

# SINGAPORE’S CONSTITUTIONALISM: A MODEL, BUT OF WHAT SORT?

*Gordon Silverstein*<sup>†</sup>

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## INTRODUCTION

All too often, Professor Mark Tushnet suggests in a recent article in the *Cornell Law Review*,<sup>1</sup> constitutionalism and authoritarian rule are thought of as two sides of a coin, a binary choice: North Korea or Japan, Syria or Canada. A nation can subscribe to constitutionalism or it can be authoritarian. It cannot be both.

Professor Tushnet rejects that assertion, using a study of the Republic of Singapore to suggest that, just as we have long accepted a spectrum of liberal democracy (running from fully democratic, through flawed and hybrid regimes, and ending with authoritarian regimes), so too should we think about constitutionalism. Singapore, he argues, is neither an exemplar of Enlightenment constitutionalism, nor is it properly labeled what he calls a “mere rule of law” constitutional state. It is, in his view, an example of “authoritarian constitutionalism,” a category that not only lies between the extremes, but one that can be stable and self-sustaining—not merely a transit stop on the way from one end of the spectrum to the other.

There are three important claims here to consider: In Part I, I agree with the proposition that we should think of constitutionalism as a spectrum rather than a cleanly defined, dichotomous condition, but I suggest that we

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<sup>†</sup> Assistant Dean for Graduate Programs, Yale Law School. A.B. Cornell University, College of Arts and Sciences; Ph.D., Political Science, Harvard University.

<sup>1</sup> Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015).

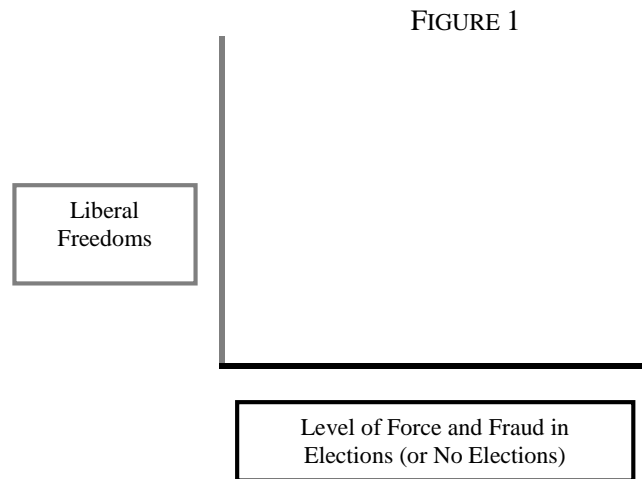
need to reassemble the criteria along three dimensions rather than the two Professor Tushnet proposes for a typology of the “varieties of constitutionalism.” One axis would measure the degree to which power is limited and contained; a second would measure the degree and extent of popular consent and legitimacy behind the government; and a third would evaluate the procedures and process by which law is made and enforced—a measure of the rule of law divorced from deeper commitments to the ideals of liberal constitutionalism. Part II explores the Singapore case in particular, attempting to evaluate its position on a constitutionalism scale. Part III considers the implications of these findings. Professor Tushnet is right to locate Singapore somewhere between the extremes, but what can we learn about constitutionalism from this case study—and what can other polities, particularly those closer to a true authoritarian status, learn from Singapore?

## I

### AUTHORITARIAN CONSTITUTIONALISM DEFINED AND MEASURED

#### A. The “ism” in Constitutionalism

Professor Tushnet makes a compelling case that we should identify varieties of constitutionalism, but by what criteria? He offers two primary variables to consider in constructing a typology of the “varieties of constitutionalism”—(1) a measure of the level of force and fraud in elections (or the lack of elections) on one axis, and (2) the degree of liberal freedoms that are enjoyed and protected in the polity. There is no question that both of these criteria are vital to any system claiming the mantle of constitutionalism, but before concluding that these are sufficient as well as necessary, we need to step back and think a bit more about the meaning of constitutionalism.



Few governments in the world lack some sort of constitutional structure “defined as a set of fundamental legal and political norms and practices that are constitutive of the polity.”<sup>2</sup> But constitutions, Tom Ginsburg reminds us, “are also associated with the narrower and empirically rarer concept of constitutionalism—the ideal of limited government under law,” associated with the Enlightenment and John Locke, among others.<sup>3</sup>

“Constitutionalism,” Keith Whittington writes, “is the constraining of government in order to better effectuate the fundamental principles of the political regime.”<sup>4</sup> And Mark Brandon states that constitutionalism “refers to a set of theories, values, principles, and institutions that are concerned with the authorization, organization, direction and constraint of political power.”<sup>5</sup>

There seems to be an important distinction to draw between a constitutional system and constitutional-*ism*, the ‘ism’ suggesting a specific set of normative commitments.

The terms ‘constitutional’ and ‘constitutionalism’ are often used interchangeably. But if we acknowledge a clear distinction between them, we can more confidently attempt to map the criteria for each and measure and compare different states against a common baseline.

The *Oxford English Dictionary* informs us that the suffix ‘ism’ connotes “a system of theory or practice, religious, ecclesiastical,

<sup>2</sup> Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11, 11 (2012).

<sup>3</sup> *Id.* at 12.

<sup>4</sup> Keith E. Whittington, *Constitutionalism*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 281, 281 (Keith Whittington, R. Daniel Kelemen & Gregory Caldeira eds., 2008).

<sup>5</sup> Mark E. Brandon, *Constitutionalism*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 763, 763 (Mark Tushnet, Mark Graber & Sanford Levinson eds., 2015).

philosophical, political, social.”<sup>6</sup> The *Oxford English Dictionary* is, however, part of the problem, as it defines “constitutionalism” as both (1) “A constitutional system of government” and (2) “Adherence to constitutional principles.”<sup>7</sup>

The first axis we need to consider is a measure of the rules and process of government. At its most basic, a constitution-*al* system can be defined as, Professor Ginsburg asserts, “a set of fundamental legal and political norms and practices that are constitutive of the polity.”<sup>8</sup> I would suggest that in the current era we might profitably think of a constitutional system as one in which the laws (and the institutions that establish those laws) roughly meet the basic requirements of a thin rule of law—essentially the eight criteria offered by Lon Fuller: That laws must have generality; must be known (publicity); cannot be retrospective; must be clear, noncontradictory, capable of being followed, and stable; and must have some congruence between stated norms and norms as applied.<sup>9</sup>

Having these basic rule-of-law practices and procedures is a requirement of any system claiming the mantle of constitutional-*ism* but they are not sufficient. As Ginsburg, Whittington, Brandon and a host of others would agree, there must also be a clear commitment to and means of assuring limits on government power. But the limit on power is not a limit for the sake of having a limit. The limit is there for a reason. This is made plain in the American Declaration of Independence: “Governments are instituted among men,” the Declaration states, to secure rights.<sup>10</sup> The great challenge, however, is that governments need power to protect rights—but powerful governments pose a threat to those very same rights.

“In framing a government which is to be administered by men over men,” *The Federalist No. 51* states, “the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>11</sup>

Professor Li-Ann Thio makes a similar point, arguing that even in the most minimal variety of constitutionalism—what she calls “generic constitutionalism”—it is essential “to regulate state power through rule of law commitments and institutions, *simultaneously empowering and restraining government action*.”<sup>12</sup>

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<sup>6</sup> OXFORD ENGLISH DICTIONARY, 113 (2d ed. 1989)

<sup>7</sup> *Id.* at 790.

<sup>8</sup> Ginsburg, *supra* note 2.

<sup>9</sup> LON FULLER, *THE MORALITY OF LAW* 38–39 (1964).

<sup>10</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That *to secure these rights, Governments are instituted among Men*, deriving their just powers from the consent of the governed . . . .” (emphasis added)).

<sup>11</sup> THE FEDERALIST NO. 51, at 354 (James Madison) (M. Walter Dunne ed., 1901).

<sup>12</sup> Li-Ann Thio, *Constitutionalism in Illiberal Polities*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 133, 134 (Michel Rosenfeld & Andras Sajo eds., 2012)

Professor Tushnet relies upon a measure of the protection of liberal freedoms as one of the axes of his typology, but it would seem a more robust measure if it were part of a broader category that would include a measure of the limits on power and the means by which those limits are imposed and enforced. Call this Axis B: the limits on government power.

Professor Tushnet's second axis is a measure of the degree to which elections are free of fraud and violence. Here again he is measuring a critical variable but one that might be fit into a larger category. Elections might be thought of as an end, but more often they are a means—but a means toward what end? If we are measuring democracy, the end is self-evident. But if we are measuring constitutional-*ism* then it would seem that the purpose and function of elections is as a source of legitimacy and measure of consent. And consent is vital in any system of limited government as the source of the power that is both needed and that needs to be checked.

Here we can return to the American Declaration of Independence: Governments that are instituted to secure rights, the Declaration states, derive their “just powers from the consent of the governed.”<sup>13</sup> While there are many forms of legitimate consent, free and fair representative or democratic elections are among the most common and widely accepted in the modern world. And so, our second axis needs to measure the means of consent and the source of legitimacy—free and fair elections.

This leaves us with three rather than two axes on which to draw our typology of the varieties of constitutionalism:

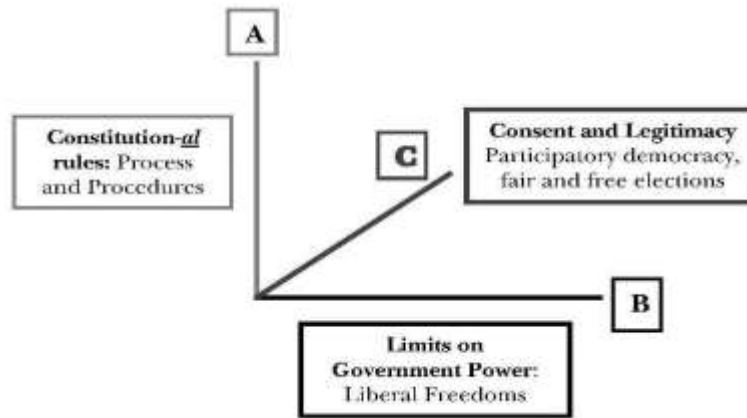
- A) Constitution-*al* rules, process and procedures—the thin rule of law;
- B) Constitutional-*ist* commitment and the means of enforcing that commitment to the norm of a limited government, measured in part by the range and breadth of liberal freedoms; and
- C) Constitutional-*ist* commitment to the norms of consent and legitimacy, which typically now includes fair and free elections.

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(emphasis added).

<sup>13</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

FIGURE 2



These line up well with the three “essential elements” that Mark Brandon argues must be present in any constitutionalist system: Institutions authorized and accountable to the people (which well might include regular, fair and free elections); Some notion of limited government, which might include “the specification of rights”; and the rule of law, or the “regularization of processes by which public norms are made and applied.”<sup>14</sup>

With this more comprehensive set of variables in mind, we can turn now, in Part II, to ask where Singapore might stand on this chart, and then, in Part III, consider the significance of this finding and just what sort of model—if any—Singapore offers to more and less authoritarian polities.

## II

### SINGAPORE: WHAT VARIETY OF CONSTITUTIONALISM?

The Republic of Singapore is an extraordinary nation. Consistently ranked as one of the very top nations in the world in terms of economic competitiveness,<sup>15</sup> and infant mortality,<sup>16</sup> Singapore reports a 96 percent

<sup>14</sup> Brandon, *supra* note 5.

<sup>15</sup> Singapore has consistently ranked as one of the top five nations in the world in the *World Economic Forum's* Global Competitiveness Index. Singapore ranked second on this list in 2013 and in 2014 (the United States was fifth in 2013 and third in 2014). WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 2014–2015, at 13 (2014), available at [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2014-15.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf); WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 2013–2014, at 15 (2013), available at [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2013-14.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf).

<sup>16</sup> The World Bank reports that Singapore's infant mortality rate of 2.2 per 1000 live births in 2013 was the third lowest national infant mortality rate in the world, better than the rate in Germany (3.2), Australia (3.4), the United Kingdom (4), and the United States (6), and significantly ahead of its closest neighbors—Malaysia (7), Indonesia (25), and Thailand (11). *Mortality Rate, Infant*, WORLD BANK, <http://data.worldbank.org/indicator/SP.DYN.IMRT.IN> (last visited Sept. 20, 2015).

literacy rate<sup>17</sup> and home-ownership rates that have soared from 29.4 percent in 1970 to 90.5 percent in 2013.<sup>18</sup> (For comparison, consider that the home-ownership rate in the United States in 2014 was 64 percent.)<sup>19</sup>

Singapore is deeply and thoroughly connected to the world—virtually every major (nonpornographic) English language newspaper and magazine is available in Singapore, as is every cable-television news program; Singaporeans travel widely, and Singapore’s Changi International Airport consistently wins the Skytrax “World Airport Award,” as it most recently did in 2015, 2014, and 2013.<sup>20</sup> Singapore has low corruption rates; a scrupulous financial sector; an educated, literate and culturally sophisticated population; and an extraordinary location as a natural harbor sitting between the Indian Ocean and the South China Sea on sea lanes that directly connect Australia to South Asia and Europe, as well as China to India and beyond.<sup>21</sup> Together, these—along with great political stability—have made Singapore one of the world’s leading centers for wealth, with the world’s sixth highest GDP per capita (US\$56,286), just ahead of the United States (US\$54,629) and well ahead of Germany, the United Kingdom, France, and Japan.<sup>22</sup>

#### A. Fundamental Rights and Limits on Government Power?

Singapore is not necessarily what one thinks of when one hears the word “authoritarian.” But neither should it be confused with a fully developed model of constitutional-*ism*. “Rarely has the Singapore system of govern[ment] been seriously called a democracy except by apologists,” Michael Barr writes, “but neither is it usually called simply a dictatorship

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<sup>17</sup> *Literacy Rate, Adult Total*, WORLD BANK, [http://data.worldbank.org/indicator/SE.ADT.LITR.ZS?order=wbapi\\_data\\_value\\_2012+wbapi\\_data\\_value&sort=desc](http://data.worldbank.org/indicator/SE.ADT.LITR.ZS?order=wbapi_data_value_2012+wbapi_data_value&sort=desc) (last visited Sept. 20, 2015).

<sup>18</sup> *Home Ownership Rate of Resident Households*, SINGAPORE DEP’T OF STATE, <http://www.singstat.gov.sg/statistics/visualising-data/charts/home-ownership-rate-of-resident-households> (last updated Feb. 16, 2015).

<sup>19</sup> Press Release, U.S. Census Bureau News, Residential Vacancies and Homeownership in the Fourth Quarter 2014 (Jan. 29, 2015), *available at* <http://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

<sup>20</sup> *Changi Airport in Singapore has Been Voted the World’s Best Airport by Air Travelers at the 2015 World Airport Awards*, SKYTRAX WORLD AIRPORT AWARDS, [http://www.worldairportawards.com/main/2015\\_airportawards\\_announced.html](http://www.worldairportawards.com/main/2015_airportawards_announced.html) (last visited Sept. 20, 2015); *Changi Airport in Singapore has Been Voted the World’s Best Airport by Air Travelers at the 2014 World Airport Awards*, SKYTRAX WORLD AIRPORT AWARDS, [http://www.worldairportawards.com/main/2014\\_airportawards\\_results\\_announced.html](http://www.worldairportawards.com/main/2014_airportawards_results_announced.html) (last visited Sept. 20, 2015); *Changi Airport in Singapore has Been Voted the World’s Best Airport by Air Travelers at the 2013 World Airport Awards*, SKYTRAX WORLD AIRPORT AWARDS, [http://www.worldairportawards.com/main/2013\\_airportawards\\_results\\_announced.html](http://www.worldairportawards.com/main/2013_airportawards_results_announced.html) (last visited Sept. 20, 2015).

<sup>21</sup> See THE WORLD FACTBOOK: SINGAPORE, <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html> (last visited Sept. 20, 2015).

<sup>22</sup> Sweden, Denmark, Australia, Qatar, Macao, and Norway were the only countries with a higher GDP per capita in 2014. *GDP Per Capita*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited Sept. 20, 2015).

except by its more enthusiastic detractors. It is a complex system,” he adds, “full of internal contradictions and inconsistencies.”<sup>23</sup>

While Singapore has a written constitution, and adheres to a thin version of the Rule of Law,<sup>24</sup> Singapore makes no claims to be a liberal, western democracy. Singapore’s “[i]deals, aspirations and political values are not etched in stone and do not transcend the generations,” Kevin Tan Yew Lee writes.<sup>25</sup> In Singapore, the Constitution has “thus far been seen as a basic framework of social and economic progress.”<sup>26</sup> Singapore’s Constitution, unlike the American Constitution, he adds, “is not based on the Lockean philosophy of limited government which stresses control and checks on government. Instead, it is a pragmatic document which provides a springboard for governmental action.”<sup>27</sup>

The Singapore Constitution was literally cobbled together. The earliest version was written by a British commission headed by George Rendel, which devolved power over many internal and social affairs to a local governing body while retaining British control over internal security and foreign policy.<sup>28</sup> Next came a 1963 Agreement with the British government, which established the Federation of Malaysia that included Singapore as a Member State.<sup>29</sup> When Singapore was severed from the Malaysian federation in August 1965, yet another document was needed but, “instead of drafting a completely new constitution, the Government of the day resorted to adopting, adapting and augmenting the 1963 State Constitution.”<sup>30</sup> Three key documents would become the foundation for Singapore’s modern Constitution: The Constitution (Amendment) Act of 1965, the Republic of Singapore Independence Act of 1965, and the provisions of the Federal Constitution of Malaysia (which had been made applicable to Singapore through the RSIA) would together serve as the independent city-state’s new Constitution.<sup>31</sup>

In 1979, Parliament passed an Act to amend the Constitution—changing the amendment rule itself, from requiring just a simple majority in Parliament for constitutional amendments, to requiring a two-third’s majority instead.<sup>32</sup> But this Act also called upon the Attorney

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<sup>23</sup> MICHAEL BARR, *THE RULING ELITE OF SINGAPORE: NETWORKS OF POWER AND INFLUENCE* 6 (2013).

<sup>24</sup> *See infra* Subpart B.

<sup>25</sup> Kevin Tan Yew Lee, *The Evolution of Singapore’s Modern Constitution: Developments from 1945 to the Present Day*, 1 *SING. ACAD. L. J.* 1, 28 (1989).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 8–9.

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.* at 17.

<sup>31</sup> *Id.* at 16–17.

<sup>32</sup> The Constitution (Amendment) Act, No. 10 of 1979; *see also* S. Jayakumar, *Legislation Comment: The Constitution (Amendment) Act, 1979 (No. 10)*, 21 *MALAYA L. REV.* 111, 111–12 (1979)



General to issue “a single composite document called the Reprint of the Constitution of the Republic of Singapore, 1979.”<sup>33</sup>

Creating a single document would require resolving a number of conflicts among the earlier documents. The Attorney General was given “the power in his discretion” to make needed modifications, including the power to “rearrange the Parts, Articles and provisions of the Constitution of Singapore and of the Constitution of Malaysia . . . which may be necessary or expedient for the perfecting of the consolidated Reprint.”<sup>34</sup>

The point here is that the Singapore Constitution is not a single, coherent, and deeply considered document reflective of a particular political theory or ideology—it is instead a pragmatic effort to set up the rules by which the government will function. This does not preclude consideration of Singapore as a constitutional-*ist* state, but it is to say that its version of constitutional-*ism* may not be so deep as to constitute the key text in a civil religion.<sup>35</sup> But this also suggests that Professor Tushnet is right to reject the notion of constitutionalism as a binary proposition.

#### B. Axis A: The Rule of Law—Process and Procedure

Constructing three rather than two axes on which to measure constitutionalism permits us to disentangle the essence of a constitution-*al* system from one that meets the baseline requirements of a polity committed to constitutional-*ism*. On this axis, Singapore scores very highly. In his article, Professor Tushnet suggests that my own view of Singapore is that of “mere rule-of-law” state.<sup>36</sup> If that is the impression I have left, it is my fault. But I want to be clear, I do not think it is any easy task, nor is it an exercise in cynical position taking, to achieve the levels of the rule of law that Singapore has been able to achieve. This is no “mere” rule-of-law state. But neither is it an example of Lockean liberalism.

In many ways, the distinction to draw is between what Lon Fuller wrote and what he likely had in mind. Following Fuller’s text, Singapore’s laws are general, they are known and available, their criminal law is not retroactive, their rules are clear and consistent, abiding by them is plausible, and the nation’s public officials are required to (and in fact do) abide by them.<sup>37</sup>

While it is the case that the People’s Action Party (PAP), which has ruled the Island nation from 1959 to the present, without interruption, can easily amend the Constitution (and makes frequent use of constitutional revision), it does so completely within the rules. These amendments

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<sup>33</sup> Tan Yew Lee, *supra* note 25, at 21

<sup>34</sup> *Id.* (quoting CONST. OF THE STATE OF SINGAPORE, 1963, art. 90).

<sup>35</sup> Robert Bellah, *Civil Religion in America*, 96 DAEDALUS: J. AM. ACAD. ARTS & SCI. 1, 1–21 (1976); Sanford Levinson, “*The Constitution*” in *American Civil Religion*, 1979 SUP. CT. REV. 123, 123–51 (1979).

<sup>36</sup> Tushnet, *supra* note 1, at n.140.

<sup>37</sup> See FULLER, *supra* note 9.

require a super-majority in Parliament (two-thirds).<sup>38</sup> That threshold has been an easy one to reach, since the PAP has never controlled fewer than 93 percent of the seats in Parliament<sup>39</sup>—but to say that they can meet the legal requirement with relative ease is not to suggest that the process and rules are a mere fig leaf. While there are sound arguments for why one might want to raise the threshold for constitutional amendment to levels more like the U.S. Federal Constitution, a nearly impossible standard such as that reflects a choice between the poles of providing the government with enough power to govern, and yet making sure that the same government checks itself, or is limited by other institutions and other actors.

One of those other institutions might be an independent judiciary. And in Singapore—particularly in cases concerning property and investment—that institution has played a vital role in protecting rights and enforcing contracts even where the rulings were adverse to the Government’s interest. Yong Pung How, the then-Chief Justice of the Singapore Supreme Court made clear how important the rule of law has been to Singapore. Ours is a nation, he said, “which is based wholly on the Rule of Law. It is clear and practical laws and the effective observance and enforcement of these laws which provide the foundation for our economic and social development.”<sup>40</sup>

Singapore has a highly trained bureaucracy, well-paid and trained judges, and technocrats of the highest caliber. Investments are scrupulously safe in Singapore. Rules are made in public, and legislative process is observed and followed with precision; but more than that, with commitment.<sup>41</sup> The rule of law itself is a normative value that is important in Singapore. It is vitally important in any measure of the depth and range of constitutional-*ism* to consider rules and procedures as part of—but distinct from—the consideration of the ideology and ideals that drive the full enterprise. On this axis—the rule of law, process and procedure—Singapore scores quite highly.

### C. Axis B: Limits on Power

Singapore’s pragmatic Constitution was built first and foremost to create the institutions, incentives, and rules necessary to forge a functioning country out of the city-state Malaysia had cast aside.

One reason Malaysia did this had to do with the multiethnic, racial, and religious divisions in the Federation. Malaysia worried that

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<sup>38</sup> The Constitution (Amendment) Act, No. 10 of 1979.

<sup>39</sup> *Parliamentary Elections Results*, SINGAPORE ELECTIONS DEP’T [http://www.eld.gov.sg/elections\\_past\\_parliamentary.html](http://www.eld.gov.sg/elections_past_parliamentary.html) (last updated Sept. 14, 2015) [Hereinafter *Parliamentary Elections Results*].

<sup>40</sup> Li-Ann Thio, *Lex Rex or Rex Lex?: Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1, 29 (2002) (quoting then-Chief Justice Yong Pung How).

<sup>41</sup> *Id.* at 5–6.

Singapore's large Chinese ethnic population would skew politics and economic development toward that group and away from the indigenous Malays, away from Malaysia's Muslims and toward the Buddhist, Taoist, and Christian Chinese in both countries—who already held a disproportionate share of wealth and economic clout.<sup>42</sup> Race and ethnicity, and the tensions that could result, certainly were foremost in the minds of leaders in Singapore as well as Malaysia.

Cast adrift, with virtually no arable land, no independent supply of drinking water and a diverse society living in close quarters on the island nation, the first priority for Singapore (as it had been for the authors of the U.S. Constitution) was to create a government strong enough to govern.<sup>43</sup> Singapore's pragmatic approach to constitution writing made this plain, as did one of the first constitutional revisions they put in place, lowering the threshold for constitutional amendment from two-thirds to just a simple majority in Parliament.<sup>44</sup> A state focused exclusively on maintaining control would likely have been more reluctant to lower the barrier for amendment.

Clearly some limits on government were present and were of concern to the ruling Party. But a clear demarcation of the separation of powers was not one of them.

In one of his first speeches as Prime Minister, Lee Kuan Yew addressed civil service officers at the opening of a political education center designed to help former colonial administrators transition to a world where popular opinion would be decisive. "The mass of the people are not concerned with legal and constitutional forms and niceties," Lee told them.<sup>45</sup> "They are not interested in the theory of the separation of powers and the purpose and function of a politically neutral public service under such a constitution. . . . If the future is not better . . . then at the end of the five-year term the people are hardly likely to believe, either in the political party that they have elected, or the political system that they have inherited."<sup>46</sup>

In this same speech, however, a young Lee Kuan Yew, worried about the challenge of communism, and racial and religious strife, concluded his speech on a higher normative plain: "I ask you," he said, "to join us in this task to work more effectively together in establishing a secure and healthy

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<sup>42</sup> See generally HUSSIN MUTALIB, *SINGAPORE MALAYS: BEING ETHNIC MINORITY AND MUSLIM IN A GLOBAL CITY-STATE* 25–29 (2012).

<sup>43</sup> THE FEDERALIST NO. 51, *supra* note 11.

<sup>44</sup> Constitution of Singapore (Amendment) Act of 1965. The supermajority requirement of two-thirds would be restored fourteen years later by Act of Parliament in 1979. See S. Jayakumar, *Legislation Comment: The Constitution (Amendment) Act, 1979 (No. 10)*, 21 MALAYA L. REV. 111, 111–12 (1979).

<sup>45</sup> Lee Kuan Yew, Prime Minister, Speech by the Prime Minister at the Opening of the Civil Service Study Centre (Aug. 15, 1959) (transcript available at <http://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19590815.pdf>).

<sup>46</sup> *Id.*

base for democratic institutions through which we hope to establish a liberal, just and happy society.”<sup>47</sup>

The Singapore Constitution contained—and continues to contain—fundamental rights provisions, including protections for speech, and the rights to assemble and form associations.

However, these rights are made subordinate to other values and priorities. The freedom of speech, protected by Article 14 of the Constitution, is made subordinate to the interests of national security, “public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offense”; the Guarantee of the right to assemble peacefully is made subordinate to “such restrictions as [Parliament] considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order”; and the guarantee of a right to form associations is made subordinate to such restrictions as the Parliament “considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.”<sup>48</sup>

These provisions are of vital importance: While Singapore does have some limits on its government and the exercise of power, and though these limits clearly enhance individual liberty, it seems fair to conclude that they are far less secure and far less central to the national norms and priorities than they are in other constitutional-*ist* systems.

This different set of priorities was clear early on. In a speech to the General Assembly of the International Press Institute in Helsinki in 1971, Prime Minister Lee argued that “people in new countries cannot afford to imitate the fads and fetishes of the contemporary West.”<sup>49</sup> Violent demonstrations by wealthy Americans seen on TV and reported by the Press “are not relevant to the social and economic circumstances of new under-developed countries.”<sup>50</sup> Education, stability, work discipline and the ability “to adapt this knowledge and techniques to fit the conditions of their country, these are vital factors for progress.”<sup>51</sup> In a nation struggling with development challenges and a multiethnic population, not to mention being surrounded by the ideological struggles of the Cold War and the violence that poses, “In such a situation,” Lee concluded, “freedom of the press, freedom of the news media, must be subordinated . . . to the primary purpose of an elected government.”<sup>52</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 14(2) (a).

<sup>49</sup> Lee Kuan Yew, Prime Minister, Address to the General Assembly of the International Press Institute at Helsinki (June 9, 1971) (transcript available at <http://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19710609a.pdf>).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* Lee flew to this conference just hours after ordering the cancellation of a printing license for a recently launched independent newspaper that was owned in part by non-

Another way fundamental liberties can be protected is through the clash of different political institutions or levels of government: With a unicameral legislature, no separation between Executive and Legislative and no form of federalism, Singapore lacks most of these natural self-checking mechanisms. The one institution that might function as a check is the judiciary—and indeed they do perform that function in the economic and property-rights realm. In public law, however, the courts have been hamstrung by constitutional amendments and, as some have argued, by various creative approaches by the government to the means of guaranteeing that independence.<sup>53</sup>

#### D. An Independent Judiciary to Enforce Limits on Government?

The Singapore Constitution clearly provides for an independent judiciary: Those appointed to Singapore's Supreme Court serve with tenure in office until age sixty-five.<sup>54</sup> But the Constitution also authorizes the President, acting on "the advice of the Prime Minister," to appoint a person who is sixty-five years of age or older "to be the Chief Justice, a Judge of Appeal or a Judge of the High Court for a specified period."<sup>55</sup> This provision has been used with some frequency,<sup>56</sup> not only for the reappointment of Supreme Court Justices, but to reappoint Chief Justices well past their sixty-fifth birthday: Wee Chong Jin served as Chief Justice for eight years under term contracts after he turned sixty-five and Yong Pung How served under sequential appointments for fifteen years after he reached age sixty-five.<sup>57</sup> Chief Justice Yong's replacement took over as Chief Justice at the age of sixty-nine and remained in office for six years

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Singaporeans, saying that he "did not accept that newspaper owners had the right to print whatever they liked." LEE KUAN YEW, *FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY: 1965–2000*, at 190 (2000).

<sup>53</sup> Lee Kuan Yew, Prime Minister, Speech by the Prime Minister at the Opening of the Civil Service Study Centre (Aug. 15, 1959) (transcript available at <http://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19590815.pdf>).

<sup>54</sup> CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 98(1).

<sup>55</sup> *Id.* art. 95(2).

<sup>56</sup> See Kevin Y.L. Tan, *State and Institution Building through the Singapore Constitution in 1965–2005*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION 63–64* (Li-ann Thio & Kevin Y.L. Tan, eds., 2009); see also *id.* at 64 n.5 ("Independent Singapore's first chief Justice, Wee Chong Jin retired at the age of 74. His successor Yong Pung How retired at age 80, while the current Chief Justice Chan Sek Keong is already past 70 at the time of writing. Other judges of the Supreme Court who were re-appointed after retirement are as follows (with their retirement age in parenthesis): Frederic Arthur Chua (78); Choor Sing (70); Dennis D'Cotta (71); AP Rajah (79); TS Sinnathuray (68); and LP Thean (70).").

<sup>57</sup> See *id.* at 64 n.65. Chief Justice Yong was replaced, in turn, by Chan Sek Keong who returned to the Court after fourteen years as Singapore's Attorney General, taking over as Chief Justice at age sixty-nine and serving, on term appointments for six years. See K. Shanmugan, Minister for Law, Tribute to Retired Chief Justice Chan Sek Keong (Nov. 12, 2012), <https://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/tribute-to-retired-chief-justice-chan-sek-keong-by-minister-for-.html>; Press Release, Prime Minister's Office, Re-appointment of Chan Sek Keong as Chief Justice, <http://www.pmo.gov.sg/mediacentre/re-appointment-chan-sek-keong-chief-justice> (last updated June 11, 2014).

under two three-year contracts.<sup>58</sup>

And while the current Supreme Court has just one Justice over the age of sixty-five, it is important to note that the government amended the Constitution in 1971 to provide for the appointment of additional judicial officers who exercised the full powers of a Supreme Court Judge but do so on term appointments.<sup>59</sup> Currently there are five Senior Judges, and ten Judicial Commissioners who serve in this capacity for “such period or periods as the President thinks fit; and a Judicial Commissioner so appointed may, in respect of such class or classes of cases as the Chief Justice may specify, exercise the powers and perform the functions of a Judge of the High Court.”<sup>60</sup> Note as well that anything done by a Senior Judge or a “Judicial Commissioner when acting in accordance with the terms of his appointment shall have the same validity and effect as if done by a Judge of that Court and, in respect thereof, he shall have the same powers and enjoy the same immunities as if he had been a Judge of that Court.”<sup>61</sup> The same powers and immunities, except for tenure in office since the appointment’s term, is determined by the President.<sup>62</sup>

Related to judicial independence is the question of judicial power and autonomy. The Singapore Constitution has what appears to be a strong supremacy clause: “This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”<sup>63</sup>

Now, mix in an equal protection clause (“All persons are equal before the law and entitled to the equal protection of the law”<sup>64</sup>) and a due process clause (“No person shall be deprived of his life or personal liberty save in accordance with law”<sup>65</sup>) and you would seem to have the recipe for strong judicial review and robust guarantees against the abuse of power and protection for individual rights through the development of a strong and independent court.

And, indeed, there was a period in the late 1980s when this seemed quite likely to happen. But it did not. Constitutional amendment intervened.<sup>66</sup>

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<sup>58</sup> Press Release, *supra* note 57.

<sup>59</sup> Tan, *supra* note 56, at 63.

<sup>60</sup> CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 4.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* art. 22(1)(a).

<sup>63</sup> *Id.* art. 4.

<sup>64</sup> *Id.* art. 12(1).

<sup>65</sup> *Id.* art. 9(1).

<sup>66</sup> The practice of using constitutional amendment to reverse court rulings is not unheard of in the United States: The 16th Amendment, providing for a progressive income tax, was passed explicitly to reverse the Supreme Court’s ruling in *Pollock v. Farmers Loan & Tr. Co.*, 157 U.S. 429 (1895) while the 13th and 14th Amendments reversed the Court’s decision in the infamous *Dred Scott v. Sandford*, 60 U.S. 393 (1857), case. See William Howard Taft, President, Special

In December, 1988, Singapore's highest court ruled that the Government had failed to properly follow statutory procedures in the Internal Security Act when it detained four dissidents who had been arrested and were being held in a rather notorious government detention center on Whitely Road.<sup>67</sup>

The four, including Chng Suan Tze, brought their case to the High Court of Appeal, which ordered their release, stating that, "All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power."<sup>68</sup> In this case, the judges ruled, "the notion of a subjective or unfettered [government] discretion is contrary to the rule of law"<sup>69</sup> and they ordered the prisoners released.<sup>70</sup>

And they were. They were driven out the gates of the detention center and came to a stop.<sup>71</sup> When the car doors opened, the prisoners stepped out and were immediately re-arrested. This time, however, the government followed the statutory procedures to the letter.

The Government abided by the court's ruling. And then, following the rules, process and procedure, the Government amended the Constitution to cut off the doctrinal progression that this case suggested might lead to more assertive court rulings on internal security and rights cases in the future.

This is a reminder of how vitally important constitutional amendment rules are, and how equally important it is for those eager to use constitutional amendment as a regular path to favored policies to retain a super-majority of seats in Parliament (but more on that when we turn to Axis C).

If we think of the difficulty of passing constitutional amendments as a surrogate for the space in which the court has room to maneuver and embed its claims to authority, then we can see that countries like the United States, with significant barriers to amendment, leave a great deal of space for courts to develop their own power; while countries like Singapore leave their courts almost no room to do the same, since uncomfortable rulings can be easily (and quite legitimately) reversed through proper constitutional amendment.

And so we have a Constitution that was never popularly ratified, that is, in fact, a hybrid constructed by the Attorney General in 1979, and subject to a supermajority requirement for constitutional amendment.

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Message (June 16, 1909) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=68517>).

<sup>67</sup> For more discussion on this case and the development of constitutional review in Singapore, see Gordon Silverstein, *Globalization and the Rule of Law: A Machine That Runs of Itself?*, 1 INT'L J. CONST. L. 247, 438-440 (2003).

<sup>68</sup> Chng Suan Tze v. Minister of Home Affairs, [1989] 1 MLJ 69, 82 (Sing.).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 89.

<sup>71</sup> See Silverstein, *supra* note 67, at 439.

There is very weak separation of powers, with a largely ceremonial President, a Parliament where between 93–100 percent of all seats have been held by one party since the nation was founded and a judiciary that is deeply respected, very well compensated, and extremely talented, and yet, left with very little space in which to develop any sort of far reaching powers of judicial review. With these in mind, it is hard to score Singapore very highly on Axis B.

#### E. Axis C: Legitimacy, Consent, and Fair and Free Elections

Given the huge majorities that the PAP has enjoyed since the nation's founding, it should come as no surprise that the party has turned to constitutional amendment with regularity. Singapore Law Professor Simon S.C. Tay, serving as a Nominated Member of Parliament (more on this below), took on the Government's Minister for Law (S. Jayakumar) in 1998 during a floor debate in Parliament, taking the Government to task for their frequent recourse to constitutional amendment, particularly for purposes of reversing unfavorable court decisions.<sup>72</sup>

The PAP has held power in Singapore since 1959, when Lee Kuan Yew was first appointed Prime Minister of what was then the State of Singapore within the British Empire.<sup>73</sup> He retained that title (and the PAP retained control) during the short-lived period when Singapore was a State within the Federation of Malaysia (from 1963 to independence in 1965).<sup>74</sup> Since 1965 there have been eleven General Elections in Singapore, and in each the PAP has been returned to power winning between 60 and 87 percent of the popular vote.<sup>75</sup> That strong showing has been significantly amplified when translated into seats in Parliament: Vote totals ranging from 70 to 87 percent in the first four elections translated into 100 percent of the seats in Parliament.<sup>76</sup> And, though the PAP's robust share of the vote has never gone below 60 percent, their share of the seats in Parliament has never gone below 93 percent.<sup>77</sup>

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<sup>72</sup> *Singapore Parliamentary Debates, Official Report* (14 January 1998) vol 68 at col 90.

<sup>73</sup> *Legislative Assembly General Election 1959*, SINGAPORE-ELECTIONS.COM, <http://www.singapore-elections.com/general-election/1959/> (last visited Sept. 20, 2015).

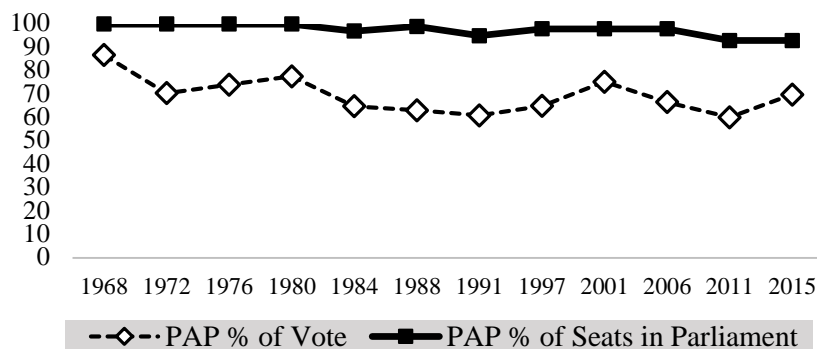
<sup>74</sup> *Singapore Election Candidates (La-Le)*, SINGAPORE-ELECTIONS.COM, <http://www.singapore-elections.com/candidates/la-le.html> (last visited Sept. 20, 2015).

<sup>75</sup> *Id.*; *Parliamentary Elections Results*, *supra* note 39.

<sup>76</sup> *Parliamentary General Election 1968*, SINGAPORE-ELECTIONS.COM, <http://www.singapore-elections.com/general-election/1968/> (last visited Sept. 20, 2015); *Parliamentary General Election 1972*, SINGAPORE-ELECTIONS.COM, <http://www.singapore-elections.com/general-election/1972/> (last visited Sept. 20, 2015); *Parliamentary General Election 1976*, SINGAPORE-ELECTIONS.COM, <http://www.singapore-elections.com/general-election/1976/> (last visited Sept. 20, 2015); *Parliamentary General Election 1980*, SINGAPORE-ELECTIONS.COM, <http://www.singapore-elections.com/general-election/1980/> (last visited Sept. 20, 2015).

<sup>77</sup> *Parliamentary Elections Results*, *supra* note 39.



FIGURE 3. SINGAPORE GENERAL ELECTION RESULTS<sup>78</sup>

Professor Tushnet is right about the relatively low levels of fraud and violence in Singapore's elections. There is, clearly, broad and enduring support for the PAP. And every advanced democracy in the world no doubt witnesses efforts by those in power to use election law to protect and enhance their majorities. But if we are to properly use the elections, and their lack of fraud or force, as a proxy for the essential legitimacy and consent that is represented on Axis C, we need to better understand the techniques Singapore has employed.

The PAP had won 100 percent of the seats in Parliament in each of the first four general elections (1968, 1972, 1976, and 1980).<sup>79</sup> Losing just two seats in 1984 was, therefore, more of a shock than one might first imagine.<sup>80</sup> But when the percent of the popular vote is factored in, the level of panic in the Party is more easily understood. Having won 87 percent of the popular vote in 1968, but dropping to 70 percent in 1972, the PAP steadily regained its popularity, rising to 74 percent in 1976 and 78 percent in 1980.<sup>81</sup> And then came 1984, when the party's popularity dropped to 65 percent.<sup>82</sup>

Lee and the Party's leaders were worried that their ability to convince the public to accept their often stern rule had clearly slipped. As the deprivations of the post-World War II era disappeared from memory, the long feared racial conflagration the PAP warned of failed to materialize, and, perhaps most importantly, as the economy grew and prosperity spread,

<sup>78</sup> See MUTALIB, *supra* note 42, at 145 tbl. 10.1 (2012) (providing results from 1968–2011); *GE 2015: Live Results*, STRAITS TIMES (Sing.), <http://graphics.straitstimes.com/STI/STIMEDIA/Interactives/singapore-general-election/2015-live-election-results/index.html> (last updated Sept. 12, 2015) (providing results for 2015).

<sup>79</sup> *Parliamentary Elections Results*, *supra* note 39.

<sup>80</sup> Gordon Silverstein, *Singapore: The Exception that Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 94–96 (Tom Ginsburg & Tamir Moustaafa eds., 2008).

<sup>81</sup> *Parliamentary Elections Results*, *supra* note 39.

<sup>82</sup> *Parliamentary General Election 1984*, SINGAPORE-ELECTIONS.COM, <http://www.singapore-elections.com/general-election/1984/> (last visited Sept. 20, 2015).

a very small space began to open for the growth of an opposition party. This was only encouraged, Lee and the Party elders believed, by the fact that the long run of peace and prosperity had made the Party's junior ministers and backbenchers soft.<sup>83</sup> This was something that had long worried Lee.

Michael Barr reports that young Lee Kuan Yew had been deeply impressed by Arnold Toynbee's *A Study of History*, "which was all the rage while [Lee] was studying law at Cambridge University after the war."<sup>84</sup>

Toynbee explained civilisational [sic] change through a theory of challenge and response, which posited that an established elite eventually loses its 'creativity' and then its end comes sooner or later because it begins meeting challenges to which it cannot adapt and with which it cannot cope. It is then inevitably superseded by a new, fresh elite.<sup>85</sup>

The lesson for Lee was clear. An elite can only hold power "for as long as they can keep themselves sharp, nimble, and 'creative' through successfully facing and coping with new challenges."<sup>86</sup>

While he certainly did not want to risk Singapore's gains by handing actual power to any opposition in Parliament, Lee and the PAP leadership were determined to bring a few articulate and established figures from outside the political arena into the Parliament. It would have all the advantages of an opposition, with few of the risks.

The first way they developed to do this was to create a new position, the Non-Constituency Member of Parliament (NCMP), which provided for the appointment of up to three (now as many as nine) Members of Parliament—the top vote-getters who had not been able to win a seat in the General Election.<sup>87</sup> NCMPs would thus bring opposition voices into the Parliament, but at little risk since NCMPs are entitled to vote on all matters before the Parliament "except Supply Bills, Money Bills, Constitutional amendments, motions of no confidence in the Government, and motions to remove the President from office."<sup>88</sup>

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<sup>83</sup> In a speech to Parliament in 1986, Prime Minister Lee Kuan Yew noted that the lack of opposition posed a problem for "the younger Ministers and MPs." They "have not faced the fearsome foes of the 1950s and 60's." When faced with an opposition member, "initially they were awkward." But, he added, "they soon sharpened their debating skills." He added that "our children have no memories of troubled times from reckless opposition. A younger generation of Ministers also missed this experience. Fierce combat made the older Ministers what they are." Lee Kuan Yew, Prime Minister, Speech by Prime Minister on the Second Reading of the Constitution of the Republic of Singapore (Amendment) Bill in Parliament (July 24, 1984) (transcript available at <http://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19840724.pdf>).

<sup>84</sup> BARR, *supra* note 23, at 3.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *Parliamentary Glossary-N*, PARLIAMENT OF SINGAPORE, <https://www.parliament.gov.sg/publications/n> (last visited Sept. 20, 2015).

<sup>88</sup> *Id.*; see also CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 39 (stating

One can see this plan as an innovative way to provide for some genuine representation of opposition views—or one can see it as a “cosmetic lure to distract voters from voting in genuine opposition MPs through the placatory effect of a guaranteed token presence of opposition NCMPs who do not have full voting rights.”<sup>89</sup>

The NCMPs were introduced in the wake of the 1984 General Election, which was seen by many as a PAP debacle. By 1990, the Party felt its grip loosening further. Just months before Lee Kuan Yew resigned as Prime Minister, the Party introduced a second way to bring in opposition voices (or stifle the development of a genuine opposition—depending on your perspective). This new position would be called “Nominated Member[s] of Parliament.”<sup>90</sup>

The NCMPs had some measure of electoral legitimacy having been drawn from among those “polling the highest percentage of votes among losers at the general election.”<sup>91</sup> Nominated Members of Parliament were meant to draw in nonpoliticians—public figures, academics, business people, labor leaders, and community figures—who could bring new perspective, but who might also sidetrack the demand for real opposition in government.<sup>92</sup> And, like the NCMPs, these Members of Parliament may vote on all matters except Supply Bills, Money Bills, Constitutional amendments, motions of no confidence in the Government, and motions to remove the President from office.<sup>93</sup>

Professor Thio argues that these positions, and particularly the NMPs, harken back to a practice that was used in British colonial times—a return to the “paternalistic colonial practice of appointing nominated legislative assembly members, drawn from among the better natives.”<sup>94</sup>

Between the introduction of the NCMPs in 1984 and the NMPs in 1990, the PAP put in place a more radical measure: The Group Representation Constituency.<sup>95</sup> The PAP argued that this measure was essential to prevent racial strife and would guarantee representation to

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Parliament shall consist of Members and Nominated Members); REPUBLIC OF SINGAPORE GOVERNMENT GAZETTE, ACTS SUPPLEMENT, No. 10 of 1988, Parliamentary Elections (Amendment) Act 1988 art. 17, available at <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=CompId%3Ad2aa62f0-8501-4497-94dc-9977a0af76c4;rec=0;resUrl=http%3A%2F%2Fstatutes.agc.gov.sg%2Faol%2Fbrowse%2FyearResults.w3p%3Btype%3DactsSup%3Byear%3D1988>.

<sup>89</sup> Thio, *supra* note 40, at 46.

<sup>90</sup> *Parliamentary Glossary-N*, PARLIAMENT OF SINGAPORE, <https://www.parliament.gov.sg/publications/n> (last visited Sept. 20, 2015).

<sup>91</sup> *Id.*.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Thio, *supra* note 40, at 46.

<sup>95</sup> DIANE MAUZY & ROBERT MILNE, SINGAPORE POLITICS UNDER THE PEOPLE’S ACTION PARTY 145 (2002).

Singapore's minority population of Malays and those of Indian descent.<sup>96</sup> Opposition leaders argued that it was meant as a stop-gap means to prevent the election of more opposition party members.<sup>97</sup>

The GRCs would group together what had previously been single-member districts into a larger group of anywhere from three to six Members of Parliament.<sup>98</sup> Parties have to contest the GRC as a slate—voters vote for the slate of their choice and cannot vote for the representatives individually.<sup>99</sup> The law requires that at least one member of each GRC slate be a member of a minority (Malay or Indian) community.<sup>100</sup>

The GRC does assure minority representation, but there is scant evidence that this was a serious concern. Singapore's minority members tend to live in concentrated geographical areas and so were able to elect their members to Parliament under the traditional system.<sup>101</sup> Opponents make the case that the GRC actually serves two other purposes: Because you can group a major and established political leader with neophytes, it is a way for the PAP to recruit and ease in new talent rather than having them face off against (and possibly lose to) an opposition candidate.<sup>102</sup> This interpretation was confirmed in 2006 when then-Senior Minister and former Prime Minister Goh Chok Tong told the *Straits Times* newspaper that the GRCs helped the PAP to “recruit younger and capable candidates with the potential to become ministers.”<sup>103</sup> Without some assurance that they would have “a good chance of winning at least their first election,” Tong told the *Straits Times*, “many able and successful young Singaporeans may not risk their careers to join politics.”<sup>104</sup>

Critics might also argue that because each Party must win the full slate—because it is all or nothing—the GRCs undercut the ability of an opposition party to get a toe-hold: hard enough to elect just one or two

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<sup>96</sup> KEVIN TAN, *THE CONSTITUTION OF SINGAPORE: A CONTEXTUAL ANALYSIS* 70–71 (2015).

<sup>97</sup> *Id.*

<sup>98</sup> The GRCs were the product of amendments to the Constitution: The Constitution of the Republic of Singapore (Amendment) Act 1988, and the Parliamentary Elections (Amendment) Act 1988.

<sup>99</sup> See *Types of Electoral Division*, SINGAPORE ELECTIONS DEP'T, [http://www.eld.gov.sg/elections\\_type\\_electoral.html](http://www.eld.gov.sg/elections_type_electoral.html) (last updated Sept. 1, 2015).

<sup>100</sup> *Id.*

<sup>101</sup> See MICHAEL HILL & KWEN FEE LIAN, *THE POLITICS OF NATION BUILDING AND CITIZENSHIP IN SINGAPORE* 113–39 (1995) (detailing the intensely ethnic nature of residential patterns in Singapore); see also Maisy Wong, *Estimating the Impact of the Ethnic Housing Quotas in Singapore* 7 (Oct. 5, 2012) (unpublished working paper) (on file with author) (stating government officials were concerned with the “concentrations of racial groups”). *Contra* Netina Tan, *Manipulating Electoral Laws in Singapore*, 32 *ELECTORAL STUD.* 632, 638–39 (2013).

<sup>102</sup> See Tan, *supra* note 101, at 636.

<sup>103</sup> Li Xueying, *GRCs Make it Easier to Find Top Talent: Senior Minister*, *STRAITS TIMES* (Sing.), June 27, 2006.

<sup>104</sup> *Id.*

members of the opposition, now you would need to elect three to six members (or none) and at least one of those from a minority community.

These maneuvers are certainly not shocking—malapportionment and the art of the gerrymander were developed and perfected in the United Kingdom and the United States.<sup>105</sup> But because of the separation of powers, federalism, and robust free speech, particularly in elections, even the most effective gerrymander has failed to allow one party to maintain unified control of government for long.

There is little doubt that the PAP could continue to hold a solid majority in Parliament even without these innovations—so why go to such lengths? Consider this: If the PAP's seats in Parliament more closely tracked their share of the popular vote, then they would not have been able to pass constitutional amendments on a straight party vote in five of the eleven Parliaments that have formed since the first General Election in 1968 and just barely made it in a sixth.<sup>106</sup> Combine that with the PAP's deep elitism<sup>107</sup> and the generational changes that were inevitable in the 1990s, and there is certainly a logic to be seen.

The NMP, the NCMP, and the GRC were not the only important ways in which the evolution of a loyal opposition has been blunted in Singapore. A far more effective tool has been the use of civil suits and bankruptcy provisions.

Singapore quite properly scores highly on any measure of fraud and violence in elections. “Suing an opponent for libel or pursuing him for tax evasion, gets far less ink than throwing him in prison, and it is every bit as effective. In Singapore, only those who are willing to risk financial ruin dare to challenge the government openly.”<sup>108</sup>

Members of Parliament in Singapore lose their seats and are banned from running for office for five years if they are convicted of any criminal offense that carries a fine of more than S\$2000.<sup>109</sup> Members are also expelled if they declare bankruptcy.<sup>110</sup> Both rules have good logic behind them—criminals should not be writing laws, and those whose personal finances are in deep arrears pose too great a risk for corruption to be trusted with a vote. Over the years, however, civil suits for libel against sitting government officials combined with criminal fines for offenses such as speaking without a permit have resulted in the expulsion (and prohibition from running for office) for at least four leading opposition candidates: J.B.

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<sup>105</sup> See James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 918–20 & n.130 (1997).

<sup>106</sup> See *supra* Figure 3.

<sup>107</sup> See *infra* note 114 and accompanying text.

<sup>108</sup> Marcus Gee, *International Affairs: The Singapore Suits*, GLOBE AND MAIL (Can.), Mar. 12, 1997, at A-15.

<sup>109</sup> CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, arts. 45(1) (e), 45(2).

<sup>110</sup> *Id.* arts. 45(1) (b), 45(2).

Jeyaretnam (sued repeatedly for defamation and bankrupted), Wong Hong Toy (convicted and fined more than S\$2000 for campaign violations), Tang Liang Hong (sued for defamation) and Chee Soon Juan (sued for defamation and convicted of public speaking without a permit) among others.<sup>111</sup> All were promising, leading opposition candidates. All were banned from running for office. None were jailed or physically hurt.<sup>112</sup> While Singapore's elections seem quite free of outright fraud and violence, they can't be said to generate a full measure of consent and legitimacy for the government, leaving Singapore in an intermediate to low position on this axis.

### III

#### SINGAPORE AS A MODEL—BUT OF WHAT SORT?

Professor Tushnet suggests that Singapore is a model of a stable sort of constitutionalism that is neither “mere rule-of-law” nor Lockean liberalism. He argues that we need not, and should not, think of Singapore as merely a stage in development, but rather to think about constitutional authoritarianism as a stable position between the extremes.<sup>113</sup>

If he is right, what are we to make of this? Is Singapore *sui generis*—an exceptional society in any number of ways? Is Singapore a model, and if so, of what sort?

Or is Singapore, instead, a model that other states might emulate? And if it is a model that might be emulated, what sort of model does it offer? Is it a model of how a state might peacefully and prosperously move from the authoritarian end of the scale toward liberal constitutionalism? Or is it, instead, a model of how a state might avoid pressures to make just that sort of move.

Singapore is worth careful study for many reasons, not the least of which is that Singapore helps us to think more carefully about terms we use too interchangeably—constitution-*al* and constitutional-*ism*. Singapore surely does subscribe to and abide by important norms that are essential to constitutional-*ism*, but the analysis cannot stop there. Singapore's commitment to constitutionalism is not the only ism that matters in Singapore. Just as important, perhaps more so, are Singapore's commitments to *elitism* and *meritocratism*.<sup>114</sup>

As early as 1955, Prime Minister Lee Kwan Yew made clear that democracy itself was not to be pursued as a normative end but if, and only

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<sup>111</sup> Silverstein, *supra* note 80, at 94.

<sup>112</sup> For more detail on these and other techniques including campaign finance rules, please see *id.*, at 73–101.

<sup>113</sup> Tushnet, *supra* note 1, at 425.

<sup>114</sup> MICHAEL BARR, CONSTRUCTING SINGAPORE: ELITISM, ETHNICITY AND THE NATION-BUILDING PROJECT 43–49 (2008); Kenneth Paul Tan, *Meritocracy and Elitism in a Global City: Ideological Shifts in Singapore*, 29 INT'L POL. SCI. REV., 7, 7–8, 13–17 (2008).

if, it proved itself effective and efficient.<sup>115</sup> Michael Barr quotes two telling speeches by Lee Kuan Yew that bookend his remarkable career. In 1955, Lee made clear in parliamentary debates that his goal was practical and pragmatic, and not a normative ideal. “As early as 1955,” Barr reports, “he was on record as regarding democracy as an ‘experiment’ to be judged by its results.”<sup>116</sup> And in 1992, Barr quotes from a well-known speech Lee delivered on “Democracy, Human Rights and the Realities.” In the 1992 speech, Lee made clear that economic development came first: “A country must first have economic development, then democracy may follow.”<sup>117</sup> “[M]y values,” Lee added, “are for a government which is honest, effective and efficient in protecting its people and allowing opportunities to all to advance themselves in a stable and orderly society where they can live a good life and raise their children to do better than themselves.”<sup>118</sup> Professor Tushnet is quite right that we cannot simply write Singapore off as an authoritarian state. But it is a mistake to conflate a constitutional state, which Singapore is, with one that is deeply imbued with and committed to constitutional-ism, which Singapore is not.

With the passing of Lee Kuan Yew in March 2015,<sup>119</sup> Singapore is finally going to have to confront a generational change. Can it create a relatively unique model? Can other states even hope to follow this model? Singapore’s size, success, and youth all make it well suited as a pilot study from which other authoritarian states might learn a great deal. But it is too soon to say just what they will learn. One thing we might all learn from Singapore is the importance of a clear distinction between constitutional systems and those that embody constitutional-ism.

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<sup>115</sup> MICHAEL BARR, CULTURAL POLITICS AND ASIAN VALUES: THE TEPID WAR 36 (2002).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Singapore’s founding father Lee Kuan Yew dies at 91*, BBC NEWS (March 23, 2015), <http://www.bbc.com/news/world-asia-32012346>.