The foundations of democratic dualism:

Why constitutional politics and ordinary politics are different

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Formal constitution-making is now an increasingly common phenomenon. But how should we understand the politics of constitutional lawmaking—what we call constitutional politics? Should it be structured differently from ordinary politics? As a descriptive matter, there seem to be important differences between constitutional and ordinary lawmaking. Constitutional lawmaking makes entrenched rules about rules and determines the institutional landscape of the state while ordinary lawmaking formulates non-entrenched rules within rules. Sometimes—and we argue preferably—constitutional politics takes place within consensus rules and institutions, which encourage the formation of coalitions that include all major social groups. Furthermore, constitutional politics frequently includes participatory mechanisms that are absent from, or peripheral to, ordinary politics, which tends to be driven more by competition among political parties. By contrast, ordinary politics generally—and also preferably, in our view—takes place within institutions that operate under more majoritarian rules and institutions.

Although such differences have been noted before, previous scholarship has not fully theorized why these settings should be structured differently (Ackerman, 2000; Arato, 2017, 2000; Kalyvas, 2009; Lutz, 1994). In this article, we develop a theory, or more precisely, a rational reconstruction (Gaus, 2013), to explain the difference between ordinary and constitutional politics in a democracy. Elucidating this distinction is practically important, we argue, because organizing constitutional politics as if it were ordinary politics or vice versa will tend to result in dysfunctional versions of both types of politics.

In making this case, we engage directly with two bodies of literature: empirical research on institutions by political scientists and research of constitutions and constitutionalism by legal and political theorists. The distinction between constitutional and ordinary politics—or

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dualism—remains underdeveloped in both bodies of work, though for different reasons. Empirical political scientists frequently ignore this distinction altogether. Constitutional theorists, by contrast, discuss dualism but, mistakenly, tend to portray constitutional politics as superior and less subject to partisan dysfunction than ordinary politics. This is particularly the case in times of constitutional replacement where, many argue, the people rise above their normal partisan concerns in adopting wholly new constitutional arrangements. We challenge both positions. We argue for the importance of the dualism distinction but also contend that constitutional politics is not a higher quality political form.

What previous analyses have missed is the fact that constitutional and ordinary politics respond differently to the threat of the faction—that is, the risk of a majority “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” (Madison, 1999). This threat is far more problematic in constitutional politics than in ordinary politics for two reasons. First, constitutional politics has fewer methods of combatting this threat. This is particularly true during times of constitutional replacement, when fewer preexisting constitutional rules and institutions exist to constrain mobilized factions. Second, constitutional politics leads to the creation of constitutional rules that structure future political competition, thereby creating a strong incentive for a majority faction to exploit its dominant position to eliminate institutional checks and thereby undermine the pluralism at the heart of democratic governance. For this reason, it makes good sense in constitutional politics—and especially in the politics of constitutional replacement—to utilize consensus rules to block factional imposition and encourage debate and consensus-building before any proposals can become binding commitments. The lengthy period of time required to make such decisions, and the risk of defaulting to the status quo, is a cost worth paying in order to ensure against the factional capture of constitutional rules.

This problem of the faction is less severe in ordinary politics and thus should be managed differently. The outputs of ordinary politics aim to implement the public’s preferences as they exist at a point in time and have less capacity to alter the legal landscape fundamentally and enduringly. These outputs are not entrenched against future change but can be altered with a simple majority, which facilitates policy change in response to social change. Given these characteristics, the most appropriate way to manage the threat of a majority faction is to enable shifting majorities, so that a single faction does not dominate decision-making at all times. A prominent role for political parties, and their competition over a wide range of policy areas, has traditionally facilitated this process of shifting majorities, particularly over the long run. The consensus rules that are ideal for constitutional politics are undesirable in this setting, though, as they can inhibit the dynamics of policy responsiveness.

The article develops these arguments in six sections. Section 1 discusses the treatment of dualism in empirical political science and constitutional theory. We identify the limitations of

the prevailing perspectives in both bodies of literature, and build our account of dualism from this critique. In section 2 we flesh out the problem of the faction, arguing that it provides a basis for clarifying dualism. Extending this idea, section 3 explains why dualism leads to the prescription that constitutional politics and ordinary politics ought to be organized differently. Section 4 highlights some of the key implications that follow from our recasting of dualism. Section 5 responds to two objections to our argument. Finally, in the conclusion, section 6, we briefly summarize the preceding discussion.

1. EXISTING APPROACHES TO DUALISM: A CRITIQUE

1.1 Neglect of dualism in empirical political science

In empirical political science it is rare for the dualist distinction separating constitutional and ordinary politics to be sharply drawn. Instead, it tends to be overlooked as scholars merge the products of constitutional and ordinary politics and therefore draw equivalences between ordinary and constitutional law. Electoral laws are a good example. Though it is rare for electoral laws to be the product of constitutional lawmaking and be included in a written constitution, political scientists typically consider them to be a part of a country's constitutional architecture and in their comparative work they assume a basic equivalence between electoral laws that are located in a written constitution, on the one hand, and electoral laws that lie beyond the written constitution, on the other hand.

For example, in his comparative study of constitutional engineering, Giovanni Sartori analyzes law-making systems—presidentialism, parliamentarism and semi-presidentialism—that almost always originate from a written constitution; but also electoral systems, which, by contrast, “may not be formally included in the constitutional text” (Sartori 1994, p. viii). But such laws serve a constitutional function, Sartori explains, as “a most essential part of the workings of a political system.” In a similar vein Robert A. Dahl, examining the US Constitution, makes clear that his use of the term constitution includes “an important set of institutions that may or may not be prescribed in the *formal* constitution itself: these are its electoral arrangements” (Dahl, 2003, pp. 41–42).

Both Dahl and Sartori point to constitutions as their object of study, though what they include in this category clearly extends beyond the written constitution. However, in other research, this term is avoided altogether and institutions are analyzed instead. This difference is more significant than it may appear at first glance. First, it represents a subtle but important shift away from the written document (and the type of politics that generates this text). Second, the scope of the term institution (i.e., what rule-like things it includes) is broader than that of constitution, even if the latter is expanded to include electoral systems. And the institutions that affect an outcome are often aggregated and conceptualized as a regime (or

system); an approach that leads not only to the melding of constitutional and non-constitutional rules but also to including behavioral traditions and expectations. This latter approach can be seen, for example, in comparative studies of welfare regimes, media systems and campaign finance regimes (see, for instance, Esping-Andersen, 1990; Noam, 2016; Norris & van Es, 2016).

Perhaps the most instructive example of the de-emphasis of dualism in modern political science is George Tsebelis's *Veto Players: How Political Institutions Work*. This influential study develops an integrative framework to capture the interactions of a wide variety of institutions originating in and beyond the written constitution. The range of institutions accommodated includes macro-constitutional structures such as presidentialism and parliamentarism, agenda-setting rules in a legislature and the type of party system. The framework translates cross-country differences in such institutions into constellations of veto players (Tsebelis, 2002, p. 5). And, in this conversion process, institutions that originate in a written constitution are treated no differently from non-constitutional institutions.

This approach makes a great deal of sense when one understands the aims of this study and, more generally, of institutionalist research in political science. As Tsebelis explains, his framework provides a way to account for variation in the stability of public policies across democracies. Thus, each veto player constellation is essentially a mapping of constraints on policy innovation. More generally, institutionalist research is concerned with positivist or scientific claims about what institutions do, and especially how they impact on policy development. Given this goal, a focus on institutional configurations is sensible because policy-making is, as a matter of fact, shaped by a wide variety of institutions. So, to explain the development of public policies, we need to take account of these various institutions and their interactions.

This approach can be useful but it ultimately reduces our capacity to address certain normative questions. Of particular relevance to this article is the question: How should constitutional politics and ordinary politics be organized? The institutionalist perspective sheds no light on such matters; a reflection of the fact that empirical political scientists usually avoid normatively challenging questions. For example, Tsebelis takes an agnostic stance on the question of whether policy stability is desirable or not, explaining that “[i]t is reasonable to assume that those who dislike the status quo will prefer a political system with the capacity to make changes quickly, while advocates of the status quo will prefer a system that produces policy stability” (Tsebelis, 2002, p. 7).

There is nothing in this argument (or similar ones) that we object to. But we do detect a normative dimension to stability that remains under cover because Tsebelis does not distinguish between constitutional and ordinary politics. We argue that stability and the status quo have greater value in constitutional politics than in ordinary politics. Thus, in our account

of dualism, we present constitutional politics as, ideally, a “one-shot” game that establishes a permanent (or at least long-lasting) coordination framework for future political interaction. The rules of a constitution should not change too frequently or drastically over time because this would undermine its capacity to act as a coordinating device (Hardin, 1999).

In ordinary politics things are different. The main purpose of decision-making is not to supply a coordinating framework but to enable the views of the majority to be determined and implemented. Therefore, a stable status quo is far less valuable than in the constitutional context. In depicting ordinary politics in this way, our account resembles theories that portray political institutions and public policies as no more than the “congealed preferences” of the majority (Riker, 1980). Although this line of theorizing raises the risk of majority tyranny, some of the distinctive properties of ordinary politics—namely, the competition of political parties over time—help to mitigate this problem. Furthermore, constitutional guarantees—most notably those guaranteeing free speech and the free press—should also play a key role in enabling political competition. Thus, our account of dualism is not only a theory of how lawmaking in constitutional and non-constitutional settings ought to function, but also how constitutional and ordinary politics ought to intersect. The design of constitutional politics as a consensual, coordinating framework should enable the majority to dominate in ordinary politics, but should also guarantee the rights that minorities need in order to participate effectively.

1.2 Dualism in constitutional and political theory

Constitutional theorists have explored dualism closely because of its importance for explaining the so-called counter-majoritarian dilemma, or why constitutions allow courts to strike down laws passed by majorities. Dualism solves this problem by envisioning “the People” acting in two capacities in a democratic state. In ordinary lawmaking the people act indirectly through ordinary institutions to make ordinary law; but in constitutional lawmaking, they act directly in their sovereign capacity (often through extraordinary institutions) (Loughlin & Walker, 2007; Lutz, 1994). Thus, constitutional law has a higher status because it is more closely linked to the people’s constituent power. A legitimate constitution therefore requires a dramatic expression of the people’s original constituent power (*pouvoir constituant originaire*)—a force that “grounds a constitutional order while remaining irreducible to and heterogeneous from that order” (Kalyvas, 2005, p. 226).

Constitutional politics, for most theorists, is an idealized form of politics that is, in essence, more sovereign because it involves the voice of the sovereign people (Colón-Ríos, 2010, p. 240). Bruce Ackerman, in an influential elaboration of dualism, describes constitutional politics as a higher lawmaking. By contrast, normal politics does not capture the true voice of the people because it is characterized by appeals to narrowly conceived interests. So, “during normal politics, the People simply do not exist; they can only be

represented by ‘stand-ins’” (Ackerman, 1993, p. 263). Underlying this argument is the idea that the people do not have the time or ability always to operate directly in their higher capacity.

A key debate stemming from this conception of dualism is how to attain this ideal plane of constitutional politics. One approach, which follows Abbé Sieyès, holds that it requires the people’s participation in institutions that are separate from, and legally superior to, those of ordinary politics—in particular, extraordinary elected assemblies (Sieyès, 1963; see also Kalyvas, 2009). Sieyès explained that the people—or the Nation, as he called them—act most often through “constituted powers” (*pouvoir constitué*) within preestablished rules. In exceptional situations, however, the Nation exercises its sovereign “constituent power” (*pouvoir constituant*) to repudiate all existing legality and establish a new system of constituted powers, which are then granted to institutions such as a parliament, executive, or courts (Sieyès, 1963, pp. 136–139). This constituent power should be expressed in a period of extraordinary politics in an assembly that “takes the place of the assembly of the nation” (Sieyès, 1963, p. 130). Once invested with sovereign power, this assembly is freed from preexisting constitutional constraints and it can reshape the state as it chooses. Its actions bear the same force as the “common will of the nation itself” (Sieyès, 1963, p. 131).

An alternative idealistic view, drawn from the US tradition, suggests that this ideal form of constitutional politics includes both extraordinary and ordinary institutions. Most notably, Ackerman rejects a theory of (US) constitutional change that involves the “arbitrary character of acts of constituent power,” as such an account would be incapable of capturing “the distinctive character of American history” (Ackerman, 2000, p. 11). The key moments of constitutional lawmaking in the USA, Ackerman points out, including the Founding, Reconstruction, and the New Deal, were acts of “constituent authority” but not “sheer acts of will.” The reformers—who were Federalists, Democrats, and Republicans—certainly “failed to follow well-established rules and principles,” but at the same time, they acted with “powerful institutional constraints on their revisionary authority” (Ackerman, 2000, p. 11). They did not seek a “root-and-branch” repudiation of the existing order but its “revolutionary reform,” in a manner that “did not seek to destroy the entire matrix of pre-existing institutions” (Ackerman, 2000, p. 12). Indeed, they hoped that through such “institutional jiu-jitsu” they could secure support from existing institutions despite the incompatibility of their initiatives with the existing system of revision (Ackerman, 2000, p. 13).

Both prominent views share the idealistic view, however, that constitutional politics can and should be less rule-based than ordinary politics to be successful. Our account of dualism argues against this view. Cognizant that constitutional politics is not necessarily ideal and can, in fact, fail, we present a more pragmatic vision of constitutional politics that acknowledges the significant dangers that a period of constitutional politics (particularly one of constitutional replacement) can pose to democratic politics. In so doing, our work shares

important parallels with the recent work of Andrew Arato on post-sovereign constitution-making as a method for avoiding the dangers of an unbounded sovereign form of constitutional politics (Arato, 2017, pp. 40–41). Arato advocates a two-step approach to constitutional politics in which the framers of a new constitutional text apply “constitutionalism not just to the result but also to the democratic process of constitutionalism” (Arato, 2009, p. 428).

Thus, in viewing the problem of the faction as especially dangerous for constitutional politics, we share with Arato the view that rule-based and institutional constraints are needed to ensure that constitutional politics functions properly. But, going in a different direction from Arato, we also seek to reconstruct dualism rationally by drawing out its practical implications for ordinary and constitutional politics; whereas the purpose of Arato’s project is to move beyond dualism to develop a new theory of constituent power. Following our approach, it becomes difficult to defend the argument that constitutional politics is a necessarily (or generally) better form of politics that should operate with fewer rules. And our reconstruction also challenges the literature that tries to elevate ordinary politics by subjecting it to numerous veto points and super-majoritarian rules.

2. THE FACTIONAL THREAT

The threat to democratic politics posed by factions has a deep history yet has been largely ignored in recent years (Coby, 1988). This factional threat, we argue, is central to a proper understanding of dualism: the threat is greater in constitutional politics than in ordinary politics and, because of this, politics should be organized differently in these contexts. In this section we flesh out the manifestations of the factional threat in constitutional and ordinary politics; and in the sections that follow we explain what this threat implies for how politics in these settings ought to be organized.

James Madison warned that the chief danger to democratic government was not tyrannical government but the tyranny of the majority. In a letter to Thomas Jefferson, Madison wrote:

In our Governments, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. (Rakove, 1998)

Madison defined a faction to be a group “who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” (Madison, 1999). And the latent causes of faction were a

zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions. . . . These factors have divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. (Madison, 1999)

Madison was acutely aware of how the factional threat could manifest in constitutional politics. In *Federalist* No. 49 he expressed his fear that constitutional replacement, with its attendant appeals to the original power of the people, could unleash the passions of a majoritarian faction and upset the constitutional equilibrium (Madison, 1788). Madison considered two general solutions to this threat. The first—loosely modeled on Plato’s idea of a guardian class—was the creation of “a will independent of the majority” such as a monarchy. He rejected this solution as a precarious security, because human nature cannot be trusted. Therefore, any so-called independent group could not be trusted always to rule in the best interests of the people.

Madison’s preferred solution was the generation of a multiplicity of interests, via three mechanisms (Madison, 1999). First, a representative form of government limited the possibility of the faction because it allowed public views to be refined and enlarged by

passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be less likely to sacrifice it to temporary or partial considerations.

Second, a large republic also reduced the factional threat since it “will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority” (Madison, 1999). Third, and most importantly, the dangers of the faction would be limited by the division of constitutional powers into executive, legislative, and judicial departments and between state and federal governments. These factors are all largely present in the ordinary politics of most democracies.

2.1 Political parties and the factional threat

Another solution to the factional threat that has emerged in ordinary politics, unexpectedly from the Madisonian standpoint, has been institutionalized parties in a competitive party system. As we explain in a moment, to mitigate the factional threat parties need to be

enduring entities with an identity and interests that are separate from those of the individuals and factions that comprise them—in other words, they must be institutionalized. Second, mitigation of the factional threat depends on meaningful interparty competition. In the absence of either condition—that is, when parties are not institutionalized and, therefore, are little more than factions; or when competitors to the governing party are banned (or silenced through the use of administrative resources)—this moderating capacity is severely undermined.

Eighteenth-century theorists, including Hume, Machiavelli, Montesquieu, and Voltaire, viewed factions and parties as either synonymous or, at most, practically indistinguishable; and both terms had a negative connotation (Sartori, 2005, p. 4). But in *Thoughts on the Cause of the Present Discontents* (1770), Edmund Burke offered a major reconceptualization, arguing that “factions” and “parties” were fundamentally different, and that the latter could enhance governance. Hence, his well-known definition of a party as “a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed” (Sartori, 2005, p. 8). By the time Burke was writing the idea that governments should be bound by law (i.e., constitutionalism), was widely accepted; but the question of who ought to form the legitimate government within a constitutional order remained unsettled. Burke believed, though without much actual evidence, that political parties should perform this function.

Despite the circulation of such ideas, the constitutional practitioners of this era remained skeptical of political parties. In France, revolutionary leaders who divided on many fundamental questions “were unanimous and persistent in their condemnation of parties” (Sartori, 2005, p. 10). The American Founding Fathers were just as determined to design a constitution that could resist the scourge of parties. Here, their views were strongly influenced by their observation of politics in the states. Pennsylvania, in particular, was viewed as being poorly governed and its politics was dominated by two factions, often described as parties (Hofstadter, 1969, pp. 45–49). On the other hand Virginia was regarded as being well-governed and hosted a consensual style of politics that was low on factionalism. Accordingly, the Founders “hoped to create not a system of party government under a constitution but rather a constitutional government that would check and control parties” (Hofstadter, 1969, p. 54).

Nonetheless, soon after the US Constitution began to operate institutionalized parties developed around the question of what ought to be the proper scope of the new federal government. The (Hamiltonian) Federalists favored a larger, more activist federal government than the (Jeffersonian) Republicans. By the Second Congress (1791–1793) most legislators were aligned with one of these factions; by the Third Congress (1793–1795), a stable pattern of partisan voting was apparent; and by the presidential elections of 1796 these parties dominated politics in every state (Aldrich, 1995, p. 77). Why, then, did parties emerge

and consolidate? As John H. Aldrich has shown, they provided a more efficient way for lawmakers to achieve their goals than acting individually or in loose (and therefore unstable) factions (Aldrich, 1995, pp. 29–36). And parties have been even more crucial in parliamentary systems where the executive normally depends on party-based mechanisms to maintain the confidence of parliament (see, for instance, Mair, 2002).

Even though political parties were not created to improve the quality of governance, but to solve politicians' dilemmas in collective action they have become fundamental to the operation of ordinary democratic politics. Parties enable politicians to coordinate within and across institutions. Parties simplify voters' choices by providing short-cuts connecting election candidates with the direction of public policy (Mainwaring & Torcal, 2006). Parties make governments accountable to ordinary citizens because, unlike factions, they are usually enduring entities, so voters can punish a governing party at the next election if it does not implement its election promises. Furthermore, party organizations have usually been an important mechanism for screening, socializing, and training future national leaders (Norris, 2006).

Parties also moderate and channel the influence of factions in two ways. First, they aggregate factions. Factions are likely to form whenever decision-makers face a controversial issue. Although persuasion and deliberation may lead some decision-makers to alter their views, some level of disagreement will usually remain and therefore factions in thought and sentiment are inevitable, as Madison recognized. But parties integrate multiple factions. If we understand the threat of the faction in ordinary politics to be the risk that a faction may, in a moment of strength, seize power and implement policies in its favor, then parties reduce the seriousness of this risk because a party's purview—what it considers to be in its interests—is likely to be more encompassing than that of a faction (Olson, 1993). In other words, a party pursuing its interests poses less of a threat to good governance than a faction pursuing its interests. This does not mean that the party's interests will correspond perfectly to those of the society, but the discrepancy will be smaller than would be the case if a faction governed. The incentive for a governing party (or coalition) to pursue encompassing policies will be even greater if the party system is competitive, because the government must then take decisions knowing that it can easily be replaced.

Second, parties reduce the factional threat in ordinary politics by disciplining how factions behave over time. A hallmark of factions, in addition to their narrow self-interest, is the fact that they operate with short time horizons relative to those that parties assume (Nwokora, 2014). Factions are created by disagreements over significant political issues. Therefore, if a faction is able to win power, its only purpose will be to implement the policies that motivated its formation and which its members agree on. It will be difficult for a faction to remain stable beyond the achievement of this goal; and therefore a government formed by a faction will not be well-placed to devise and implement policies that benefit a democracy over the

long term. A political party, by contrast, is an institution that aims to endure. Some of its individual members may hold short-term goals, and this group may include those politicians who face term limits or are due to retire. But the party as an organization will seek to maximize benefits for “overlapping generations” of its members (Simmons, 2016, p. 4). As Joel Simmons puts it, parties are “coalitions that outlive the political lives of their own coalescing members” (Simmons, 2016, p. 4). An institutionalized party will create and resource an organizational apparatus to identify and represent the interests of “the party,” which may diverge from those of any faction. And, because of its capacity to shape its members’ careers, the party will be well-placed to ensure that it usually wins in its struggles against a faction. Thus, political parties not only aggregate factions, they also impose their own, long term horizons.

2.2 The continued factional threat in constitutional politics

Constitutional politics, by contrast, has not developed strong defenses against factions. On the contrary, evidence shows that constitutional politics—particularly the constitutional politics of constitutional replacement—is itself highly susceptible to factional manipulation. In the USA, for example, many argue that a period of constitutional politics involving a federal constitutional convention would be very harmful. As a result, the part of the US Constitution allowing for the convening of a federal constitutional convention has become a “‘protest clause’ to goad or scare Congress itself to act on a desired amendment” (Caplan, 1988, p. 74). Furthermore, the problem of factions has emerged in constitutional politics across Latin America and the former Soviet Union (Landau, 2013; Partlett, 2012).

Such experiences suggest two reasons why constitutional politics is susceptible to manipulation. The first is the lack of settled rules and institutions that can ensure inclusiveness and fairness in the process of constitutional lawmaking. In fact, constitutional politics can lead to the delegitimization of preexisting institutions and rules. In Russia, for instance, President Boris Yeltsin used a constitutional convention in order to discredit existing institutions and seize power unilaterally (Partlett, 2012).

Second, it raises the specter of a constitutional convention that can claim absolute power in the name of the people, where a powerful faction can push through constitutional rules to entrench itself in power. The abuse of constitutional conventions in Venezuela in 1999 provides a vivid illustration of this risk. Then-president Hugo Chavez devised the electoral rules for an elected National Constituent Assembly in order to capture and control this institution. Thereafter, he claimed that the Assembly was legally superior to other institutions and it went on to curtail severely the powers of the existing institutions (many of which contained Chavez’s opponents) (Landau 2013, p. 946). Taken together, these examples suggest it is important to limit the dangers of constitutional politics.

3. RECONSTRUCTING DUALISM

3.1 Ideal interactions in ordinary and constitutional politics

The differing threats of the faction have important normative implications for how ordinary and constitutional politics should be organized. With more defenses against the threat of the faction, ordinary politics should be responsive to “We the Majority.” This is because, assuming the existence of some level of disagreement in a society, the majority has a stronger claim than any other subgroup to have its preferences translated into policy. Adherence to this principle is fair because, as formal theorists have shown, the majoritarian principle is impartial with respect to individuals and with respect to the alternatives before it (May, 1952). Therefore, by saying that the majority should govern, we ensure that all individuals and all alternatives under consideration are treated equally. This stands in contrast to a super-majoritarian arrangement where the status quo, and the groups that prefer it, are privileged.

Moreover, the majoritarian principle enables policy to adjust over time. Assuming the conditions for political competition, political interactions are not a one-shot game in the ordinary arena but rather occur iteratively with policy determined, and amended, over successive rounds of an extended game. The losers in any round can overturn their defeat in the future by engaging in a coalition-building strategy that is more successful than their last effort. As a result of these dynamic processes, public policies are likely to remain broadly responsive to the changing preferences of a society. At any point in time there may be a gap between the government’s policies and the society’s preferences. But, over time, due to competition between parties and the discipline this imposes on decision-making within parties, policies that remain significantly out of step with the public’s preferences are likely to be reined in or altered (Wlezien, 2004).

The nature of ideal interactions in constitutional politics is quite different, as Table 1 shows. Constitutional politics is a one-shot game, in which “We the People,” as opposed to “We the Majority,” make decisions. Those decisions establish institutional structures that are binding for many years thereafter. For instance, these structures distribute power in important ways that can send strong signals to informal elite groupings (Hale, 2014, p. 240). In contrast to ordinary lawmaking, therefore, constitutional lawmaking is largely fixed and conclusive, because it concerns a codified document that is entrenched against majoritarian change and structures the institutions of politics. In this setting, factions pose a significant problem and there is not the same need for speed, or efficiency, as in ordinary politics.

Dysfunction in constitutional politics is a heightened version of the factional problem that Madison warned of. The creation of new rules—particularly those governing institutional relationships—can undermine existing institutions and democratic governance. Moreover, constitutional politics allows factions to suspend ordinary checks and balances politics and

instead rely on extraordinary institutions as ways of governing. For instance, in Hungary a strong factional majority has used its control of constitutional rules to weaken the power of the Hungarian Constitutional Court and other checking institutions (Scheppelle, 2018). This ability to engineer the structure of the state in your own interests is a powerful tool for entrenchment that is unavailable in ordinary lawmaking. Control of formal written constitutional law therefore threatens to undermine the very basis of democratic governance: political competition. For constitutional lawmaking to be functional, it should therefore represent a consensual and deliberative process of norm creation and rule-making on this basis.

3.2 Different rules for different politics

To ensure productive forms of ordinary and constitutional politics, different rules are required for the organization of constitutional politics, on the one hand, and the organization of ordinary politics, on the other. The sets of rules include (a) selection rules for translating voters' preferences into seats in a lawmaking assembly; (b) decision rules or the rules of voting in a law-making assembly, which establish when a proposal will become a binding law; and (c) relationship rules, which determine the formal interaction between institutions. The choice of rules in each of these areas should be sensitive to the different challenges of ordinary and constitutional politics. In Table 2 we present the ideal-type rules that should be used in these contrasting settings.

The rules to organize constitutional politics should aim to counter the serious threat of factional entrenchment in this context. To discourage factional aggregation, selection rules ought to have disaggregative tendencies, which generate weak incentives for individuals and groups to coalesce to boost their electoral chances. Such rules may include the laws that create a proportional representation electoral system or that otherwise enhance minority representation in an assembly (including defined minority seats). Furthermore, to ensure that powerful majorities cannot ignore minorities in decision-making, decision rules ought to be more super-majoritarian and relationship rules should seek to involve multiple institutions in decision-making. Finally, relationship rules should be more pluralistic. This will ensure the lengthening of the decision-making time frame, thereby giving more opportunity for deliberation and reason-giving and to outlast any temporary factions that emerge during the process that might threaten the inclusiveness of its outcomes.

Since ordinary politics is less threatened by the dangers of factional entrenchment, political interactions ought to be organized along different lines. Specifically, it is adequate—indeed it is ideal—for the rules of ordinary politics to create processes that are likely to be responsive over the long run but efficient in the short run. Therefore, selection rules should

encourage the aggregation of political parties and competition between them. At the same time, decision rules should be based around the simple-majority principle to ensure that the majority viewpoint (often found within a party) on an issue (at a point in time) can be enacted into law or policy. Finally, relationship rules should be more unitary, to improve the efficiency of the lawmaking process and minimize the likelihood of significant institutional obstruction (but see our qualifications in the next section).

4. NORMATIVE IMPLICATIONS: DUALISM IN PRACTICE

This account of dualism has concrete implications for the evaluation of institutions in practice. In particular, it suggests that serious problems may be encountered in attempts to democratize constitution-making by introducing majoritarian rules into constitutional politics. On the other hand, it rejects proposals to make ordinary politics more deliberative by imposing elaborate and difficult consensus rules. In both cases our theory suggests that these attempts, even when well-intentioned, are likely to increase the chances of dysfunctional politics.

4.1 Implications for constitutional politics

Our theory rejects arguments for democratizing constitutional politics by introducing majoritarian rules. This body of literature, which often focuses on Article V of the US Constitution, argues that difficult decision and relationship rules undermine the democratic nature of a constitution. Underlying this position is an uneasiness with the role of the court—and, in particular, the US Supreme Court—in updating constitutional meaning through judicial interpretation and a desire to place the updating of the constitution back into the hands of the people. Akhil Amar, a prominent advocate of this view, criticizes the reliance on the Supreme Court as a “kind of continuous constitutional convention” (Amar, 1994, pp. 458–459). As a result, his work has sought out alternatives to the Article V procedure. In rejecting this line of reasoning, we are aware that our account privileges the status quo in constitutional politics. But we do so in the knowledge that politics involves trade-offs. And, in this case, the dangers of factional entrenchment through majoritarian constitutional change are, in general, more problematic than the risks associated with an enduring status quo.

Decision rules. Some theorists have argued that majoritarian decision rules will improve constitutional politics. For Amar, “a majority of voters” have an “unenumerated, constitutional right to alter our government and revise our constitution in a way not explicitly set out in Article V” (Amar, 1994, p. 459). If a majority of Americans demands it, he argues,

Congress must “call a convention to propose revisions . . . [and] an amendment or new Constitution could be lawfully ratified by a simple majority of the American people” (Amar, 1994, p. 459). Sanford Levinson also argues that formal adherence to the super-majoritarian rules of Article V is “paralyzing democracy” (Levinson, 1996, p. 123). He labels Article V “one of the most basic imperfections in our scheme of governance” (Levinson, 2006, p. 165). He continues, arguing that Article V is an “iron cage with regard to changing some of the most important aspects of our political system” (Levinson, 1996, p. 121). He attacks the role of the states in the process:

Unless one is a “high federalist” in a distinctly modern sense—that is, someone who really does accept the metaphysical integrity of Idaho qua Idaho, and so on—it seems hard to argue that actual population ought not play some role in the ratification process. (Levinson, 1996, pp. 121)

Levinson argues that there is nothing un-American about a national majority changing the constitution because “fourteen American states in their own constitutions explicitly give the people an opportunity ‘to periodically vote on whether a convention should be called’” (Levinson, 2006, pp. 11–12). Finally, Stephen Griffin has argued that “[i]t is not clear that there is a real need . . . for the supermajority requirement for approval by state legislatures or conventions” (Griffin, 1995, pp. 172–173). He says that by forcing constitutional change off the books Article V has “limited the ability of the Constitution to structure political outcomes” and has hindered deliberative change (Griffin, 1995, p. 172).

In contrast to these views, our account of dualism suggests that majoritarian decision rules can lead to a dysfunctional form of constitutional politics and there is suggestive evidence to support this contention. In Hungary, as mentioned above, a newly elected faction in Parliament democratized the amendment rule by converting it from a three-quarters majority to a two-thirds majority. They then used their control of two-thirds of the legislature to amend the Constitution 12 times in order “to weaken institutions that might have checked what the government was going to do next” (Bánkuti et al., 2012, p. 139).

Furthermore, there are important positive reasons for super-majoritarian decision rules in constitutional politics. Specifically, such rules promote consensus by preventing majoritarian factions from capturing the process and shaping the constitutional order for their own interests. This consensus approach also improves the quality of deliberation in the high stakes of formal constitutional change, which in turn can mean an outcome that can garner a broader—and, ideally, consensual—level of support. This is a standpoint that finds support in the scholarship. Christopher Eisgruber (2001) argues that in a system where super-majorities are required for ratification, constitution designers are more likely to create institutions that are “impartial rather than majoritarian” and thus responsive to the interests of minorities as well as majorities. Similarly, John McGinnis and Michael Rappaport (2002) discuss how

super-majoritarian rules improve consensual decision-making by encouraging negotiation and compromise. Finally, enhanced deliberation can itself increase the chances of achieving formal constitutional change because it increases deliberation. In this way, difficult amendment rules contribute to a slower but ultimately more functional form of constitutional politics.

Relationship rules. Many argue that constitutional politics is more democratic if it involves majoritarian relationship rules. A common claim is that a democratic constitution-making process should allow runaway conventions with limitless power to reshape the legal system (even before proposing a new constitution). Many constituent power theorists—and Latin American constitutions—take this position, arguing that constituent assemblies should be all-powerful bodies that draft new constitutions that are legally superior to existing institutions. For instance, Article 349 of the Venezuelan Constitution states: “The existing constituted authorities shall not be permitted to obstruct the Constituent Assembly in any way.” Another proposal is that constitutions should be changed through a referendum.

Our account suggests that majoritarian relationship rules can lead to dysfunctional politics, and again there are examples to support this contention. In Venezuela, Hugo Chavez was able to exploit the idea that an elected National Constituent Assembly controlled by his supporters was legally superior to other institutions. As we noted earlier, this Assembly then went on to curtail severely the powers of the existing constituted institutions where many of Chavez’s opponents were located. It first sought to attack the judiciary, establishing “a committee of nine members selected by the Assembly and granting that body sweeping power to suspend or remove members of any court within the system, to select new judges, and to reorganize the structure of the judiciary.” It then went on to decrease sharply the powers of the ordinary legislature, reducing it to “its Delegated Commission (which normally stayed in session during congressional recesses) and several other Committees” and subjected many of its activities to the approval of the Assembly ((Landau, 2013, p. 947).

A better solution to this problem can be found within the “American tradition” of constituent power (Partlett, 2017). In this tradition, elected constitution-making bodies have no inherent power or privileged position vis-à-vis other constituted institutions other than those powers required to propose a constitutional text. They must therefore interact with other institutions in the formulation of new constitutional norms. Article V in the US Constitution reflects this tradition, describing a “convention to propose amendments” and requiring that a strong super-majority of state legislatures agree to call such a body. With numerous institutions involved in constitutional politics, the process of constitutional change can help to block factional aggregation and improve deliberation.

Selection rules. Our theory also has implications for selection rules (i.e., electoral rules) in constitutional politics. Often ignored by theorists, our theory suggests that elections for

specialized constitution-making institutions should be less majoritarian and more proportional. Accordingly, these selection rules should seek to disaggregate majorities in order to frustrate the creation of factions and ensure the most representative group possible.

Recent trends in constitution-making provide examples that support this claim. In Tunisia, use of the Hare quota formula helped to generate a more representative and less aggregated constitution-making body, and thus contributed to what is widely regarded as a successful process of constitutional change (Carey, 2013). In other places, constitution-makers have included selection rules that are likely to produce a more representative assembly. For instance, the Missouri Constitution includes a provision that seeks to ensure that more than one political party will be represented in the convention from each district (Missouri Constitution of 1945, art. XII, § 3(a)). And in other US states such as Rhode Island, elections to specialized constitutional conventions are non-partisan (Morse, 2014). Finally, in Iceland, designers of the constitution-making process decided to form a constitution-making body randomly by lot (Meuwese, 2013).

4.2 Implications for ordinary politics

Our theory also opposes attempts to encourage deliberation and wide agreement by introducing super-majoritarian, consensual rules in ordinary politics. Ordinary politics, we have argued, is more likely to be functional when it is grounded in majoritarian principles. Although we qualify this statement below—particularly with regard to relationship rules—we acknowledge that our approach may produce less considered political outputs. But we think this is worth risking in light of the considerable costs of delay that an overly super-majoritarian system of ordinary politics would entail.

A key area where our theory sheds some light is to understand debates about deliberation in ordinary politics. Although deliberative theorists disagree on several matters, at the core of their theories is the idea that public decision-making should be grounded in strong reasoning and persuasive argument. In a deliberative form of politics citizens and their representatives are expected to justify and convince others about the laws they would prefer, giving reasons to explain their position and responding to the arguments of others in return. Our work supports this deliberative turn in the literature (Goodin, 2008), particularly when deliberation is viewed as a mechanism to provide “second-order agreement” on constitutional rules (Johnson, 2006, p. 50) and when theorists affirm the need, ultimately, for majoritarian decision rules. For instance, Habermas’s conception of deliberative politics makes it clear that “[p]olitical deliberations . . . must be concluded by majority decision in view of the pressures to decide” (Habermas, 1996, p. 306). Gerald Postema makes a similar claim (Postema, 1995, p. 356). However, we argue against those who believe that super-majoritarian rules should be introduced into ordinary politics to make decision-making more deliberative.

Decision rules. Super-majoritarian decision rules are a requirement under a strong variant of deliberative theorizing. Gerald Gaus, for instance, writes that “there is a strong case that the optimal deliberative democratic voting rules require extraordinary majorities” (Gaus, 2008, p. 27). In fact, without super-majority rules it is hard to see what would stop a majority from avoiding serious reason-giving and forcing a decision on the issue in question. Following our account of dualism, however, such strong claims in favor of deliberation are problematic when they introduce super-majoritarian decision rules into ordinary politics.

A good example of the dysfunctionality that may result from the use of consensus decision rules in ordinary politics is the filibuster in the US Senate. This rule requires 60 votes in the Senate to stop discussion and hold a final vote on a piece of Senate business. In so doing, it essentially requires a super-majority for Senate action. Some have defended the filibuster on the basis of its deliberative characteristics (Arenberg & Dove, 2012; Steiner, 2004). It might have had deliberative consequences in its weak form, while it was a “tool of last resort,” and majoritarian practices dominated (Oleszek, 2014, p. 304). But in recent years the filibuster has been used more widely and become central to political calculations. The result has been the emergence of political dysfunction, consistent with our account of dualism. The use of the filibuster as an obstruction technique during the Obama administration, especially for presidential nominations, led some to declare this period an Age of Dysfunction (Zasloff, 2012). And in response to this growing dysfunction, the Senate has now—very sensibly, in our view,—voted to eliminate the filibuster for all nominations (judicial and otherwise) except for the Supreme Court. As we see it, there are convincing reasons to have a filibuster for nominations to the Supreme Court because of the Court’s role in determining constitutional meaning.

Thus, although we are critical of the use of super-majoritarian rules for ordinary politics, we support the strong claims about deliberative politics—and use of super-majoritarian rules—for constitutional politics (Closa, 2005). In fact, we think it is no coincidence that much of the work on deliberative politics focuses on constitutional politics. And a key objection to theories of deliberative politics; namely, that ordinary citizens lack the interest or cognitive capacity to engage in deliberative lawmaking, can be more easily countered in the context of constitutional politics than in ordinary politics. The evidence suggests, in fact, that people are more likely to be able to understand and be willing to engage with the issues of constitutional lawmaking than those of ordinary politics. This is not to say that constitutional law is always easily understood—it is not—but the relevant values considerations can often be grasped more easily than the policy details of ordinary lawmaking.

Relationship rules. Our theory has similar implications for the relationship rules in ordinary politics. It suggests that there should not be *excessive* institutional interaction in ordinary lawmaking. By excessive, we acknowledge that a key constitutional principle in many forms of democratic politics is that lawmaking requires the assent of many institutions.

For instance, in many presidential systems laws require the approval of two legislative bodies and the president. In this way, differently constituted majorities play an important role in ordinary politics.

We argue, however, that ordinary politics should not move too far toward a consensus approach as this can critically undermine the responsiveness and efficiency of decision-making. Thus, we advise against, for instance, arrangements such as Thailand's "post-political" constitutional system, which makes wide use of highly consensual relationship rules, specifically through so-called guardian institutions (Ginsburg, 2009, p. 84). This includes, in the current constitution, an unelected senate as well as a constitutional court that has a number of ancillary powers. These guardian institutions can ultimately entrench the power of entrenched elites by checking the power of concerted majorities to make political changes. For instance, the Thai Constitutional Court has banned populist parties and checked the power of electoral majorities (Ginsburg, 2009, pp. 89–99).

Selection rules. Our theory suggests that selection rules in ordinary politics should tend to be aggregative, to ensure that the government is able to govern effectively and efficiently. Selection rules that overly disaggregate popular preferences can undermine the ability of parties to channel political preferences. In turn, they are likely to hinder the ability of the government to respond effectively to citizens' preferences.

Recent examples suggest the dysfunctionality of overly disaggregative rules. In Australia, for instance, selection rules for the Australian Senate (the upper house of the Parliament) were highly disaggregative and fostered elaborate preference deals that allowed some candidates to win seats despite securing a very small percentages of the vote. These were recently changed because of concerns about dysfunctionality to reduce the fragmentation of the Senate party system. Similarly, Italy has recently changed its electoral rules to ensure that they are more aggregative. Italy's 1946 Constitution was grounded in the idea that political power should be dispersed in order to forestall dictatorship. By the 1980s, however, this system was widely considered to be leading to political dysfunction, in particular corruption. This has led to several reforms of the electoral system (Baldini & Renwick, 2015).

5. RESPONSES TO POTENTIAL OBJECTIONS

In this section, we respond to two potential objections to our model. The first is the objection that political parties no longer serve the role that we suggest. The second is the potential criticism that our approach overly prioritizes the status quo in constitutional politics.

The crisis of parties. Our analysis of ordinary politics builds from an ideal-type depiction of political parties. In this sense, we follow a long tradition of theorizing in which parties are examined at their best (Invernizzi-Accetti & Wolkenstein, 2017). The limitations of such models have become apparent in recent decades as citizens increasingly reject parties, especially traditional, mainstream ones, resulting in party systems that are unable to carry out the functions that normative theories, including ours, cast upon them. The sources of this malaise are varied. The decision by the party elites across several established democracies to become more attached to the state, and less connected to the people, is certainly one cause (Katz & Mair, 1995). Furthermore, in some contexts, parties have effectively managed to employ administrative resources—such as the domination of the media—in order to entrench themselves and avoid meaningful party competition. The declining significance of ideology is another factor (Mair, 2002). Focusing more on how citizens are changing, or the demand (for parties) side, some authors link the demise of parties to a general depoliticization of mass publics (Mair, 2013). However this is a disputed claim, with others suggesting that citizens remain politically engaged while choosing to participate in politics “on their own terms” (Li & Marsh, 2008, p. 248). As part of these revised terms they now often prefer to be active on issues at a local or global level instead of participating through traditional, national-level parties.

Whatever the exact cause of the crisis of parties, it certainly has implications for our account of ordinary politics because it makes a functional form of such politics harder to achieve in practice (Bogaards, 2015; Pelizzo & Nwokora, 2018). In response, we would recommend measures to strengthen parties, to enable them to perform their representative and expressive functions better. This is a difficult problem to tackle. One important answer is to strengthen the institutions (e.g., a free and competitive media system) that facilitate criticism and discussion of politics. This will ensure parties cannot entrench their own power through the control of information.

Another attractive route is the introduction of mechanisms to improve democracy within parties. There have been moves in many countries to expand the number of participants involved in internal party decision-making; for instance, by using primary elections to select election candidates (Gauja, 2012; Hazan & Rahat, 2010). However, such reforms have not typically revived parties in the way their advocates had hoped (Katz, 2013). In a recent contribution to this debate, Invernizzi-Accetti and Wolkenstein propose that rather than merely expanding the number of participants involved in party decisions, the decision-making processes should be made more deliberative, meaning a greater effort to “institutionalize fora of discussion and debate amongst [party] members” (Invernizzi-Accetti & Wolkenstein, 2017, p. 98). The reforms introduced so far have not sought to improve the quality of deliberation, so a focus on this goal may help to revitalize parties and thus enable them carry out the functions, in ordinary politics, they are uniquely placed to perform.

Status quo problem. A second objection is that our account overly privileges the status quo in constitutional politics. This is a problem because constitutional politics is often an important avenue of political system change. In an ideal scenario constitutional politics can be used to deepen democracy by expanding opportunities for citizen input, oversight, and participation in policy-making, and by enhancing the accountability of elected representatives to the people.

Thus privileging the status quo may undermine the potential of constitutional politics to foster democracy. There is no escaping this limitation. But it needs to be seen in a broader context, we contend. First, while there is little question that a protracted constitutional change process will typically favor status quo interests, it may also have some normatively attractive elements. Most significantly, a drawn-out process of constitutional change creates opportunities for deliberation and upon completion will have forged “a large majority—a consensus—for” the new constitutional rule. The value of strong initial backing for a constitution has been shown in recent research to strengthen a constitution and improve its capacity to withstand moments of crisis (McGinnis & Rappaport, 2002, p. 741).

Furthermore, in some contexts, devising an appropriate set of constitutional rules to tackle the factional problem may help to overcome the status quo problem as well, by increasing the number of episodes of constitutional politics and the number of times the constitution is actually changed. We believe this may sometimes be the case because of the widespread recognition that an unstructured episode of constitutional politics is incredibly risky and potentially dangerous to existing institutions. As a consequence, there is an understandable fear that undertaking any constitutional politics may lead to worse outcomes. In the USA, for example, uncertainty about the powers of a constitutional convention convened under Article V—and more particularly fear of factional capture—has meant that this mechanism has never been used (Caplan, 1988). With a safer process of constitutional change, however, there is more scope to control what happens when constitutional politics is engaged, which in turn may increase the likelihood that such politics will be used when it provides a way to tackle enduring governance problems.

6. CONCLUSION

This article has defended the dualism distinction—that is, the separation of constitutional and ordinary politics—and explained how it should influence the choice of rules for politics in these settings. In so doing, we have argued that constitutional politics is not a better or higher form of ordinary politics but rather that the two forms of politics ought to operate within different configurations of rules in order to function successfully. The crux of that difference is their ability to manage a serious, but sometimes misunderstood threat to democratic

politics; namely, the problem of faction. Because ordinary politics has mitigated this problem through political party competition many theorists have forgotten its relevance.

But the factional capture of constitutional politics is a key threat to democratic politics: it can undermine formal institutions and reduce the competitiveness of the party system, thereby undermining the critical mechanism for managing factionalism in ordinary politics (Landau, 2013). On the basis of such insights, our normative model helps to address questions about how best to structure politics in democratic regimes. For instance, it suggests that constitutional lawmaking should be relatively difficult because it ought to occur within a super-majoritarian arena, while ordinary lawmaking should be relatively easy because the relevant hurdles should be surmountable with a simple majority. It is our hope that this model will shed light on additional questions of democratic functioning. These questions—and the answers that this model can help provide—are particularly relevant as formal constitution-making becomes increasingly common in the world.

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TABLE I Attributes of constitutional and ordinary politics

Arena	Legitimizing principle	Functional goals	Effect of decisions	Accountability mechanisms	Decisive actors
Ordinary politics	"We the majority"	Efficiency, responsiveness	Short-run (normally less than 5 years)	Elections, election campaigns, manifestos	Political parties
Constitutional politics	"We the people"	Inclusiveness, impartiality	Long-run (often many decades)	Elections, appointments, deliberation	Unifying figures

TABLE 2 Rules for constitutional and ordinary politics

Arena	Selection rules	Decision rules	Relationship rules
Ordinary politics	More aggregative/consolidating; e.g., Turkey's 10% electoral threshold, Italian electoral law of 2015	More majoritarian; e.g., most legislatures (though US Senate filibuster is an important exception)	More unitary; e.g., parliamentary sovereignty (bicameralism an important exception)
Constitutional politics	More disaggregative; e.g., Tunisia Hare quota (proportional) electoral system, non-partisan elections (e.g., Palau), non-partisan elections (or selections) of minority representatives	More super-majoritarian, e.g., South Africa (s. 73) of Interim Constitution, Poland (super-majoritarian replacement rule), Australia/USA (constitutional ratification)	More pluralistic, e.g., USA (Article V process, requiring proposal by Congress and ratification by the states), Australia (dual majority requirement for referendum)

NOTES

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