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Against Constitutionalism: A Review

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Marin Loughlin's *Against Constitutionalism* offers an engaging and deeply critical new perspective on constitutionalism as a modern universal value. In contrast to prevailing thought which emphasizes the continued necessity of constitutionalism in a constitutional democracy, Loughlin argues that adherence to the "ideology" of constitutionalism in fact harms democracies through its elevation of the Constitution as a "civil religion". In particular, Loughlin condemns the contemporary role of the judiciary in light of the "rights revolution", which placed government action under review by the courts as "auditors" for compliance with abstract principles espoused by neoliberals.[2] His book is separated into three distinctive parts which contribute to this thesis: Part I, which describes the theoretical origins of "constitutionalism" in the Enlightenment period; Part II, which critically analyses the intersection between constitutional rights and constituent power; and Part III, which argues that the idealized and exaggerated role of the Constitution now threatens the integrity of constitutional democracies.

Part I of *Against Constitutionalism* tracks the growth of constitutionalism in becoming a term possessing normative content, and the elevation of the Constitution as "fundamental law" by the late 18th century.[3] Chapters 1-3 primarily delineate the values underlining classical constitutionalism (e.g., the rule of law and the separation of powers) as the author describes how they have been subjected to change with the growth of big government.[4] Chapter 4 builds on this premise and stipulates that neither classical constitutionalism nor classical liberal ideals can truly be met in modern states. Therefore constitutionalism, Loughlin argues, was reconceived in the mid-20th century, influenced heavily by a Hayekian ordo-constitutionalism which viewed constitutionalism as a "project to discipline government by requiring it to protect markets and individual freedoms".[5] Finally, in this section Loughlin emphasizes the Constitution as a text 'with context' – that, as a product of the time of its drafting, it is mistaken to consider either Constitution or constitutionalism as

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[2] Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022).

[3] ibid 32.

[4] ibid 32.

[5] Loughlin (n 2) 23.

immutable goods.

Part II argues that a true constitutional democracy should be differentiated from the concept of constitutionalism. Loughlin holds that an ideal constitutional democracy maintains the irreconcilable values of 1) constituent power and 2) constitutional rights in constant conversation, which preserves the "dynamic" quality of the regime.[6] Loughlin here calls upon Carl Schmitt's definition of constituent power, that it is "the political will that determines the institutional form of the state" while also maintaining the constitutional order.[7] On the other hand, Loughlin views constitutional rights as the ultimate product of natural rights and Lockean individual rights codified within the fundamental law. However, he argues, constitutional rights in "modern practice" are now no longer recognisable as basic rights, but are held as abstract values associated with constitutionalism and thereby dominate constituent power. In a somewhat veiled critique of formalism, Loughlin advances that in lieu of "reconciliation between basic principles", a role served by a written constitution, democracy is sustained by a "condition of indeterminacy" that prohibits rights from dominating the political force of constituent power.

Finally, Part III contains Loughlin's main concerns with modern or universal constitutionalism. The role of a Constitution, he argues, has been "transformed from an instrument of collective self-decision-making into a symbolic representation of political identity".[8] These symbolic representations must also include "ever-expanding" vague or aspirational features that impose a positive duty on governments to protect negative rights, the limitations of which are left to the judges to define.[9] As a result, Loughlin argues that judges are now arbiters of the "idealized and totalizing invisible constitution", which thereby greatly impacts the separation of powers necessary to a functioning democratic state.[10] This is the process Loughlin terms as "constitutionalisation", wherein "constitutionalism is reinterpreted through the prism of individual rights rather than institutional powers". Loughlin also addresses the perceived failure of classical or neoliberal scholars to account for states of exception (declaring emergency powers), which today has led to aggrandized executive branches.[11] This "invisible constitution", he argues, "dissolves the boundary

[6] ibid 77-97.
[7] Loughlin (n 2) 83.
[8] Loughlin (n 2) 24.
[9] Loughlin (n 2) 130.
[10] Loughlin (n 2) 24.
[11] Loughlin (n 2) 159–161.

between constitutional reason and political necessity…[and] draws as much on political as on legal rationality".[12]

In his conclusion, Loughlin warns readers that the continued veneration of constitutionalism – and perhaps classical liberalism and neoliberalism – as globalised and necessary ideals risk further degradation of constitutional democracies. "Constitutionalism" has supported the undue expansion of executive branches, while granting the judiciary status of a Schmittian "motorized legislator"[13] and gatekeeper of public policy, both developments which place the government at an arm's length from the constituent power of its people. "Ultimately", Loughlin summarizes, "the argument against constitutionalism rests on the claim that it institutes a system of rule that is unlikely to carry out popular support".[14] Instead, he proposes the "political conception of constitutional democracy" as best suited to realise goals of equal liberty.[15]

In *Against Constitutionalism,* Loughlin's careful analysis of modern issues with constitutional governance is especially relevant in the context of today's democratic decline. The aggrandisement of executive powers, the rise of populist authoritarian leaders and legalistic authoritarian regimes, and toxic political polarization have facilitated a renewed interest in constituent power as an extra-legal authority within a constitutional order.[16] Contemporary debates are predicated on the question of whether constituent power exists above and beyond the law or is equally subject to its restrictions. Loughlin falls firmly within this former category. Supporters of broad constituent power naturally adopt a positivistic and value-free account of the law, which is consistent with the fundamental premise that the law must reflect the people's collective decision-making rather than be aligned with any particular set of values or principles.

Like Loughlin, other works that support the idea of a dominant constituent power draw influence not from its conceptual origin in Emmanuel Sieyès, but from

[12] Loughlin (n 2)24.
[13] Loughlin (n 2).
[14] Loughlin (n 2) 202.
[15] Loughlin (n 2) 202.
[16] Peter Niesen, 'Constituent Power: A Symposium – Introduction' (*Verfassungsblog*, 18 December 2020) <https://verfassungsblog.de/constituent-power-a-symposium-introduction/> accessed 16 January 2023.

Schmitt.[17] These sources argue that binding popular power within the confines of the law creates the potential for tyranny, allowing those with institutional authority to use a perverted version of the "law" as a tool of oppression.[18] While Loughlin proposes that constituent power and constitutional politics should be in equal conversation, his alignment with Schmitt – who views constituent power as an unbound force – as well as his restrictive account of rights tip the balance towards the state of indeterminacy. In aligning with Schmitt, Loughlin and other like accounts avail themselves to the critique that a majority unburdened with a strong conception of the law are capable of tyranny themselves. Beyond this resemblance, elements of his primary arguments and historical accounts are somewhat dissatisfying or present further questions requiring elucidation.

In Part I, Loughlin promotes an idealized account of classical liberalism in its early stages, followed by a description of how these principles have gradually lost their original meanings as states grew in size and suffrage, and can no longer be realized in an era of big government. It can be argued that this perspective is somewhat narrow-minded. To the extent that the meanings of these principles have changed to accommodate the enfranchisement of more persons under the law, this is perhaps attributable to the development of such principles, rather than their perversion. Loughlin seems to recognize this in part and calls upon Ackerman's definition of the Constitution as persuasive; a definition that presupposes that the Constitution and its tenets are fundamentally subject to discussion and growth.[19] While rich scholastic debate still exists upon the extent and nature of (for example) the rule of law, it is difficult to maintain that the ideal is entirely unrecognisable from its origins. The widespread acceptance and utilisation of the rule of law and other classical liberal principles in constitutional democracies support this idea, while also countering Loughlin's proposal that such ideas should not be considered universal.[20] The strength of the rule of law in democracies globally, without derogation from its foundational concept of the law's precedence, provides a powerful counternarrative that is not addressed here.

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[17] Emmanuel Sieyès, 'What Is the Third Estate?' in Michael Sonescher (ed), *Sieyès: Political Writings* (Hackett Publishing 2003). Joshua Braver, *We the Mediated People* (Oxford University Press 2023). Leigha Crout, 'Resistance as Constituent Power', *forthcoming*.

[18] Braver (n 17) 7–8.

[19] Loughlin (n 2) 146.

[20] 'Explore the Map' (*Freedom House*) <https://freedomhouse.org/explore-the-map> accessed 17 August 2022.

Next, Loughlin advocates a mixed account of the political. While none would dispute the necessity of political participation by the body politique, his promotion of a "condition of indeterminacy" dependent on political will presents concerns.[21] Specifically, a Schmittian conception of constituent power combined with a value-free, positivistic account of the law means there are no true limitations upon what form a "constitutional state" might take, however illiberal in nature. This is particularly true when juxtaposed with the author's critique of formalism. Loughlin's indeterminacy ignores autocratic leaders in democratic states as well as authoritarian regimes that have relied upon a neutral account of the law and on the supremacy of popular power to accrue authority and suppress constitutional rights. An example of the dangers of Schmitt's conceptions of constituent power and these proposed departures from formalism can be found in the People's Republic of China (the PRC or China).

While not a constitutional democracy, the philosophies promoted by PRC's government – the Communist Party of China – reflect Schmittian influence and embrace a similar "indeterminacy" reliant on political will.[22] Ultimately, this will is dictated by the sovereign – the designated holder of the people's constituent power under Schmittian thought.[23] Without the trappings of formalism or a conception of the law as imbued with liberal principles, the idea that "leadership of the Communist Party of China is China's Constitution" has rapidly gained traction with both scholars supportive of the incumbent regime as well as the state. While intuitively appealing, Loughlin's argument that political will exhibited through "democratically constituted and democratically accountable processes" should be the basis of a constitution must have a concrete foundation in the law for implementation. Otherwise, as witnessed in China, it is possible for these procedures to become the tools of the state.

Loughlin's positioning on this matter is also confusing given his critique of "political necessity" unduly impacting constitutional reason in the context of states of emergency. The "invisible constitution" interpreted by judges that Loughlin criticizes as relying on political as well as legal considerations, seems to some degree to incorporate the political elements that he finds desirable in a less formalistic context. Clarifying these points would provide helpful information on Loughlin's stance regarding political participation and how this should relate to constitutional law.

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[21] Loughlin (n 2) 107.

[22] *Xianfa* (Constitution) at Preamble (1982).

[23] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer, trans. Duke University Press 2008) 265-266.

Finally, his description of the "rights revolution" as the primary – if not sole – cause for degradation of constitutional democracies is difficult to sustain under scrutiny. In describing the prioritisation of rights as an almost unintentional consequence of post-war globalization, Loughlin denies the very intentional cultivation of international law and international human rights law infused with classically liberal ideals, which emphasizes the implementation of strong constitutional law and constitutional rights to prohibit the degradation of the former. Few examples are provided here to show how judicial enforcement of rights has displaced legislative actions or impeded political participation, but it is possible to draw illustrations of judicial activism from the United States Supreme Court (SCOTUS).

In overturning the Court's precedent in *Roe v. Wade* which protected an individual's right to an abortion,[24] SCOTUS impacted the lives of millions of individuals – some, fatally – in what has been described as an exercise in tyranny by the minority.[25] In theory, Loughlin would laud this decision as a correction of judicial overreach – the right to an abortion is not explicitly protected within the U.S. Constitution nor in federal legislation. However, this perspective misses the root causes of the issue. Within the context of the United States, it is instead more appropriate to view *Roe* and other substantive due process cases that "create" rights as a response by the Court to institutional – and largely political – failures, which functionally prohibit proportional representation within the state.[26]The controversial gerrymandering process and other manipulations of election procedures are prominent examples of this.[27] Other features of this system also work against equitable political participation;[28] in turn, this further skews the dynamic in favour of the

[24] *Roe v. Wade*, 410 U.S. 113 (1973).
[25] 'Dobbs v. Jackson Women's Health Organization' (*Oyez*, 19 August 2021) <www.oyez.org/cases/2021/19-1392> accessed 17 August 2022.
[26] 61% of Americans support the right to have an abortion and 2% support limited access to abortions, whereas 37% believe that it should be illegal in all cases. Hannah Hartig, 'About six-in-ten Americans say abortion should be legal in all or most cases', (*Pew Research*, 13 June 2022) <https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2> accessed 17 August 2022.
[27] Gerrymandering is defined as, 'Redrawing constituency boundaries for political gain. It involves "careful drawing of constituency boundaries by a party so that either it wins a particular seat or, more generally, it wins more seats than its opponents".' 'Gerrymandering' (*Oxford Reference*) <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095849914;jsessionid=4749B59FD4F0C3186ADBF1D44A6A2698> accessed 17 August 2022.
[28] E.g., the unlimited capacity of corporations to contribute to election campaigns grants disparate electoral power to the former as well as lobbyists and interest groups.

minority, and has now created a system-within-a-system that threatens the basic rights of the majority. Contrary to Loughlin's claims, the rights revolution has not degraded democracy within the United States but in many cases has acted to preserve it.

The ultimate irony in Loughlin's approach is that, while criticizing the universal character of constitutionalism, he proposes a universal problem that does little to describe the actual reasons behind democratic decline. His critique, although rich in theoretical contributions, does not sufficiently consider the practice of constitutionalism in successful democracies and how this is under threat not by errant, politically minded justices endeavouring to unduly influence the state, but primarily by political actors seeking to subvert constitutional law to acquire or protect their positions of authority.

In sum, *Against Constitutionalism* provides a fascinating insight into the origins of constitutionalism and its growth into modernity. As an exceptionally timely piece, it uses a historical perspective to bring new clarity into discussions of constituent power as a source of authority in a constitutional state, and proposes a thought-provoking framework of how constituent power and constitutional rights might be balanced. While its characterisation of the rights revolution and the dangers of constitutionalism are ultimately unconvincing, it nevertheless projects the requisite urgency in addressing systematic problems of constitutional democracies as well as prohibiting the spread of authoritarian rule, and advances the debate on the merits of universal values and fundamental rights.