



Confucian democratic constitutionalism

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Constitutionalism is commonly believed to be a stranger to Confucianism, which dominated East Asia's intellectual, ethical, political, and cultural traditions before the "encounter with the West" in the late nineteenth century. Most notably, Max Weber captured the gist of Confucianism in terms of patrimonialism in which no principled mechanism to control the ruler's arbitrary use of power was acknowledged, let alone devised (Weber, 1951). In the rare cases in which early twentieth-century scholars paid attention to Confucianism as a political tradition, their focus was mainly on the early development of the centralized state and the vast bureaucracy that undergirded it (e.g., Balazs, 1964).

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However, the lingering Weberian image of the Confucian state has prevented scholars in East Asia and beyond from investigating the other aspects of Confucianism that have contributed to its political viability and historical endurance. The result is the lack of interest in Confucian East Asia's long "constitutional" tradition. Classical Confucians such as Mencius and Xunzi not only advanced a highly sophisticated philosophical argument for the moral and political constraint of the ruler (Kim, 2020) but also inspired later Confucians to develop an intricate institutional system that could keep the ruler on the right track of government—called "the Way"—at the heart of which lay the commitment to the protection and promotion of the well-being of the people (Hahm, 2001).

With the rise of Neo-Confucianism during the Song dynasty, Confucian constitutional discourse unfolded as an argument for exalted ministry power (*vis-à-vis* the emperor) and decentralized localism, which was starkly contrasted with the centralized state underpinned by the ruler's undivided power (Song, 2015). When Confucian political order was near an end in the late nineteenth century, some of the Confucian-educated intellectuals turned to Western-style constitutionalism. Central to it was the establishment of the parliament representing the will of the people, now understood as self-governing citizens (Kim, 2023, pp. 14–19), although this political ideal became displaced in the East Asian political discourse in the course of turbulent modern East Asian history marked by colonialism, civil war, and compressed Western modernization.

While traditional Confucian constitutional discourse was advanced under the assumption that East Asian societies are comprehensively Confucian in the Rawlsian sense, Confucian democratic constitutionalism aspires to be a contemporary vision for Confucian constitutionalism with a view to making East Asians, subscribing to diverse comprehensive doctrines, Confucian democratic citizens who possess both the right to political participation and the right to equal protection of civil and political rights.

As a constitutional theory, therefore, Confucian democratic constitutionalism aims to present a Confucian constitutional theory that is normatively appealing and politically plausible in pluralistic, multicultural, and increasingly rights-sensitive East Asia, whose civic culture is still deeply saturated with Confucian values, mores, rituals, civility, and moral sentiments. Since it is motivated to develop a constitutional theory that is acceptable to East Asian people whose way of life is still, though not comprehensively, guided by what I call "civic Confucianism," the primary purpose of Confucian democratic constitutionalism does not lie in reinstating traditional Confucianism or making its essence, if there is such a thing, safe in contemporary East Asia. Confucian democratic constitutionalism does not even aim to develop a constitutional institution that is uniquely Confucian.

The guiding ambition of Confucian democratic constitutionalism is to complete the work left unfinished by the late nineteenth and early twentieth-century Confucians who wrestled to justify the otherwise Western constitutional system in Confucian terms—that is, to create a political theory that weaves the Confucian account of equalitarian dignity, two foundational political rights to which it gives rise (*i.e.*, the right to political participation and the right to equal protection of rights), the dignity of legislation, the authority of an independent court, constitutional



dialogue, and Confucian public reason into a coherent normative system in pluralist East Asia that still remains characteristically Confucian.

The key concern here, therefore, is not so much how to update traditional Confucianism in contemporary East Asia but how to facilitate the East Asian people's constitutional self-government in the Confucian cultural context. Confucian democratic constitutionalism aims to achieve this goal within the normative perimeter of Confucian egalitarian dignity and by use of Confucian public reason, which is produced through mutual accommodations between democratic principles, institutions, and rights, on one side, and Confucian values, mores, and moral sentiments, on the other. Still, Confucian democratic constitutionalism is in part inspired by traditional participatory Confucian legal and political practices, such as the "Petitioner's Drum" (Kim, 2023, pp. 218–221), and thus it is not completely severed from traditional Confucianism.

As a constitutional theory, Confucian democratic constitutionalism is distinguished from two dominant Western theories of constitutionalism—namely, legal constitutionalism and political constitutionalism. The key difference between Confucian democratic constitutionalism and legal constitutionalism lies in the former's rejection of liberal legitimacy that is largely independent of the democratic decision-making procedures in civil society and, ultimately, in the legislature, both of which are guided by what I call "the politics of Confucian public reason" (Kim, 2023, pp. 117–122).

Confucian democratic constitutionalism stipulates that many different types of Confucian public reason can be formed in the public space of civil society when individuals are engaged in the cultural negotiation between Confucian values and moral sentiments and democratic principles and rights. This means that there is no monolithic idea of Confucian public reason that has a fixed content, making it authoritatively Confucian. Since what we find in a Confucian democratic society is many different types of Confucian reasons, moral disagreement, though moderated, never disappears, and the presence of moral disagreement requires that political debate, deliberation, and, ultimately, voting be conducted within the normative terrain regulated by Confucian public reason. In Confucian democratic constitutionalism, therefore, the dignity of legislation is crystalized in the procedural resolution of moral disagreement and the democratic search for the public good, which encompasses Confucian democratic rights.

Grounded in weak well-being consequentialism, Confucian democratic constitutionalism is also distinguished from political constitutionalism that is radically antifoundational and does not recognize the value of public reason, not to mention a mode of public reason that is culturally grounded and requires civic cultivation. While political constitutionalism valorizes procedural legitimacy and casts a skeptical eye on the value of judicial review, Confucian democratic constitutionalism embraces judicial review as one of the important ways in which the people's basic rights (and, by implication, their well-being) can be protected, though eventually, it prefers constitutional dialogue between the branches of government—especially between the legislature and the court—over judicial (or legislative) supremacy.



Still, there is a notable similarity between Confucian democratic constitutionalism and political constitutionalism in that they both understand the rule of law as placed within the circumstances of politics characterized by value pluralism and moral disagreement. Of course, the politics of Confucian public reason imparts distinctive cultural characteristics to the mode of moral disagreement that arises in a Confucian democratic society, and this renders Confucian democratic constitutionalism both Confucian and political (à la Bellamy, 2007).

Whereas the difference between Confucian democratic constitutionalism and the two dominant Western constitutionalists highlights the former's structural characteristics that make it stand between legal constitutionalism and political constitutionalism, its difference from Confucian meritocratic constitutionalism shows that there can be two different ways in which the Confucian philosophical and political tradition can be re-appropriated in contemporary East Asia—one for the people's constitutional self-government and the other for the rule by virtuous and knowledgeable political elites.

One of the most telling differences between Confucian democratic constitutionalism and Confucian meritocratic constitutionalism lies in the fact that while the former is premised on egalitarian Confucian dignity and struggles to render democratic principles and rights in Confucian terms, the latter rejects core democratic principles such as popular sovereignty, political equality, and the right to political participation. Moreover, Confucian meritocratic constitutionalism sidesteps the question of an independent judiciary and a separation of powers by focusing exclusively on the meritocratic upper house in the legislature that is not institutionally accountable to the people, who are viewed as myopically self-interested, uneducated, and lacking public spiritedness.

By contrast, Confucian democratic constitutionalism is premised on core democratic principles that have been rendered meaningful to East Asian people through the mediation of Confucian public reason. Predicated on Confucian egalitarian dignity, it derives the dignity of the legislature from the equal right to political participation and the authority of the judiciary from the equal right to constitutional protection of civil and political rights.

As such, Confucian democratic constitutionalism is not merely different from Confucian meritocratic constitutionalism. It is developed as an alternative to Confucian meritocratic constitutionalism, which, in my view, lacks coherence as a political theory and goes against the developmental dimension of Confucian humanism.

There are several reasons why Confucian meritocratic constitutionalism fails to provide a morally appealing and politically practicable model of constitutionalism in the contemporary East Asian context.

First, Confucian meritocratic constitutionalism is mainly concerned with constraining popular sovereignty and focuses solely on the legislature. It pays virtually no attention to the executive and judicial branches of government, even though the latter are commonly staffed by nondemocratic means, and bureaucrats tend to make more laws and public policies than elected political representatives, even in liberal democracies.



Second, by understanding the legislature primarily as a policymaking organ, and failing to distinguish between principle and policy, Confucian meritocratic constitutionalism has almost nothing to say about the legislature as the lawmaking institution and its profound implications for citizen rights.

Third, Confucian meritocratic constitutionalism presumes that politics is one thing and the rule of law is another. Though it emphasizes the importance of respect for basic rights, it does not acknowledge that people understand the moral content of any given right differently and may disagree on which set of rights should be taken as basic or how conflicts of rights should be resolved.

Finally, and most importantly, Confucian meritocratic constitutionalism rests on an alternative Confucian conception of human dignity (as one's moral achievement), but it forestalls the possibility that people, otherwise narrow-minded and self-interested, can grow morally and intellectually. It is chiefly concerned with how to distribute political power (and rights) equitably, based on the level of virtue acquired, but it shows little interest in how to make people morally empowered and politically engaged, which is an important way in which virtue can be cultivated and strengthened. It is doubtful that the people themselves would welcome a political system that purports to leave them in a permanent state of dependency and docility.

Confucian democratic constitutionalism attempts to address these and related questions coherently in a way consistent with Confucian egalitarian dignity and virtue ethics.

First, operating on Confucian public reason and guided by weak well-being consequentialism, Confucian democratic constitutionalism acknowledges the critical distinction between policy and principle and thus allows no easy trade-off between good governance and protection of (constitutional) rights unless a compelling justification, verified by the court, is provided by the state. This does not mean that Confucian democratic constitutionalism blindly emulates liberal constitutionalism. It is the Confucian commitment to the well-being of the people that requires the state's exercise of coercive power to be justified to the people themselves.

Second, while Confucian meritocratic constitutionalism is predicated on the service conception of political rights, according to which political rights should be distributed in proportion to one's contribution to others' well-being, thus leaving the right to equal protection of civil and political rights ambiguous, Confucian democratic constitutionalism endorses both the equal right to political participation and the right to equal protection of constitutional rights coherently. This is because Confucian democratic constitutionalism is premised on the Confucian account of equal dignity, which focuses on equal moral potential to become good.

Third, while Confucian meritocratic constitutionalism, mainly concerned with the selective elite's right to rule and their good performance, explicitly rejects the people's right (and power) to remove the top political leaders from their positions, Confucian democratic constitutionalism, drawing on classical Confucians such as Mencius and Xunzi, supports the power of impeachment, which must be exercised by the political representatives elected by the people. In short, Confucian democratic constitutionalism attempts to reformulate the Confucian ideal of "humane



government” (*renzheng* 仁政) as suitable in the contemporary pluralist social context.

At this point, two critical questions may arise—first, how Confucian democratic constitutionalism can retain its Confucian characteristics in the face of the continued attrition of civic Confucianism in East Asia, and, second, whether it can meet the complex governance challenges effectively given its emphasis of the cooperative search for Confucian democratic rights and their protection through the dialogue between the legislature and the court, two deliberative branches of government.

Let me start with the first question. The fact that Confucian democratic constitutionalism begins with contemporary social circumstances does not necessarily make its Confucian character weak or diluted. It only means that there is an urgent sociological reason to search for and develop public morality and constitutionalism that are culturally meaningful and politically practicable in contemporary East Asia. Moreover, the fact that Confucian democratic constitutionalism upholds political equality and democratic legitimacy does not make it a despoiler, rather than an innovator, of the Confucian tradition. Some East Asians believe that Confucianism has several essential characteristics, such as hierarchy, meritocracy, paternalism, collectivism, and androcentrism, and that they should be used as a yardstick to evaluate the Confucian character of modern Confucian ethical and political theory. Confucian democratic constitutionalism objects to this essentialist approach to the Confucian tradition.

As a political tradition, one of the defining characteristics of Confucianism lies in the perfectionist ambition to make a ruler virtuous and thus dedicated to the moral development of the people by providing the socioeconomic condition of material sufficiency. Virtually all traditional Confucians, from Mencius to the Confucians of the late Qing period, subscribed to this paradigm. But Confucians always had serious moral and political disagreements about how best to interpret the Confucian political ideal in their distinctive social, economic, and political circumstances. Mencius and Xunzi, the two most prominent ancient Confucian masters after Confucius, developed contrasting accounts of human nature, resulting in two different models of classical Confucian constitutionalism—one focused on virtue and the other highlighting ritual (Kim, 2020). While Northern Song Confucians, all self-claimed followers of Mencius, championed the project of centralization by interpreting some key Confucian classics (such as the *Ritual of Zhou*) to make a case for absolute kingship, their Southern Song counterparts, again all ardent followers of Mencius, supported a decentralized political order and localism (Song, 2015). Confucian democratic constitutionalism is yet another attempt to interpret Confucianism in a contemporary pluralist context, focusing on the East Asian people’s democratic self-government.

On the flip side, it is also unreasonable to find Confucian meritocratic constitutionalism more faithful to the Confucian tradition than Confucian democratic constitutionalism simply because it better represents the tradition’s hierarchical and paternalistic side. Such an essentialist approach to Confucianism not only fails to recognize the inclusive, participatory, and feminist sides of Confucianism, culminating in the eighteenth-century Korean female Neo-Confucian philosopher Im Yunjidang’s argument for moral equality between men



and women and female sagehood (Kim, 2022), but it also prevents Confucianism from evolving into a progressive and democratic philosophy and social practice (cf. Angel, 2012; Tan, 2004; Tseng, 2023). One may believe that Confucian meritocratic constitutionalism is more authentically Confucian than Confucian democratic constitutionalism, given its embrace of the meritocratic upper house composed of nondemocratically selected political elites who are insulated from the will of the people. But it should be noted that the parliament had never been an integral element of traditional Confucianism, which recognized monarchy as the only legitimate form of government, until it was exposed to modern Western political systems and practices.

In this regard, it is worth noting that the idea of a meritocratic upper house was first entertained by classical liberals such as John Stuart Mill and F. A. Hayek and some Confucian meritocrats, such as Bai and Bell, do acknowledge that they were partly inspired by British political theory and practice (Bell, 2015, pp. 154–155; Bai, 2020, pp. 84–85). In advocating the second chamber, however, Mill never attempted to place it beyond the principles of popular sovereignty and democratic self-government, which clearly distinguishes him from Confucian meritocrats who reject any meaningful institutional constraint of political elites by the people themselves. Thus understood, what is important is not so much whether the normative appeal of Confucian political theory must be judged by its fidelity to traditional Confucianism but whether Confucianism can transform its political nature in conversation with non-Confucian values, principles, and social practices that have become an important part of the public life in East Asia.

Can Confucian democratic constitutionalism meet the contemporary challenge of governance? What is the role of the executive and administrative and regulatory agencies in Confucian democratic constitutionalism in a world where the need for expertise is ever-growing? After all, when understanding the legislature primarily as a policymaking, rather than lawmaking, institution, Confucian meritocratic constitutionalism reveals its preoccupation with the question of effective (or meritocratic) government in the contemporary economic and political context, though it presents the meritocratic upper house as the locomotive of good governance.

Like Confucian meritocratic constitutionalism, Confucian democratic constitutionalism is premised on well-being consequentialism, albeit a weak version, and there is no denying that the most energetic engine to activate good and effective governance comes from the executive branch of government. It is hardly surprising that some leading American constitutional theorists pay renewed attention to the executive as well as administrative and regulatory agencies as the key institutional forces that deliver the common good and human welfare within the normative limits of the rule of law (Posner & Vermeule, 2010; Sunstein & Vermeule, 2020).

Two points are in order. First, in Confucian democratic constitutionalism, the chief executive is not envisioned as the contemporary incarnation of the emperor who sees no defined institutional boundaries in exercising coercive power. In Confucian democratic constitutionalism, the primary purpose of establishing the office of the chief executive is to realize the Confucian ideal of humane government—a government that serves the well-being of the people. This cannot



be expected from the legislative and the court, whose central task is deliberation. But in my democratic reformation of the Confucian humane government, the chief executive derives its power not from Heaven but from the people who are subject to public decisions the executive makes and to which legal sanctions are attached. Like legislative and judicial powers, Confucian democratic constitutionalism holds that executive power derives from the people's power of collective self-government and that it must function within the clearly demarcated institutional limits set by the people or their elected representatives. This is how Confucian democratic constitutionalism understands the reciprocity between ruler and ruled.

Second, it is hardly disputable that there are notable discrepancies between the executive and other branches of government when it comes to expertise and its efficient exercise. Still, its salient attention to the cooperative relationship between the legislature and the court in search of Confucian democratic rights notwithstanding, Confucian democratic constitutionalism has no desire to hamstring the executive that serves the people's well-being. That said, Confucian democratic constitutionalism is clearly distinguished from Confucian meritocratic constitutionalism that places executive power and administrative and regulatory agencies beyond the people's democratic control. Like the constitutional models proposed by scholars such as Rosanvallon (2011) and Eisgruber (2001), who reconceive democratic legitimacy from the standpoint of the entire democratic constitutional system, Confucian democratic constitutionalism not only stresses the critical importance of the communication between the state and civil society but also acknowledges crucial constitutional functions played by administrative and regulatory agencies whose institutional independence places a check on the arbitrary use of power.

In the end, Confucian democratic constitutionalism supports a political system in which various forms of institutions can be devised and experimented with and where the power to determine which set of institutions can achieve an effective and efficient government without curtailing its democratic legitimacy belongs to the people themselves. Its Confucian pedigree comes not from a specific institutional structure inspired by Confucian philosophy but from Confucian public reason.

Sungmoon Kim

Under western eyes: Kim's Confucian constitutionalism

The relationships of East Asian countries to the West are central to global developments in the twenty-first century. They are often tense, particularly between the world's two greatest powers, China and the United States. Some scholars are trying to develop political and moral theories that may help ease the tensions. They seek to find common ground between Confucian traditions prevalent in East Asia and liberal democratic traditions of the West, while enhancing mutual understandings that can keep persisting differences amicable. Sungmoon Kim is a prodigious, creative, and insightful contributor to these efforts.

We can reasonably doubt how much impact academic political theories can have on great power politics. Still, politicians are primarily activists, not thinkers.



They must often search for ideas that will work for them. If there are intrinsically beneficial ideas on hand that they find useful, the odds that they will act for better rather than worse improve, at least at the margins.

Kim's ideas, in *Confucian Constitutionalism* and his other works, offer such benefits. By building on both Confucian and Western liberal democratic thinking, they promise to aid political actors East and West who seek peaceful, cooperative relationships with each other. They also mesh with my own views. Like Kim, I ascribe equal dignity to human beings based on their common moral potential, even though people realize their potential to very different degrees. Like Kim, I believe that human dignity mandates equal rights to political participation and equal protection of basic civil and political rights. I also agree that policies to secure these rights are best achieved through democratic legislation and pursued in dialogue with constitutional courts and citizens. There is nothing in Kim's constitutionalism with which I strongly disagree.

That concurrence is, however, a mixed blessing for Kim, because I agree even though I know virtually nothing about Confucian traditions or debates among contemporary Confucian political theorists. So, it is fair to ask: do Kim's positions truly flow from Confucian premises, or do they really rest on Western liberal democratic precepts in the guise of Confucianism? If his premises are authentically Confucian, do they logically imply the egalitarian constitutional conclusions he reaches? Even if they are genuinely Confucian, are they likely to resonate with enough East Asians to inspire widespread political support?

I raise these questions because I struggle with related ones. I have claimed that most if not all modern nations can develop distinctive "stories of peoplehood" that champion defensible forms of democracy and human rights while still expressing many of the unique values and traditions that shape their members' senses of the special worth of their nation and themselves (e.g., Smith, 2020, p. 58). I have also suggested it is imperative to develop such stories, if proponents of liberal democratic values are to compete successfully against the recent surge of authoritarian nationalist movements. I see Kim's arguments for Confucian constitutionalism as kindred, but that only makes my worries about his positions more urgent.

Others can better judge how genuinely Confucian Kim's positions are and how far his views will resonate with the leaders and citizens of East Asian nations. But even a parochial Western academic like me can assess whether his foundational conception of human dignity is different from leading Western versions of that ideal. I can also consider how persuasive the links between his premises and his conclusions are, as well as how far those conclusions differ from most Western ones. I believe Kim's Confucian constitutionalism holds up well in all these regards. However, as I will discuss in my conclusion, these comparisons with Western thought also raise concerns about executive and administrative power that Kim does not address.

Let me begin with Kim's Confucian egalitarian view of dignity. Comparative law scholar Christopher McCrudden has argued that modern global constitutionalism displays widespread acceptance of a 'meta-principle' of 'human dignity' that has many sources (McCrudden, 2008, p. 2020). He lists the natural rights philosophy of the Declaration of Independence, 'Catholic traditions, Social Democratic thought,



and reactions against the horrors of the Second World War' (McCrudden, 2020, p. 111). We can add Scottish Enlightenment thinkers' belief in universal human moral sense or common sense, Romantic aesthetic conceptions of humanity's creative capacities, and other doctrines. Kim himself notes that many Western thinkers embrace human dignity on varied grounds that include diverse religious conceptions, classical and Kantian notions of rational self-direction, the distinctiveness of humanity from all other forms of life, and more (pp. 34–35). Is there anything significantly different about Kim's Confucian account of dignity? Does it logically undergird any distinctive content for Confucian constitutionalism?

The answer to both questions is yes. Note first that Western grounds for egalitarian views of human dignity are all eminently disputable, so it is significant if a plausible argument for such a conception can be made on Confucian premises. Kim contends that beliefs in equal human dignity can be based both on a Mencian account of the universal moral potential of human beings to achieve virtue and on Xunzian beliefs in people's equality of self-cultivating abilities and capacities to approach moral perfectibility (pp. 46–63). These universal, equal moral potentials, abilities, and capacities should be devoted to realizing Confucian conceptions of virtuous moral character and moral lives (p. 38).

All these beliefs have parallels in Western accounts of human dignity, and all are equally open to criticism. But collectively, they represent a distinct Confucian view of dignity, because Confucians agree on many characteristics of virtuous lives that are less central to or altogether absent from Western conceptions. Confucian values include "filial piety, ritual propriety, respect for elders," and obligations to cultivate both familial and social harmony (pp. 101, 123). Kim sees Confucians as linking human dignity to the realization of these Confucian values, not Western ones. Dignity thus understood logically implies distinctive forms of constitutionalism.

Let us turn next to Kim's accounts of civic Confucianism and Confucian public reason. There the political implications of Kim's defense of Confucian values first become clear. Because Kim holds that Confucian conceptions of human dignity differ from Western ones, the concern naturally arises that Confucian constitutionalism will prove incompatible with the pluralism that Western liberal democratic systems profess to value. That concern is heightened by the fact that East Asian societies themselves are now highly pluralistic, with many non-Confucian moral and political traditions espoused and often reformulated and blended by diverse bodies of citizens. Chinese Communist beliefs are perhaps the leading example. Will Confucian constitutionalism repress these non-Confucian East Asian views?

Kim plausibly argues that it will not. He holds that the emphasis on harmony in Confucian notions of virtue, reinforced by the related rarity of religious wars in East Asian history, can enable East Asian societies to maintain a "socially capacious civic Confucianism." Adherents would treat non-Confucian belief systems, and non-Confucian citizens, benignly, often receptively—arguably more so than many liberal democratic nations do (p. 90).

Yet how distinctive can Kim's notion of Confucian public reason be, since most recent discussions of public reason trace back to John Rawls? Kim shows that Confucian public reason is quite different. The culture of civic Confucianism fosters



a constitutional norm of civility which calls for all persons to listen politely to their fellow citizens and to engage substantively with them, while fully acknowledging all differences. But Confucian civility also imposes expectations on those with non-Confucian beliefs. They too are to engage respectfully, and in accord with Confucian ritual properties, with those with whom they disagree. Such practices probably improve the odds that negotiations over shared values and policies will produce results that are broadly consistent with egalitarian readings of Confucian values. In theory, societies guided by Rawlsian public reason might end up in a similar place, but there is no reason to expect them to do so, unless one believes reflection and debate will inevitably lead to a widespread embrace of Confucianism.

Space permits only a summary account of Kim's further arguments in favor of two foundational rights, as well as legislative democracy with judicial review. In societies premised on egalitarian Confucian notions of universal moral dignity, there are no grounds to deny anyone equal rights of political participation and equal protection of their civil and political rights (pp. 63–65). Those rights, and the fact that public policies are expected to emerge from processes of civil, constructive engagement among all citizens, make it reasonable to hold that the core institutions of Confucian constitutionalism are, first, a fully democratically elected legislature empowered to do all lawmaking, which may contain two houses to aid deliberation, but without an elite upper house made up of those allegedly superior in merit.

Second, because legislatures can lose sight of basic social values, Confucian constitutionalism also justifies empowering an independent judiciary with powers of judicial review. These powers are, however, to be exercised only as moments in ongoing dialogues with the legislative branch and the citizenry about the society's fundamental values (p. 209). Those dialogues are to be conducted in as much accord with Confucian norms of human dignity, harmony, civility, and virtuous mutual engagement as judges, legislators, and citizens prove capable of achieving. Again, the results are likely to have a Confucian cast. If so, Kim will have vindicated his claim to have blended Western liberal democratic theories with Confucian traditions in ways that egalitarian Confucians, along with others, can see as expressive of their own deepest commitments.

Finally, I wish to raise two concluding concerns. Overall, Kim largely succeeds in combining many of the best features of Western liberal democratic thought with Confucian traditions in ways that give his Confucian constitutionalism distinctive foundations and contents. Societies which embraced his view would display political practices, processes, and policy outcomes that would have similarities but also important differences from those common in the West. Those differences might well be ones in which citizens of East Asian democratic constitutional systems could take justified pride.

Yet I have two reservations about Kim's constitutional vision. Both are also reservations about Western liberal democratic constitutionalism. The first is that so far, Kim has been largely silent about two linked features of most modern constitutional systems: the office of the chief executive and the set of administrative and regulatory bureaucratic agencies that implement most legislative, executive, and judicial decisions. This silence may reflect the fact that in Kim's democratic constitutionalism, there is no place for the claims of special merit, whether the



mandate of Heaven or the possession of great virtues, that once justified the powers of rulers and bureaucrats in older imperial Confucian systems.

But at least in presidential systems, elected chief executives often claim a kind of democratic authority that differs from and arguably exceeds that of the legislature—because the chief executive is elected by and represents the people as a whole. The chief executive is not as suited for democratic deliberations among formal representatives of different viewpoints as the legislature is. But Kim still needs to say more about the role the chief executive should play in the democratic processes that he calls a “constant and open-ended communication” among only “the legislature and the court” and “civil society” (p. 209).

Moreover, while most modern administrators and regulators do not claim to be superior in Confucian virtues, they usually claim to possess superior technical expertise, enabling them to specify better than elected officials what measures will prove instrumentally rational in achieving public purposes. Though often exaggerated, these claims of technical expertise are usually not bogus. Technical knowledge is required to design solutions for most problems addressed by modern governments. Elected officials do not have the time or bandwidth either to develop such knowledge or to administer solutions on a continuing basis. Administrative and regulatory agencies are therefore central to modern governance. What is their place in democratic Confucian constitutionalism? How should they be designed to advance its values and purposes?

Kim might reply that neither the chief executive nor bureaucracies need occupy a prominent place in the theory of Confucian constitutionalism, however important they may be in practice, because they should be subservient to the policies and values defined through the ongoing dialogues, or perhaps trialogues, among the legislature, the courts, and the citizenry. But this possible answer leads to my second reservation about his account. More powerful chief executives and bureaucratic agencies have proliferated as modern states have expanded and matured because, many argue, legislatures and courts cannot be made institutionally competent to deal with many of the major tasks involved in governing modern societies. Those tasks require not only expertise but an alacrity, efficiency, and unity of purpose that diverse, deliberative legislatures, acting in dialogue with still more deliberative courts as well as citizens, cannot remotely achieve.

Thus, while Kim’s compelling portrait of Confucian constitutionalism might serve to foster better forms of legislative, judicial, and civic activity, those all might prove to be largely beside the point for the great bulk of modern governance. Chief executives and civil service officials who may in practice be all too reminiscent of authoritarian emperors and domineering Mandarin bureaucrats may now be all too unavoidable in East Asian societies—and in Western ones.

But if they are to be avoided anywhere, people must engage in the kind of imaginative and constructive contemplation of new political possibilities that Sungmoon Kim continues to provide. Scholars and citizens, East and West, are in his debt.

Rogers M. Smith



Why Confucian democratic constitutionalism prevails over its meritocratic counterpart

In *Confucian Constitutionalism*, Sungmoon Kim makes a compelling case for a democratic constitutional order for contemporary East Asian societies of the Confucian heritage. As a constitutional theory, Confucian democratic constitutionalism defines the limits of government and the exercise of political power. As a distinctively East Asian normative model, it aims to address the challenges of contemporary East Asian politics to a constitutional project.

Confucian democratic constitutionalism emerges as the main alternative to Confucian meritocratic constitutionalism defended by the so-called ‘Confucian meritocrats’ (Bai, 2008, 2013, 2019; Bell, 2006, 2015; Chan, 2014; Fan, 2013; Jiang, 2012). Although most Confucian meritocrats have never presented a full-fledged constitutional theory, they have discussed various constitutional issues in their works, including human rights, the role of the court, and the relationship between principles and public policy. Kim uses these discussions to define Confucian meritocratic constitutionalism and to argue that Confucian democratic constitutionalism is a more promising constitutional order for the future of East Asia.

Kim sees several reasons for favoring Confucian democratic constitutionalism over Confucian meritocratic constitutionalism. The main reason concerns value pluralism. Confucian meritocratic constitutionalism fails to recognize that the notion of the common good is contested in present-day East Asian societies. Most Confucian meritocrats seem to believe East Asian governments must follow the moral principles of the early Confucian masters. However, contemporary East Asian societies are characterized by diverse moral views, such that political leaders cannot make the right decisions for all (pp. 187–193).

Another important reason for supporting Confucian democratic constitutionalism concerns the presence of significant normative lacunas in Confucian meritocratic constitutionalism. ‘Confucian meritocrats hardly present a coherent normative theory of Confucian constitutionalism’ (p. 3). Because Confucian meritocrats are overly focused on legislative reforms, they fail to justify several of their normative constitutional assumptions. For instance, they do not indicate why matters of principle should be distinguished from matters of public policy (p. 184), what the normative role of the court is (p. 207), how one can defend fundamental rights while rejecting political rights (p. 207), how the rule of law can be consistent with Confucian political meritocracy (p. 3), why there can be objectively correct answers for public policy issues, and how principles should be treated in Confucian meritocratic constitutionalism (p. 184).

I find Kim’s second justification of Confucian democratic constitutionalism less convincing than the first. This is because the failure of Confucian meritocrats to explain normative aspects of their constitutional approach only indicates that the latter is incomplete, not necessarily wrong. More importantly, recent developments in constitutional theory suggest that Confucian meritocratic constitutionalism can be more coherent than Kim assumes. In fact, Confucian meritocrats can elaborate



a more comprehensible constitutional approach by incorporating some of the ideas presented by Adrian Vermeule in *Common Good Constitutionalism* (2022).

Drawing from the Western classical tradition, Vermeule claims that the truth of legal propositions can depend on specific moral values. In his view, constitutionalism must aim for central goods, such as peace, justice, and abundance, which in contemporary times require the provision of health, safety, and economic security (2022, p. 20). Common good constitutionalism shares a firm perfectionist outlook with Confucian meritocratic constitutionalism: according to Vermeule, the ultimate aim of the state, as well as of all officials, is to promote the common good (2022, p. 14). The latter is the end of government, the justification for public actions, and a collective good for all of society (Vermeule, 2022, p. 20). This perfectionist outlook also shapes the meaning and purpose of the law, which Vermeule views as “rational ordinances oriented to the common good” so that constitutional interpretations must be based on the legitimacy of advancing the well-being of society (2022, pp. 22, 55).

Besides sharing an extreme perfectionist outlook, both common good constitutionalism and Confucian meritocratic constitutionalism believe in the legitimacy of principles of the past in the present. Furthermore, like Confucian meritocrats, Vermeule supports an instrumental approach to institutional design so that the choice of a particular institutional order depends on its concrete ability to order society towards the common good (Vermeule, 2022, p. 71). Notably, this instrumentalism makes Vermeule’s common good constitutionalism compatible with institutional reforms proposed by Confucian meritocrats, provided that (as Confucian meritocrats argue) political leaders who are meritocratically selected have a better chance of achieving desired political goods.

Of course, these normative similarities do not exclude significant normative differences between Vermeule’s common good constitutionalism and Confucian meritocratic constitutionalism. In addition to belonging to different intellectual traditions, these two theories propose different conceptions of the good: Vermeule’s notion is based on the Western classical legal tradition, while Confucian meritocrats defend a conception of moral and material well-being of the people, as understood by Confucians. Furthermore, most Confucians may not consider justice, without appropriate qualifications, a central good.

However, fundamental normative similarities are an opportunity for Confucian meritocrats to adopt the normative framework of common good constitutionalism and reject Kim’s second justification of Confucian democratic constitutionalism. In other words, like Vermeule, Confucian meritocrats can argue that the common good is “a type of justification for political action” (Vermeule, 2022, p. 21). To defend the continuity of ancient Confucian principles in contemporary East Asian societies, they can replace Vermeule’s idea of the common good with a distinctively Confucian concept of human flourishing, centered on human relationships, harmony, and the cultivation of critical Confucian virtues. In this way, common good constitutionalism would represent a type of constitutional theory of which Confucian meritocratic constitutionalism and Vermeule’s model are tokens.

This argumentative move allows Confucian meritocrats to address some of the normative lacunas Kim highlights. For instance, by adopting the conceptual framework of common good constitutionalism, Confucian meritocrats could



explain the priority of the good over the right. They could argue that the aim of constitutionalism is not to guarantee that individuals have sufficient autonomy from abuses of power but “to ensure that the ruler has both the authority and the duty to rule well” (Vermeule, 2022, p. 61). At the same time, in line with the conceptual framework of common good constitutionalism, Confucian meritocrats could understand the institutional order, the court’s proceedings, and the distribution of individual rights as instrumental in achieving the unifying social goal. Finally, they can argue that ‘rights exist to serve’ (Vermeule, 2022, p. 36), and it is the common good to define the limits and possibilities of rights (Vermeule, 2022, p. 36). This, from their perspective, explains why freedom of speech and other fundamental liberties have only instrumental value in achieving good government, thereby addressing another normative lacuna Kim mentions (p. 179).

My point is not to argue that forms of common good constitutionalism are desirable constitutional frameworks for East Asia or the West. On the contrary, I believe that its faith in the legitimacy of principles of the past in the present is deeply problematic where societies have undergone radical historical change. Furthermore, common good constitutionalism can result in excessive power of unelected officials to pursue the common good. This may make it difficult to take back power from political leaders. Instead, my point is to show that the normative framework of common good constitutionalism provides Confucian meritocrats with resources to fill some of the normative lacunas Kim highlights.

Now, the crucial question is whether, if Confucian meritocratic constitutionalism can be a coherent constitutional theory, it is preferable to Confucian democratic constitutionalism. There are two reasons to doubt this. First, Kim’s first justification for Confucian democratic constitutionalism still stands. The pluralism of present-day East Asia should make us question the desirability of any constitutional theory that heavily relies on a historically grounded conception of the common good. Second, I agree with Kim that East Asia’s political circumstances uniquely justify Confucian democratic constitutionalism. The historical circumstances in which rights and liberal institutions were introduced in most East Asian states radically differ from those of West European and North American democracies. As Kim explains, “it is difficult to say that any of the East Asian countries has developed a coherent set of moral principles that is widely regarded by its citizens as objectively true or as constituting their constitutional identity” (p. 199). Liberal political and legal institutions were imposed on most East Asian societies under the assumption that this was what democracy required (p. 198). The constitutions of most East Asian countries include the defense of fundamental rights, but such rights were not the outcome of debate and deliberative processes involving members of the public (p. 198). “[V]irtually all civil and political rights have been introduced from the West, not only by Western intellectuals, missionaries, and politicians but also by the progressive local elites” (p. 197).

This complex situation makes a Confucian form of common good constitutionalism extremely objectionable because the imposition of a pre-established idea of the common good in East Asia would perpetuate historical injustice. In contrast, Confucian democratic constitutionalism allows East Asian citizens to conceptualize rights and democratic practices according to their ways



of life and aspirations through Confucian public reason, which reflects the moral values and mores of most contemporary citizens in East Asia. Furthermore, Confucian democratic constitutionalism supports a dialogical relationship between the court and the legislature that encourages citizens to participate in deliberative dialogues (pp. 240–244). The strength of Confucian democratic constitutionalism is not only that it respects the value of pluralism more than Confucian meritocratic constitutionalism (the first reason offered by Kim in support of Confucian democratic constitutionalism), but it also provides a means through which East Asians can define their political institutions and practices. This is what makes Confucian democratic constitutionalism more suitable for East Asia than Confucian meritocratic constitutionalism, even as both are coherent constitutional approaches.

Elena Ziliotti

Between Confucianism and democracy: On Sungmoon Kim's Confucian democratic constitutionalism

In the past decade, Sungmoon Kim has been forcefully arguing for Confucian democracy in East Asia. His arguments are based on his egalitarian understanding of Confucianism, which recognizes moral and political equality in early Confucian texts. Overall, I have three worries about Kim's democratic constitutional project. First, his egalitarian reading of passages from early Confucian texts (especially Xunzi) is inconsistent with these texts and their context. Second, I doubt the significance of Confucianism to his normative project. His overall commitment to democracy renders Confucianism contingent and trivial, such that Confucianism can be easily replaced by any other comprehensive doctrine. His view also implies that, due to drastic social changes in East Asia, Confucianism has no intrinsic significance in East Asia's future. Third, I am skeptical about the value of Kim's institutional proposal. There is no important or distinctive institutional design in Confucian democratic constitutionalism that shows its Confucian nature. Thus Confucianism becomes a mere label for Kim's vision of democratization in East Asia. In this contribution, I focus on my last worry: Kim's institutional setup of Confucian democratic constitutionalism is not distinctively Confucian.

Together with Sor-hoon Tan and Rogers Ames, Kim belongs to the group of Confucian pragmatic democrats who, inspired by John Dewey, value Confucianism primarily as a background democratic culture in East Asia. Their primary commitment is to democracy rather than Confucianism. This commitment includes political equality, popular sovereignty and the right to political participation. For them, the demand for democracy should be accommodated by any contemporary comprehensive doctrine. However, building democratic institutes in East Asia cannot come from nowhere; it must rely on its local indigenous culture, which is Confucianism. Without Confucianism, East Asia cannot achieve full democratization.

Admittedly, Confucianism is more than merely instrumentally valuable to Kim. He argues that Confucian perfectionism, which recognizes the connection between morality and politics, is not just different from liberalism, but also more



desirable than liberalism and liberal forms of perfectionism (2016, pp. 66–68). However, any Confucian ideas incompatible with democratic values must be discarded since democracy is the best among all possible political systems. It follows that Confucianism as a comprehensive doctrine must also embrace democracy to be relevant to contemporary political life in East Asia. In this sense, Confucian pragmatic democrats are democrats first, Confucians second. Their commitment to democracy is prior to that to Confucianism.

Kim recognizes this priority of commitment when he says that he “takes the perspective of a citizen, rather than that of a political elite or that of a theorist as a self-conscious Confucian, in evaluating the value of Confucianism and its relation to the effective, legitimate, just, and/or good political life” (Kim, 2018, p.193). In other words, Kim argues as a (Confucian or non-Confucian) citizen in East Asia rather than a Confucian scholar. Kim sees as problematic the position of the Confucian scholar who “tends to see herself primarily as a Confucian and takes the gist of her philosophical mission to be revivifying or developing classic Confucianism by reconstructing it in ways compatible with human rights, individual autonomy, freedom, and equality” (2018, p.190). Confucian meritocrats, such as Joseph Chan (2014), and Confucian participatory democrats, such as Steven Angel (2012), belong to that group.

Confucian Constitutionalism synthesizes and develops key elements of Kim’s earlier arguments, such as the idea that Xunzi is a political egalitarian, that public reason Confucianism can avoid the challenge of pluralism, that Confucian meritocracy cannot accommodate various institutional challenges, and that modern Confucians must embrace the idea of political equality. Kim’s defense of political equality is the most comprehensive and sophisticated among all Confucian democrats. It involves ideas about pluralism, public reason, perfectionism, distributive justice, and other political issues. Such a defense grounds Kim’s democratic version of Confucian constitutionalism. His arguments appeal to textual readings of early Confucians, normative political theories, and South Korea as the primary case study for the practice of Confucian pragmatic democracy. The core thesis of Kim’s democratic theory of Confucian constitutionalism is that contemporary democracy, which is based on the idea of political equality, is compatible with Confucianism, and Confucians have both instrumental and non-instrumental reasons to embrace democracy.

In the rest of this contribution, I will challenge the distinctiveness of Kim’s Confucian democratic constitutionalism. If one looks carefully at its institutional design, one can see that Confucian democratic constitutionalism is not that different from other non-Confucian democratic constitutional views. Consequently, for Confucian democratic constitutionalism, Confucianism is merely a label for a form of democracy that can be virtually compatible with any other comprehensive doctrine.

There are no major differences between the institutions and practices of Confucian democratic constitutionalism and those of liberal democracies. For example, in both Confucian democratic constitutionalism and Constitutional democracy, the equal right of political participation and the right to equal protection are foundational (2023, p. 57). There are also similarities in institutional setup, which Kim presents



in the last three chapters of *Confucian Constitutionalism*. The first similarity is in their overall constitutional structures. Like liberal democracy, Confucian democratic constitutionalism accepts the division among the legislative, executive, and judicial powers. It also endorses the two-house legislative system in which members of both houses are democratically elected by the people, and in this it differs from the Confucian meritocrats' proposals, like Chan's meritocratic upper house (2023, p. 155).

A second substantial similarity between Confucian democratic constitutionalism and liberal democratic forms of constitutionalism concerns the role of constitutionalism. Confucian democratic constitutionalism recognizes the importance of the court and its power to implement judicial reviews. It also values interactions between legislative and judicial powers. However, Confucian democratic constitutionalism recognizes that laws and rights must be defined by political means and interact with people's choices rather than viewing them as absolute principles or values. In this sense, Confucian democratic constitutionalism shares important features with political democratic constitutionalism. However, a critical difference with Richard Bellamy's (2007) political constitutionalism is that Confucian democratic constitutionalism rejects "a purely procedural or political mode of public reason" (Kim, 2023, p. 206). Confucian democratic constitutionalism presupposes a form of public reason that involves substantial cultural meanings and moral values. Kim also points out some conceptual distinctions between the institutional design of Confucian democratic constitutionalism and liberal democratic constitutionalism. Still, the role of constitutionalism in Confucian democratic constitutionalism is hardly different from its role in liberal democratic theories of constitutionalism.

Consider Kim's point about the need for close dialogue between court and legislature. Is there no dialogue between the judicial and legislative branches in liberal democracies? Similarly, if we look carefully at how constitutionalism is practised in liberal democratic countries, does not the legislature have more authority than judiciary institutions? Claiming that Confucian democratic constitutionalism proposes a unique political design is unconvincing. Instead, Confucian democratic constitutionalism is not much different from contemporary Western liberal democratic constitutionalism.

This leads to a deeper worry about Confucian democratic constitutionalism. Kim argues that certain conceptual elements, such as its view of public reason, distinguish Confucian democratic constitutionalism from forms of political constitutionalism. However, if these two constitutional alternatives do not generate different institutional design recommendations, what is the point of making these conceptual distinctions? Lack of institutional differences may suggest that there is nothing distinctively Confucian in Confucian democratic constitutionalism, either conceptually or practically.

Here is an easy way to demonstrate my point. If we replaced "Confucian" with "Daoist", "Christian" or "Judaic," the constitutional model could remain mostly the same. This is because in his development of Confucian democratic constitutionalism, Kim peels off any Confucian ideas that are incompatible with democracy. As a result, Kim's Confucian democratic constitutionalism does not seem distinctly Confucian, and it is therefore not clear what it adds to constitutionalist debates.



Kim, so far, has not met the challenge of expressing Confucianism in unique institutional establishments. Perhaps he does not regard it as a challenge since he might be comfortable endorsing a full-blown modern democratic constitutionalism. And as a pragmatic democrat, Kim might view Confucianism only as a background culture, which does not have to be involved in democratic institutional designs. Yet this would further risk rendering the Confucian aspects of Confucian democratic constitutionalism trivial and obsolete.

From this perspective, Confucian meritocratic constitutionalism presents a more original conceptual framework and institutional design. Its service conception of political legitimacy, its instrumental view of democracy, and its view of moral and political inequality are distinctive. Additionally, Chan's proposal for a meritocratic upper house and the tricameral system defended by Jiang Qing (2013) are unique and consistent with Confucian meritocratic constitutionalism's conceptual distinctions.

Confucian meritocratic constitutionalism is more consistent with the Confucian tradition than Confucian democratic constitutionalism. But of course, novel conceptual and institutional innovations are insufficient conditions to support Confucian meritocratic constitutionalism against Confucian democratic constitutionalism. The question is whether Confucian meritocratic constitutionalism is also desirable. For traditional Confucians, a political system that recognizes different moral achievements and aims to promote people's material and moral well-being is desirable, and unconditional political equality may not be necessary for an ideal Confucian political design.

The above challenge intends to show that Kim's theory is neither uniquely Confucian nor a novel constitutional theory. If the challenge stands, Confucian democratic constitutionalism should be understood as straightforward democratic theory. I cannot recognize much of Confucianism in Kim's overall discussion, except in his claim that Confucianism is a kind of perfectionism. As a democratic theory, I cannot see much difference between Confucian democratic constitutionalism and other mainstream Western constitutional theories.

What the above discussion does not show is that Confucian democratic constitutionalism is incoherent or not valuable. Confucian democratic constitutionalism is an important application of contemporary Western democratic theories to East Asian societies, especially South Korea. In this sense, Kim's work is more concerned with the democratization of East Asian societies than with constructing an alternative democratic Confucian political theory that is different from Western theories.

There is a closely related methodological dilemma for Confucian political philosophers. On the one hand, modern Confucian political philosophers can be loyal to Confucian tradition, whose perfectionism recognizes moral and political inequality. Even though Confucian tradition is evolving, Confucianism has historically been, and largely still is, paternalistic and meritocratic. But this does not mean that Confucianism cannot be democratic or egalitarian in the future or that no Confucian resources can support democracy and egalitarianism. Confucian political philosophers who claim to be loyal to the Confucian tradition, like Confucian meritocrats, thus seem to oppose modern values like democracy and equality. On the other hand, modern Confucian political philosophers can embrace modern values



and provide a democratic reading of Confucianism, with the result that their moral and political views are not very distinct from more mainstream democratic views.

To avoid this dilemma, Kim rejects an essentialist understanding of Confucianism and regards it as an evolving tradition that can accommodate paternalism and meritocracy (e.g., Kongzi) and egalitarianism and democracy (e.g., Kang Yuwei). For Kim, the urgent issue is not loyalty to tradition but figuring out how people in East Asian societies can live a self-governing life.

I am sympathetic to Kim's position. However, if Kim's overall democratic constitutionalism treats Confucianism only instrumentally to justify democratic values, rather than defend a Confucian form of democracy, his theory will only be relevant to Confucian citizens. Non-Confucian citizens who already accept democratic values or institutions might not have epistemic reasons to follow those Confucian justifications.

Yong Li

How (not?) to defend Confucian democratic constitutionalism

Sungmoon Kim seeks to challenge the dominant meritocratic understanding of Confucianism and offer an egalitarian reading in its place (p. 1). He employs two strategies for doing so. The first is sociological. He claims this reading provides a “socially grounded” version of democracy and constitutionalism that is suited to the “specific mode of pluralism that Confucian civic culture has given rise to” in East Asian countries. (p. 2) The second is conceptual and normative. He argues that this reading provides a way of rendering Confucianism compatible with democracy and constitutionalism (pp. 2, 5). In both cases the meritocratic understanding is rejected on external grounds. Sociologically it is unsuited to contemporary societies, and conceptually it seems tied to a feudal and illiberal model of politics (pp. 2-3). Given that he assumes most people would be reluctant to embrace a theory that is not only outmoded but also objectionable, that seems reason enough to provide an alternative reading more attuned to contemporary sensibilities.

I am not an expert—or even a non-expert—of Confucian thought. So I cannot judge the accuracy of Kim's reading of Confucian texts. Nevertheless, I have methodological concerns regarding his approach. In particular, I doubt that either his sociological or his conceptual strategies provide adequate grounds for rejecting the traditional meritocratic account of Confucianism or supporting his own revised view.

Can Confucian constitutionalism be “socially grounded”? In the methodological note at the end of his introduction (pp. 26-34) Kim raises two points relevant to his attempt to socially ground his account of Confucianism. The first concerns how far East Asian societies can still be called Confucian (and whether this fact should matter or not). The second asks how far Confucianism can be re-read to fit this social reality and still retain its distinctiveness as recognizably Confucian. I explore both points in turn below.



Although Kim aligns himself with myself and Jeremy Waldron at various points in distancing himself from Rawls' (1993) political liberalism, there is a Rawlsian character to Kim's desire to "socially ground" his democratic reading of Confucian constitutionalism (pp. 1, 72, 107–10). As is well-known, Rawls assumed that, notwithstanding the reasonable pluralism permeating contemporary advanced industrial and liberal democratic societies, an "overlapping consensus" on constitutional essentials is nevertheless both possible and, crucially, available (Rawls, 1993, pp. 140–142). At points in his exposition Kim comes close to endorsing Rawls' assertion as true for Western democracies but not for East Asia, which has a different history and cultural context. For example, he argues that legal constitutionalism is appropriate for "a mature liberal democracy where there is a deep underlying agreement on the matters of principle" (p. 205), but simultaneously contends that "no democracy in East Asia is a mature liberal democracy" with the history Rawls draws on for his "overlapping consensus" (p. 203). As a result, a Confucian form of public reason is needed "that tracks what is implied in the informal public culture of democratic (and non-democratic) political societies of East Asia" (p. 203)

Sadly, I doubt that the latent agreement on liberal values assumed by Rawls can be counted on at present within even established constitutional democracies. As Judith Shklar (1986) insightfully observed, commenting on Rawls' Hart Lecture in a letter to him of 10 November 1986, "the burden of historical proof" involved in this approach "becomes very heavy." Thus, it becomes important to ask "How widely shared?" these views are, "How deeply held and by whom and in what times? In peace and in war, in secure and insecure times?" And, in a comment that seems even truer and more damaging to the Rawlsian enterprise now than it was then, "Remember that most of your fellow citizens just now think that the Declaration of Independence is too radical for them." She concludes, "My point is simple. If you base your case on history, then contemporary history, which is what the best social science is, must provide you with a far less speculative ground to start from." I am not qualified to comment on East Asia but presumably Shklar's questions and "simple point" apply with equal force regarding the currency of Confucian values.

The crux here is that a historical consensus offers an elusive and uncertain basis for justifying a constitutional and political settlement. Kim criticizes the meritocratic Confucians for ignoring current social realities, not least their pluralism—albeit tempered in this case by an underlying commitment to a civic Confucian culture. But could they not retort in turn that his theory may itself be vulnerable to historical change? Their aim is to offer an ideal of the best form of governance. Could they not claim that if it was instituted it would generate support by virtue of its effectiveness and success? And would that not be a more secure source of social grounding than a purely contingent accordance with prevailing cultural attitudes?

That brings us to the second point regarding how far (and in what ways) Confucianism can be re-read without losing its distinctive character. Kim addresses this issue by comparing his democratic reading of Confucianism to contemporary interpretations of the republican tradition. The comparison is apposite, for those seeking to update Confucianism confront an analogous challenge to that confronting contemporary republicans: what one might term the Constant dilemma. In his



famous essay comparing the liberties of the moderns with those of the ancients, Benjamin Constant suggested that the liberty of the moderns, centered on the private rights of individuals and participation in the market, had rendered the liberty of the ancients both impossible and unappealing, involving as it did public military and political service by the few considered capable of being citizens and premised on slavery and the relegation of women to a pivotal supportive role within the family. Nonetheless, if “individual liberty” was “the true modern liberty,” Constant acknowledged that “political liberty is its guarantee” and argued it was “indispensable” (Constant, 1819, p. 323). He worried that in their enjoyment of their private liberties, citizens might neglect and even subvert these political guarantees (Constant, 1819, pp. 323–324), or be tempted to trust in a technocratic elite to provide them—a temptation Constant associated with the Napoleonic settlement. The difficulty was that the very factors that made these guarantees necessary also encouraged their neglect and subversion. Hence the Constant dilemma: could ancient liberty be updated to be compatible with modern liberty?

Confucianism seems to face a parallel dilemma, given that Kim associates it with a strong form of perfectionism that he sees as unsuited to the value pluralism he regards as characteristic of modernity—including contemporary East Asian societies. Constant’s solution to his dilemma was to claim that the republican, ancient liberty, commitment to political participation could be weakened and reworked within a representative system of democracy that was compatible with liberalism and the liberties of the moderns. Kim suggests something not altogether dissimilar with regard to Confucianism, whereby perfectionism can be weakened to certain core elements of human well-being that are equally important for the dignity of all and that he identifies with certain core liberal democratic rights.

I am not qualified to judge whether this is a plausible adaptation of Confucianism or not. What I want to question is whether Kim’s democratic Confucianism is *prima facie* better “socially grounded” than meritocratic Confucianism, as he describes it. After all, it is unclear that modern capitalism provides the basis for allegiance to liberal public (as opposed to private) values. As Max Weber noted in his observations on the Russian Revolution, the convergence of liberalism and capitalism in Western Europe was a highly contingent historical occurrence, involving a combination of factors unlikely to be repeated elsewhere (Weber, 1994, pp. 69–70). Is not the attempt to build a democratic culture on this weakened Confucian culture doomed from the start?

Kim tends to dismiss the meritocratic version of Confucianism as obviously obsolete. Of course, certain associations and features may well be; as Daniel Bell (2008, p. 115) conceded, it would be ridiculous if “Being Confucian” today entailed conforming to the traditional stereotype of being “old, Conservative and serious.” Yet, surely the meritocratic aspect chimes with contemporary epistemic and realistic criticisms of the viability of democracy (e.g., Achen & Bartels, 2017; Brennan, 2016, Rosanvallon, 2011) and the related argument of regulation theorists that “output” legitimacy can often prove more significant and appropriate for justifying authority than “input” legitimacy. Although I am a critic of these arguments, I consider them worthy of criticism, rather than being simply dismissed as outdated. Moreover, the Confucian version potentially has a reply to at least one criticism



of epistocracy—namely, that expertise does not necessarily equate to impartiality or incorruptibility (Dahl, 1989, p. 76)—by offering an account of the virtues and knowledge the elite must possess to merit their position.

In sum, methodologically Kim moves backwards from the “social ground” of East Asian societies to a weaker version of Confucianism that he then suggests is more realistic than meritocratic Confucianism. Yet such historical grounding offers a shifting and unstable basis for a substantive account that has critical purchase on that reality. Meanwhile, it could be regarded as talking past a meritocratic Confucianism that adopts just such an ideal strategy while making valid criticisms of the realism of liberal democracy in complex societies.

Kim’s normative and conceptual argument comes in when he defends Confucian democratic constitutionalism as a substantive model. He suggests that the only normatively acceptable political system is some kind of constitutional democracy that he regards as taking a certain canonical form: namely, a democratic system based on free and fair elections involving the principle of ‘one person one vote’ plus majority rule, on the one side, and the separation of powers and judicial review by an independent court, on the other. He then suggests that Confucianism can offer a basis for both political constitutionalism and democracy, as well as legal constitutionalism based on a bill of rights and “weak form” judicial review (Tushnet, 2006).

On the one hand, Kim sees political participation as expressing “the egalitarian ideal of Confucian dignity” (p. 195) and forming, as per the political constitutionalist argument, the “right to have rights” (p. 195). Moreover, following the arguments of Waldron (1999) and Bellamy (2007), he considers that reasonable disagreements over what Confucian culture entails can only be legitimately resolved democratically (pp. 184–185, 192 ff). On the other hand, though, he associates a set of related civil and political constitutional rights with the Confucian idea of equal dignity and individual moral development. As such, they reflect his “weak” reading of the perfectionist Confucian account of human well-being, the maximization of which he describes as forming the goal of traditional Confucian theories of governance. These fundamental rights, along with the related concern to ensure all are equal before the law, form the basis of the legal constitutional element of his theory.

Kim views the grounding of rights and judicial review in what he calls a weak form of “well-being consequentialism” (pp. 196, 242) as providing a distinctively Confucian basis for this legal aspect of his constitutional theory—though one that arguably parallels the neo-Aristotelian common good argument regarding rights of John Finnis (1980) and Adrian Vermeule (2022). Yet, he remarks at several points how the role of courts, bills of rights and judicial review, along with the very idea of the separation of powers, are neglected and even alien to traditional Confucian thought. Just as his egalitarian and weakened reading of Confucianism seems to be driven by the thought that any other view is simply outmoded in contemporary societies, so his Confucian defense of courts and constitutional rights seems driven by the thought that these are necessary elements of a constitutional settlement. In other words, there is a risk of a certain circularity in the argument—one that reifies certain institutional mechanisms as necessary to achieve particular ends—and that



undermines the critical potential of a Confucian account with regard to existing constitutional models.

For example, Kim notes how meritocratic Confucianism has advocated the constitutional role of a second chamber of a virtuous elite and rejects this as a model in favor of judicial review, which he thinks meritocratic Confucianism neglects. But second chambers can play a scrutiny role and serve as a democratic check on governments and the first legislative chamber (Waldron, 2016, ch. 4), not least through being elected or selected on different grounds to the first that are nonetheless consistent with political equality, such as sortition (Abizadeh, 2001). Indeed, Billings Learned Hand, a critic of strong judicial review, saw the suspensive veto power of the House of Lords as an alternative (Hand, 1958, p. 68). In other words, Kim's reading of Confucianism to fit a supposed canonical model of constitutional democracy may have resulted in his neglect of the resources of the more traditional Confucian approach to constitutionalism.

Kim's Confucian Constitutionalism is an original and informative exploration of a possible Confucian model of democratic constitutionalism suited to East Asian societies. Based on an internal critique of his arguments, there are resources for strengthening both his critique of meritocratic Confucianism and his advocacy of a Confucian democratic constitutionalism by arguing more directly from Confucian principles and values rather than weakening them to conform to the supposed conditions of East Asian societies, on the one side, and the institutions and practices of constitutional government, on the other.

Richard Bellamy

Is Confucian democratic constitutionalism emotionless?

It was numinous intelligence (*shenming* 神明) that the sage was more richly endowed with that made him different from people in general, and what made him the same as people in general was that he too had the five emotions (*wuqing* 五情).

Wang Bi 王弼 (226–249), translation quoted from Lynn (2014, p. 219)

In a famous passage in the history of Confucian philosophy, Wang Bi questioned the then-popular thesis that Confucian sages were emotionless (*wuqing* 無情). The school of thought that Wang Bi was often associated with, Wei-Jin *xuanxue* 魏晉玄學, emerged after the end of the Han Dynasty (202 BC–9 AD, 25–220 AD). The collapse of the Han left society in “sociopolitical chaos and ideological diversity” (Mou, 2023, p. 172). As the authority of the dominant Confucian school—Han Classical Studies (*Handai jingxue* 漢代經學)—declined, Confucian literati sought help from various philosophies, resulting in intellectual pluralism. But the moral-political legacy of Confucianism persisted, as most scholars “agreed that Confucius was the highest sage” (Chan, 2010, p. 3). *Xuanxue* scholars like Wang Bi drew on Daoism to reinterpret Confucianism. Daoism provided resources for order, peace, distance from worldly affairs, and critical reflections on the political system (Chan,



2010; Tang, 2005). In a ritually Confucian society plagued by crises, Confucians accommodated Daoism's challenge, broadening the tradition.

Challenges and accommodations are recurring themes in Confucian history. These moments often spark debates about deviation from orthodoxy, yet accommodation is recognized as crucial to Confucianism's success (see, e.g., Hall & Ames, 1995, p. 210). Accommodations often blur the boundaries between Confucians and non-Confucians, leading scholars to question the internal coherence of Confucian identity and challenge the consistent translation of Ru 儒 as "Confucians" (Nylan, 1999).

Confucian democratic constitutionalism, a theory advanced by Sungmoon Kim in *Confucian Constitutionalism*, is proposed in this context. As Dongxian Jiang (2021) observes, contemporary East Asian societies are socially plural, but a rather resilient Confucian political culture still persists. Seeking to address pluralism in East Asian societies, Kim proposes a constitutional politics that is democratic, equal, and civically Confucian. As such, Kim steps up to the challenge of pluralism and walks Confucianism into a moment of accommodation.

Refreshingly, Confucian democratic constitutionalism reminds us that a Confucian political theory does not have to be shackled by the meritocratic house, exam-based selection of legislators, or the status of state religion. Specifically, Kim's Confucianism involves three interrelated aspects: (1) a civic Confucianism allowing citizens to maintain a Confucian civic identity without entirely surrendering their ways of living; (2) a public reason Confucianism enabling negotiation between modern political freedoms and Confucian rituals and values; and (3) a constitutional Confucianism returning 'the right to reconceptualize and exercise rights to the people themselves' (Kim, 2023, p. 198).

In a context where Confucianism does not enjoy a privileged status as a moral doctrine but, as Kim argues, still serves as a set of "semiotic practices" and a "cultural text" (2023, p. 31), accommodation can presumably be important for Kim in two senses. One, as a set of shared cultural practices, Confucianism outlines a horizon on which "brute pluralism" can attain a civil and civic character. Profound and intense disagreements among plural citizens can become reasonable disagreements that respect human dignity and equality. Two, public reasoning shaped by 'distinctive Confucian characteristics' makes up and develops a repertoire of constitutional-political language recognizable and meaningful for citizens living in plural East Asian societies (Kim, 2023, p. 114). It strengthens the gradually growing public political culture and helps East Asian citizens formulate their political and constitutional identities.

Intriguingly, political emotion is not a main theme in Confucian Constitutionalism. Although Kim notes that Confucian moral sentiments are integral to public reason Confucianism (2023, p. 114), emotions, or *qing* 情, rarely make any appearance in his book. It is not fair to ask an author to write about something beyond their agenda. However, emotions matter here for the three reasons I detail in the rest of this contribution. These reasons mobilize me to reintroduce Wang Bi's discussion about sagehood, a "critical concern in Confucian self-understanding" (Chan, 2007, p. 113), as a point of conversation for *Confucian Constitutionalism*.



Sagehood may seem an obsolete political concept, but we can reinterpret Wang Bi's comments in a way meaningful to a pluralist society in the following way.

Wang Bi refuted the thesis that sovereign power—be it the monarch, the people, or the constitution—should be above the dimension of emotions, that only an emotionless entity can constitute politics and construct political meaning. To him, emotions are key to being responsive to worldly affairs. In a pluralist society, one cannot expect Confucianism to edify the people's emotions with Confucian rituals and music (*liyue* 禮樂). If emotions are constitutive of the body politic, does Confucianism still have something to offer for thinking about the political and constitutional functions of emotions in a pluralist society (I owe this reinterpretation to Shoufu Yin)?

Below, I outline the significance of emotions in Confucian democratic constitutionalism in three aspects: one about democracy, one about Confucianism, and one about constitutionalism. Each implies a clarification or development opportunity for Kim to enhance our understanding of what Confucian democratic constitutionalism offers in a pluralist society.

First, democracy. De facto social pluralism poses a challenge to society not just because it results in disagreements about values but also because such disagreements are often inseparable from intense emotions. A heavily contested liberal solution to this problem is to argue that emotion-based arguments can be tamed by resorting to personal interests, which are purportedly universal (see, e.g., Holmes, 1997). In contrast, Michael Walzer (2004) rejects a sharp distinction between passions and interests, doubting that personal interests by themselves are sufficient to sustain associational identity. To Walzer, “No political party that sets itself against the established hierarchies of power and wealth will ever succeed unless it arouses the affiliative and combative passions of the people at the lower end of the hierarchies” (2004, p. 147). This dialogue shows that attempts to address the challenge of pluralism often either imply an answer to or directly confront the question of passionate disagreements.

Confucian democratic constitutionalism probably does not rely on an interest-centric language to tame passionate disagreements, since it is not predicated upon rational self-interests. Here we can consider Kim's (2018) interpretation of John Dewey. Dewey stated that “when we take ends without regard to means we degenerate into sentimentalism [W]e fall back upon mere luck and chance and magic or exhortation and preaching; or else upon a fanaticism that will force the realization of preconceived ends at any cost” (1920, p. 73). Commenting on this claim, Kim notes that “democracy as a regulative social ideal that concerns the citizenry's way of life would be merely fantastical, if it were not embodied materially in a concrete institutional form” (2018, p. 57). In other words, democratic institutions are key to protecting society from declining into sentimentalist fanaticism. Passions are to be guarded against. Does this mean that the lack of discussions about emotions in Confucian Constitutionalism implies an intention to contain the effect of political emotions?

Second, Confucianism. Kim reconstructs his Confucianism as a partial comprehensive doctrine not relying on (traditional) Confucian cosmology, ontology, or epistemology. Nonetheless, in Confucian democratic constitutionalism,



Confucianism bears important functions of public outreach, civic education, and political cultivation. Emotions are particularly crucial here because they play a double-sided role in Confucian ethics. They are “seeds and sprouts of our moral possibilities for responding and caring” and “are linked to the vital forces of human life,” but when not exercised properly, they may also “undermine and destroy” our moral life because passions can lead to destructive actions (Nelson, 2018, pp. 195, 197). This is why Xunzi stated in his comments on music that “the happiness and anger of the former kings achieved a uniform measure in these things. Therefore, when they were happy, all under Heaven harmonized with them, and when they were angry, then violent and disorderly people feared them” (2014, p. 219). Such expression of emotions and the proper ways of expressing emotions are key to self-cultivation.

The pluralist challenge with emotions is that different social groups may not agree on how to ‘properly’ handle certain powerful emotions like fear, anger, hatred, and pride. In such a context, does political cultivation through Confucian moral sentiments imply altering or limiting non-Confucian groups’ ways of handling emotions, perhaps for the purpose of achieving civility? Or does civil public reasoning imply the concealment of passions, especially those with high mobilizing potential (which, as Kim notes (2020, p. 160 n. 38), is closer to a Legalist position)?

Third, constitutionalism. Emotions are essential in shaping the constitution of a polity. Montesquieu famously argued that “[j]ust as there must be virtue in a republic and *honor* in a monarchy, there must be *fear* in a despotic government” (1989, p. 28). Montesquieu’s point here is that different constitutions tend to valorize moral sentiments that are compatible with them. An anachronistic moral sentiment incompatible with the constitution of a polity can challenge the very foundation of constitutional politics. András Sajó’s (2011) *Constitutional Sentiments* further explores this point as he uncovers the sentimental foundations of the U.S. and French constitutions. Sajó notes that “constitutional design is a half-conscious venture of emotion management” and that “public sentiments continue to participate in the shaping of constitutional law even after the enactment of the constitution” (2011, pp. 5, 75). Sajó shows that public sentiments are in enduring negotiations with the enactment and the execution of constitutional laws. Constitutional laws almost always attempt to limit the expression of intense emotions, but such limiting effects are limited themselves. Powerful public sentiments like fear and rage can set boundaries for what are considered important issues for the constitution and what are included or excluded as options. Hence, Sajó calls the U.S. constitution-making experience “the constitutionalism of fear” (2011, p. 115), given that fear of excessive government intervention as a public sentiment undergirded the selection of issues and the proposed solutions in this process. What, then, will be the emotional foundation of Confucian democratic constitutionalism? Are shared Confucian semiotic practices robust enough to generate Confucian sentiments as an emotional foundation for young East Asian democracies?

None of these questions fundamentally reject the vitality of Confucian democratic constitutionalism. Quite the opposite, these questions echo Kim’s insistence that contemporary Confucian political theory—or any political theory concerned



with East Asian realities—must develop an account of politics that addresses the challenges and problems confronting East Asian societies today, including but perhaps not limited to pluralism. Contemporary East Asian societies are not short of emotionally based arguments and social movements. Such movements are practically generating new constitutional and political identities. As Wang Bi argued, the shared “five emotions” are the foundation of speaking to these identities in the making, of responding to worldly affairs. If Confucian democratic constitutionalism envisions a political plane where intense emotions can be at least bracketed so that political discussions based on civic Confucian identity are not straitjacketed by them, just like how Wang Bi’s sage ‘may respond to things without becoming attached to them (*yingwu er wulei yu wu* 應物而無累於物)’ (Lynn, 2014, p. 376), it must confront the question of emotion rather than sidestep it.

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