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Review Essay: For Constitutionalism

By *Mark Tushnet**

Martin Loughlin, **Against Constitutionalism**, Harvard University Press, Cambridge (MA) 2022, 240 pages, EUR 36.95 (Hardcover), ISBN 9780674268029.

Roberto Gargarella, **The Law as a Conversation Among Equals**, Cambridge University Press, Cambridge 2022, 342 pages, £ 85.00 (Hardcover), ISBN 9781009098595.

A. Introduction

Two of the world's leading constitutional theorists published books in 2022 challenging constitutionalism in the name of democracy.[1] Martin Loughlin of the London School of Economics has previously published important works including *The Idea of Public Law* (2003) drawing upon both Anglophone and continental constitutional theory.[2] Roberto Gargarella of the University of Buenos Aires has used deep explorations of Latin American constitutional history to present a critique of Latin American constitutionalism in *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (2013).[3] Constitutionalists should pay attention when two figures of such stature in the field converge on a single proposition.

Loughlin states his version of the proposition in his book's title: *Against Constitutionalism*—elaborated a bit in the opposition he creates between (his version of) constitutionalism and what he calls constitutional democracy. I will explore both qualifications—"his version" and "constitutional democracy" rather than democracy tout court—below. Gargarella's version is simpler: a "tension between constitutionalism and democracy."[4] My summary expansion of those propositions, to be developed further in this Review

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1 *Martin Loughlin*, Against Constitutionalism, Cambridge, Massachusetts 2022, hereinafter cited as Loughlin; *Roberto Gargarella*, The Law as a Conversation Among Equals, Cambridge 2022, hereinafter cited as Gargarella.

2 *Martin Loughlin*, The Idea of Public Law, Oxford 2003.

3 *Roberto Gargarella*, Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution, Oxford 2013.

4 *Gargarella*, note 1, p. 5.

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Essay, is this: Constitutionalism requires that some important subjects of political life be removed from what Loughlin calls "the ordinary cut and thrust of politics,"[5] entrenched against revision except through some extraordinary modes of political action such as constitutional amendment or replacement. Among those subjects are the core structures of political decision-making and fundamental rights essential to the creation and maintenance of mainstream understandings of democracy.

Democracy, though, requires that policy on *all* important subjects be subject to the reliably determined, reasonably stable, and reasonably deliberative preferences of contemporary majorities—"the ordinary cut and thrust of politics." And "all" really means "all"—it includes structures of decision-making and fundamental rights. Entrenchment, in short, means that today's majority can't get some of the policies it really wants.[6]

This Review Essay explains why the difficulties Loughlin and Gargarella arise from foundational constitutional theory and not simply from the current state of affairs in constitutional democracies around the world. Section B sketches foundational constitutional theory and speculates about why foundational theory hasn't been prominent in work by U.S. legal academics.[7]

Section C presents the arguments Loughlin and Gargarella make in some detail, proposing that neither author is against constitutionalism "as such" but both contest in the name of democracy a historically situated form of constitutionalism that they argue is dominant today. Loughlin's phrase, "the ordinary cut and thrust of politics," offered as a shorthand for constitutional democracy, requires rather detailed elaboration. That occurs in Sections D and E. Section D offers a story aimed at motivating readers to take seriously the arguments Loughlin and Gargarella make against constitutionalism. Section E provides another story about how constitutional democracy can be sustained without entrenchment. A brief final section concludes.

B. What Is Foundational Constitutional Theory?

As a participant in U.S. constitutional scholarship and discourse I report a rather strong sense that we (here) use the term *constitutional theory* to refer to theories of constitutional interpretation—originalism, textualism, living constitutionalism, and so on down the usual list—and to accounts of the values served by institutions like federalism and the separation of powers and by substantive constitutional provisions such as those promoting equality

5 *Loughlin*, note 1, p. ix.

6 As both authors emphasize the tension is between entrenchment and occurrent majority preferences, not merely entrenchment's manifestation in the "countermajoritarian" practice of constitutional review lodged in the courts—though both authors also take that manifestation to be the most prominent contemporary *symptom* of that tension.

7 Foundational constitutional theory is somewhat more prominent in works by U.S. political scientists.

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and liberty.[8] These, and particularly accounts of how one can interpret a textual constitutional, are components, though in my view rather minor ones, of foundational constitutional theory.

Foundational constitutional theory starts from the premise that constitutions operate in what Jeremy Waldron calls "the circumstances of politics," which he describes in these terms: "the felt need . . . for a common framework or decision or course of action," in the face of "disagreement about what that framework, decision, or action should be."[9] Taking disagreement as ineradicable, foundational constitutional theory deals with the building blocks of constitutionalism. It addresses questions like these.[10] (1) What is a constitution a constitution *of*? A territory, almost certainly, but what about the people of that territory? Must a *demos*—a group of people who think of themselves as engaged in an enterprise of collective governance—exist before a constitution can be framed?[11] Can a constitution help create a demos?[12] Or, as the Nazi constitutional theorist Carl Schmitt contended, can a constitution be only for an *ethnos*, a people who share a common and rather thick culture (going beyond the constitution itself)?[13] If so, must the ethnos be a group of people with a common and typically narrow set of ancestors, as Schmitt is most naturally read to have

8 One indication, which though dated seems to me still representative, is the table of contents of the most recent and apparently last edition of *John H. Garvey, T. Alexander Aleinikoff* and *Daniel A. Farber*, Modern Constitutional Theory: A Reader 5th ed., St. Paul 2004. The first set of readings deals with the topic, "Theories of the Constitution," with subheadings "The Nature of Constitutional Theory," "Process Theory," "Morality-Based Approaches," "Reconceptualizing Democracy," and "Critical Perspectives." Only the first of these comes close to dealing with what I call foundational constitutional theory. The other readings deal with "Methods of Constitutional Interpretation," "Judicial Review," "Federalism," "Separation of Powers," Equality and Race," Equality and Gender," "Affirmative Action," "Liberty," and "The Public-Private Distinction." (The last of these has some points of contact with foundational constitutional theory.)

9 *Jeremy Waldron*, Law and Disagreement 102, Oxford 1999. *Gargarella*, note 1, p. 22, expressly adverts to the inevitability of disagreement in political life, but of course that acknowledgement pervades both books.

10 Some of my formulations may be idiosyncratic or adopted for ease of exposition, but I believe that they track other formulations in the literature on foundational constitutional theory.

11 This question roiled the discussion in the 2000s of the proposed Constitution for Europe. For important contributions, see *Joseph H.Weiler*, The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration, Cambridge 1999; Symposium issue on the proposed European Constitution, International Journal of Constitutional Law 3 (2005), pp. 163-515.

12 Foundational theorists often use the United States as an example of a demos created by the U.S. Constitution. For one version of the argument, see *Mark Tushnet*, What Then is the American?, Arizona Law Review 38 (1996), p. 873.

13 *Carl Schmitt*, The Crisis of Parliementary Democracy, translated by Ellen Kennedy, Cambridge, Massachusetts, ("Democracy requires … first homogeneity and second—if the need arises—elimination or eradication of heterogeneity.").

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believed,[14] or might it be a group composed of people of whatever ethnic origin who become strongly socialized into the relevant culture, as has been asserted about France? Can a constitution promote or preserve democracy when a lot of people disagree a lot about constitutional fundamentals, and if so, how much "dis-homogeneity" of this sort can there be before things fall apart?[15]

(2) Must a constitution be comprehensive, dealing with all possible modes of generating public policy that bind people subject to the constitution? Must it be written? (In which case the claim of comprehensiveness is going to come under strain.) Can the constitution include unwritten norms or, in current terms, guardrails that ensure the smooth functioning of the institutions of governance?[16] If a nation has a written document styled "the constitution," can the full constitution include more than that document?[17] If it does, what do the written constitution's provisions for entrenchment—that is, the provisions requiring more than a simple majority to alter the text—imply about revisions to "constitutional statutes"?[18]

(3) What's the relationship between representation and democratic participation in law-creating? Under what circumstances if any should representatives regard themselves as bound by the views of those they represent (and how are they to know what those views are)?[19] Under what circumstances should representatives be obliged to exercise judgments on questions before them that are independent of their constituents' views? How extensively, if at all, should direct legislation by the people through referendums and similar devices

14 For a more generous reading of Schmitt's concept of homogeneity, see *William Rasch*, Carl Schmitt's Defense of Democracy, in: Jens Meierhenrich / Oliver Simons (eds.), The Oxford Handbook of Carl Schmitt, Oxford 2016, p. 320-27 (discussing "The People as Constituent Power").

15 For a discussion in the context of the analysis by the German Constitutional Court and German scholars of how best to understand the European Union, see *Jo Eric Khushal Murkens*, From Empire to Union: Conceptions of German Constitutional Law since 1871, Oxford 2013. p. 194-98.

16 See *Steven Levitsky / Daniel Ziblatt*, How Democracies Die, New York 2018.

17 See *William N. Eskridge / John Ferejohn*, Super-Statutes, Duke Law Journal 50 (2001), p. 1215.

18 See *Farrah Ahmed / Adam Perry*, Constitutional Statutes, Oxford Journal of Legal Studies 37 (2017), p. 461. Note as well the difficulties associated with the idea of "mere" statutory amendments to superstatutes in the United States.

19 For a comparative and critical discussion of how so-called "imperative mandates" (directives from constituents to representatives) operate, see European Commission on Democracy Through Law (Venice Commission), Report on the Imperative Mandate and Similar Practices, 2009, https://www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2008)031-e (last accessed on 12 June 2023), concluding that "the basic constitutional principle which prohibits imperative mandate or any other form of politically depriving representatives of their mandates must prevail is a cornerstone of European democratic constitutionalism.".

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be allowed?[20] How does the development of organized political parties affect the answers to all of these questions?

(4) How permanent is the constitution? Every constitution allows for its own amendment, but how can we understand the now widespread phenomenon of provisions that are said to be unamendable?[21] What's the relation between unamendability and constitutional replacement? How do we understand the replacement of one constitution by another?[22]

And, finally, the question that animates Loughlin and Gargarella: How can a people be self-governing if they are unable, without extraordinary effort, to obtain from "their" government policies that on reflection and after deliberation a majority of them prefer? Constitutions divide the overall domain of public policy into two parts. In one outcomes result from the ordinary cut and thrust of politics. In the other policy choice is removed from that cut and thrust, to be governed in the first instance by choices made in the past (choices which, in all the interesting cases, a current majority would make differently), though revisable by some special supermajority requirement (by a constitutional amendment or, where amendment is barred by an eternity clause, by a constitutional replacement). As already noted, the entrenchment of prior policy choices against current ones is prima facie a deprivation of the ability of today's people to govern themselves. The foundational constitutional question here is, Can the prima facie deprivation be justified? Loughlin and Gargarella say no.

Again calling on my participation in the community of discourse about constitutionalism in the United States, I suspect that many U.S. constitutionalists think it not worth spending much intellectual energy on addressing these questions.[23] We have easy answers at hand that are entirely sufficient for our everyday use: The U.S. Constitution is written, freely amendable except with respect to the states' equal representation in the Senate, governs every citizen who accepts its authority no matter where they "came from," and more.[24]

20 For a comparative presentation of "best practices" for referendums, see European Commission on Democracy Through Law (Venice Commission), Code of Good Practices on Referendums, 2007, https://www.cik.bg/upload/56756/VENICE+COMMISSION+-+CODE+OF+GOOD+PRACTICE+ON+REFERENDUMS.pdf (last accessed on 12 June 2023).

21 See *Yaniv Roznai*, Unconstitutional Constitutional Amendments: The Limits of Amendment powers, Oxford 2017.

22 Accounts of these questions typically invoke the difficult concept of "constituent power." For important recent contributions, see *Roznai*, note 21; *Joel Colon-Rios*, Constituent Power and the Law, Oxford 2020.

23 My view is that Frank Michelman is the leading U.S. participant in the enterprise of foundational constitutional theory. For his most recent contribution, see *Alessandro Ferrara / Frank Michelman*, Legitimation by Constitution: a Dialogue on Political Liberalism, Oxford 2022; *Frank Michelman*, Constitutional Essentials, Oxford 2022.

24 See *Mark Tushnet*, Foundations of Public Law: A View from the United States, in: Michael Wilkinson / Michael W. Dowdle (eds.), Questioning the Foundations of Public Law, Oxford 2018, p. 209.

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And that's certainly true, but the qualification "for everyday use" is important. Questions of foundational constitutional theory ordinarily reside below the surface when a constitutional order is operating relatively smoothly. They emerge from below, though, when the order experiences some sort of crisis. The locus classicus of foundational constitutional theory in the twentieth century was Weimar Germany.[25] For Loughlin in the contemporary United Kingdom, Brexit provoked recourse to such theory, and for Gargarella in Latin America, the rise of right-wing and left-wing populist executives whose divergent political positions can't adequately be dealt with using the terms of a politics-neutral "constitutionalism" did so.[26] The U.S. Civil War forced the U.S. Supreme Court to figure out the status of states within the nation and resolved the question of who the people of the United States were.[27] Foundational questions also surface during periods, sometimes quite long, when one constitutional order has lost its ability to organize political life but has not yet been replaced by another.[28]

I believe that we in the United States are in a transitional period and that the foundational question on which Loughlin and Gargarella focus—the compatibility of constitutionalism and constitutional democracy—is of pressing concern now.[29] Section C presents Loughlin's and Gargarella's arguments. Then Section D uses a stylized but I hope not unrealistic account of small-scale politics to deepen our understanding of the core question they raise.

C. The Tension Between Constitutionalism and Constitutional Democracy Explicated: A Summary of Loughlin and Gargarella

How can a people be self-governing if they are unable, without extraordinary effort, to obtain from "their" government policies that on reflection and after deliberation a majority of them prefer? To repeat an earlier observation: Constitutions divide the overall domain of public policy into two parts. In one outcomes result from the ordinary cut and thrust of

25 For a collection of excerpts from the impressive literature developed by German constitutionalism during Weimar, see *Arthur Jacobson / Bernhard Schlink* (eds.), Weimar: A Jurisprudence of Crisis, Berkeley 2002.

26 Gargarella refers to other examples when crisis provoked attention to foundational questions: the Icelandic constitutional drafting exercise (*Gargarella*, note 1, pp. 244-45) and the Chilean movement for constitutional reform (*id*., pp. 271-72), which culminated in a referendum in 2022.

27 On the former question, see Texas v. White, 70 U.S. (7 Wall.) 700, (1868) (characterizing the United States as "an indestructible Union, composed of indestructible States."). On the latter question, see U.S. Const., Amend. 14.

28 For general discussions of regime transitions in U.S. constitutional history, see *Jack Balkin*, The Cycles of Constitutional Time, Oxford 2020; *Mark Tushnet*, Taking Back the Constitution: Activist Judges and the Next Age of Constitutional Law, New Haven 2020.

29 One indication is the rise of concern in some segments of the polity about legislation restricting ballot access and about other threats to democratic participation, as well as concern about the role of the Supreme Court in our polity and interest (again, among some) in structural revisions to the Court. On the latter, see Presidential Commission on the Supreme Court, Report, Dec. 7, 2021.

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politics. In the other policy choice is removed from that cut and thrust, to be governed in the first instance by choices made in the past (choices which, in all the interesting cases, a current majority would make differently), though revisable by some special supermajority requirement (by a constitutional amendment or, where amendment is barred by an eternity clause, by a constitutional replacement). As already noted, the entrenchment of prior policy choices against current ones is prima facie a deprivation of the ability of today's people to govern themselves. The foundational constitutional question here is, Can the prima facie deprivation be justified? Loughlin and Gargarella say no.

The constitutionalism Loughlin is against has the following components:

> *[A textual constitution] establishes a comprehensive scheme of government, founded … on the principle of representative government and … on the need to divide, channel, and constrain governmental powers for the purpose of safeguarding individual liberty. That constitution is also envisaged … as creating a permanent governing framework that … is conceived as establishing a system of fundamental law supervised by a judiciary charged with elaborating the requirements of public reasons, so that … the constitution is able to assume its true status as the authoritative expression of the regime's collective political identity.*[30]

Constitutionalism with these characteristics is, Loughlin argues, the predominant form of constitutionalism today, influencing constitutional design and constitutional theorizing around the world. It is, he contends, a pernicious form of constitutionalism that should be rejected because it is an ideological project designed to sustain a system in which public power is deployed in the service of narrow, wealthy elites. Loughlin develops this argument by examining constitutional practices and theorizing in the United States, western Europe, and beyond.

Gargarella does not offer quite as concise a summary of constitutionalism but his account is broadly compatible with Loughlin's. He too relies on U.S. constitutional history and on some of the same texts to which Loughlin attends. Interestingly, though, Gargarella shows how Latin American constitutions and constitutional theorists developed principles quite similar to those in the United States, sometimes because of emulation and sometimes because the theorists independently drew conclusions from common premises.

One advantage of reading the books in tandem is that they complement each other. The authors emphasize different parts of the story. Gargarella devotes more attention than Loughlin to the ways in which the principle of representation interferes with rather than advances democracy and—unsurprisingly in light of Latin American history and his prior scholarship—gives more emphasis than Loughlin to the ways in which popularly elected executives have distorted democracy.[31] Both authors devote a fair amount of attention to the role of constitutional courts in obstructing democracy, Loughlin a bit more than Gargarella.

30 *Loughlin*, note 1, pp. 6-7.

31 See especially *Gargarella*, Latin American Constitutonalism, note 3.

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Quite valuably, though both authors refer extensively to U.S. constitutional history and theory, Laughlin introduces examples from European constitutional history and theory. Gargarella uses examples from Latin America, constructing an argument that Latin American constitutionalism as it developed in the nineteenth and twentieth centuries responded to specific local conditions and theoretical assumptions, and has become dysfunctional as those conditions changed dramatically and those assumptions have been abandoned. Yet, Gargarella's bottom line description of Latin American constitutionalism seems to me quite similar to Laughlin's version of constitutionalism. His extensive discussion of democratic alternatives to representation reinforces the impression that he and Laughlin are concerned about phenomena that are if not identical at least part of a family that constitutionalists can recognize. The critiques both authors develop are largely consistent with each other, with Loughlin offering perhaps somewhat sharper formulations.

I. Loughlin: Against a Historically Developed and Contingent Form of Constitutionalism

Loughlin offers a genealogy of constitutionalism with its six features. Each feature arises, he argues, in specific historical contexts and advances interests in that context, then generates puzzles or problems to which the development or elaboration of another feature responds. As Jonathan Gould puts Loughlin's argument, "constitutionalism emerges to mediate the inevitable tension between constituent power and constitutional rights. *Someone* must determine when the will of the people must give way to individual rights…."[32]

That "someone" ends up being the judiciary, and the argument culminates in a sustained challenge to the role of courts in that form of constitutionalism. The courts "acquire[] the authority to pronounce on 'what constitutional justice requires,'" and absorb the function of ensuring "the smooth working of democratic will-formation."[33] Constitutional "fetishism" comes into existence with citizens coming to believe that the constitution's "meaning can be disclosed through skillful legal analysis"—elsewhere described as a "cult of constitutional legality."[34]

According to Loughlin, "Contemporary constitutionalism envisages a regime of government according to law. But the concept of constitutional legality makes this an indeterminate project."[35] The reason is that the constitution's important terms are abstract, and "acquire meaning only when infused with values, with no rational method existing for choosing between contestable values claiming to be the best iteration of the principle…. Constitutional legality emerges as a powerful and intensely contestable political

32 *Jonathan S. Gould*, Puzzles of Progressive Constitutionalism, Harvard Law Review 135 (2022), pp. 2053, 2062. [emphasis added].

33 *Loughlin*, note 1, pp.131, 135.

34 *Loughlin*, note 1, pp.141, 410. See also *id*. p. 147 (referring to "the abiding faith placed in the judiciary to determine the legitimacy of laws enacted by democratically elected legislatures.").

35 *Loughlin*, note 1, p. 162.

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phenomenon."[36] When "infused" with values, constitutionalism "present[s] one window into reality, … an abstract ideology, a striving for power."[37] What that window reveals, who that power serves is best examined by "shifting the focus toward social, political, and economic factors…."[38]

We can move from Loughlin's critique of the judiciary to his analysis of constitutional democracy with this important formulation:

> *Diverting these issues to a forum that is relatively remote, unaccountable, costly, and operates on the principle of individual complaint, constitutionalism pushes ever more political issues into an institution that is insulated from the cut and thrust of ordinary life.*[39]

For Loughlin, constitutional democracy can be reconciled with constitutionalism "only when constitutional democracy is reconstructed as constitutionalism," but doing so, he argues, renders constituent power redundant and thereby knocks the props out of the defenses of contemporary constitutionalism.[40] We must insist that constitutionalism is irreconcilable with constitutional democracy to maintain "the regime's open, dynamic, and indeterminate qualities. And the fact that this tension must be managed prudentially through political deliberation and accommodation and cannot satisfactorily be reconciled in law signifies that constitutional democracy is a discrete regime that differs from constitutionalism."[41]

How are "political deliberation and accommodation" to occur? "[T]hrough continuous and active political deliberation over the right and the good. Conflict and dissent are constitutive features that must be preserved … by ensuring that the meaning of these basic and contestable values remain the subject of continuous political negotiation through democratically constituted and democratically accountable processes."[42] The argument wraps up with the observation that "[t]his feature of democracy places structural limitation on the degree to which it can be sublimated into constitutionalism."[43]

36 *Loughlin*, note 1, p. 163. I believe that the formulation "no *single* rational method *exclusively* existing" would be better: Many rational methods exist but none is definitively the sole method compatible with reason.

37 *Loughlin*, note 1, p. 22. For Gargarella's statement on the ideological dimension of constitutionalism, see *Gargarella*, note 1, pp. 11-12.

38 *Loughlin*, note 1, p. 124.

39 *Loughlin*, note 1, p. 168. See also *id*. p. 177 (asserting that "Constitutionalism shifts the action away from legislatures and governments into courts and away from the collective will-formation toward individualized rights-based claims.").

40 *Loughlin*, note 1, p. 23.

41 *Loughlin*, note 1, p. 24.

42 *Loughlin*, note 1, p. 108.

43 *Loughlin*, note 1, p. 108. The passage continues, "Once a political regime is conceptualized in the language of rights, lawyers too readily assume that it contains an overarching framework to be attended to by the judiciary…." *Ibid*.

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Loughlin offers a powerful critique of what he rightly contends is the predominant form of constitutionalism in today's world. One wonders, though, whether that is the *only* form constitutionalism can take. I and others have argued for what we call popular or political constitutionalism but Loughlin asserts that these are "misnomers" that bring into the domain of constitutionalism aspects of "popular agency … that are antithetical to the actual meaning of constitutionalism."[44] Really? Perhaps so, if the "*actual* meaning" is determined entirely by widespread usages in contemporary constitutional discourse.

Perhaps not, though. I have just quoted Loughlin's argument that constitutional democracy involves "democratically *constituted* [emphasis added] and democratically accountable processes."[45] Gargarella can be understood to argue that such processes can be—and, I argue in Section D, should be—subsumed within the term "constitutionalism."[46]

II. Gargarella: Problems with Representation

As I've noted, Gargarella more than Loughlin points to problems with the role of representation in contemporary constitutionalism.[47] Gargarella introduces his critique of representation by quoting Thomas Jefferson, who referred to the Constitution's attempt "to limit … the [government's] 'direct and constant control by the citizens.'"[48] Expanding the point, Gargarella argues that representative government embodies "distrust of the citizens, resistance against citizen engagement, and fear of democratic rule."[49]

Once in place representative systems typically develop pathologies. Representatives gradually lose touch with the people they are supposed to represent and "develop a separate group identity," for example.[50] More important perhaps is a structural difficulty associated with the inevitable rise of political parties as the vehicles for selecting candidates. Today's democratic nations are diverse and heterogeneous along many dimensions. Individual citizens themselves are similarly multidimensional—adherents of a specific religion (or none at all), descendants of immigrants or indigenous peoples, workers in traditional manufacturing enterprises or participants in the gig economy, and of course much more. Gargarella suggests that any system of representation will collapse all those dimensions into one or

44 *Loughlin*, note 1, p. 7.

45 *Loughlin*, note 1, p. 108.

46 I emphasize that doing so takes nothing away from Loughlin's critique of the predominant form of contemporary constitutionalism.

47 I forgo a summary of Gargarella's extensive discussion of problems associated with judicial review to avoid repetition or a presentation that might magnify small differences between Loughlin and Gargarella.

48 *Gargarella*, note 1, pp. 5-6.

49 *Gargarella*, note 1, p.12.

50 *Gargarella*, note 1, p. 91.

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two at the point where citizens choose representatives.[51] Party systems with a small number of parties with realistic chances of electing legislators certainly do so.[52] As he puts it, "the representative systems we know … are 'tight-fitting suits' that restrict the free movement of our growing, developing political body, preventing it from adequately reacting to th changing world around it."[53]

Gargarella concludes his book with an overview of "alternatives" to representative government "that are worth trying."[54] Gargarella addresses some skeptical arguments offered by Tom Ginsburg about whether these new forms of deliberative politics are indeed worth trying. Ginsburg doubts that these methods "can become a regular or routine part of democratic government," observes that the "inputs" from the public are sometimes "not particularly attractive," and suggests difficulties in scaling up these experiments to the level of national government.[55] To the first point, Gargarella responds that nothing in his version of constitutionalism requires "citizens to actively participate in politics, *on an everyday basis*" (emphasis added).[56] To the third, he notes that some deliberative experiments have indeed operated on a national scale.[57]

Gargarella rightly observes that Ginsburg's second objection is the most serious, and he offers a simple but, in my view, quite deep response: "trust the people in those rare occasions … when they stand up and engage in politics. If the collective discussion refers to a topic the people care about, I would simply say: pay attention to them…."[58] He deflects the criticism a bit by saying many of the examples of bad outcomes often trotted out actually show "participation without deliberation," but that's not the core point because he can't guarantee that processes that look deliberative will actually be so.[59] Rather, the deep point, especially about specifications of abstract values is, "Who are you to say that this specification is so far out of bounds that you're simply going to block the people from acting on it?"

51 It is perhaps worth mentioning that nations whose party systems support an extremely large number of parties each with some realistic chance of having its members elected to the legislature have difficulty generating policies with real sticking power, as one coalition displaces another.

52 Gargarella elaborates this argument at *Gargarella*, note 1, pp. 109-13.

53 *Gargarella*, note 1, p. 97.

54 These include constitutional dialogues that involve extensive participation by nongovernmental organizations (*id*. pp. 258-60), and deliberative assemblies in six nations (*id*. pp. 290-97).

55 See *Gargarella*, note 1, pp. 322-23.

56 *Gargarella*, note 1, p. 323.

57 For two important recent discussions, largely theoretical though with some empirical evidence, about expanding the scale of deliberative processes, see *Hélene Landemore*, Open Democracy: Reinventing Popular Rule for the Twenty-First Century, Princeton 2020; *Camila Vergara*, Systemic Corruption: Constitutional Ideas for Anti-Oligarchic Republic, Princeton 2020.

58 *Gargarella*, note 1, p. 323.

59 I return to the "no guarantees" point in Section V .

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The remainder of this Review Essay can be read as an elaboration of Gargarella's responses to Ginsburg, though two stories about what a constitutional politics that really was a conversation among equals might look like.

D. The Tension Between Constitutionalism and Constitutional Democracy Illustrated

Consider the imaginary city of Glen Falls, part of an urban agglomeration in its state—not a major city, not quite a suburb—whose population is reasonably diverse demographically and politically (a "swing" jurisdiction).[60] Its state constitution says that, like all cities, Glen Falls's seven-member city council "shall operate" the city's schools and "shall control" the city's police force. The state constitution also guarantees the free exercise of religion, due process, and a general right to liberty and human dignity. The constitutional text also recognizes that the rights it guarantees can be limited under appropriate circumstances—say, when demonstrably justified in a free and democratic society,[61] or when the restriction is proportional to the social benefit flowing from the policy at issue,[62] or when the restriction is narrowly tailored to promote a compelling public interest.

Two issues have arisen in Glen Falls over the past several years. (1) A series of incidents involving police confrontations with citizens has produced proposals for the creation of a "police accountability board" with power to investigate the conduct of the city's police, recommend the adoption of policing policies, identify police officers who behave inappropriately in their interactions with residents, and recommend disciplinary measures which would take effect upon approval by a state judge. As the proposal has worked its way through discussions, the board would have one member of the city council, one member elected by active and retired police officers, and three members elected by the city's voters,

(2) The other issue involves public health in the city's schools. Occasional outbreaks of communicable diseases have led a group of parents to propose that schoolchildren will not be allowed to enroll in the city's schools unless their parents provide proof that the children have received a set of vaccinations. Most children receive the specified vaccinations as part of their routine medical care, but some children don't, some because their doctors believe that the children would have a serious adverse reaction to one or another of the vaccinations, some because their parents believe that the vaccinations are unnecessary and intrude on their children's right to "natural" development and on their right as parents to

60 The story I've invented here is set in the United States and relies upon constitutional arrangements some of which are unique to that nation. I constructed the story in this way because I am of course more familiar with U.S. doctrine than with doctrine elsewhere. I believe, though, that stories (suitably adjusted) with a similar analytic payoff could be constructed using the structures and doctrines of other jurisdictions.

61 See Charter of Rights and Freedoms § 1 (Canada 1982).

62 See R. v. Oakes, 1 SCR 103 (1986) (Canada).

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decide what risks of ordinary life their children should be exposed to,[63] and some because their religious beliefs counsel against introducing unnatural substances into a person's body.

These issues have become part of the regular political discourse in Glens Falls. One or two city council members are elected each year, and candidates are regularly asked what their views are on the police-accountability and vaccination proposals. The candidates take positions on whether the proposals would be good policy. They ask whether the police-accountability board would actually help improve policing or would deter the city's police officers from using appropriate policing techniques, whether the board's procedures are fair, and—importantly—whether creating the board would improperly remove the city council from its role as the body ultimately responsible for "controlling" the police as the state's constitution requires. They ask whether the vaccination requirement would actually help limit the spread of communicable diseases, and whether there should be medical, "liberty"-based, or religious exemptions from the vaccination requirement. With respect to the exemptions, particularly liberty-based and religious, they ask whether the vaccination requirement would actually restrict liberty or religious exercise and if so, whether the restrictions are demonstrably justified, proportional, and the like.[64]

These discussions are cast in empirical and principled terms, though of course candidates take positions on the proposals in part because they think that their positions will prove politically popular. The proposals' popularity, though, isn't a matter of "sheer preference" by residents or parents—relatively few people say, "This proposal would make me personally better off, and that's all I care about."[65] True, it might make its supporters better off, but in significant part because the proposal would make the city as a whole better off (in the voter's eyes).

After two or three years of discussion and elections, the city council votes 5-2 to create the police accountability board and 4-3 to require the vaccinations, with only a medical exemption available. This is constitutional democracy at work.

As Ernest Brown once wrote, though, that's only Act I in a constitutional system.[66] Act II opens with litigants challenging the city council's actions in court. For present purposes it's enough to focus on several possible challenges. Police officers contend that the police accountability board's structure is inconsistent with the constitutional requirement that the city council "control" the police. The city responds that the constitutional requirement

63 Some parents analogize the decision to get or forgo vaccinations for their children to their decision to let their children walk to a city park unaccompanied.

64 For a recent empirical analysis of how constitutional terms feature in British parliamentary debates (in the context of a nation without a written constitution), see *Alex Schwartz*, The Changing Concepts of the Constitution, Oxford Journal of Legal Studies 42 (2022), p. 758.

65 I make this point to address at least implicitly Bruce Ackerman's claim that "ordinary politics" is typically driven by mere preference or narrow self-interest. See generally *Bruce Ackerman*, We the People: Foundations, Cambridge, Massachusetts 1991 (describing "dualist democracy").

66 *Ernest Brown*, Quis custodiet ipsos custodes?*:* The School-Prayer Cases, The Surpreme Court Review 1963 (1963), pp. 15-16.

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of "control" is satisfied by the presence of one city council member on the board, the procedures for imposing discipline, and the requirement that a court approve discipline before it takes effect. Parents contend that the vaccination requirement isn't adequately justified because the incremental decrease in the risk of communicable disease is small in light of the fact that most parents voluntarily choose to have their children vaccinated (so the requirement isn't proportional or doesn't serve a compelling interest).

Parents with religious objections also contend that allowing medical but not religious exemptions amounts to discrimination against the exercise of a religious belief (the "no pollution of the body" belief). The city responds with empirical evidence about how effective the vaccination requirement will be and about the number of medical exemptions (predicted to be small) and the number of religious ones (predicted to be larger), and contends that allowing religious exemptions would more substantially diminish the public-health benefits of the vaccination requirement than do medical exemptions.

The tension between constitutional democracy and constitutionalism arises when (if) a court finds the challenges well-founded. "Control," the court holds, requires a greater degree of city council involvement in governing the police than the accountability board provides. Exercising an independent judgment about facts relevant to constitutional matters, it agrees that the vaccination requirement isn't narrowly tailored or proportional, and that denying religious exemptions while allowing medical ones discriminates against religious exercise. And, again importantly, for present purposes I concede that these interpretations of the state constitution's provisions are reasonable ones (in the case of "control," my view is that the challengers' interpretation is better than the city's).

In one sense this might seem simply the famous "countermajoritarian difficulty" Alexander Bickel identified.[67] It's more than that, though. Bickel's formulations took the mere fact of majority support (the 5-2 or 4-3 votes) to create the difficulty. He didn't seek to penetrate the political process to see whether majoritarian approval was a real exercise of constitutional democracy. John Hart Ely's focus on whether the political process actually represented majority views was an important modification of or corrective to Bickel's view.[68]

Is the Glen Falls story an example of representational failure? One possibility is this: Perhaps the city council's rejection of religious exemptions rested on the view that religious objections were irrational and therefore not reasonably taken into account in evaluating policy proposals. I've tried to present the city council's position as resting on a prediction about the number of religious exemptions it's likely to face and the effect of providing them on public health—that is, as taking the religious claim seriously but finding that public health considerations provide an adequate justification for rejecting it while allowing medical exemptions. What, though, of the possibility that (in the judges' eyes) "enough"

67 *Alexander Bickel*, The Least Dangerous Branch, New Haven 1962.

68 *John Hart Ely*, Democracy and Distrust: A Theory of Judicial Review, Cambridge, Massachusetts 1980.

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voters think that religious claims are simply irrational or that the courts, constrained to develop doctrine that they have the capacity to administer, come up with a rule that the mere possibility that voters didn't treat religious objectors as equal citizens justifies invalidating the policy?

A second possibility arises from the fact that the institutions of representative government, here the city council, act as intermediaries between citizen views and enacted policy. Gargarella notes that political parties might introduce distortions in the mediating process.[69] The idea is this: Suppose the issues of police accountability and vaccinations become linked in political party programs. If you vote for a candidate favoring the police accountability board you also get a candidate who favors the vaccination requirement, and conversely for candidates opposing both the board and the vaccination requirement. Depending on the relative intensity of voters' views on the two issues and the distribution of that intensity, Glen Falls might end up with a police accountability board that its residents favor and a vaccination requirement that they don't.[70] Here too I've tried to present the story in a way that hives this issue off by saying that the policies were adopted by different margins.

The general difficulty remains, though. Note the point we've reached. Constitutionalism requires judges to assess the quality of deliberative processes, going well beyond the formal characteristics that Ely used as proxies to determine when deliberation was likely to fail. I think there's no escape from Loughlin's conclusion that such assessments will be deeply if unconsciously ideological and Gargarella's conclusion that they will be deeply if unconsciously influenced by the judges' position as members of the legal and other elites.

The tension between constitutional democracy and constitutionalism comes to this: Even when we have good reasons to think the ordinary citizens in their capacities as voters, and their representatives in their policy-making capacity, have attended to the constitution's terms and acted on reasonable understandings of those terms, constitutionalism allows courts to displace the voters' and representatives' decisions in the name of the judges' own (reasonable, of course) understanding of the constitution's terms.[71]

The idea of reasonableness is doing a lot of work here. Authorizing courts to say that what citizens have created as law is unreasonable might enable a wider range of judicial invalidations than I've suggested would be appropriate: Judges might think unreasonable quite a few things that you or I might think reasonable. Nor do there seem to be institutional mechanisms to constrain judicial understandings of reasonableness that would license extensive displacement of popular choices. One possible response would move out

69 *See* text accompanying notes 50-53 *supra*.

70 A somewhat similar result might occur if deliberations within Glen Falls were "polluted" by local voters' concerns about how their decisions might be perceived elsewhere, for example in the urban metropolis next door. I personally think that such "pollution" shouldn't be of concern because local voters make their decisions factoring in everything *they* think important.

71 Where the rules the court follows result from the imperative to develop administrable doctrine we might think that the interpretation isn't reasonable in first-order terms but becomes reasonable when second-order concerns about administrability come into the story.

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legal theory into sociology. Suppose that judges are socialized into the overall system I've described. From that socialization that might develop a capacious sense of reasonableness that would limit the number of occasions on which they would mistakenly find legislation unreasonable—and, we might hope, these occasions would involve legislation whose is taken invalidation would have only a small adverse impact. Similarly, we might hope that these adverse effects would be offset by the benefits of the admittedly rare occasions when the judges set aside legislation that "really" is unreasonable. If we predict that things will shake out differently we might want to authorize the courts to opine about constitutionality but not act on that assessment.

I conclude this Section with a tweak to the Glen Falls story about the police accountability board. Recall that the imagined state constitution says that the city council "shall control" the police force. Constitutionalism as Loughlin understands it requires the city council to accept the court's interpretation that the best interpretation of the word "control" is that the city council doesn't "control" the police force (enough) with the board in place. Suppose that the state constitution is amended to replace the word "shall" with the word "should." And suppose that the city council, after taking the advice of its lawyers, concludes that this modification doesn't change the best interpretation—that is, the court's prior interpretation—that the city council doesn't "control" the police force enough with the board in place. The council says, though, that the change in wording authorizes it to disregard the best interpretation of "control." They should control the police force but they don't have to—and with respect to police accountability they don't want to. The constitutional provision becomes precatory or a "directive principle" to guide but not determine the choices of policy-makers.[72] The next Section asks, Could an entire constitution consist of directive principles?

E. Constitutional Democracy Without Constitutionalism?

Loughlin wants to advance constitutional democracy while opposing constitutionalism. That's an intelligible position if we take "constitutionalism" to refer to the particular historically determined and ideological form that Loughlin critiques. Could "constitutional" mean something else in the phrase "constitutional democracy"?

One possibility is that the term refers to the institutions by which a nation's people choose their policies. Things get tricky here, though. Loughlin and Gargarella reject the distinction drawn by the constitutionalists they oppose between ordinary policies (tax rates, for example) and policies identifying the institutions for making policy (bicameral legislatures, the separation of powers, the use of referendums). No less than the former, the latter must be subject to democratic deliberation and determination. How, though, can we (the citizens of democratic nations) do that without having institutions in place that will

72 The term "directive principles" was a coinage in the 1937 Constitution of Ireland and was picked up in the 1950 Constitution of India.

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help us decide whether to use ordinary legislation for *this* policy, a referendum for *that* one, a constitutional assembly for a third?

Loughlin's answer is, We decide how to decide by the ordinary cut and thrust of politics (and, specifically, not by relying upon decisions about how to decide made by a constitution's framers or by contemporary judges). Yet, one might object, we should hope that Loughlin doesn't really mean "cut and thrust" in a literal sense—fighting in the streets with swords and their contemporary equivalent (even if in periods of extreme social and political stress such as Weimar Germany street violence might become part of the daily political landscape).

If not fighting, though, ordinary politics even about constitutional matters has to be conducted through some institutional forms. And, one might worry, those institutional forms might not be well-suited for preserving or deepening the *constitutional* dimension of constitutional democracy.[73] Some obvious examples related to the story told in Section B above: An institution that decides by majority vote might be insensitive to concerns about minority interests ("rights," if one cares to distinguish between interests and rights); a legislature might be insensitive to the merits of deciding by referendum.

The answer implicit in Loughlin and Gargarella is this: Yes, we have to have institutions to decide how to decide, but those institutions need not be entrenched, in the sense that we need to know in advance which institution has the power to decide which questions. There *are* institutions of governance: legislatures, courts, constitutional assemblies on occasion, and the like. Those institutions have no entrenched powers, though. Put another way: They can't be veto points for policy proposals about constitutional matters. So, for example, there's no rule saying that only a legislature can call a referendum, nor one saying that some changes in the organization of governing power can be accomplished only through action by a constitutional assembly, nor one saying that constitutional rights can be altered—expanded or contracted—only by judicial interpretation or constitutional amendment.

How can this possibly be?

"In the beginning," according to John Locke, "all the world was America"—an imagined territory whose land was unowned and without a government.[74] Gargarella evokes Locke by imagining a community of people moving from their place of origin to a territory where they will create a government.[75] On their way they get together and create a document describing how they will make decisions once at their destination and what rights they

73 This concern lies at the heart of the critique of contemporary populism as anti-institutional. For a discussion prefiguring the one offered in this Review Essay, see *Mark Tushnet / Bojan Bugaric*, Power to the People: Constitutionalism in the Age of Populism, Oxford 2022, pp. 242-44.

74 *John Locke*, Second Treatise on Government § 49. Loughlin observes that if intended as a depiction of the actual state of affairs in the Americas Locke's proposition was inaccurate and colonialist. *Loughlin*, note 1, pp. 168-70.

75 *Gargarella*, note 1, pp. 16-18.

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will have—a written constitution in short. Gargarella periodically reverts to this parable to illustrate how the document might guide but not control the new nation's policy-making.

In this Section I offer a similar parable, focusing on some matters not within Gargarella's explicit purview. After doing so I introduce some complexities that arise when people find themselves, as they almost always do, in the political circumstances Loughlin describes, that is, in a nation with the kind of constitutionalism he criticizes.

Start with the proposition that in Waldron's circumstances of politics people will disagree both about substantive policies—should there be an independent police oversight board? should dissemination of "fake news" be regulated?—and about the mechanisms for developing policies that will bind everyone in the society. We can use Loughlin's phrase to say that resolving these disagreements should be left to the ordinary cut-and-thrust of politics. In the end, though, the cut-and-thrust has to end and policies adopted. But how?

With one caveat referring to unrealistic possibilities,[76] somebody, or more precisely some *body*—an institution, in short—has to decide these questions. Suppose, then, that a group of people—a social movement, if you will—decides to develop what they hope will be a good, indeed the best available, system of institutions to make the needed decisions. They decide to bring together a group of experts and ordinary citizens to discuss the possibilities and in the end come up with a document, a proto-constitution, reflecting their considered and deliberated judgment about what's likely to work best in their nation.[77]

For present purposes the details of that proto-constitution don't matter. It might look a lot like the existing U.S. Constitution or the existing German Basic Law, for example—but with one massive qualification. The document itself says something like this: "The provisions that follow reflect the judgment of the document's authors that when our people use them the institutions and rights set out will produce a collection of policies that better advances our people's well-being than would the use of any other institutions and rights. As such, the provisions are our recommendations about what people should do as new

76 See *Robert Nozick*, Anarchy, State, and Utopia, New York 1974 (describing the possibility of policy adoption by a voluntary association of voluntary associations).

77 They might be inspired by Rousseau's injunction to take people as they are and devise laws as they might be. Jean-*Jacques Rousseau*, The Social Contract (originally published 1762, available in multiple versions; the statement appears in the work's first sentence). Gargarella's exposition can be read to follow Rousseau's injunction in its description of people's motivations in politics, as both self-interested and attracted to ideas of civic virtue. *Gargarella*, note 1, pp. 43-45, 73-75. Gargarella makes the important point that the ratio between self-interestedness and a civic-virtue orientation is endogenous to the institutional design choices made by constitution drafters. *Id*. p. 74.

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policy questions arise[78]—again, both substantive and dealing with institutional design. When such questions do arise, as of course they will, we think that people will be better off if they follow our recommendations than if they come up with something else. We might be wrong, though, and if people end up thinking after deliberation and something like a cooling-off period they should use some other institutions to decide, or create new or ignore old rights, that's fine with us."[79]

Some relatively concrete examples: Suppose the proto-constitution reproduces Articles I and II of the U.S. Constitution, requiring concurrence by both houses and a presidential signature (or a veto override) for legislation with binding effect on the nation's people. If, again after deliberation and a cooling-off period, the people through a referendum or their representatives through legislation decide that a one- or two-house veto would be a good thing in some contexts, they can create such a decision-making institution without worrying about its consistency with the provisions written into the proto-constitution.[80] Or, if the proto-constitution contains a provision drawn from international human rights law requiring that hate speech be banned,[81] the people can decide that in their circumstances it's best to leave hate speech unregulated.

The NGO or social movement publicizes its proto-constitution. People discuss it, criticize and offer alternatives to some provisions, and eventually decide that the proto-constitution, perhaps modified as a result of discussions, actually offers a pretty good framework for making pubic policy. So, when issues arise people use the institutions "created" by the proto-constitution—except when they decide that using some other institution makes more sense for the issue on the table: They can hold a referendum even if the proto-constitution

78 The idea that constitutional provisions could be (mere) recommendations surfaced during debates about some aspects of foundational constitutional theory in the late eighteenth century. See *Mark Tushnet*, Amendment Theory and Constituent Power, in: Gary Jacobsohn / Miguel Schor (eds.), Comparative Constitutional Theory, Cheltenham 2018. The argument was about the legal status of constitutional provisions specifying how the constitution could be amended. As I read the debates the prevailing view was this: Constitutions are created by the people acting as the constituent power. (Loughlin emphasizes the importance of the idea of the constituent power in the emergence of the form of constitutional he criticizes. See *Loughlin*, note 1, pp. 177-86.) The constituent power—that is, the people acting as a collective constitution-maker—can't be limited by legal provisions embedded in the existing constitution. (Under modern views the people can be constrained by international human rights norms.) But, the argument went, provisions specifying how to amend the constitution purported to be exactly that kind of constraint. The solution was to treat amendment procedures as recommendations that the people in the future would be wise to follow but could be free to ignore after deliberation and cooling-off.

79 To drive the point home, the proto-constitution might not contain any provisions specifying how its terms can be amended: Changes in the constitution would occur through the ordinary cut-and-thrust of politics.

80 The implicit reference here is Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983).

81 International Covenant on Civil and Political Rights, art 20 (2) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

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doesn't allow for them or allows them on some issues but not on the one at hand. In short, they use the proto-constitution as a starting point and sometimes an end-point, but sometimes they improvise institutionally.[82]

So far I've discussed how politics can get us to the point of decision, with policy choices on the table, deliberated, and ready for considered rather than merely impassioned decision. I still haven't described how the decision will actually be taken. Sometimes of course issues will fester because there's isn't enough agreement about *how* to resolve them. Sometimes, though, people will get impatient and say, "We've got to do something about this; let's use the proto-constitution's institutions, or improvise something new—but let's get on with it!"[83]

Of course all this is a fairy tale, like Gargarella's parable, to motivate thinking about alternatives to the form of constitutionalism that our authors target. No one encounters a blank slate for decision-making and, as Loughlin emphasizes, in today's world most people confront a rather coercive and problematic constitutionalism. Is it possible to imagine how to get from here to there—from problematic constitutionalism to constitutional democracy?[84]

Loughlin argues that the constitutionalism he attacks is an ideological project in the service of economic, social, and political interests. Constitutional democracy is a different ideological project in the service of different interests. How the latter might be able to displace the former is a matter for economic, social, and political analysis, of a sort that on which I claim no expertise or even hints of insight. What I can offer, though, are some thoughts on how people embedded in one set of institutions might be able to transform them incrementally.

Suppose, then, that a political movement favors either some substantive policy or some decision-making institution (or both) that appears to be precluded by the constitution-in-place: to use U.S.-based examples, regulation of the content disseminated by social media, the removal of minimum age requirements on service as chief executive, the imposition of age limits on service on a constitutional court, elimination of the constitutional court's power to conclusively determine constitutional meaning. The movement, though, hasn't—and probably won't—achieve the special majorities required by the constitution-in-place for formal amendment.

82 *David Howarth*, The British Constitution as an Improvised Order, in: Dimitrios Kyritsis / Stuart Lain (eds.), The Methodology of Constitutional Theory, Oxford 2022, p. 283, analyzes improvisation in British constitutional development and finds some improvisations successful, others less so.

83 As Charles Sabel has emphasized, improvisation or, in his terms, experimentalism, occurs when most decision-makers agree that something has to be done, that they have tried to use existing decision-making mechanisms to arrive at a decision, but have failed to do so. See, e.g., *Charles Sabel* / *William H. Simon*, Democratic Experimentalism, in: Justin Desautels-Stein / Christopher Tomlins (eds.), Searching for Contemporary Legal Thought, Cambridge 2017, pp. 477-98.

84 The well-known metaphor of repairing a ship at sea could be invoked here. Gargarella directs out attention to the metaphor, *Gargarella*, note 1, p. 278, though he uses it to make a different point.

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Here are two possible courses of action. Sometimes the movement's lawyers will be able to develop arguments based upon existing law (often, stray and subordinate seeds that have lain fallow) that give the proposals enough plausibility to be advanced in standard legal forums. The arguments, though, might well be concededly strained—placing a patina of "lawful today" on proposals that seek real departures from current law. Social media platforms might be characterized as "common carriers," for example, and as such entities whose terms of service can "traditionally" be regulated.[85]

Alternatively the movement's lawyers can develop "workarounds," particularly for the institutional innovations, that are facially consistent with the constitution-in-place but inconsistent with their spirit.[86] Superannuated constitutional court judges can retain their offices but be restricted to deciding a trivial subset of the court's caseload; elect a chief executive of the constitutionally prescribed age but have that person pledge to delegate everything to the movement's more popular younger leader.

The innovative arguments and the constitutional workarounds might "work," in the sense that the institutions of the existing constitution will give them legal effect. The movement can then point out that no one—its lawyers included—really thought that the arguments and workarounds were consistent with the constitution-in-place; they were stalking horses for a transition to constitutional democracy, which has now begun incrementally to be institutionalized.

Or, the arguments and workarounds might be rejected by the institutions in place. The movement can then point out that their rejection can't be explained by "the law" but only by political and ideological accounts because the workarounds rely on facially plausible arguments consistent with the constitution. This might weaken the hold the ideological project of Loughlin-type constitutionalism has on the polity.

All of this is of course highly speculative and—today, in the absence of the kind of social and political movement I've posited—unrealistic. But then, so is the idea that Loughlin and Gargarella's ideological critiques will produce the constitutional democracy they favor. Or, put another way, Loughlin's argument about constitutionalism's content is inextricable from an account of social and political developments, and the arguments for constitutional democracy must be similarly inextricable from a quite different social and political account.

Now for some qualifications and objections. First, the qualification "deliberation and cooling-off" needs some elaboration. The proto-constitution might contain provisions seeking to ensure that deliberation occur and that decision be taken after immediate passions

85 For a discussion of the problems associated with speech and social media, see *Richard L. Hasen*, Cheap Speech: How Disinformation Positions our Politics – And How to Cure it, New Haven 2020. Hasen discusses a range of regulatory responses, contending that they are consistent with the U.S. Constitution as currently interpreted but acknowledging that the Supreme Court has the doctrinal resources with which to find them unconstitutional.

86 For an analysis of workarounds, see *Mark Tushnet*, Constitutional Workarounds, Texas Law Review 87 (2009), p. 1499.

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have had a chance to damp down. But, again, those provisions can't be binding. So, how can deliberation and cooling off be guaranteed?

There probably aren't any guarantees available. Loughlin's reference to the ordinary cut-and-thrust of politics does point in the right direction. Put simply: The ordinary cut-and-thrust of politics takes time. It is not instantaneous, contrary to the suggestion in one well-argued and important article.[87] Cooling off occurs almost automatically though not inevitably. And here's a general point about seeking guarantees: Trying to do so, for example through a judicially enforceable constitution of the type Loughlin criticizes, will quite often fail and will almost always have greater costs to democratic self-government than will occur when the ordinary cut-and-thrust of politics produces "instantaneous" and not readily reversible decisions.

On deliberation: Political actors offer reasons, sometimes merely strategically, sometimes sincerely, for the positions they seek to advance. The ordinary cut-and-thrust of politics includes efforts by all participants to address these reasons—to deliberate, in short. And, once again, efforts to guarantee or improve deliberation through some institutional mechanisms are no more likely to produce "desirable" levels of deliberation than politics.

One might worry that if constitutional democracy is no more than a conversation among equals, how can we ensure that participants in the conversation treat each other as equals? The constitutionalism Loughlin and Gargarella critique purports to use mediating institutions, particularly the courts, to provide that assurance. Gargarella's story about a community created by immigration to a new and unoccupied land relies heavily on the idea that participants know each other well and regularly interact on a personal level. It's not hard to generalize from our everyday experiences of such interactions with people with whom we seriously disagree on some matters that mutual respect rather than intolerance would emerge in such settings. But, of course, modern societies aren't like that.

A democrat's response to the objection that equality and the fundamental rights associated with it are at risk without some sort of mediating institution to protect it has several components. The first is something like confession and avoidance. The German constitutional theorist Ernst-Wolfgang Böckenförde argues that constitutional democracy (in the terms used here) can be preserved only in conditions of "relative homogeneity" in the nation.[88] A nation's people can be diverse, pluralistic, and multicultural, but for constitutional democracy to survive they must agree that, within quite a wide range of reasonable disagreement about specifics, people are equal and all have fundamental rights. If too many people reject the proposition of human equality you simply can't have a stable constitutional democracy.

87 *Ming-Sung Kuo*, Against Instantaneous Democracy, International Journal of Constitutional Law 17 (2019), p. 554.

88 For a discussion, see *Mirjam Künkler / Tine Stein*, Carl Schmitt in Ernst-Wolfgang Böckenförde's Work: Carrying Weimar Constitutional Theory into the Bonn Republic, Constellations 25 (2018). As the title of that article implies Böckenförde uses the term "homogeneity" because he is a Christian Democratic liberal student of Carl Schmitt.

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The posited existence of a wide range of reasonable disagreement is quite important. As Loughlin and Gargarella observe,[89] constitutional provisions dealing with equality and fundamental rights are typically written (or understood, in systems with unwritten constitutions) in abstract terms. Real-world controversies ordinarily don't involve disagreements about whether we should recognize equality or free expression in the abstract. Rather, they involve the specification or, in terms European theorists tend to use, the concretization of the abstractions.

Frequently—in my view almost always—claims that some statute or its application violate principles of equality or fundamental rights are claims about specifications. And, almost equally frequently there are legally plausible arguments that the statute or application is constitutionally permissible under a reasonable specification of the abstract rights precisely because the range of reasonable disagreement is wide. The upshot is that when the social conditions for reasonably stable constitutional democracy exist indisputable violations of equality or fundamental rights will be rare (and, because rare, perhaps tolerable in the larger scheme of things).

Another version of confession and avoidance may be more effective. Yes, equality and the fundamental rights associated with it may be at risk but no mediating institution, including the courts, can reliably ensure that rights and equality among participants will be preserved. The question then is about the relative size of risks to rights and equality under uninstitutionalized democracy and under contemporary constitutionalism. The histories Loughlin and Gargarella summarize suggest that contemporary constitutionalism poses serious risks to rights and equality; contemporary experience suggests that uninstitutionalized democracy also poses serious risks, though we shouldn't lose sight of the fact that that experience has been shaped by contemporary constitutionalism's delegation of responsibility for preserving the constitution to the courts and other mediating institutions.

The resolution of the question about relative risks is more likely to be dispositional and sociological than analytical. According to James Madison, if people were angels no government would be necessary. Dispositional optimists about the world in general and politics in particular see people as to a sufficient degree angelic. They may think the risks of democracy smaller than the risks of contemporary constitutionalism. Pessimists see the devilish side as more important, and they may see things the other way.

On the sociological front, elites, notably including constitutional lawyers, are likely to see the risks of uninstitutionalized democracy as greater than the risks of contemporary constitutionalism. If I'm right Loughlin and Gargarella, whose audience will primarily consist of members of such elites, have a steep hill to climb. In contrast, at least some

89 *Loughlin*, note 1, p. 136; *Gargarella*, note 1, pp. 193-96 (discussing the "interpretative gap").

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politicians—true democrats—are likely to see the risks of constitutionalism as greater than the risks of democracy. But, again, there are no guarantees available either way.[90]

F. Conclusion: For Constitutionalism (Of a Certain Type)

Loughlin and Gargarella show how the form of constitutionalism that has come to dominate discourse around the world today is incompatible with constitutional democracy. Does that mean that we should be against constitutionalism "itself"? I think there is an important reason to hesitate before answering "Yes." The term *constitutionalism* has become what emotivist philosophers might call a "hooray" word whose use conveys an approving attitude.[91] We might not want to sacrifice that approval by forgoing the term's use.

Can we avoid that sacrifice? Loughlin argues that the form of constitutionalism he critiques "expresses the constitution of society,"[92] which can mean that it is the condensate of the citizenry's varying ways of understanding that each individual citizen is part of the common enterprise of self-government under the constitution. We could be for constitutionalism if its meaning can be detached from the particular form of constitutionalism that's Loughlin's target.

The process of detaching that meaning does not seem outside the realm of practical political action. The processes of political deliberation and decision described in Sections C and D exemplify what Gargarella calls law as a conversation among equals. Advocates for the adoption of such processes might think it strategically advantageous to take advantage of the "hooray-ness" of the term *constitutionalism* to insist that constitutionalism could take a form different from the one pointed to in widely prevalent contemporary discourse. They might say, "Contrary to what you now think, constitutionalism is a conversation among equals, nothing more—and hooray for that!"

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90 In what is "arguably the most quoted sentence in postwar German political thought," Ernst-Wolfgang Böckenförde asserts that "the liberal, secular state lives off the preconditions which it cannot itself guarantee" (quotations taken from *Murkens*, note 15, p. 77, which also provides citations to the original sources for the quotations).

91 The classic presentation of emotivism is *Charles L. Stevenson*, Ethics and Language, New Haven 1944.

92 *Loughlin*, note 1, p. 130.

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