

The Contemporary Crisis of Constitutional Democracy[†]

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Abstract—The growth of constitutional democracy has been a remarkable feature of the last 30 years, but during the last decade it has suffered a dramatic decline. That decline is marked less by constitutional democracies being overthrown than by an increase in regimes that retain the formal institutional trappings while flouting the norms and values on which constitutional democracies are based. This process of constitutional degradation is the subject of two recent books that together present the most comprehensive evaluation available on the current state of constitutional democracy. In this review article, the findings and analysis presented in Graber, Levinson and Tushnet’s *Constitutional Democracy in Crisis?* and Ginsburg and Huq’s *How to Save a Constitutional Democracy* are examined and appraised. The article argues that solutions to the contemporary crisis cannot be found only by strengthening liberal institutions; to survive, constitutional democracy must also seek to reinvigorate its democratic aspirations.

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1. *The Rise and Decline of Constitutional Democracies*

When, in 1748, Montesquieu published his monumental work on the history of government, he opened up a new era of reflection and deliberation on the conditions under which nations are governed. Distilling the results of a scientific investigation stretching over more than 20 years, Montesquieu concluded that there could be no ideal political constitution.¹ With respect to constitutional arrangements, *The Spirit of the Laws* advanced a theory of

[†] A review of Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018), 725 pp (hereafter GLT); Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018), 295 pp (hereafter G&H).

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¹ Baron Montesquieu, *The Spirit of the Laws* (first published 1748, A Cohler, B Miller and H Stone tr and ed, CUP 1989) xlv.

relativity: constitutions express the history and culture of a people, varying in form according to particular social, economic and geographical conditions.

Montesquieu's relativity theory was further bolstered when, over the following century, the term 'constitution' acquired a new, more precise meaning. The new documentary constitutions adopted across Europe after Napoleon had imposed the French way of thinking about government, for example, were hardly struck from a single template; drafted according to political circumstances, they continued to exhibit considerable variation.² Nor could the American Constitution be held up readily as a model that others might emulate. Latin American countries that during the 19th century sought to do so with such unfortunate consequences had overlooked Publius's proclamation that the American Constitution had been drafted for a people 'descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government' and 'very similar in their manners and customs'.³

Scroll down 250 years, however, and one might be forgiven for thinking that Montesquieu's relativity theory has since been overthrown. In the latter half of the 20th century, increasing numbers of states were categorised as constitutional democracies, and from the 1990s the growth in these numbers has been dramatic. At the end of the Second World War, there were only 12 established constitutional democracies in the world.⁴ By 1987 this number had grown to 66 of the world's 193 United Nations member states, and by 2003 the 1987 figure had almost doubled to 121.⁵ By the new millennium, almost every state seeking to legitimate its rule in the eyes of its citizens and the world felt obliged to adopt a written constitution incorporating a separation of powers, a commitment to the rule of law, the protection of individual rights, and the holding of free and fair elections. At the end of the 20th century, it appeared that there was only one game in town, and that game was constitutional democracy.

As it turned out, however, the claim that the rise of constitutional democracy marked the end of constitutional history has proven premature. According to the calculations of political scientists, constitutional democracy reached its global highpoint in the period 2006–2011 and has since been in dramatic decline.⁶ This reversal has been a source of growing concern. Perhaps the most

² John A Hopwood, *Modern Constitutions since 1787* (Macmillan 1939) ch 3.

³ James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (first published 1787, I, Kramnick ed, Penguin 1987) no 2. For the nineteenth century experience in Latin America see: Brian Loveman, *The Constitution of Tyranny: Regimes of Exception in Spanish America* (University of Pittsburgh Press 1993). On the drift away from American influence in Latin American constitution-making see G&H, 168–70.

⁴ Eric Hobsbawm, *Age of Extremes: The Short Twentieth Century, 1914–1991* (Abacus 1995) 112: 'Taking the world as a whole, there had been perhaps thirty-five or more constitutional and elected governments in 1920 (depending on where we situate some Latin American republics). Until 1938 there were perhaps seventeen such states, in 1944 perhaps twelve out of the global total of sixty-four.'

⁵ Samuel Issacharoff, 'Populism versus Democratic Governance' in GLT, ch 25, 445.

⁶ Zachary Elkins, 'Is the Sky Falling? Constitutional Crises in Historical Perspective' in GLT, ch 4, 65: 'Democracy is ... descending from a local and global maximum that it hit in 2011'; G&H, 9: 'According to

distinctive feature of this turnaround is that this decline has not been marked by constitutional democracies being overthrown by *coup d'état* or other type of fundamental collapse. Rather, it is due to an increase in the number of what some have called 'defective democracies', that is, regimes that retain the formal institutional trappings while flouting the norms and values on which constitutional democracies are based. Constitutional democracy is not being overthrown; it is being degraded.

The evidence from across the world is plain. The dramatic failures of the Arab Spring movements of 2011—Egypt reverting to military rule, Libya, Yemen and Syria descending into armed conflict, and political repression deepening in the Gulf states—is only the most high-profile instance of this decline. Of more general significance have been the emergence of so-called 'illiberal democracies' in Hungary and Poland, and the growing electoral success of nationalist parties, such as the Front National in France, the Alternative für Deutschland in Germany and the Freiheitliche Partei Österreichs in Austria. Constitutional values have been eroded by the increasing political influence of religious fundamentalism in countries like Israel, Turkey and India, and by the rise to power of authoritarian presidential figures like Maduro in Venezuela in 2013, Duterte in the Philippines in 2016, Trump in the United States in 2016 and Bolsonaro in Brazil in 2018. Similarly emblematic has been the failure of South Africa, following the remarkable initial successes of its post-Apartheid constitutional formation, to establish a regime of multi-party democracy. In 2017, Freedom House, the US human rights organisation, found indicators of democratic degradation in 71 countries and concluded that constitutional democracy was facing its most serious crisis in decades.⁷

These developments have prompted three leading American constitutional lawyers to bring together constitutional scholars from across the world to reflect on the present state of affairs. Mark Graber, Sanford Levinson and Mark Tushnet's book, *Constitutional Democracy in Crisis?*, presents across 38 chapters evidence drawn from detailed studies of particular regimes. It is a landmark account, compulsory reading for any student of comparative constitutional analysis. Containing a wide range of country studies from constitutional lawyers, it also includes multi-disciplinary investigations into the factors shaping the last decade of decline. The main limitation of the work, an inevitable consequence of the collaborative nature of this undertaking, is its tendency to assume that the basic characteristics and underlying values of constitutional democracy are self-evident. Emphasis is placed on the essential

Freedom House, an American human rights organization, the number of democracies around the world has been declining since 2006. . .'

⁷ Freedom House, *Freedom in the World 2018* <https://freedomhouse.org/report/freedom-world/freedom-world-2018>.

institutional features of constitutional democracies, but less attention is given to the changing role of constitutions and of the societal preconditions enabling constitutions to perform their fundamental integrative functions.

The inquiry undertaken in the second book under review, Tom Ginsburg and Aziz Huq's *How to Save a Constitutional Democracy*, examines the socio-institutional aspects of constitutional development more directly. Arguing that the form of democracy at work today provides 'a façade for undemocratic behaviour',⁸ they present a systematic account of the trends that led to the contemporary degradation of constitutional processes. For that purpose a minimalist definition of constitutional democracy is supplied, consisting of three basic elements: free elections, the recognition of basic rights and the maintenance of the integrity of legal institutions.⁹ Ginsburg and Huq recognise that constitutional democracies exhibit a variety of governing arrangements, and that degradation 'takes many forms' and appears 'in widely disparate economic, social and political circumstances'.¹⁰ In seeking to establish precise institutional markers that facilitate measurement, comparison and evaluation, they simplify the concept and reduce it to certain institutional forms. This method has evident strengths, confirmed by the rigour of their analysis and the acuity of their findings. But the question that looms over their study is whether, in simplifying for the sake of clarity, Ginsburg and Huq have managed to capture the ambiguities of their subject and therefore the sheer range of factors influencing the standing of constitutional democracy in the world today.

2. *Constitutional Democracy in Theory and Practice*

Constitutional democracy is a modern regime that expresses a principle of 'self-government'. For most of human history, societies have been regimented through the rule of emperors, monarchs and entrenched oligarchies. These regimes—autocracies of various types—could only be overthrown by the assertion of the right of national self-determination. The struggle to realise this right is recent: it may have provided the inspiration for the late-18th-century American and French revolutions, but the practice was mainly taken up only in the 20th century. As Ginsburg and Huq note, this principle of self-government demands not just the formation of governments through electoral contestation, but also the establishment of institutional arrangements that ensure elections will be regular, free and fair, and that basic rights to freedom of speech, expression and association are respected. Such institutional arrangements are invariably bolstered by a documentary constitution that provides checks by way of a separation between law making, governmental and judicial functions.

⁸ G&H, 9.

⁹ G&H, 10–15.

¹⁰ G&H, 34.

However necessary the institutional infrastructure that Ginsburg and Huq specify may be, to function well a constitutional democracy must also be underpinned by certain social conditions. These include active civil society associations that educate and formulate, and strong political parties that convert diverse views into a common will. But above all, it requires a culture that tolerates differences and recognises the need for restraint in the exercise of power. As John Stuart Mill put it in *Representative Government*, it requires a people ‘united among themselves by common sympathies’, sympathies that are propagated by identity of race and descent, community of language and religion, and the possession of a national history.¹¹ Constitutional democracy is particularly well suited to operate in relatively homogeneous societies, that is, in small city republics of the type that Rousseau adopted as his standard.¹²

This explanation of the social and cultural aspects of conditions for a flourishing constitutional democracy is important here. Constitutional democracies which have rapidly been established over the last few decades, and which by common understanding are now ‘in trouble throughout the world’,¹³ do not commonly fit this template. Contemporary constitutional democracies are invariably populous, culturally diverse states, with complicated histories and a wide variety of governmental arrangements. The term is deployed today to cover a broad range of regimes. But one can only claim that constitutional democracy has triumphed—thereby overturning Montesquieu’s theory of relativity—by adopting a formal institutional account of the term. It is the only game in town because its defining features are now almost as varied as the differences Montesquieu found between monarchies, aristocracies and democracies.

One reason for the great variation in the character of modern constitutional democracies is the fundamental shift that has taken place in the function of modern constitutions. Invented to ensure the maintenance of limited government, constitutions have recently been transformed into blueprints for the good society. Initially, their task was to impose checks on governing institutions such that there would be no need to enumerate a citizen’s basic rights; governments would be obliged to respect individual rights by virtue of constitutional design. The amendments now known as the US Bill of Rights, for example, were adopted not out of necessity, but as concessions to alleviate certain concerns of the southern states.¹⁴ And later, when the inclusion of a statement of basic rights in written constitutions became more common, those rights expressed

¹¹ JS Mill, *Three Essays* (first published 1861, OUP 1975) 382.

¹² ‘The Geneva Manuscript’ (first draft of *The Social Contract*, first published in 1762) in J-J Rousseau, *The Social Contract and Other Later Political Writings* (V Gourevitch tr, CUP 1997) 158: ‘We conceive of the general society in terms of our particular societies, the establishment of small Republics leads us to think of the large one, and we do not properly begin to become men until after having been Citizens.’

¹³ GLT, 5.

¹⁴ Following the adoption of the 1787 Constitution, the first session of Congress in 1789 proposed 10 amendments which, in 1791, following ratification by three-quarters of the states, became part of the Constitution and are collectively known as the Bill of Rights. On the circumstances of its adoption see Leonard W Levy, *Origins of the Bill of Rights* (Yale UP 1999).

what were essentially ‘negative freedoms’, that is, rights guaranteeing a zone of individual autonomy free from interference by public bodies.

Over the last 50 years, however, this classical liberal conception has been displaced. Far from being cordons that protect private interests from public interference, constitutions have become instruments for reforming the established social order. The first tentative steps in this shift were made by the German Federal Constitutional Court. In the late 1950s it interpreted its post-war constitution, the Basic Law, as ‘an order of objective values’ that not only permeated the entire legal system, but, through its general radiating effect, was to shape the entire social order.¹⁵ Such developments have had a profound impact on constitutional consciousness, not least on the more than 100 constitutions that since 1990 have been adopted across the world. It is a shift that considerably complicates the attempt to offer explanations, let alone seek remedies, for the contemporary crisis of constitutional democracy.

Consider, by way of illustration, the constitution adopted by Ecuador in 2008. This constitution prioritises a vast array of social rights, including rights to food, water, health, social security, education, housing, work and cultural identity. Further, it establishes extensive anti-discrimination rights with respect to ethnicity, age, sex, culture, civil status, language, religion, politics, sexual orientation and disability.¹⁶ The constitution even includes the novel right to ‘integral respect for [nature’s] existence’.¹⁷ Declaring that ‘all principles and rights are unalienable, obligatory, indivisible, interdependent and of equal importance’,¹⁸ and that the norms of international human rights are immediately and directly enforceable in domestic courts,¹⁹ Ecuador’s constitution requires the government to ‘adopt affirmative action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality’.²⁰

This is a far cry from a constitution designed to bolster the established order through the protection of life, liberty and property. Moreover, this is not simply a constitution that is supercharged with enhanced rights protections. The foregrounding of basic rights in Ecuador’s 2008 constitution is an integral part of a reform that loosens institutional checks and balances. Promoted by President Correa as part of a popular campaign against political elites, the 2008 constitution, through an exercise of what Weyland calls ‘discriminatory legalism’, extends discretionary presidential power at the expense of legislative authority.²¹

¹⁵ See Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) ch 7; Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings* (OUP 2017) ch 10.

¹⁶ Constitution of the Republic of Ecuador, 2008, Title II, Rights.

¹⁷ Constitution of the Republic of Ecuador, 2008, Title II, art 71.

¹⁸ Constitution of the Republic of Ecuador, 2008, Title II, art 11.6.

¹⁹ Constitution of the Republic of Ecuador, 2008, Title II, art 11.3.

²⁰ Constitution of the Republic of Ecuador, 2008, Title II, art 11.2.

²¹ Kurt Weyland, ‘The Threat from the Populist Left’ (2013) 24 *Journal of Democracy* 18; Carlos de la Torre, ‘Technocratic Populism in Ecuador’ (2013) 24 *Journal of Democracy* 33; Steven Levitsky and James Loxton, ‘Populism and Competitive Authoritarianism in the Andes’ (2013) 20 *Democratization* 107. See also G&H, 94.

What does this example reveal about the present condition of constitutional democracy? In the concluding chapter to *Constitutional Democracy in Crisis?*, Graber uses the Ecuadorian constitution to illustrate how constitutional democracy had become ‘thickened’ during the late 20th century and suggests that it is a model that those on the left in America aspire to emulate.²² But in other chapters, Ecuador is identified as one of nine countries that since 2010 have exhibited a ‘significant downwards shift’ in liberal democracy,²³ and it is reported that Freedom House classifies Ecuador as one of only seven countries that has recently moved from being ‘free’ to ‘unfree’.²⁴ Is Ecuador to be admired as a model of constitutional democracy or condemned as an illustration of its decay?

The answer to that question depends in large part on which conception of constitutional democracy you adopt. In a classic study of 1962, Giovanni Sartori maintained that during the 19th and early 20th centuries there was general agreement about the meaning of ‘constitution’. The term designated a charter that established ‘a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a “limited government”’.²⁵ But over the last century there seems no doubt that the *garantiste* aspect, that which ties the concept to the maintenance of individual liberty, has been obscured. Sartori argued that this was due to an intensification of the politics of constitution making, leading to the greater prevalence of merely nominal and façade constitutions. Nominal constitutions authorise the particular type of governing order established in a regime, whereas façade constitutions not only obscure the ways in which political power is actually exercised, but also replace the *garantiste* constitution’s educative *purpose*—an education in liberty—with an educative *effect*, which has a more explicitly ideological character.

Sartori’s distinction between a *garantiste* and a façade constitution replicates the difference between the function of constitutions in the intellectual frameworks of John Locke²⁶ and Jean-Jacques Rousseau.²⁷ The question, then, is whether constitutional democracy is designed to restrain government

²² Mark Graber, ‘What’s in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy’ in GLT, 672.

²³ Zachary Elkins, ‘Is the Sky Falling? Constitutional Crises in Historical Perspective’ in GLT, 58.

²⁴ Tom Ginsburg and Aziz Z. Huq, ‘Defining and Tracking the Trajectory of Liberal Constitutional Democracy’ in GLT, 38.

²⁵ Giovanni Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) 56 *American Political Science Review* 853, 855.

²⁶ John Locke, *Second Treatise of Government* (first published 1690) § 222: ‘The Reason why Men enter into Society, is the preservation of their Property; and the end why they chuse and authorize a Legislature is, that there may be Laws made, and Rules set as Guards and Fence to the Properties of all the Members of the Society, to limit the Power, and moderate the Dominion of every Part and Member of the Society.’

²⁷ Jean-Jacques Rousseau, *The Social Contract* (first published 1762) I 9: ‘the fundamental pact ... substitutes a moral and legitimate equality for whatever physical inequality nature may have placed between men, and that while they may be unequal in force or in genius, they all become equal by convention and by right’.

for the better protection of individual liberties or whether it should aim to help transform society in order to realise equal liberty.

It is on this unstated question that the Graber, Levinson and Tushnet volume equivocates. Ginsburg and Huq, in contrast, are quite clear: they see President Correa's constitutional reforms 'as an opening gambit in a process of democratic erosion', a process that included removal of 'more than half the members of Congress'.²⁸ Making use of the special methods of a constituent assembly became in this instance the means by which the legislative branch of the state could be bypassed.²⁹ Ginsburg and Huq come down firmly on the Lockean side, on what they call 'liberal constitutional democracy'.³⁰ But in so doing, do they capture only one dimension of modern constitutional democracy?

3. *The Hollowing Out of Constitutional Democracy*

Constitutional Democracy in Crisis? may equivocate on its conception of the regime, but its component studies have the singular virtue of presenting compelling evidence of the factors that are hollowing out the established institutions of constitutional democracy.

One commonly offered explanation for this trend concerns the impact of globalisation. The rapid expansion in global trade, investment, technology and communication networks has led to the creation of transnational regulatory institutions whose rule systems have reduced the capacity of states to regulate their own economies. A rapidly growing transnational institutional network is eroding constitutional democracy in two main ways. First, the rule systems are operated by officials who are insulated from established constitutional methods of control and accountability. Secondly, rule systems are often explicitly designed to protect market arrangements from political interference. By virtue of their design and mode of operation, these transnational developments indicate the degree to which the activity of governing now functions at some remove from the original ideals of national self-determination.

²⁸ G&H, 94.

²⁹ G&H, 144.

³⁰ Ginsburg and Huq are, however, more nuanced on the legacy of the New Deal. They state (G&H, 128–9): 'To some, the New Deal was a constitutional coup of such depth and such a radical character that it robbed us of the framers' legacy ... On the one hand are those who see the modern administrative state that emerged from the New Deal as a necessary and essentially beneficial response to changes in the economic and social pressures on the nation ... On the other hand, however, are those on the American right today who perceive the New Deal as a betrayal of the original Constitution and the source of what President Trump calls a "civilizational threat" of "the creep of government bureaucracy". The New Deal, however, does not meet our definition of democratic erosion ... [It] did not mark a complete rupture in institutional developments ... we do not think that the New Deal satisfies our definition of erosion, because it is not characterized by substantive negative change in any of the three institutional predicates of democracy.'

Some scholars argue that this trend expresses the hegemony of liberalism over democracy.³¹ But others maintain that these transnational arrangements impose a discipline on nation states that compensates for deficiencies at the national level. Ordoliberalism, for example, claim that transnational regimes can impose what is in effect an economic constitution on states, able to strengthen the liberal constitutional values of limited government and individual liberty.³² It is beyond question that the operation of global capital markets leads to a certain loss of capacity at the national level. But whether this weakens or strengthens constitutional democracy depends on whether you prioritise classical constitutionalism or representative democracy. The ambivalence of constitutional democracy is again obvious.

There is one aspect of globalisation on which all seem to agree: that it reinforces the hollowing out of domestic institutions. Constitutional democracy is erected on the assumption that the legislature, as the primary vehicle of electoral representation, has a pivotal role,³³ yet the persistent trend has been for legislatures to be conceding authority to governments, regulatory officials and courts. Such concessions drastically erode the principle of representation, bolstering a conviction that the institutional apparatus of government is now a self-perpetuating system in no need of elected representatives. If the governmental machinery in Belgium and Spain (and lately in Northern Ireland) can operate for long periods without representative and responsible ministers, many may think representative democracy is now of limited value.

Just as legislatures have been weakened, so too are political parties. Organised as vehicles for the formation of democratic will, they are felt to be remote from their members and beholden to powerful backers. Political parties are now often perceived as mechanisms that function to manage supporters' expectations rather than channelling their collective will. Since constitutional democracy requires a stable political party system that provides for partisan contestation within a rule-based framework of government and opposition, this development also weakens the authority of this type of governing regime.³⁴

The impact of these various trends is reflected in the decline in electoral participation rates over the last 30 years.³⁵ It might once have been possible to

³¹ See eg David Schneiderman, 'Disabling Constitutional Capacity: Global Economic Law and Democratic Decline' in GLT, 551. Schneiderman notes (at 562–3) that this is one reason why Ecuador revised its investment treaty policies after 2008.

³² See eg Wilhelm Röpke, 'Interdependence of Domestic and International Economic Systems' (first published 1951) in Alan Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan 1989) ch 5.

³³ See Samuel Issacharoff, 'Populism versus Democratic Governance' in GLT, 450: 'the premise of modern constitutional democracy is the primacy of the legislative branch'.

³⁴ Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (Harper & Row 1942); EE Schattschneider, *Party Government* (Holt, Rinehart & Winston 1942) 1: 'political parties created democracy . . . modern democracy is unthinkable save in terms of the parties'.

³⁵ See World Development Report 2017, *Governance and the Law* (World Bank 2017) 228, showing that over the last 25 years the average global voter turnout rate dropped by more than 10%. See further *Voter Turnout Database* <https://www.idea.int/data-tools/data/voter-turnout>.

claim this as proof of satisfaction with the system, but disengagement is now combined with a growing polarisation in political views. Graphically displayed in the fixed nature of red–blue electoral maps in the United States and the UK, a high degree of political polarisation now threatens to destroy the common sentiment that binds together the political nation. Almost a century ago, Arthur Balfour asserted that the British ‘political machinery presupposes a people so fundamentally at one that they can safely afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never-ending din of political conflict’.³⁶ This is far from the case today, signified by the waning in authority of the informal norms and practices that convey the essential values of a common constitutional culture.³⁷

The prospect across the political landscape of Europe is now evident. We see it in the decline in the fortunes of almost all established political parties, and especially those promoting social democracy.³⁸ With the centre no longer holding, the void is being filled by emerging popular movements. They express a variety of political convictions, but what seems most clearly to define what is now commonly labelled ‘populism’ is its antagonism to most varieties of constitutional democracy.³⁹ Claiming to express the authentic voice of the people, populists are critical of constitutional devices that filter majority views through such institutional sieves as electoral colleges, unelected second chambers, expert commissions, judicial scrutiny mechanisms and transnational networks. These, they assert, are methods by which political elites preserve their power in the face of the majority’s will. The influence of such movements has grown as a direct response to three contemporary themes: growing economic inequality, mass migration and the consequent difficulty of maintaining a secular civic space.

As Thomas Piketty and others have shown, economic inequality has been rapidly rising across advanced economies.⁴⁰ In both the United States and the UK, for example, the earnings of the top 1% as a proportion of national

³⁶ AJ Balfour, ‘Introduction’ in Walter Bagehot, *The English Constitution* (OUP 1928) xxiv.

³⁷ It might be noted that the institutional skew given to constitutional democracy in the works under review is illustrated by the fact that the GLT editors suggest that although the UK is a democracy, it ‘may not be’ a constitutional democracy: GLT, 8.

³⁸ Peter Mair, *Ruling the Void: The Hollowing Out of Western Democracy* (Verso 2013) 1: ‘The age of party democracy has passed.’ For a more nuanced analysis see Carolien van Ham and others, *Myth and Reality of the Legitimacy Crisis: Explaining Trends and Cross-National Differences in Established Democracies* (OUP 2017) 80: ‘In combination it seems the omens are not good: the future for parties does not seem too bright. Fewer of us are party members; fewer of us vote in elections; of those of us who do vote we are more inconsistent in our voting behaviour—though curiously perhaps we are still inclined to show some loyalty in our attachment to particular parties ... But before we write the obituary for political parties as a species, it is worth reflecting on a few things, the first of these being the fact that we’ve been here before.’

³⁹ See Jan-Werner Müller, *What is Populism?* (Penguin 2017), arguing that populism’s main claim is a rejection of pluralism. cf Ernesto Laclau, *On Populist Reason* (Verso 2005) x: ‘in the dismissal of populism far more is involved than the relegation of a peripheral set of phenomena to the margins of social explanation. What is involved in such a disdainful rejection is, I think, the dismissal of politics *tout court*, and the assertion that the management of community is the concern of an administrative power whose source of legitimacy is a proper knowledge of what a “good” community is.’

⁴⁰ Thomas Piketty, *Capital in the Twenty First Century* (A Goldhammer tr, Belknap Press 2014) pt III.

income has more than doubled over the last 40 years (and now reaches 20% and 14%, respectively).⁴¹ Extreme wealth imbalance raises constitutional issues by undermining the common feeling that sustains republican government, not just because of the corrosive influence of economic power being converted into political power (through lobbying and regulatory capture), but also through a growing sense that the wealthy no longer see themselves as part of a territorially bounded political nation. That the interests of ordinary people are being ignored is not unfounded.⁴² But, once again, the critical question is whether this development has been caused by the erosion of constitutional democracy or by its evolution. A regime captured by wealthy elites is not a constitutional democracy; it is at best an oligarchy, at worst a plutocracy.⁴³ On the other hand, the fact that the United States, the world's first modern constitutional democracy, also has one of the highest ratios of income inequality in the advanced world may not be coincidental.

It is not just growing economic inequality; the impact that demographic change is having on the homogeneous character of 'the people' is crucial. Unprecedented levels of migration, especially in Europe and North America, have created a more fragmented sense of the *demos*, which loosens the 'common sympathies' that sustain constitutional democracies.⁴⁴ The problem is not intolerance of difference as such. Intolerance becomes a political issue only when conditions permit its open expression, and it becomes destructive of constitutional democracy only when it is endorsed by political leaders.⁴⁵ But these conditions may now be materialising, fuelling the rise of a type of politics signified by the adoption of Australia's boat ban, Trump's 'America First' policy and the EU's 'Fortress Europe'.

In such political circumstances, it is difficult to maintain a common civic space for deliberative action. That challenge is exacerbated by the rise of fundamentalist religious movements with a very particular sense of majority will. The effort to maintain a pluralist civic space in the face of such movements has been intensely felt in such regimes as Erdoğan's Turkey, Modi's India, Netanyahu's Israel and Kaczyński's Poland. It is a palpable tension in constitutional democracies such as India and the United States, which, despite maintaining a formal separation of church and state, are among the world's

⁴¹ Ganesh Sitaraman, 'Economic Inequality and Constitutional Democracy' in GLT, 534.

⁴² Desmond King and Rogers M Smith, 'Populism, Racism, and the Rule of Law in Constitutional Democracies Today' in GLT, 467.

⁴³ Sitaraman (n 41) 538.

⁴⁴ T Alexander Aleinikoff, 'Inherent Instability: Immigration and Constitutional Democracies' in GLT, 487: 'In the United States, the percentage of foreign-born residents (14 per cent) is approaching levels not seen since 1920s ... In Sweden and Austria, the percentage is above 18 per cent; in Germany, 15 per cent; and in France, the United Kingdom and Spain it is over 12 per cent.'

⁴⁵ Jennifer Hochschild, 'What's New? What's Next? Threats to the American Constitutional Order' in GLT, 98: 'private sentiments of racism or intolerance may be reprehensible, but as a general rule they become politically problematic only when expressed and acted upon, and political dangerous only when endorsed and strengthened by social and political leaders or organizations'.

most religious societies.⁴⁶ Whatever else it may stand for, constitutional democracy is commonly understood to be founded on a crucial distinction between matters public and matters private, with questions of religious truth being largely relegated to the private sphere so that the pluralist, secular public sphere can flourish.⁴⁷ These movements are now either weakening the authority of that civic space or transforming it from one that accommodates difference to one that gives voice to a singular type of ‘truth’.

Signs that the institutional forms of constitutional authority are now being widely challenged are there for anyone prepared to look. In the United States, corporate power corrupts the republic. In Turkey, the power of Islam erodes its secular constitutional foundations. In Hungary, the rapid adoption of neo-liberal policies after communism has led to a resurgence of nationalism. In Ecuador, economic and political conditions stifle the emancipatory potential of its constitutional values. In South Africa, the failure to build a functional democratic institutional infrastructure erodes post-Apartheid ideals. In Israel, immigration policies stretch to breaking point its ambiguous foundation as a ‘Jewish and democratic’ state. These are serious issues, but it is surely not enough simply to hold up ‘constitutional democracy’ as the ideal of enlightened government against which symptoms of degeneration can be measured. Since constitutional democracy remains a contested concept, any inquiry into the contemporary crises facing nation states must also consider the ambivalent role that constitutions have come to play in trying to hold them together.

4. *Methods of Constitutional Erosion*

The trends of the last decade have renewed scholarly interest in the institutional conditions of national stability and prosperity. In *Why Nations Fail*, Acemoglu and Robinson argued that countries prosper only when the state is able to maintain law and order, provide the essential physical and social infrastructure, and protect market interactions, and that for these conditions to be met the state must be controlled by its citizens rather than be the preserve of a small political elite.⁴⁸ In *How Democracies Die*, Levitsky and Ziblatt explained that democracies acquire authoritarian features when political actors reject the democratic rules of the game, deny the legitimacy of opponents, tolerate or encourage violence, and curtail the civil liberties of opponents.⁴⁹ Ginsburg and Huq contribute to this growing body of institutionalist literature

⁴⁶ Ran Hirschl and Ayelet Shachar, ‘“Religious Talk” in Narratives of Membership’ in GLT, 515.

⁴⁷ The history of this distinction is, however, rather complex. See eg Ian Hunter, ‘Secularization: The Birth of a Modern Combat Concept’ (2015) 12 *Modern Intellectual History* 1.

⁴⁸ Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile Books 2012).

⁴⁹ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Viking 2018) 21–6. This builds on the classic study of Juan J Linz, *The Breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibration* (Johns Hopkins UP 1978).

by focusing on the mechanisms through which constitutional erosion takes place.

Noting that between 1960 and 1989 there were 145 successful coups whereas since 1989 there have been only 36,⁵⁰ they maintain that violent revolution is not much of a threat to established constitutional democracies: 'the coup and the emergency regime change are yesterday's instruments against democracy'.⁵¹ That is, constitutional democracies are being degraded rather than overthrown. Ginsburg and Huq note that, unlike overthrow, erosion is incremental rather than immediate. Significantly, whereas overthrow involves rupture in legal continuity, erosion is commonly effected through existing legal powers. Erosion, then, involves the use of legal powers to achieve a gradual deterioration in the three basic institutional predicates of constitutional democracy: electoral competition, basic rights of expression and association, and the integrity of institutions.

Ginsburg and Huq identify five methods by which existing legal powers can be used to erode constitutional democracies. These are measures to amend the constitution, to eliminate or weaken existing constitutional checks, to strengthen executive power, to weaken civil society organisations and to suppress party competition.⁵² The use of such measures varies according to circumstance, but the general orientation of change is anti-pluralist, leading to the consolidation of the power of charismatic politicians claiming to be the authentic representatives of a non-institutionalised notion of 'the people'. The most important point is that the social and political forces that give expression to these authoritarian tendencies emerge from within, rather than outside, the existing structures of constitutional democracy.

A good illustration of the use of these methods is seen in the case of Hungary. Making the transition to constitutional democracy after 1989, Hungary had simultaneously 'to establish an independent nation-state, a civil society, a private economy, and a democratic structure'.⁵³ This was not achieved without controversy, and in 2010 the electorate expressed its dissatisfaction with the reforms by voting Viktor Orbán's centre-right Fidesz Party into government. However, because of an electoral provision designed to prevent fragmentation, Fidesz won 53% of the vote but acquired 68% of the legislative seats. It was therefore able to use its two-thirds majority to amend the constitution. There followed a raft of new laws and constitutional amendments 'changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure'.⁵⁴ Since the activism of Hungary's Constitutional Court had been of particular concern,

⁵⁰ G&H, 55.

⁵¹ G&H, 66.

⁵² G&H, 72–3.

⁵³ Gábor Halmai, 'A Coup against Constitutional Democracy: The Case of Hungary' in GLT, 243.

⁵⁴ *ibid* 246.

the new constitution both limited its jurisdiction and enlarged its composition, while also establishing a National Judicial Office that controlled case selection and assignment. These reforms enabled Fidesz in effect to dictate the courts' mode of operations, thereby undermining the independence of a key institution of constitutional democracy.⁵⁵

Elsewhere, we see variations on this pattern. In Poland, with its higher threshold for constitutional amendment, the independence of its Constitutional Tribunal could not be compromised by constitutional reform, but was nevertheless undermined by a series of legislative changes.⁵⁶ In Venezuela, Hugo Chávez used the device of a referendum to authorise the establishment of a constituent assembly which, claiming to possess sovereign legal authority, 'closed the Congress, purged the judiciary, and gutted the electoral bureaucracy'.⁵⁷ In Russia, Vladimir Putin, faced with a term limit on his presidency, 'simply arranged for a constitutional amendment that would strengthen the powers of the prime minister, an office he duly occupied for a term', and then in 2012 returned to the presidency.⁵⁸

Ginsburg and Huq offer many illustrations of the ways in which these various methods have been used to convert constitutional democracy into 'charismatic populism'⁵⁹ or to bring about 'partisan degradation'.⁶⁰ They present compelling evidence from across the world that these methods are seriously depleting institutions of what might be called 'counter-democratic' accountability,⁶¹ suppressing oppositional movements in civil society or political parties, and bolstering the governing party's powers of rule. Constitutional democracies are being converted into 'illiberal democracies' or 'competitive authoritarian regimes', that is, regimes in which 'party rotation in power is no longer a genuine possibility'.⁶²

5. *Methods of Constitutional Protection*

Although there is an extensive literature of political science on the relative advantages of presidential or parliamentary systems of government, it tends to be orientated towards effectiveness rather than questioning which is most able to protect constitutional democracies against erosion. Focusing on this latter question, Ginsburg and Huq argue that parliamentary systems are to be preferred. They are to be favoured because they are more responsive to shifting political conditions, they can more easily jettison bad leaders, and they provide

⁵⁵ G&H, 68–70, 91–3, 98.

⁵⁶ G&H, 99–100; Wojciech Sadurski, 'Constitutional Crisis in Poland' in GLT, 259–64.

⁵⁷ G&H, 93.

⁵⁸ G&H, 95.

⁵⁹ G&H, 78–83.

⁶⁰ G&H, 83–90.

⁶¹ Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (A Goldhammer tr, CUP 2008).

⁶² G&H, 20.

more effective arrangements for ‘maintaining accountability and checking efforts at charismatic populism and partisan degradation’.⁶³ Parliamentary systems, in short, are less susceptible to collapse into authoritarian modes of governing.

With this concern in mind, Ginsburg and Huq examine a range of possibilities in the design of constitutions. They are sceptical of the value of the most widely discussed device, that is, the adoption of repressive measures to safeguard constitutional democracies from internal threats. Commonly presented under the banner of ‘militant democracy’,⁶⁴ they argue that such constitutional measures as party bans, prohibitions on office holding and curbs on free speech are ‘too dependent on the model of the Nazi ascent to power to capture the range of ways in which more mainstream parties today turn to erosion as a means of remaining in power’.⁶⁵ Since such mechanisms threaten the rights of association fundamental to constitutional democracy, they are potentially counterproductive and, even if they may occasionally be necessary, they can never be sufficient.

Edmund Burke famously maintained that a constitution without the means of change is without the means of its conservation.⁶⁶ But if a constitution can be too easily amended, then it cannot realise the essential objective of providing conditions for stabilising the state’s basic governing framework. This is a key dilemma of constitutional design. One solution, now commonly adopted in constitutions, is to entrench essential core principles within the constitution.⁶⁷ And where this technique is not instituted, judicially created equivalents, such as India’s basic structure doctrine, have often been devised.⁶⁸ Ginsburg and Huq accept that such techniques can provide ‘no fail-safe against erosion’.⁶⁹ While noting that courts have occasionally performed a vital role in protecting constitutional democracy,⁷⁰ they also highlight the danger that this ‘can perversely raise the stakes in political battles over who controls the courts’.⁷¹ Their general message is that although a broad range of institutional safeguards from multiple-staged threshold voting arrangements to the extending network

⁶³ G&H, 183.

⁶⁴ Karl Loewenstein, ‘Militant Democracy and Fundamental Rights’ (1937) 31 *American Political Science Review* 417 (pt I), 638 (pt II); András Sajó (ed), *Militant Democracy* (Eleven International Publishing 2004). For an analysis in the context of the ECtHR ruling in *Rafah Partisi (the Welfare Party) v Turkey* (2001) 35 EHHR 3, see Patrick Macklem, ‘Militant Democracy, Legal Pluralism, and Self-Determination’ (2006) 4 *ICON* 488.

⁶⁵ G&H, 171.

⁶⁶ Edmund Burke, *Reflections on the Revolution in France* (first published 1790, CC O’Brien ed, Penguin 1968) 106.

⁶⁷ G&H, 174: ‘two-thirds of the constitutions now in force contain some such entrenching clause’. See further Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) ch 1.

⁶⁸ Roznai (ibid) ch 2.

⁶⁹ G&H, 174.

⁷⁰ Ginsburg and Huq offer the illustration of the role of the Colombian Constitutional Court’s ruling in 2010 that President Uribe’s proposed constitutional amendment, which would have permitted him to stand for a third term, was unconstitutional as ‘an example of a Constitutional Court almost single-handedly saving constitutional democracy’: G&H, 188.

⁷¹ G&H, 174.

of arm's-length checking institutions may exist, ultimately there are no ideal design solutions that can safeguard constitutional democracies.

Ginsburg and Huq examine one final set of protective measures which, given their conception of constitutional democracy, is surprising. The various institutional devices they examine are mechanisms that, designed to curb the will of transient majorities, are essentially 'counter-democratic' techniques. But the last set of proposals they address implicitly acknowledges the limitations of one of their basic predicates of constitutional democracy: the holding of free and fair elections. Drawing on what Van Reybrouck calls 'democratic fatigue syndrome',⁷² Ginsburg and Huq explore the possibilities of reinvigorating constitutional democracies by devising alternatives to voting and supplements to periodic elections. These include the use of citizens' assemblies, participatory budgeting methods, and the exploitation of new learning and communicating technologies.⁷³ This is a surprising inclusion because Van Reybrouck's basic thesis is that, although people may approve of constitutional democracy in theory, they are increasingly rejecting it in practice. And he argues that the main reason for withdrawing their participation is that the democratic component of constitutional democracy is today limited to a device—periodic elections—that, having initially been devised as a counter-democratic mechanism, expresses a rather emaciated conception of democracy.⁷⁴ Ginsburg and Huq are therefore forced to conclude, implicitly at least, on the ambivalent note that constitutional democracy does not simply need saving; some of its basic predicates may also need to be re-examined.

6. *The Prospect for Constitutional Democracy*

The two books under review together present the most comprehensive evaluation available of the current state of constitutional democracy. Their analyses lead inexorably to the conclusion that the prospect is not favourable. Measured against the economic, social and cultural conditions of the flourishing of this type of regime, contemporary trends are imposing severe strains on its mode of operation. Instead of democracy being widened and deepened, the signs are that widening economic inequalities and a deepening gulf between the political elites and those they represent are eroding the sources of legitimacy on which the viability of the regime rests. Assessed in those terms, constitutional democracy is indeed in a critical condition, not least because a regime that holds out the promise of the individual's liberation from

⁷² David Van Reybrouck, *Against Elections: The Case for Democracy* (L Walters tr, Bodley Head 2016)

⁷³ G&H, 202–4. See further Van Reybrouck (n 72) 106–62; James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (OUP 2009).

⁷⁴ Van Reybrouck (n 72) 2, 163. Van Reybrouck draws especially on the analysis of Bernard Manin, *The Principles of Representative Government* (CUP 1997).

authoritarian rule is now widely perceived to be operating in a remote and unresponsive manner.

Scholars have often speculated that the trend towards democracy is a natural evolution attributable to ‘a general law of social progress’.⁷⁵ This type of approach is now widely discredited. Constitutional democracy is to be examined in a more objective manner by regarding it as a specific aspect of the general processes of rationalisation that are indicative of modernity.⁷⁶ This is especially the case when, as with the two books under review, the role of documentary constitutions—rather than an absolute concept of the constitution of the state⁷⁷—is stressed. The establishment of a modern constitution commonly signifies the replacement of a governing regime shaped by ‘accident and force’ with one determined by ‘reflection and choice’.⁷⁸ But if we look at the standing of constitutional democracy as an index of the extending rationalisation of modern political life today, then perhaps the critical question becomes: how has a technique designed to enhance human freedom by regulating political action through ‘higher-order’ law come to be so widely experienced as imposing constraints on freedom? The question of the contemporary crisis of constitutional democracy is, it would appear, situated at the crossroads where Weber’s thesis on rationalisation meets Marx’s concept of alienation.⁷⁹

Recognising that the principle of equality was an inexorable feature of modernity, constitutional democracy seems to have been originally devised as a regime that, in the face of an emerging democratic temperament, held out the best prospect of maintaining the aristocratic basis of governing and protecting the order of property. The solution entailed conceiving democracy mainly as requiring the periodic election of representatives whose role was not so much to express the will of the people as to ‘refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country’.⁸⁰ The institutional framework to bolster it, of necessity an accommodation with established power holders,⁸¹ would then be policed by lawyers who ‘are attached to public order

⁷⁵ See eg James Bryce, *Modern Democracies* (Macmillan 1921) vol 1, 24.

⁷⁶ Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (first published 1905, S Kalberg tr, OUP 2011); Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (F Lawrence tr, MIT Press 1985) lct 1.

⁷⁷ Carl Schmitt, *Constitutional Theory* (first published 1928, J Seitzer tr, Duke UP 2008) § 1.

⁷⁸ *The Federalist Papers* (n 3) no 1.

⁷⁹ Weber (n 76); Karl Marx, *The Economic and Philosophical Manuscripts of 1844* (DJ Struik ed, International Publishers 1964).

⁸⁰ *The Federalist Papers* (n 3) no 10.

⁸¹ See eg Mark A Graber, *Dred Scott and the Problem of Constitutional Evil* (CUP 2006) 3: ‘In order to form a “more perfect union” with slaveholders, citizens in the late eighteenth century fashioned a constitution that plainly compelled some injustices and was silent or ambiguous on other questions of fundamental rights. The constitutional relationships thus forged could survive only as long as a bisectonal consensus was required to resolve all constitutional questions not settled in 1787.’

beyond every other consideration' and who 'if they prize freedom much, they generally value legality still more'.⁸²

The ambition and ambiguity of modern constitutional documents is remarkable. Drafted in the name of the people, they are presented as instruments of settlement, whilst incorporating multiple techniques of evasion.⁸³ They speak in the name of unity ('we the people'), notwithstanding that they are invariably the outcomes of a crisis in which some celebrate victory but others experience defeat. Expressing a new chapter in a nation's history, they face the future and hold up the promise of 'a more perfect union', at the same time bolstering their authority by drawing on mythical national history. Modern constitutions are presented as simple instruments for organising government, but to fulfil their purpose they are increasingly being invested with some sacred redemptive quality.

This tension between their instrumental and symbolic dimensions has been heightened by the shifting role of constitutions over the last century. With the defeat of fascism and the collapse of socialism, the construction known as constitutional democracy has been fashioned as the principal vehicle through which the last major ideology of modern times is advanced. It has therefore also become the battleground for what remains of political contestation. Within this struggle, any political movement that challenges the legitimacy of the structures of constitutional democracy is now given a generic label. Whether the contest comes from the left through such movements as Syriza in Greece or Podemos in Spain, the right as in Italy's Lega Nord or the Dutch Freedom Party (PVV), or from religiously based nationalist movements like India's Hindutva or Turkey's Justice and Development Party (AKP), the challengers are invariably called 'populist'. This has now become one of the major political issues of our times, but if the contemporary crisis of constitutional democracy is to be fully grasped, then causes leading to the emergence of these movements need investigation, rather than their manifestation being the subject of denigration.

The books under review do address some of these causes. In his study of Hungary, Gábor Halmai recognises that Fidesz was responding to an overambitious exercise in constitutional renewal during the post-1989 period, spearheaded by a Constitutional Court that advanced an 'invisible constitution' containing ideal standards of constitutionality beyond the textual constitution.⁸⁴ He notes that before the 2010 elections 'the majority of voters were already dissatisfied not only with the government, but also with the transition itself'.⁸⁵ Examining the reasons why Hungary turned away from liberal

⁸² Alexis de Tocqueville, *Democracy in America*, vol 1 (first published 1835, H Reeve tr, DJ Boorstin intro, Vintage Books 1990) 275.

⁸³ See Martin Loughlin, 'The Silences of Constitutions' (2018) 16 *ICON* 922.

⁸⁴ Halmai (n 53) 245.

⁸⁵ Halmai (n 53).

constitutionalism, he explains that authoritarianism, including pre-1939 arrangements, has always played a deeper role in governing the Hungarian state and that, whereas constitutional democracy values ‘secularism, cosmopolitanism, autonomy and rationality’, Hungarians continue to emphasise ‘religion, national pride, obedience, and respect for authority’.⁸⁶ These factors, together with growing economic inequalities, relatively poor economic growth and the adoption of a ‘legalistic form constitutionalism’ that reduces ‘the Constitution to an elite instrument’,⁸⁷ go a considerable way to indicating why in 2010, in the words of Kim Scheppele, Hungarians ‘voted for the one conventional party that remained standing’.⁸⁸ From this emerges a more complicated picture than what Ginsburg and Huq call a model case of ‘democratic erosion’,⁸⁹ not least because the fact that Fidesz has retained clear majorities in both the 2014 and 2018 elections may indicate a crisis of liberalism rather than of democracy.

The basic point is that if constitutional democracy is in a critical state, solutions are unlikely to be found by focusing only on ways of strengthening liberal institutions. Remedies must be considered that take seriously the need to reinvigorate democratic aspirations. Yet much of the analysis in these two books seems content to rest its account of democracy on the mechanism of voting, making it easy to highlight its manifest limitations and to skew the remedy towards reinvigorating the authority of institutions of counter-democratic rule. We do not need to be in the thrall of false polarities to recognise that the values of liberalism and democracy have different orientations that are not easily reconciled within constitutional democracy. A more balanced appraisal might therefore enquire into the evident deficiencies of the workings of many counter-democratic institutions and take seriously a conception of democracy as a social and cultural practice rather than a mere mechanism for choosing leaders.

There is nothing new in this appraisal. At the end of his second volume on *Democracy in America*, Alexis de Tocqueville wrote that, although equality of condition is a providential fact of modernity, it is up to us to determine ‘whether the principle of equality is to lead ... to servitude or freedom, to knowledge or barbarism, to prosperity or to wretchedness’.⁹⁰ The freedom Tocqueville held up as a cardinal virtue was not freedom from political engagement. He was alert to the danger that the equalisation of conditions

⁸⁶ Halmai (n 53) 250.

⁸⁷ Halmai (n 53) 251. See also Paul Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2014).

⁸⁸ Kim Lane Scheppele, ‘The Party’s Over’ in GLT, 505.

⁸⁹ G&H, 68–70.

⁹⁰ Alexis de Tocqueville, *Democracy in America*, vol 2 (first published 1840, H Reeve tr, DJ Boorstin intro, Vintage Books 1990) 334.

might cause individuals to retreat to their own private worlds and neglect the civic virtues sustaining social interdependence. Above all, freedom for Tocqueville meant collective self-government. If constitutional democracy is to continue to provide the authoritative framework through which we contest political questions, Tocqueville's message cannot be ignored.