources needed to mount a successful campaign of violent resistance. Further, the benefits they receive from rule-of-law and thin constitutionalism, and in particular the regularity accompanying the rule of law, may be enough to suppress high levels of resistance by the second-class citizens. They might resign themselves to a world in which they are badly treated if the bad treatment is predictable.²³

Next, what of the first-class citizens? They might benefit materially and psychologically from the system, but some of them might want to use their liberal freedoms in ways that could lead to instability. Consider freedom of speech. Some first-class citizens may want to use that freedom to agitate for the elimination of the quasi-dual state and illiberal constitutionalism and for replacing it with liberal constitutionalism. The abstract right of free expression can be specified, within liberalism, in ways that give the government some resources to deploy against these agitators. For example, for long periods it was thought compatible with a liberal idea of free expression for the government to be authorized to punish speech that had a tendency to lead to social disorder.²⁴ And, even under more stringent verbal tests social circumstances might be such that an illiberal quasi-dual state could plausibly claim, for example, that agitation for the elimination of second-class citizenship was, under prevailing social conditions, highly likely to lead to serious violence in the short run—that is, that the government could show that it could indeed satisfy an only slightly modified version of a test requiring “imminent lawless action.”²⁵ At some point, though, the regime might have to deploy illiberal forms of suppression, including violence and departures from the rule of law, against first-class citizen dissidents to cut off a threat to its persistence.

23. There are many accounts of adaptations of this type by African-Americans to the American system of apartheid—segregation by law—particularly in connection with what might be called the routine activities of daily life such as shopping and transportation. As suggested earlier, though, it might well be that that system was illiberal and nonconstitutionalist because arbitrary treatment of African-Americans was so pervasive as to dominate the domains in which African-Americans were subject to rule-of-law constitutionalism.

24. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47, 52 (1919) (using the language of “clear and present danger” but applying it in a way that makes clear that the test actually is one of “tendency”).

25. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The watering-down occurs by eliminating the requirement that the agitator's words be words of incitement. But, scholars have raised important questions about the coherence of that requirement in circumstances where seemingly innocuous words have the effect of incitement. *See, e.g.*, G. STONE ET AL., *THE FIRST AMENDMENT* 19 (2d ed. 2003).

At that point, again illiberal constitutionalism would become illiberalism without constitutionalism.²⁶

Another implementation problem for the quasi-dual state's stability arises from difficulties in maintaining the boundary between the first-class and the second-class citizens. That boundary can be physical, as in segregation and apartheid, and conceptual, in the identification of who exactly is a first-class citizen.

As political philosopher Charles Taylor puts it, liberal polities are "porous."²⁷ Specifically, people move into them and have relations outside them. What could the illiberal constitutionalism regime do in the face of porosity, and in particular in the face of movements by the first-class citizens "outside" their privileged position? Geographic separation can help maintain stability, but it poses its own problems, in particular, by reducing the costs of organizing resistance within the community of second-class citizens. And, often, the first-class citizens will either need or find it convenient to employ the second-class citizens; think here of an analogy to the "guest workers" in many nations.²⁸ In these and other settings, the first- and second-class citizens will have social interactions. Some of these interactions will reinforce the division, but some might undermine it. The facts of *Loving v. Virginia*²⁹ are illustrative.³⁰ Richard Loving, a white construction worker, and Mildred Jeter, a woman of African-American and Native American descent, grew up in a small town in Virginia during the segregation era.³¹ They met and fell in love.³² They married in nearby Washington, D.C., then returned to Virginia, where they were arrested for violating that state's law against racial intermarriage.³³ These facts show how porosity interacts with the line between first- and second-class citizens. And, more important for present purposes, they show how efforts to maintain the line between first- and second-class citizenship lead to restrictions on the liberal constitutional rights of the first-class citizens, here the right to choose who one marries.

26. The South African example suggests that all of what I have written about the quasi-dual state might be true of Fraenkel's dual state as well. The pure dual state can maintain control of the second-class citizens through terroristic repressions, but some first-class citizens might reject that policy, and the dual state might be able to meet the threat *they* pose by depriving them of some of their liberal constitutional rights.

27. TAYLOR, *supra* note 7, at 63.

28. Typically guest workers are non-citizens, but the practice does include some workers who are or become citizens.

29. 388 U.S. 1 (1967).

30. *Id.* at 2–7.

31. *Richard Loving*, BIOGRAPHY.COM, <https://www.biography.com/people/richard-loving-110716> (last updated Nov. 10, 2016).

32. *Id.*

33. *Loving*, 388 U.S. at 2–3.

These facts illustrate a more general difficulty with an illiberal constitutionalism dividing the citizenry into one group with full liberal rights and another with mere rule-of-law and thin constitutional protections: Maintaining the boundary between the two classes will require that the first-class citizens surrender some of their liberal constitutional rights.³⁴ Perhaps, though, we might still treat the system as one of illiberal constitutionalism because the first-class citizens, though they do not enjoy the full panoply of liberal constitutional rights, enjoy enough of those rights. They are not subject to the systematic arbitrariness that makes a system non-constitutionalist, and they have enough liberal rights to make the system different from one in which everyone is subject only to rule-of-law constitutionalism.

Porosity leads to another difficulty for the type of illiberal constitutionalism under consideration. The system must be able to sort people into the two categories of first- and second-class citizens. So, for example, in the stylized example of Hungary, one has to know who counts as an ethnic Hungarian. Consider a person whose grandparents were concededly ethnic Hungarians but whose mother married an ethnic Serb or Pole or German. Is such a person an ethnic Hungarian, and therefore a first-class citizen, or not? The categories' existence requires something like Nazi Germany's Nuremberg Laws.³⁵ And, as those laws show, the definitional features in rules allocating people to the two categories will inevitably have important arbitrary features: Suppose that, like the Nuremberg Laws, the (imagined) Hungarian laws define ethnic Hungarians as those with four ethnic Hungarian grandparents. That definition seems quite arbitrary when applied to a person with three ethnic Hungarian grandparents and one Serbian one, who has always lived as an ethnic Hungarian, or to a person with one ethnic Hungarian parent and one Serbian parent who is fully assimilated into the ethnic Hungarian community. In short, there is arbitrariness at the heart of the illiberal regime—in the very definitions on which the system rests—and that arbitrariness undermines its claim to be constitutionalist.

So, although one can imagine an illiberal constitutionalism as a modified dual state, in which there are permanent second-class citizens who receive rule-of-law constitutionalism, there appear to be good

34. Nor will it be possible for the system's defenders to argue persuasively that the way in which the right is restricted—here, the right to marry—lies within the range of permissible liberal specifications of the abstract right.

35. See Richard D. Heideman, *Legalizing Hate: The Significance of the Nuremberg Laws and the Post-War Nuremberg Trials*, 39 LOY. L.A. INT'L & COMP. L. REV. 5, 5 (2017). See also Ann Coulter (@AnnCoulter), TWITTER (Nov. 7, 2016, 10:42 PM), <https://twitter.com/anncoulter/status/795833821501460480?lang=en> (“If only people with at least 4 grandparents born in America were voting, Trump would win in a 50-state landslide.”).

reasons to think that such a constitutionalism could not be stable over the medium to long run. Depending on how stringent the requirement of stability for a reasonable period is, this might show that illiberal constitutionalism is (or is not) possible.

This Essay turns now to the second approach to illiberal constitutionalism, from the top, where the analogy is to federalism. A key characteristic of some forms of federalism is that citizens of a single nation enjoy different sets of liberal rights depending on where they happen to live. This is not to say that they enjoy different rights described at a reasonably high level of abstraction. So, again to use a stylized example, people who live in Rio de Janeiro have a right to freedom of expression, as do people who live in Brasilia. But the rights they have differ in their specifications. Importantly, there are alternative reasonable specifications of essentially all liberal rights, specifications compatible with the liberal premise that all people are equal in all respects relevant to governance.³⁶ If one believes, as some do,³⁷ that laws restricting the distribution of hate speech are compatible with that premise, if Brasilia has a law banning hate speech and Rio de Janeiro does not, people in Brasilia have a right to free speech that is different from the right that people in Rio de Janeiro do.³⁸ To revert to the language already used in this Essay, as people in Rio de Janeiro see it, people in Brasilia are second-class citizens of Brazil because they have fewer rights than “Cariocas” do.³⁹

United States constitutional history provides a real-world example. Constitutional doctrine from the 1920s to the early 1960s held that first some, then most of the substantive guarantees of the first eight amendments—the Bill of Rights—were applicable to the states by

36. There might be some rights, which might be described as absolute rights, as to which there are no alternative reasonable specifications. The main candidate would be the right not to be subjected to torture. The argument drawn from federalism that this Essay makes would not be affected by the existence of a relatively small number of such rights.

37. A shorthand defense of that belief: Many political systems that seem unarguably liberal have laws against hate speech, and such laws are defensible within liberal premises in the sense that the reasons for them, and in particular reasons drawn from ideas about promoting or maintaining social equality, are compatible with those premises even if, on balance, one thinks that the liberal reasons against such laws are stronger than the liberal reasons for them. For a recent liberal defense of some laws regulating hate speech, see JEREMY WALDRON, *THE HARM IN HATE SPEECH* 3–4 (2012).

38. If the reader disagrees with the author about hate speech laws, there are a host of other examples—regulations of sexually explicit material or of demonstrations in public places—that could make this point.

39. “Carioca” is the word used to describe a resident of Rio de Janeiro. *Carioca*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2009).

operation of the Fourteenth Amendment's Due Process Clause.⁴⁰ But, until the late 1960s states could comply with the Constitution with varying specifications of the applicable protections. *Palko v. Connecticut*,⁴¹ for example, dealt with a statute authorizing the government to appeal from an acquittal in a criminal case where, the government claimed, the jury had received mistaken instructions about the applicable law.⁴² The defendant challenged the statute's constitutionality, asserting that it violated the Double Jeopardy Clause.⁴³ That assertion rested on cases holding that the federal government could not appeal acquittals based upon a claim of mistaken jury instructions, because, the cases said, such appeals were barred by the Double Jeopardy Clause.⁴⁴ The U.S. Supreme Court rejected *Palko's* challenge, saying that the Due Process Clause, the relevant constitutional provision, guaranteed only those rights that were "implicit in the concept of ordered liberty."⁴⁵ Importantly, other states could interpret the double-jeopardy ban as prohibiting government appeals in criminal cases. As Justice John Marshall Harlan put it, under the Court's so-called "selective incorporation" doctrine, Bill of Rights guarantees were not applied to the states "jot-for-jot" as they were applied to the national government.⁴⁶

In federal systems, then, people in one location can enjoy different sets of *specified* liberal rights.⁴⁷ Now consider all possible abstract liberal rights: Each can be specified in numerous ways. Some specifications provide greater protection than others, though all specifications are compatible with liberalism: hate speech laws or no hate speech laws, interpretation of equality provisions as ensuring only

40. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949) (involving an unconstitutional search), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (involving free speech or free press).

41. 302 U.S. 319 (1937).

42. *Id.* at 320–21.

43. *Id.* at 321.

44. See *id.*

45. *Id.* at 325.

46. *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting). In *Duncan*, Justice Harlan criticized the Court for insisting on jot-for-jot incorporation, which, he accurately said, was inconsistent with the approach taken in *Palko* and its successors. *Id.*; see also *Williams v. Florida*, 399 U.S. 78, 129 (1970) (Harlan, J., dissenting) (explicitly contrasting jot-for-jot incorporation with *Palko*).

47. A comment on a draft of this Essay by Professor Gerald Torres pointed out that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1304 (2012) might provide another example of a class of citizens entitled, within subnational jurisdictions, to a less robust set of rights than citizens elsewhere. The Act provides that Indian tribes "exercising powers of self-government" must respect a list of rights similar to but not as comprehensive as the national Bill of Rights. *Id.* § 1301. The example might be contentious because of questions about the relation between Indian tribes as quasi-sovereign governments and the U.S. government.

formal equality or as ensuring substantive equality, and the like. Further, we can probably array the different specifications of each right on a scale ranging from strong or “full” protection to weak protection.

Suppose that one subnational jurisdiction chooses to specify all the liberal rights in ways that lie at the low end of each scale. It has laws against hate speech and laws against the dissemination of lies, it allows appeals of acquittals, and so on through the list of liberal rights. By assumption each of those specifications is consistent with the liberal premise of equality of all persons. For that reason, I find it difficult to conclude that this subnational jurisdiction is illiberal. Yet, when we look at the nation as a whole, we see a large number of people who enjoy a wider range of rights than those in the “low-end” jurisdiction. From the national perspective, one might say, as a first cut, that the people in the low-end jurisdiction are second-class citizens vis-à-vis those in the rest of the nation. If so, a federal system of this sort might be described as one in which not all citizens are treated as equals in respect of governance, and so as an illiberal constitutional system: illiberal because of the inequality, but constitutional because all citizens enjoy liberal rights at some level of specification.⁴⁸

The Essay now introduces some qualifications and complications. The first is reasonably obvious, but may not be that important for the overall inquiry. In the prior example, Hungarians of non-Hungarian ethnic origin are permanently confined to second-class citizenship but citizens of the low-end jurisdiction are not similarly confined because they can move elsewhere in the nation.⁴⁹ If the possibility of exit is always an answer to the possibility of second-class citizenship, it may be quite difficult to find examples of illiberal systems. People who are not ethnic Hungarians can “self-deport” (rather than be ethnically cleansed through force).⁵⁰ If people self-deport because they do not like the low level of rights they have, even though rights at that level are consistent with liberal premises, we may end up with a state in which the vast majority of people are full, first-class citizens and the second-class citizens have decided that, all things considered, having that status

48. To forestall the objection that the “low end” rights affect only local matters and so do not disadvantage the citizens of the low-end jurisdiction vis-à-vis those in high-end ones, consider the example of hate speech regulation applicable to some matters on the national policy agenda. Citizens in the high-end jurisdiction may say some things that citizens in the low-end one cannot, and as a result might have greater influence on shaping national policy. For additional discussion, see *infra* text accompanying notes 49–52.

49. On standard accounts of federalism, this “exit” option places some constraints on each subnational jurisdiction’s choices. In particular, the availability of high-end jurisdictions might induce jurisdictions initially at the low end to adopt more protective specifications of liberal rights.

50. An illiberal system’s attempt to prevent exit may exacerbate tensions between the community of second-class citizens and the first-class ones, thereby undermining stability.

is better than moving elsewhere. That might be a stable illiberal constitutional system.⁵¹ This seems to be the most likely form of stable illiberal constitutionalism.

A second qualification is that people in the low-end jurisdiction are not second-class citizens vis-à-vis each other. Everyone within that jurisdiction has the same low level of rights.⁵² What, though, of a single polity within which some citizens have their liberal rights specified at a high level and others have them specified at a lower level (though, again, at a level that is defensible within liberalism)? Suppose, for example, that in my stylized Hungary, acquittals of ethnic Hungarians cannot be appealed because of double jeopardy concerns but acquittals of ethnic Poles can be appealed (and both groups otherwise have identical rights in criminal proceedings). This is almost by definition illiberal because of the discrimination. But, at least at present, I am inclined to think that it is constitutionalist because the content of the low-level rule allowing appeals is consistent with constitutionalism.

Again in a stylized version, Quebec provides a more consequential example. In a province with a substantial majority of Francophones, English is a disfavored language.⁵³ Signs must be predominantly in French, and education policy is structured to channel children into Francophone schools.⁵⁴ The purpose and effect of these policies is to show that Quebec has a preferred class of citizens, the Francophones, and another, one might say second, class of citizens, the Anglophones. As in the Hungarian “example” of criminal procedure rights, in this example everyone has the same set of liberal rights within a wide range, but not with respect to rights that have some relation to maintaining Quebec’s Francophone identity. Importantly, Anglophones participate fully in the province’s local politics on a one-person, one-vote basis. And they have full free speech rights. They can, for example, advocate for abandoning the province’s pro-Francophone policies, though of course they are (or would be, if they bothered to try) predictably outvoted when questions of provincial identity are put to a vote.

Should we treat this version of Quebec as an illiberal system because of its language policy? Note that the language policy is not a shortfall, because the province rejects equality among citizens without regard to their language as a matter of principle. And it is not an isolated

51. Cf. Anna Stiliz, *Guestworkers and Second-Class Citizenship*, 29 POL’Y & SOC’Y 295 (2010) (arguing that some restrictions on the rights of guestworkers may be morally permissible).

52. As the preceding paragraph dealing with exit suggests, they might be said to have chosen to have their rights specified at a low level.

53. See *Rebelling Against Quebec’s ‘Language Police,’* BBC: NEWS (May 7, 2013), <http://www.bbc.com/news/magazine-22408248>.

54. See *id.*

aberration or unfortunate deviation from liberal equality that persists because of historical accident. Rather, the language policy is constitutive of Quebec's political identity. Yet, because Anglophones have the opportunity to persuade their co-citizens that the language policy should be abandoned, and there is nothing in the constitutional structure that precludes them from succeeding, I am inclined to think that the province is not illiberal: It is open to changing even its constitutive identity through political mechanisms fully compatible with liberalism, and the fact that change is unlikely results from the preferences of Francophone voters, which might change.

A final case is more difficult. Here the national ethnic identity is protected by the constitution. That is, under the constitution as it presently exists, the government is required to take steps to sustain the national identity. So, for example, the Preamble to Hungary's 2011 Constitution reads: "We commit ourselves to cherishing and preserving our heritage, our unique language, the Hungarian culture We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation."⁵⁵ The constitution does have provisions dealing with amendment, but, to ensure that the case remains a difficult one, assume that the constitutional provisions dealing with national identity are understood, within the nation's legal culture, to be part of the constitution's "basic structure," and for that reason cannot be amended within the constitution's own framework.⁵⁶

Assume, in addition, that Hungary's free speech guarantee is interpreted as making it permissible—and perhaps even required, in light of the phrase "preserve and nurture"—to prohibit advocacy of policies that have a tendency to undermine the Hungarian character of the state. Liberal constitutional accounts of free speech have converged on the conclusion that the free speech principle makes it impermissible to prohibit speech simply because it has a bad tendency.⁵⁷ So, the "bad tendency" provision is not within the range of permissible specifications of the liberal right—it is illiberal. Those who are not ethnic Hungarians are irremediably relegated to second-class status by the nation's

55. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY] Apr. 25, 2011, pmbl. The reference to the "Holy Crown" is, within Hungarian culture, an important pointer to the way in which the Preamble describes Hungarian ethnicity as constitutive of national identity.

56. See generally YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017) (explaining the recent comprehensive treatment of unamendable constitutional provisions).

57. In my view (which is probably an outlier among scholars), that convergence still leaves room for invoking a "bad tendency" test where a polity is a highly contentious one, with peace among contending factions quite fragile. But, for purposes of this Essay, assume that the stylized Hungary is not such a polity.

constitutive commitments. But, again, if we assume that they receive rule-of-law and thin constitutional protections in all other domains, then the Hungary described here may be an illiberal constitutionalist system.

To this point this Essay has described several ways in which an illiberal constitutionalism might have first- and second-class citizens. The next question is whether these illiberal constitutionalist systems can be stable enough. The problem here arises once again from porosity, but it takes a somewhat different form than it did earlier because the core illiberalism implicates limitations on freedom of expression. We can assume that Hungary's second-class citizens would prefer that the nation abandon its constitutive commitment to Hungarian ethnicity. But, on these assumptions, they cannot express that preference because of the laws restricting freedom of expression; indeed those laws are what make the system illiberal. But, what about ethnic Hungarians who are, so to speak, cosmopolitans? They reject in principle the proposition that any nation can permissibly have a constitutive commitment to ethnonationalism. Cosmopolitans too are going to be subject to punishment for advocating cosmopolitanism, because that advocacy has the prohibited bad tendency. The analogy to the problem for illiberal constitutionalism illustrated by *Loving v. Virginia* should be clear.⁵⁸ The system's illiberalism cannot be contained with the group of second-class citizens. At some point, the regime may have to revert to mere rule-of-law constitutionalism for all of its opponents to defend, in the regime's eyes, the nation's constitutive identity. Yet, the line between an illiberal constitutionalism that subjects second-class citizens and the regime's opponents to the rule of law and thin constitutionalism, and authoritarianism seems to be thin indeed.⁵⁹ Still, if the line, though thin, can be drawn, perhaps a system in which a regime's supporters have liberal rights and its opponents have rule-of-law and thin constitutional protections might be constitutionalist.

Another source of porosity is external. Illiberalism will meet with some opposition on the international scene.⁶⁰ To continue with this stylized example, the Polish government is not going to be happy about the treatment of ethnic Poles in an ethno-nationalist Hungary. It will use the standard tools of international relations—sanctions, shaming, recruiting other nations into a coalition of opposition—to put pressure

58. See *supra* notes 29–31 and accompanying text.

59. Another source of instability might flow from the psychology of leadership in illiberal regimes. “Illiberal” leaders might well have authoritarian impulses, and, frustrated when they come close to the line between illiberal constitutionalism and authoritarianism, may simply choose to breach the line.

60. “Some” opposition, but not universal opposition. Authoritarian regimes will not oppose illiberal ones because of their illiberalism, though of course they may oppose them for other reasons. And, leaders of illiberal regimes will almost certainly see each other as worthy of support.

on Hungary. These external pressures might push the illiberal regime away from its illiberalism, perhaps toward liberalism, but perhaps toward authoritarianism. Still, the target nation might be able to resist those pressures. And perhaps the illiberal nation is so insignificant in international terms that no outsiders care enough to do anything about the nation's departures from liberal constitutionalism. So, though external pressure might undermine an illiberal constitutionalist regime, that regime might persist for long enough to be counted as stable.

This Essay concludes by returning to the scenario offered earlier of a society divided among three groups, each of which has greater access than the others to different resources important for governance: votes, local wealth, and wealth from the diaspora. At the time of its creation, the illiberal constitution's allocation of power works effectively to preserve peace among the groups. The difficulty, if it is one, is that all three sets of resources can change (another example of porosity). Rates of population growth among the groups may vary; locally generated wealth and inputs from the diaspora may increase or decrease. In some configurations these changes may revive the tensions that the constitution initially resolved. So, for example, the constitution gives less power to the group with the largest numbers than would a "one person, one vote" system. If that group's population grows quite a bit more quickly than the populations in the other groups, the illiberal allocation of voting power may come to seem increasingly unfair—and particularly so if the resources the other groups brought to the table decrease. A large drop in contributions from the diaspora might make it seem increasingly unfair that the third group has political power equal to that of the first and second. We can readily imagine other configurations with similar destabilizing effects.

Which components of the "peace pact" constitution change, and even whether any do, is of course an empirical question. So is whether the array of forces—again, votes and material resources generated locally and from the diaspora—changes in a way that leads some citizens to rethink the constitutional arrangements. And, finally, so is whether citizens will conclude that undoing the peace-pact constitution in light of these changes is worth the risk that violent conflict will revive. If the contingencies happen to fall out in the right way, the illiberal constitution would be stable enough. Once again, then, this Essay concludes that a stable-enough illiberal constitutionalism is possible, though once again the odds are against it.

This Essay is a first foray into what has proven to be quite difficult terrain for me, and I expect to revise my thinking as I explore other facets of illiberal constitutionalism. Consistent with the question mark in this Essay's title, the conclusion is quite tentative: At present it seems that the form of illiberal constitutionalism in which one group of

citizens receives substantial liberal rights, and another receives rule-of-law and thin constitutional protection against arbitrary treatment but nothing more, is a theoretically available possibility. And, under some conditions such an illiberal constitutionalism might be at least as stable as liberal constitutionalist systems have shown themselves to be.