CONSTITUTIONALISM'S WRONG TURN: LEGAL RATHER THAN POLITICAL SUPREMACY

THE AGE OF FOOLISHNESS: A DOUBTER'S GUIDE TO CONSTITUTIONALISM IN A MODERN DEMOCRACY

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Brian Christopher Jones*

INTRODUCTION

Imagine a world where whatever you say goes. Where you could invent your own powers,[1] and where you were not limited by anything, even the fundamental law governing the society in which you live.[2] Indeed, if you so wanted, you could declare the fundamental law invalid.[3] But not only that. You could also negate changes to the fundamental law you disagreed with,[4] halt and decide elections,[5] dissolve political parties,[6] and stop other people from doing things that they had been democratically elected to do. And when you did these things, criticism of you or your office was frowned upon, and skeptics of your work would be said to be compromising fundamental

* Senior Lecturer in Law, School of Law & Social Justice, University of Liverpool.

[1] The most prominent example of this is probably Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where the US Supreme Court invented its own powers of judicial review for Acts of Congress. However, many other examples have arisen throughout the years. See, e.g., Richard Albert, *The Most Powerful Court in the World: Judicial Review of Constitutional Amendment in Canada*, 109 Supreme Court Law Review (forthcoming 2022), p 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203008. Albert notes that the Canadian Supreme Court's doctrine of constitutional "architecture" is "the Court's own innovation. Its content and boundaries are to be determined by the Court alone"; SILVIA SUTEU, ETERNITY CLAUSES IN DEMOCRATIC CONSTITUTIONALISM (2021) chp 4.

[2] *See, e.g.*, MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2022) at 178 ("there are no limits to the judiciary's competence to identify basic values and determine the rights that derive from them"). Taiwan Constitutional Court, J.Y. Interpretation No 405 (7 June 1996), para 1. The Court noted that its interpretations are binding "regardless of whether the Interpretations concern the meaning of the Constitution, are solutions of disputes concerning the applicability of the Constitution or adjudication on the unconstitutionality of statutes"; As Aharon Barak once said, "nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable" (Nicholas Aroney & Benjamin B Saunders, *On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Power in Australia*, 36(2) University of Queensland Law Journal 221).

[3] *See, e.g.*, Certification of the Constitution of the Republic of South Africa, 1996, Case CCT 23/96 (6 September 1996).

[4] *See, e.g.*, Albert, *supra* note 1, at 3-4; YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2019); RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS (2019).

[5] *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000).

[6] A number of constitutional courts throughout the world possess powers to dissolve political parties. This power probably stems from the German Basic Law, which first provided its constitutional court this awesome power. See, German Basic Law, Art 21(2). One of the most questionable examples of a court upholding the dissolution of a political party was found in: Refah Partisi (the Welfare Party) and Others v Turkey No 41340/98, ECtHR (GC) 2003.

constitutional principles.[7] To top things off, imagine you were doing all of this without having to answer for any of it: not having to go before any official body and explain yourself; not having to worry about losing your position; not having to submit yourself to the judgment of the people; not having to speak with the media; and not even having to give very good reasons for your decisions.[8] To many that would sound like something terribly sinister: despotic or autocratic behavior run rampant, or perhaps something even worse. But it's not. This is how many contemporary constitutional democracies operate. More specifically, it is how apex courts operate within numerous constitutional setups throughout the world.

Two books were published in 2022 that openly criticized the current state of constitutionalism around the world, and especially in relation to some of the world's oldest common law democracies. Allan's *The Age of Foolishness* was one of them. The other was Martin Loughin's *Against Constitutionalism*.[9] Loughlin's book is certainly an accomplishment in terms of its historical depth and its tracing of constitutionalism's origins and development. It will undoubtedly be read more widely than Allan's book. But *The Age of Foolishness* has its virtues. It is less concerned about origins and development, and more concerned about the practicalities of the here and now, and what these practicalities mean for the operation of democracy. Both books could be read together, and both provide unique insights into the state of contemporary constitutionalism. But one is much more fun to read than the other, and it's that book that is under review here.

I'll start with a pedantic critique of Allan's book: he does not define his terms. Although he acknowledges that the title of the book is a nod to Charles Dickens' *A Tale of Two Cities*, that is where Allan leaves it in terms of discussing the notion of "foolishness." At no point does he define "foolishness," attempt to elaborate on how he understands the concept, or label particular developments or constitutional branches as "foolish" in terms of their actions.[10] Perhaps Allan's constitutional "doubts" equate to what he considers "foolish," but if placed on a continuum "foolishness" would go well beyond "doubt." But Allan's lack of precision has also provided an opportunity in this review to elaborate on just what I think he may be referring to regarding the "age of foolishness." The opening paragraph of this review has potentially provided some answers. If the definition of foolishness is "being unwise, stupid, or not showing good judgment," as the

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[7] *See, e.g.*, T.R.S. Allan, *Human Rights and Judicial Review: A Critique of "Due Deference,"* 65(3) Cambridge Law Journal 671 (2006)("Invoking general notions of governmental expertise or superior democratic credentials, such a doctrine effectively places administrative discretion beyond the purview of the rule of law."); Haroon Siddique, 'Plans to restrict judicial review weaken the rule of law, MPs warn' THE GUARDIAN (June 2, 2021), https://www.theguardian.com/law/2021/jun/02/plans-to-restrict-judicial-review-weaken-the-rule-of-law-mps-warn.

[8] *See, e.g.*, Keith Ewing, *The Unbalanced Constitution*, in TOM CAMPBELL, KEITH EWING & ADAM TOMKINS, SCEPTICAL ESSAYS ON HUMAN RIGHTS (2001)("Those who would presume to sit in judgment of democracy and indeed determine its content and values must themselves be exposed to some form of democratic scrutiny" (at 117); Brian Christopher Jones, *The Widely Ignored and Underdeveloped Problem with Judicial Power*, UKCLA BLOG (25 February 2020), https://ukconstitutionallaw.org/2020/02/25/brian-christopher-jones-the-widely-ignored-and-underdeveloped-problem-with-judicial-power/.

[9] MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2022).

[10] However, Allan does see the virtue in discussing definitions. After all, he does this with "constitutionalism" (pp 88-95).

Cambridge English dictionary defines it,[11] then there are many examples to draw from throughout Allan's book regarding how contemporary constitutionalism operates. Below I articulate some of the missteps that constitutionalism has taken throughout the years, and which Allan has rightly called into question.

Constitutionalism has taken a wrong turn: from political to legal supremacy. In doing this, it has allowed an unaccountable and irremovable power to once again become the masters of our constitutional states. It has shed the divine right of kings, only to replace it with a group of unelected and untouchable sovereigns. It has allowed the "referees" or "umpires" to become the stars of the show. Using Allan's *The Age of Foolishness*, this review article details how the transition to legal sovereignty has impacted constitutional democracy.

I. CHALLENGING THE TYPICAL DEMOCRATIC BACKSLIDING NARRATIVE

Democratic backsliding has undoubtedly occurred in many democracies, but a large amount of backsliding appears to be ignored or completely neglected, and a good deal of backsliding has even been characterized as positive for democracy. The focus for the vast majority of literature has only been on certain types of backsliding, and the metrics by which countries are judged on this has not revealed the full extent of the phenomenon.[12] While much of Allan's work revolves around the interpretation of legal texts, his two recent books have gone well beyond this material, venturing into discussions on democracy and the implications and value of written constitutions more generally. *The Age of Foolishness* contests some of the ideas behind these metrics.[13] Allan's other recent book, *Democracy in Decline*, also focuses on common law jurisdictions but examines themes related to democratic erosion: judges, international law, supranational organizations, and undemocratic elites.[14] Taken together, these works significantly challenge the typical democratic backsliding narrative, demonstrating that backsliding often occurs in ways not currently being measured, and that some backsliding is even considered essential or positive democratic development.

A good deal of the democratic backsliding or democratic decay literature is focused around increasing executive power and the threats to—or the weakening of—the courts. But those focuses disregard a large chunk of the backsliding puzzle. In many jurisdictions politics has been substantially depoliticized over the past few decades,[15] courts (both domestic and international)

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[11] Cambridge English Dictionary, "foolishness," https://dictionary.cambridge.org/dictionary/english/foolishness

[12] Freedom House, Freedom in the World Research Methodology, https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology; Economist Intelligence Unit, 'Democracy Index 2021: The China Challenge (2022)', at 65-80.

[13] Allen openly questions the metrics by which many democracies are measured nowadays, saying that "whether jurisdiction X gets awarded the label of 'a Rule of Law regime' will in part depend upon whether you - the one doing the assessing - think its laws to be morally good ones" (p 33).

[14] JAMES ALLAN, DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION (2014).

[15] *See, e.g.*, COLIN HAY, WHY WE HATE POLITICS (2007); PAUL FAWCETT, MATTHEW FLINDERS, COLIN HAY, & MATTHEW WOOD (EDS), ANTI-POLITICS, DEPOLITICIZATION, AND GOVERNANCE (2017); PETER MAIR, RULING THE

have become emboldened,[16] and more generally politics has been repeatedly beaten into submission by law and legal processes.[17] In Mair's piercing words, politicians are now "ruling the void."[18] Although incursions of the courts into the political realm have been acknowledged by leading political theorists,[19] none of the leading metrics on the operation of democracy or the leading literature on democratic backsliding takes courts—and especially increasing court powers—into account when considering democratic backsliding.[20] To the contrary, the idea of significant court powers seems built into many of these metrics.[21] It's almost as if the more courts intervene in the political arena, the better.

And yet, there still seems to be a one-way narrative when it comes to democratic backsliding: that any attempt to reign in the courts or circumscribe their powers amounts to democratic backsliding. But the backsliding literature fails to acknowledge that court power has grown substantially in recent decades, and that these developments may not have been beneficial for democracy. After all, how is striking down procedurally legitimate constitutional amendments, granting yourself institutional powers that are not articulated in the Constitution or in statutory law, or questionably dissolving significant political parties not also evidence of democratic backsliding? Indeed, these inherently undemocratic events may very well enhance a country's scores on these metrics. And beyond these apex court-focused powers, other constitutional developments seem very much like democratic "backsliding," but yet they are rarely articulated as such. For example, how does the increase in unamendable constitutional provisions and further divestment of decision-making from the political realm to unelected actors (e.g., independent

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VOID: THE HOLLOWING OF WESTERN DEMOCRACY (2013); Depoliticization was also a key part of many theories of government, such as Public Choice Theory.

[16] *See, e.g.*, C. NEAL TATE & TORBJORN VALLINDER (EDS), THE GLOBAL EXPANSION OF JUDICIAL POWER (1995); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

[17] JUDITH SHKLAR, LEGALISM (1986), p 111 ("politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies. Justice is thus not only the policy of legalism, it is treated as a policy superior to and unlike any other."

[18] Mair, *supra* note 15.

[19] FRANCIS FUKUYAMA, LIBERALISM AND ITS DISCONTENTS (2022), at 119, 124 ("While judges theoretically interpret laws passed by democratically elected legislators, they have at times bypassed the latter and promoted policies that allegedly reflect their own preferences and not those of the voters")("By allowing themselves to be used as a means of leapfrogging the legislative process, courts and agencies have been made the targets of intense backlash and politicization").

[20] Nancy Bermeo, *On Democratic Backsliding*, 27(1) Journal of Democracy 5 (2016); David Waldner & Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 21 Annual Review of Political Science 93 (2018);

[21] In the Economist's Democracy Index, one of the key questions is: "The degree to which the judiciary is independent of government influence. Consider the views of international legal and judicial watchdogs. Have the courts ever issued an important judgment against the government, or a senior government official?". And yet, it is unclear to what degree the views from "international legal and judicial watchdogs" impact upon the report. However, it seems likely that any potential restriction of court powers would be in violation of judicial independence, and be unfavorably looked upon by international legal and judicial watchdogs.

Freedom House also has a bit more in relation to the rule of law. Section F of their methodology is focused on this factor, and includes elements such as: judicial independence, compliance and enforcement of judicial decisions, due process, and equal treatment of citizens.

bodies, commissions, banks, or other apolitical agencies) not make it into the democratic backsliding narrative? Thus, there's little doubt that those assessing the quality of democracy and the scale of backsliding have criteria that they tend to focus on, but that expansion of judicial authority or a decrease in political decision-making does not appear to be one of those. And then when states attempt to do something about court power, such as circumscribe judicial authority or amend appointment procedures, they are chastised for judicial meddling and for threatening the rule of law.

The idea that democratic backsliding takes place when state power is increasingly vested in one elected individual as opposed to a large collection of elected individuals is sound and logical. But the idea that democracy is somehow strengthened when vast amounts of power are transferred from a large group of elected and removable individuals that operate on majority rule and given to a small contingent of unelected and virtually irremovable individuals that also operate on majority rule is questionable and problematic. It may be downright foolish.

II. EXPOSING THE DEPRESSING AND BIZARRE PSYCHOLOGY OF CONSTITUTIONALISM

The psychology of constitutionalism, far from being the aspirationally positive love-fest that it's often made out to be,[22] is actually quite bizarre and depressing. Indeed, the theory hinges upon the belief that ordinary citizens are ignorant or badly misinformed, irrational, prone to value emotion over reason, and therefore ultimately dangerous.[23] As Allan recognizes, a common tactic for many is to "just characterize a big proportion of the voters as 'deplorable' or in some other way unworthy of consideration" (p 61). Thus, whatever positive, happy thoughts are being bandied about regarding constitutions or constitutional rights,[24] this is the subtext: ordinary citizens are an obstacle—and perhaps even a significant threat—to realizing these. The depressing bit is that accusations of ignorance and irrationality are the same tired tropes of ordinary people that have been proffered every time states thought about expanding the franchise beyond the wealthy, letting women vote and become members of the legislature, and expanding civil rights to all citizens.[25]

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[22] Historically, written constitutions were a symbol of "progress," and today, they are seen as "the only medium through which to realize the promise of an inclusive regime of equal rights" (LOUGHLIN, *supra* note 9 at 176-77); See also Constitution Net, 'Constitutions FAQ', https://constitutionnet.org/constitutions-faq. This website connects constitutions to societal development, and to combating problems such as corruption and poverty.

[23] *See, e.g.*, STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY (1995); ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2nd edn) (2016); JASON BRENNAN, AGAINST DEMOCRACY (2017).

[24] As Allan rightly points out, the approach to constitutions and bills of rights is often: "these things are a force for good in the world, so don't ask too many questions about them" (p 20).

[25] Frederick Banbury, MP famously said that "Women are likely to be affected by gusts and waves of sentiment…Their emotional temperament makes them so liable to it. But those are not the people best fitted in this practical world either to sit in this House." And John Henderson, MP said, "If we were to have women in this House they would be legislating for these commercial industries of the management of which they know nothing" (Women's suffrage: 10 reasons why men opposed votes for women, BBC NEWS (29 April 2018), https://www.bbc.co.uk/news/uk-43740033). Walter Bagehot famously opposed expanding the franchise in England in the 19th century, noting, "But in all cases it must be remembered that a political combination of the lower classes,

This dim view of humanity connects to views about democracy and the status of the political realm in relation to the legal realm. For a theory that apparently sees a lot of good in abstract principles and rights, it sees very little good in human nature, or the people that are instrumental in bringing about the realization of these rights.

Allan has no qualms calling out the depressing and bizarre psychology of contemporary constitutionalism. Indeed, he basks in admonishing the legal profession for its "great love for unelected judges" but its corresponding lack of faith in and "too little love" for democracy (p 1).

An utterly depressing view of humanity

The root of constitutionalism contains a comical but heartbreaking paradox: it is said to ground itself in the authority of the people, and yet the theory takes an especially dim view of ordinary citizens. But if one takes the origins of constitutionalism into consideration, this view is unsurprising. During the second half of the eighteenth century there was widespread concern that "feelings were getting out of hand."[26] Fears over emotions came not just from political theory, but from numerous other places at the time (poetry, literature, and wider culture).[27] These concerns are undoubtedly reflected in the origins and development of constitutionalism. The American founders were so afraid of ordinary citizens directly choosing the president that they took this prospect out of their hands by forming an electoral college,[28] and added a number of other checks on the potential of the people to influence constitutional decision making.[29] The bizarre thing is why this concern for feelings being "out of hand" has stuck, even after all of humanity's technological, philosophical, medical, and scientific advancements over the past two plus centuries. Are eighteenth century concerns for the passions even relevant in the twenty-first century? Apparently so.

A host of contemporary intellectuals have embraced a distrust of ordinary citizens that have sustained these structures or would ultimately take them even further. Using Allan's "deplorable" strategy noted above, there's little doubt this tact has been thoroughly embraced by many. In a leading work on the theory of constitutionalism, Stephen Holmes boldly claims that "Present-day citizens are myopic; they have little self-control, are sadly undisciplined, and are always prone to sacrifice enduring principles to short-term pleasures and benefits."[30] Holmes goes on to equate constitutions with sobriety and electorates to drunkenness, stating that "[i]f voters were allowed to

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as such and for their own objects, is an evil of the first magnitude; that a permanent combination of them would make them (now that so many of them have the suffrage) supreme in the country; and that their supremacy, in the state they now are, means the supremacy of ignorance over instruction and of numbers over knowledge" (WALTER BAGEHOT, THE ENGLISH CONSTITUTION, at 14).

[26] ADELA PINCH, STRANGE FITS OF PASSION: EPISTEMOLOGIES OF EMOTION, HUME TO AUSTEN (1996), at 1.

[27] *Ibid*.

[28] Federalist No. 68 ("It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder…The choice of *several* to form an intermediate body of electors will be much less apt to convulse the community with any extraordinary or violent movements…this detached and divided situation will expose them much less to heats and ferments.")

[29] The presidential veto and the extremely high amendment thresholds being two of these.

[30] HOLMES, *supra* note 23 at 135. He also writes that constitutionalism was designed to "free people from the effects of debilitating passion" (at 273).

get what they wanted, they would inevitably shipwreck themselves."[31] Others, such as Ilya Somin, chronicle people's "ignorance" in relation to legal and political issues to argue for smaller government and more judicial intervention.[32] And some have even taken it into overdrive. Jason Brennan labels the American electorate "ignorant, irrational, misinformed nationalists," and classifies citizens into "hobbits," "hooligans," and "vulcans" (only the vulcans know best).[33] Brennan's solution is an epistocracy, where only the informed elite make important decisions. Sounds familiar. After the shocks of Brexit and Trump in 2016, openly questioning the value of democracy was commonplace. Authors provided cases against democracy,[34] and forcefully questioned the idea of letting people vote,[35] material that builds on other literature openly critical of democracy.[36] The list could go on, but the point is this: the origins of constitutionalism embraced these depressing views of human nature, and they still substantially impact today's constitutional conversations.

Ultimately, when taking into consideration constitutionalism's current difficulties it's difficult to argue with the conclusions of Frank: that much of the contemporary hostility to a rise of populism is "all about despair. Its attitude toward ordinary humans is bitter. Its hope for human redemption is nil. Its vision of the common good is bleak."[37] Indeed, I can't imagine looking around me and constantly thinking about how dumb, ignorant, lazy, and self-serving my fellow citizens and elected officials are. What a depressing and unbelievably callous line of thought. And yet, it is this view of humanity that contemporary constitutionalism has embraced.

The correspondingly dim view of politics

The political realm's proximity to the people ensures its subdued place within constitutionalism's hierarchy. Because the political realm is the most connected to ordinary people and most controlled by the people's wishes, it is also not to be trusted, and contains the same myopic views and dangers as the electorate. So barriers to its powers must be inserted, reviews of its outputs must take place, and generally it should understand that it is subordinate to other realms.[38] But during the mid-twentieth century a new—more antagonistic—relationship between law and politics was formed: one not of equality between law and politics, but rather law asserting itself as superior to politics.[39] This subordination of the political realm has largely been the product of a legalism that subscribes

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[31] HOLMES, *supra* note 23, at 135.
[32] SOMIN, *supra* note 23.
[33] BRENNAN, *supra* note 23.
[34] Caleb Crain, 'The Case Against Democracy,' The New Yorker (Oct. 31, 2016), https://www.newyorker.com/magazine/2016/11/07/the-case-against-democracy.
[35] David Van Reybrouck, 'Why Elections are Bad for Democracy,' THE GUARDIAN (June 29, 2016), https://www.theguardian.com/politics/2016/jun/29/why-elections-are-bad-for-democracy.
[36] *See, e.g.*, Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 Foreign Affairs 22 (1997).
[37] THOMAS FRANK, PEOPLE WITHOUT POWER: THE WAR ON POPULISM AND THE FIGHT FOR DEMOCRACY (2020), at 242.
[38] After all, the US Congress has not one but two points where its outputs could be reversed: first from the President by veto, and then by the judiciary striking down a law.
[39] Brian Christopher Jones, *The Legal Contribution to Democratic Disaffection*, 75(4) Arkansas Law Review 813, 829-34 (2023).

to the belief that: "Law is not only separate from political life but…is a mode of social action superior to mere politics."[40] Indeed, as Robin West notes, "The problem, as increasingly assumed as gospel by the constitutional dogma…is that politics itself is a debased, ignoble endeavor that elicits our worst instincts."[41] Apparently the legal realm is impervious to these qualities, just as it is impervious to other types of criticism.

In its subdued form, the political realm takes on the role of being constitutionalism's punching bag. It doesn't just take copious amounts of criticism from the public, the media, civil society, and a host of other bodies, as it should; under constitutionalism, it also must take abuse from the judiciary. And contemporary judges seem to be more critical than ever of the political realm, going well beyond what's needed in their judgments and venturing into territory of unduly harsh criticism and intentional embarrassment.[42] From an American perspective Chafetz has expertly chronicled how the U.S. Supreme Court has used "strikingly dismissive language about the governing capacity of other institutions and that hold up judicial procedure as a paragon of reason and rectitude."[43] In using such language the justices are not merely upholding the rule of law or the constitutional text, but "putting forward an argument for the courts as the most trustworthy policymakers."[44] Bear in mind this language is not just coming from the U.S. Supreme Court. Within the past decade, UK courts have expressed concerns over totalitarianism,[45] have asserted that political actors were acting in a "clandestine" manner,[46] and have suggested that elected officials were incompetent regarding basic constitutional structures.[47] These assertions go well beyond what was necessary, portraying the judiciary as the only competent and trustworthy branch of government.

The distressing thing about this judicial mindset and the increasingly critical nature of their view of the political realm is that it seems to be built into the operation of constitutionalism. Given the wide implementation of written constitutions and bills of rights, the "protection" of these documents is provided to apex courts. Under these arrangements it's quite easy to make the political realm look negligent, incompetent, or worse, even though legislatures and courts may simply disagree over extremely contentious issues in relation to how best to protect rights, including what may or may not be reasonable in the circumstances. But as Allan notes, "It is

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[40] SHKLAR, *supra* note 17, at 8.

[41] R West, *Ennobling Politics*, in HJ POWELL & JB WHITE (EDS) LAW AND DEMOCRACY IN THE EMPIRE OF FORCE (2009), p 59. Indeed, this view of the political arena can be found in Holmes' work. He notes that liberal constitutions are "crafted to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, unaccountability, instability, and the ignorance and stupidity of politicians" (Holmes, supra n __, at 6).

[42] Jones, *supra* note 39, at 837-40; Brian Christopher Jones, *Judicial Review and Embarrassment*, Public Law 179 (2022).

[43] (forthcoming) Josh Chafetz, The New Judicial Power Grab, 67 St. Louis University Law Journal (2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4321887.

[44] *Ibid*, at 6.

[45] Christian Institute v Lord Advocate [2016] UKSC 51; 2017 S.C. (U.K.S.C.) 29 at [73].

[46] Cherry v Advocate General for Scotland [2019] CSIH 49; 2020 S.C. 37 at [58].

[47] R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2) [1991] 1 A.C. 603; R. (on the application of Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin); [2017] 1 All E.R. 158 at [85].

grossly misleading in terms of a characterization of what is in fact happening….to portray the legislature (and indeed to force them to portray themselves) as wanting to take people's rights away" (p 145). The disagreements are actually more about the scope, reach, and limits of these rights, elements that "reasonable, well-meaning, smart, and even nice people" can and often do differ on (p 78). But the structure and operation of contemporary constitutionalism makes the political realm look undignified, corrupt, morally bankrupt, and even sinister.

Taking comfort in written constitutionalism?

Part of the attraction of having a written constitution is the comfort that it may provide to citizens in various ways, perhaps through an enhanced sense of transparency, clarity, stability, or rights protection.[48] These are qualities that—at first glance—unwritten constitutions may struggle to achieve. But the vast experience of countries operating under written constitutionalism over the past two plus centuries has demonstrated that this method of governance also struggles mightily with achieving these goals, and that little comfort should be put in these documents. Allan is right to prefer a New Zealand style arrangement (p 42), where unwritten constitutionalism still allows for most major decisions to take place in the cut and thrust of democratic politics.

It is debatable whether written constitutions outperform unwritten constitutionalism on any of the variables noted above. Citizens that live in jurisdictions without a written constitution have just as good civic and political knowledge as citizens that live in jurisdictions without constitutions.[49] Constitutional texts may not be as clear or precise as they seem, and inevitably they are open to interpretation and the meaning of specific wording may change over time.[50] Including a significant amount of rights in a constitutional document does not make states more "egalitarian," and crude correlations show that those that do score less well on democracy and quality of life metrics than those that include less constitutional rights.[51] Additionally, although constitutional stability can be seen in some jurisdictions with long-standing constitutions, so too can it be seen in jurisdictions operating on unwritten constitutionalism.[52]

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[48] Perhaps some of this stems from the longevity of the US Constitution 1789.

[49] BRIAN CHRISTOPHER JONES, CONSTITUTIONAL IDOLATRY AND DEMOCRACY: CHALLENGING THE INFATUATION WITH WRITTENNESS (2020), 40-42.

[50] Indeed, Murphy notes that most constitutions quickly become "palimpsests," as "the original words are soon overwritten by customs, usages, and interpretations" (WALTER F MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER (2007), p 15).

[51] As Hirschl notes, "the increasingly popular constitutionalization of rights has not proven to be a significant step toward egalitarianism"; in fact, "the very notion of judicial empowerment as an efficient response to systemic deficiencies is based on a simplistic and static understanding of political sociology … not to mention a thin functionalist perception of constitutional and political change" (HIRSCHL, *supra* note 16, pp 213, 216); Richard Albert has posted some prominent tweets comparing these figures as well. See here: https://twitter.com/RichardAlbert/status/1289555908024885249?s=20 and here https://twitter.com/RichardAlbert/status/1594859305177845762?s=20.

[52] Edward Willis, *Unwritten constitutionalism: stability without entrenchment*, Public Law 386, 399 (2022). Wills notes, "This is what stability can look like in the absence of formal entrenchment: where reference to a categorical master-text cannot be relied on to secure entrenchment, stability emerges from an alignment in constitutional practice and discourse recognising the value of maintaining the integrity of basic principles and values."; *See also*

Studies of how and why unwritten constitutionalism produces equal or better outcomes to written constitutionalism are emerging,[53] but Allan's insight through sporting analogy may be a significant part of this picture. He asserts that, "when there are no referees players are often pretty conscientious about not fouling and about calling fouls on themselves (the odd person excepted); they can in some ways be more rule-abiding than when a referee is present." Indeed, the attitude when a referee is present becomes "I can do whatever the ref lets me get away with" (p 100). And the more powerful that apex courts around the world get, the more likely that this boundary pushing mindset of "let's do whatever we can get away with" becomes an inherent feature of written constitutionalism.[54]

The constitutional picture without apex court guardian referees controlling the direction of travel is not nearly as gloomy as some make it out to be. It is no accident that unwritten constitutionalism has produced concepts such as the "loyal opposition" and rely on conventions such as collective responsibility of government to Parliament. The former is essential to recognizing the legitimacy of rival political parties to take part in government, rather than attempting to ignore or exclude them, or label them traitors.[55] And one of the hallmarks of collective responsibility is that the government must explain themselves to parliament, and that if they're unable to maintain the confidence of the House, then the government falls and an election is held.[56] These features normalize the opposition and also ensure that failing governments are removed from office, making the use of guardian referees less relevant. Ultimately, I would much rather lawmakers be thinking "we should be cautious about what we enact, as the opposition could respond in kind when they're in office," as opposed to "we should enact whatever we want and see if the courts accept it."

III. THE RECKONING: CAN HYPER-JUDICIALIZED STATES EXPECT PUSHBACK?

Concern about judicial power and the effects that it can have on democracy is not a partisan issue. Both the left and right in many jurisdictions throughout the world have expressed strong concerns with judicial activism and the impact and influence that unelected individuals have upon the constitutional state. But these ideas rarely coalesce into a wider critique regarding the development of constitutionalism. The problem with the current state of constitutionalism stems from a lack of forthrightness: apex court judges have undoubtedly become the masters of the constitutional state, but constitutionalism still seems unwilling to admit this. Judicial supremacy is masked as "constitutional supremacy," constitutional amendments are masked as "interpretations," and the

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Graham Gee & Gregoire Webber, *What is a Political Constitution?*, 30(2) Oxford Journal of Legal Studies 273 (2010).

[53] Willis, *supra* note 52; Janet McLean, *The Unwritten Political Constitution and Its Enemies*, 14(1) International Journal of Constitutional Law 119 (2016); Jones, *supra* note 49.

[54] This mindset seems to have taken hold in the United States. See, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2nd ed)(2019).

[55] *See, e.g.*, Gregorie Webber, *Loyal Opposition and the Political Constitution*, 37(2) Oxford Journal of Legal Studies 357 (2016).

[56] ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005), at 1.

supposed "sovereignty of the people" is non-existent, limited to a severely restricted political arena that's highly constrained by what it can achieve. It's no wonder that Allan labels this "pseudo-constitutionalism" (p 105).

The idea that the current trajectory of constitutionalism can sustain itself—increasing the power of constitutional elites with less connection to the citizenry and decreasing the power of constitutional elites with more connection to the citizenry—is fanciful. Allan is correct in his analysis that "pseudo-constitutionalism can expect pushback. [It] can expect occasional cries of illegitimacy and [it] can expect people to vote for political parties and politicians that will try to do something about it" (p 105). No doubt this is true. It's just a shame that, only now, are legal scholars actually seeing the damage that this bull-headed version of constitutionalism is having on constitutional democracies around the globe. As Wen-Chen Chang wrote in 2019, "It is little wonder that elected politicians easily feel frustrated under judicial constitutionalism and may try all possible means to control the judiciary, an inclination blatantly violating judicial independence and separation of powers."[57] Loughlin furthers this, noting that populism is "the inevitable political response to the reflexive turn taken by contemporary constitutionalism."[58] It's what happens when the supposed core of every constitution, the people, realize that their power is actually shrinking and feel that they no longer possess any.[59]

If constitutionalism is set on a form of juristocracy, then mechanisms must be found to increase the role of citizen involvement. I now have to admit being a supporter of something that I previously thought reprehensible, and overtly contrary to the rule of law and judicial independence: judicial elections. Given all the recent discussion over court reform in the United States,[60] it's baffling that there's been no discussion of whether members of the Supreme Court should be elected, or at least face retention elections after a period on the court. And yes, I'm well aware of the potential threats to judicial independence and the rule of law. But if the Court is determined to have their say on virtually every major issue that arises in the political realm, then what other option is there besides elections? Should we keep referring to interventionist courts and judges as merely "umpires" and "referees?" Should we continue to uphold the fiction of a non-existent citizen sovereignty? Perhaps we should honestly and forthrightly admit that apex court judges do much more than interpreting, explaining, or finding the law, and that judicial elections may not have had the drastic negative effects many accentuate.[61] Apex court judges are guardians of a system which requires significant and substantial accountability mechanisms on elected

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[57] Wen Chen Chang, *Back into the Political? Rethinking judicial, legal, and transnational constitutionalism*, 17(2) International Journal of Constitutional Law 453, 455 (2019).

[58] LOUGHLIN, *supra* note 9 at 199. Loughlin continues this line of argument later, writing that, "The argument against constitutionalism rests on the claim that it institutes a system of rule that is unlikely to carry popular support, without which only increasing authoritarianism and countervailing reaction will result" (at 202).

[59] Ada W. Finifter, *Dimensions of Political Alienation*, 64 American Political Science Review 389 (1970); Jones, supra note 39 at 822.

[60] *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 Harvard Law Review Forum 398; Presidential Commission on the Supreme Court of the United States, Final Report (December 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

[61] CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009).

politicians, but virtually no accountability or control mechanisms on the people that make the ultimate decisions in relation to constitutionality, democracy, human rights, and a host of other important issues. If that's not foolish, then I don't know what is.

CONCLUSION

The Age of Foolishness teaches us that the paradox of contemporary constitutionalism would be a tragedy if it wasn't also so comical. After having attempted to shed the harsh realities of unaccountable, irremovable, and arbitrary rule of monarchs and despots, we seem to be heading back to where we began: with an unaccountable and irremovable institution arbitrarily guiding democracies in a top down, paternalistic fashion. And rather than acknowledging apex court judges as deeply human individuals that also carry with them the same biases, faults, and imperfections of those in the political realm,[62] contemporary constitutionalism labels them "referees," "umpires," and "guardians." In sports, when the referees or umpires become the stars of the show, then you know that something is wrong: a referee has been unduly harsh or unjust, calls are being made that probably shouldn't have been, or perhaps there's scandal afoot. And yet contemporary constitutionalism has no problems with the referees and umpires being the stars of the show; indeed it seems to embrace it.[63]

Constitutionalism's failures largely stem from not understanding, or not fully taking seriously, the intricacies of unwritten constitutionalism's focus on politics—not law—as the key to constitutional success. Far from the idea that it is the written constitution that makes politics possible, it is actually quite the reverse: it is politics that makes upholding the constitution possible.[64] And yet, anyone that advocates more politics and less law nowadays is swimming against an enormous and unrelenting tide. Constitutionalism's turn toward legal supremacy has sapped much of the meaning and significance the political realm relies on to properly function. Its focus on subjugating politics and constraining political actors has undoubtedly decreased the importance of the political realm and made citizens less likely to participate in democracy. The current trends are undoubtedly concerning. Allan captures the implications of this perfectly, writing: "if too many important decisions are made outside the realm of politics then democracy takes on a desiccated, enervated flavour. It becomes harder to see why people would bother to vote at all under too heavy an influence of these sort of court-centric preferred constitutional arrangements…It is a bleak prospect that chills me to the bone" (at 44).

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[62] DAVID PANNICK, I HAVE TO MOVE MY CAR: TALES OF UNPERSUASIVE ADVOCATES AND INJUDICIOUS JUDGES (2008) at 4 ("if there were otherwise any doubt. . . the law is applied by human beings some of whom suffer from all the prejudices, vanities and irrationalities common to our species.")

[63] From the American perspective, this seems to have definitely been the case with two late justices: Antonin Scalia and Ruth Bader Ginsburg. *See, e.g.*, Brian Christopher Jones & Austin Sarat, *Judges as Sacred Symbols: Antonin Scalia and the Cultural Life of the Law*, 6(1) British Journal of American Legal Studies 7 (2017). From the UK perspective, a similar picture emerges when looking at Jonathan Sumption and Brenda Hale.

[64] BERNARD CRICK, IN DEFENCE OF POLITICS (4th ed. 1992)("diverse groups hold together, firstly, because they have a common interest in sheer survival and, secondly, because they practice politics—not because they agree about 'fundamentals', or some such concept too vague, too personal, or too divine ever to do the job of politics for it").