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INFORMAL CONSTITUTIONALISM AND THE ROLE OF POLITICS

CONSTITUCIONALISMO INFORMAL E O PAPEL DA POLÍTICA

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Abstract: The author first considers the nature of constitutionalism and how best to understand that concept, arguing that it is about locking things in and opting (comparatively speaking) for certainty over flexibility. He then considers how close this notion is to paternalism and raises the possibility of an Australian-style no-bill of rights written constitution. He then turns to look at informal constitutionalism which is most obvious in a New Zealand-style unwritten constitution or parliamentary sovereignty set-up. The paper concludes by examining the role of politics in constitutionalism, of both the written and unwritten varieties.

Resumo: O autor começa por considerar a natureza do constitucionalismo e a melhor forma de entender esse conceito, argumentando que se trata de bloquear as coisas e optar (comparativamente falando) pela certeza em detrimento da flexibilidade. Em seguida, considera quão próxima esta noção se encontra do paternalismo e levanta a possibilidade de uma constituição sem uma carta de direitos escrita, ao estilo australiano. Depois, volta-se para o constitucionalismo informal que se mostra mais óbvio numa constituição não escrita ao estilo da Nova Zelândia ou do género de soberania parlamentar. O artigo termina com a análise do papel da política no constitucionalismo, quer nas variedades escritas como nas não escritas.

Summary: 1. Introduction; 2. Constitutionalism; 3. Formal and Informal Constitutionalism; 4. The Role of Politics in Constitutionalism

Sumário: 1. Introdução; 2. Constitucionalismo; 3. Constitucionalismo Formal e Informal; 4. O Papel da Política no Constitucionalismo

Keywords: constitutionalism; paternalism; Informal and Unwritten Constitutionalism; Bills of Rights; parliamentary sovereignty; conventions; rise of judicial power.

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Palavras-chave: constitucionalismo; paternalismo; constitucionalismo informal e não escrito; cartas de direitos; soberania parlamentar; convenções; ascensão do poder judicial

1. Introduction

My brief is to write on informal constitutionalism and the role of politics. You might wonder why this task would be given to a native born and educated Canadian who has been a law professor in Hong Kong before the 1997 handover (one task while there being to teach British constitutional law), then in New Zealand for eleven years (teaching constitutional law in the democratic world's last true unwritten constitution jurisdiction,² a post-Brexit United Kingdom possibly returning to that fold³), and for the last thirteen years has been one in Australia (teaching constitutional law in a country which straight out copied the US Constitution, or at least the Madisonian pre-bill of rights version). Then again, perhaps you won't wonder at the division of labour for this symposium if you are in the camp that thinks Kiwis and Brits have more experience than most with informal constitutionalism and that the Aussies have an unusual sort of formal constitutionalism. But I get ahead of myself.

The other course I normally teach is jurisprudence or legal philosophy, this still being a compulsory course in my law school in Australia, and before that at my former law school in New Zealand. So let me put on that latter hat for a moment and start by considering how we should understand this assigned topic of mine. No doubt we will need some idea of what is captured by the notion of 'constitutionalism' before we can move on to ponder what might fall within the aegis of 'informal constitutionalism'. Maybe there can even be different ways in which the tag 'informal constitutionalism' can apply to a country? Meanwhile, most of us probably suspect that all countries make use of informal constitutionalism to some extent. I start this paper with those sort of questions before shifting to look at the role of politics in constitutionalism, of both the informal and formal sorts.

2. For a description of New Zealand's constitution see JAMES ALLAN, *Against Written Constitutionalism*, *Otago Law Review*, 14, 2015, pp. 191 ff.

3. Or so is one implication or likely outcome of Brexit. See JAMES ALLAN, *Democracy, Liberalism and Brexit*, *Cardozo Law Review*, 39, 2018, p. 879. Note, too, that some people put Israel in the unwritten constitution camp, though the claim is harder to sustain there than it is with New Zealand.

2. Constitutionalism

Two decades ago our fellow symposium speaker here today, Larry Alexander, edited a perspicacious book length treatment of the topic of ‘constitutionalism’.⁴ For the purposes of this first part of my paper, I would like to highlight or poach some of the key insights from that book (at least by my way of thinking). Here is my precis.

Constitutionalism is about locking things in. It is about settlement. And the reason the people in a nation might opt to do that, to choose security over flexibility, is that they believe ‘that there is far more danger of loss of political wisdom and morality or of political akrasia than there is danger that wide agreement on better rules will be thwarted’.⁵ Outlining Richard Kay’s understanding of constitutionalism, with which he overwhelmingly agrees, Alexander says that:

For Kay, the purpose of a constitution is to lay down fixed rules that can affect human conduct and thereby keep government in good order. ... [Constitutionalism] brings about predictability and security ... by defining in advance the powers and limits of that government.

The price of [constitutionalism] ... is rigidity, or put differently, suboptimal response to change.⁶

Nor is it just Alexander and Kay who understand constitutionalism in these terms. So, too, does Michael Perry. As Alexander puts it, ‘[I]ike us, [Perry] answers the question of why norms should ever be entrenched against majority repeal by reference to distrust of our future politics’.⁷

Hence on these sort of views, and remembering that we are limited biological creatures (not Gods) who regularly have to make least-bad choices, opting for constitutionalism is opting for rigidity and comparative certainty over flexibility; for security over potential rights-infringing ‘short-term considerations of

4. LARRY ALEXANDER (ed.), *Constitutionalism: Philosophical Foundations*, Cambridge, 1998.

5. LARRY ALEXANDER (ed.), *Constitutionalism: Philosophical*, p. 2.

6. LARRY ALEXANDER (ed.), *Constitutionalism: Philosophical*, p. 4. Richard Kay makes these points himself in his own chapter in that book, *American Constitutionalism*, pp. 16-63. For instance, Kay says that ‘[t]o embrace constitutionalism is to concede the costs of sub-optimal public responses to change as an acceptable price to pay for the security obtained. Constitutionalism is risk-averse in the sense that it prefers the awkwardness of rigidly bound state action to the possibility that government will overshoot the mark in dealing with new circumstances’. (p. 24)

7. LARRY ALEXANDER (ed.), *Constitutionalism: Philosophical*, p. 6. Detailed by Perry in his chapter of the book (‘What Is “the Constitution”? (and Other Fundamental Questions)’) from p. 99.

collective welfare at the expense of the liberties of individuals and minorities’;⁸ for the specified, laid-down and known (though certainly also imperfect) over the uncertain and flexible (which will sometimes be better and sometimes worse); and for the locked-in and settled over the contingent and comparatively unconstrained.

Now going along with all that one needs also to suppose or believe that written rules can convey fixed meanings – that decisions made in the past by those considered to have the legitimate authority to do so have the capacity to lock us in today. Otherwise, while you might have thought you were buying certainty and security, there would in fact be nothing actually locking you in to the various choices and decisions made in the past. You would in fact have bought smoke and mirrors. In other words, to achieve those sort of locked-in outcomes may require the later-in-time interpreters to adopt a particular approach to constitutional interpretation. As it happens, I believe that it does require that.⁹ So too do Alexander and Kay and Fish¹⁰ and others. However, for the purposes of this paper I will simply point out that connection – between the claimed attractions of constitutionalism and the potential need to interpret a constitution in a particular manner – and move on. My focus today is on the formal and informal varieties of constitutionalism, ignoring or if you prefer pre-supposing the concomitant interpretive issues that surround it.

Hence, let me turn back to the trade-off lying at the heart of choosing constitutionalism, the one between certainty and flexibility, between the locked-in and the contingent. I want for a moment to consider the nature of that trade-off (that understanding of constitutionalism) through the prism, firstly, of paternalism and secondly, of democracy. Start with the former, because it is plain that there is a potential connection between constitutionalism and paternalism. Go back to the time of the framers and ratifiers, the time of the making of a constitution. If a core motivating reason for my wanting to lock things in *now* is a distrust of *future* politics then it follows that I think the deal on offer (at least when it is one ‘that most believe [is] good enough’¹¹), with all its constraints on future decision-making, is all-things-considered and on-average-over-time better than what future generations would produce if left more unconstrained. That might look like arrogance, but provided it is combined with a desire for the on-balance best outcomes for future generations in one’s country and a belief that that will eventuate then it is better seen as paternalism.¹² I, as part of the group drafting

8. RICHARD KAY, *American Constitutionalism*, p. 24.

9. See JAMES ALLAN, *Constitutional Interpretation v Statutory Interpretation: Understanding the Attractions of “Original Intent”*, *Legal Theory*, 6(1), 2000, pp. 109 ff.

10. See their respective chapters in GRANT HUSCROFT/ BRADLEY MILLER (eds.), *The Challenge of Originalism*, Cambridge, 2011.

11. LARRY ALEXANDER (ed.), *Constitutionalism: Philosophical*, p. 2.

12. I make the case in more detail in James Allan, *Rights, Paternalism, Constitutions and Judges*, GRANT HUSCROFT/ PAUL RISHWORTH (eds.), *Litigating Rights: Perspectives from Domestic and International Law*, Portland, 2002, pp. 29-46. Of course one might argue that the founders do not see themselves as better or more moral, just as having invested more time and thought in the matter. But that, if true, is still a form of paternalism. ‘Trust us because we’ve put a lot of time into this’ may be less distasteful than ‘Trust us because we’re better and more

and ratifying the US Constitution (or far less plausibly in my view, but allowing me to make a Portuguese reference, the Lisbon Treaty), am doing this for you – my grandchildren, and great-grandchildren and great-great-grandchildren – because I believe it will deliver better overall outcomes than what you could deliver for yourselves if left more unconstrained. Now that is paternalism, and at first glance it is hard to see how it can be completely severed from the Alexander/Kay/Perry concerns that motivate constitutionalism.

Before I say why I think that first glance conclusion can in some circumstances be wrong, let me just observe or note what happens as we move forward in time. It is this. The paternalism in the years 1787-1790 that motivated the drive for constitutionalism transmogrifies more than two centuries later into what some describe as ‘ancestor worship’.¹³ The effect of constitutionalism later in time, years after the founding, is that citizens are locked in to (in the sense that change and amendment is hard, harder than what is needed to pass a statute) what people in the past designed and laid down. They were the ones we today accept as having had the legitimate authority to make the constitution, these metaphorical ancestors of ours. And provided the point-of-application interpreters of that document find its meaning in what those back then with the legitimate authority to do so wrote into the document and intended it to mean, then one side of constitutionalism – viewed from the present day looking back to its drafting and ratification – can be described as ancestor worship.¹⁴ To sum that up in blunt terms, constitutionalism seems to carry with it traces of paternalism and ancestor worship.

In my view that is undoubtedly the case when we are focused on, say, the US Constitution or the Canadian Constitution. As I noted above, it is hard to see at first glance how traces of paternalism (and down the road of ancestor worship) can be completely severed from the Alexander/Kay/Perry understanding of constitutionalism. And yet that first glance conclusion is contingent, not necessary. That is what the Australian Constitution teaches us. And that is because Australia’s Constitution is more or less the pre-Bill of Rights Madisonian US Constitution. So the Australians, albeit within the inherited British Westminster parliamentary model, copied and mimicked a US-style elected Upper House Senate rather than the Canadian or UK options; they also copied the American

moral people than you are’, but both count as versions of ‘we know better than you do’. Nor, in my view, does it become anti-paternalistic if the motivating desire is trying to protect later generations against wicked elites, say. A future majority can do that just fine in a parliamentary sovereignty set-up.

13. For example, see MICHAEL KIRBY, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, *Melbourne University Law Review*, 24, 2000, p. 1.

14. Of course if ‘living tree’ interpretive approaches to interpretation are used by today’s interpreting judges then (to the extent these approaches are unmoored from original intentions, say some, or from original public meaning, say others) the tie to the past is severed and ancestor worship evaporates. In its place grows up ‘worship of today’s top judges’ because the rest of us are still locked in. True, we are no longer locked in to what those in the past intended the Constitution to mean using words to effect those intentions. Instead, we are now locked in to what some collection of unelected judges in the present deems best, proportional, suitable, what have you. I return to this point below in discussing the role of politics.

model of federalism rather than the Canadian one; they left the choosing of the top State court judges to the States, as in the US, not to the centre, as in Canada; the Australians even mimicked the US in opting to create a national capital city not part of any State (and whose residents did not have a vote for the Senate or House until the 1970s).¹⁵ However, after much debate and with a thorough understanding of the then US 1st Amendment jurisprudence, the Australian constitution-makers rejected a bill of rights of any sort. They chose to leave all such matters to the elected Parliament. Indeed, the Australian Constitution has references throughout to ‘until the Parliament otherwise provides’.¹⁶

In other words, if you shun any sort of bill of rights and any sort of strong judicial review on rights-related grounds, what you lock in can look a lot like parliamentary sovereignty filtered through bicameralism and federalism – and that is hardly an overtly paternalistic choice. Sure, you will still have strong judicial review and the striking down of statutes on federalism grounds. But as I have argued at length elsewhere,¹⁷ as far as leaving each generation to make choices for itself through the democratic process there is a big difference between rights-related review and federalism review. With heads of powers federalism related judicial review the unelected judges are choosing between which of two democratically elected legislatures can do precisely what some statute is attempting to do – the judges are *not* putting this precise attempt beyond the reach of all democratic politics, state or national (as happens with rights-related judicial review). Hence, what you end up with under the locked-in Australian Constitution is a checks and balances, diffusion of power set-up. It is assuredly not the full-blooded New Zealand-style unwritten, unicameral, unitary constitution with its full embrace of parliamentary sovereignty, true. But in terms of being anti-paternalistic it is much closer to the Kiwis than it is to today’s written constitutions with their bills of rights authorising strong judicial review of virtually all imaginable social policy-making undertaken by the elected legislatures.¹⁸ Of course the empirical

15. The High Court of Australia case that decided that Territorians could be given representation by Parliament, though they were not given the same number of Senators as a State, was *Western Australia v Commonwealth* (*‘First Territory Senators Case’*) (1975) 134 CLR 201.

16. For example, in sections 7, 31, 34, 39, 46, 48 and a good deal more.

17. See JAMES ALLAN, *Not in for a Pound – In for a Penny? Must a Majoritarian Democrat Treat All Constitutional Judicial Review as Equally Egregious?*, *King’s Law Journal*, 21, 2010, p. 233. This is not, of course, to deny that a judge inclined to do so would lack the tools to manipulate federalism review to achieve an outcome he or she actually wanted on rights-related grounds. Nor is it to deny that the attachment to one level of democracy over a bigger one might not lead to, say, an American Civil War (to the extent the South could be described as being democratic). Relatedly, it is harder to make that ‘small democracy versus bigger democracy’ claim in the context of the UK and Brexit because, in my view (see fn. 2 above), the EU is simply not very democratic in its internal operations. So the structural contest there is not easily seen as between a more local democracy and a bigger democracy.

18. Just looking at the US and Canada we see that under rights-related strong judicial review the judges have the last word as regards such issues as abortion, euthanasia, whether there will be same-sex marriages, whether each and every refugee claimant must be given an oral hearing (at huge taxpayer expense and with security implications), whether democratically enacted restrictions on carrying handguns will be struck down, capital punishment, whether incarcerated prisoners must in all cases be allowed to vote and plenty more besides those. Either that is being done on the basis of moral entitlements articulated in the language of rights that

truth is that virtually every democratic country in today's world has a national bill of rights, while Australia does not. But that is a contingent truth, not a necessary one, with virtually no countries on earth, democratic or otherwise, having bills of rights as recently as the end of World War II.¹⁹ The evident traces of paternalism and ancestor worship that come with constitutionalism do so because rights-related review happens also to have been widely locked in. Or put differently, the Alexander/Kay/Perry understanding of constitutionalism, centred as it persuasively is on locking things in and preferencing rigidity and security, does not *entail* hefty dollops of paternalism. That is just what we happen almost always to see. Nevertheless, the pre-bill of rights Madisonian Australian Constitution (admittedly a rarity) shows that (if we want) we can have our constitutionalism without the paternalism on the side.

If we turn now to the relationship between constitutionalism and democracy it is clear that some aspects of that were touched upon already when thinking about paternalism. So here I want only to focus on one particular subset of that relationship, namely whether constitutionalism need be understood as antithetical to democracy. And when we do that, odds are we will run into the above pointed-out (and likely to be true as a matter of empirical fact) assumption that constitutions will have bills of rights. For instance, in his introduction to his edited book, Alexander says of Jeremy Waldron's chapter,²⁰ that 'Waldron quite correctly argues that constitutionalism is not democratic even if it is established democratically'.²¹ Now I have no quibbles with the argument that X need not be democratic even if the process for choosing X is itself a democratic one. That is patently true. My quibble is that Waldron was actually discussing a particular sort of pre-commitment, namely whether Britain in 1998 ought to commit itself to a bill of rights. So yes, a democratic majority of citizens can opt for one of those instruments and yet (here I agree with Waldron) once one is in place it does not deliver democratic decision-making – at least not if it gives you a strong form of judicial review.²² But that begs the question of whether constitutionalism itself needs to include a bill of rights instrument. As I have argued, and as

were locked in by the framers and ratifiers – hence, with dollops of paternalism and ancestor worship evident – or today's judges are unlocked in by past people's choices when they decide a bill of rights case but are nevertheless locking the rest of us citizens in to what amounts to the judges' own moral druthers and policy preferences. This latter possibility I will come to below when I look at the role of politics.

19. There were two at that point in the democratic world, the US Bill of Rights and the slightly older French Declaration of the Rights of Man. But only the former was justiciable under cases brought by citizens, and at that point top American judges were nowhere near as prepared to gainsay the elected legislature as they are today.

20. LARRY ALEXANDER (ed.), *Constitutionalism: Philosophical*, Waldron's chapter in the book (Precommitment and Disagreement) beginning at p. 271.

21. LARRY ALEXANDER (ed.), *Constitutionalism: Philosophical*, p. 10.

22. As for statutory bills of rights, well that is a matter of contingent fact. I say that the evidence is such that the British statutory bill of rights has in fact delivered what amounts to strong judicial review virtually up to US levels and hence non-democratic decision-making. See JAMES ALLAN, *Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky*, TOM CAMPBELL/ K.D. EWING/ ADAM TOMKINS (eds.), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford, 2011, pp. 108-126.

appears obvious both to me and to the pre-bill of rights Madison for that matter, constitutionalism does *not* need to include such an instrument. Move to Australia and see for yourself. What you will find Down Under, leave to one side a fairly minor recently ‘discovered’ (or in my view made-up by the judges themselves) judicial doctrine about a limited implied freedom of political communication,²³ is constitutionalism that delivers a strongish version of parliamentary sovereignty filtered through bicameralism and federalism. Those and a Swiss-style amending formula are at the heart of what is locked in – just non-judicial and non-rights-related procedures for checking and balancing power.

Accordingly, constitutionalism can be, preponderantly will be, but need not be understood as antithetical to democracy in a full-blooded sense. Or put differently, any conflict between constitutionalism and democratic decision-making is contingent not necessary.

3. Formal and Informal Constitutionalism

It is tempting at this point simply to equate ‘formal and informal’ constitutionalism with written and unwritten constitutionalism. On that understanding New Zealand, the world’s best example of a parliamentary sovereignty democracy that lacks a written constitution,²⁴ would be the poster boy for informal constitutionalism. If we were to go down that road then it is easiest to understand an unwritten constitution in terms of what is missing. And what is missing in New Zealand is some over-arching single document – a written constitution – from which other laws obtain their legitimacy and which provides much (though not all) of a jurisdiction’s Rule of Recognition.²⁵ Such a written constitution, in addition possibly to giving a federalist division of powers and opting for bicameralism or unicameralism, might also decide to entrench a bill of rights, which as we have seen is the overwhelming (but not required) choice in today’s democratic world. Taking that as giving the main shape of a written constitution then affords us a basic idea of New Zealand’s unwritten constitution – which is the absence of any sort of single over-arching document doing all or any of that.

Now I think that succumbing to the ‘informal equals unwritten’ temptation would hardly be fatal. Do that and the upside is that you have room to describe New Zealand (and for that matter the Britain that existed before its entry into what is now the EU, and in all likelihood the post-Brexit model) as having a constitutional government. Yes, because of its unwritten and therefore informal nature it would not be a core case of constitutionalism, more like a penumbral instance. That said, surely it would be odd to be forced to describe today’s New Zealand, as well as arguably the world’s first democracy Britain, as lacking

23. See JAMES ALLAN, The Three “R”s of Recent Australian Judicial Activism: *Roach, Rowe and (no) ‘Riginalism’*, *Melbourne University Law Review*, 36, 2012, pp. 743-782.

24. An argument I have made at length. See fn. 2 above. I repeat bits of that case here.

25. This term was coined by H.L.A. HART in his magisterial *The Concept of Law*, Oxford, 1961.

constitutional government. And to have to do so solely because the Kiwis and Brits (at least pre-1972) lacked a written constitution.

On the other hand, the temptation to concatenate *a*) the notion of informal constitutionalism with *b*) what you observe in democratic jurisdictions that happen to lack a written constitution is not cost free. Recall the Alexander/Kay/Perry notion of constitutionalism from above. This involved, to some degree at least, the preferencing of rigidity, security, the certain and the locked-in over flexibility, room to manoeuvre, the contingent and the non-locked-in. But if New Zealand counts as an example of constitutional government, because we opt to equate informal versions to unwritten ones, then we may have to qualify bits of the Alexander/Kay/Perry understanding. After all, a full-blooded parliamentary sovereignty set-up – one that has a Kiwi-style unwritten, unicameral, unitary constitution – goes as far as you can in preferencing flexibility and anti-paternalism and democratic decision-making. So succumb to the ‘informal = unwritten’ temptation and we would have to qualify our core level understanding of constitutionalism. It could still centre on the desire to ‘lock things in’²⁶ but now would expand to include more informal methods of limiting power and even ways of locking outcomes in. Sure, there would still be the archetypical formal route of a written constitution with a bill of rights, the guardians of which would be an independent judiciary with the power to invalidate statutes. But in the democratic world power can also be limited more informally, without a written constitution, and under our expanded understanding of constitutionalism we would include this as a penumbral case. Consider again New Zealand. Are there limits on power there? Of course there are. Can those limits largely or overwhelmingly be traced back to one over-arching document, as in Canada, Australia and the United States? No. Limits on power in New Zealand flow from a bunch of statutes, all of which can be altered in the normal way by Parliament. And they flow from conventions, and more there perhaps than elsewhere. Most obviously they flow from elections and the democratic process. Yes, it is an incredibly democratic set-up, each generation being left to vote for Members of Parliament (“MPs”) who, through Parliament, can do what they think is best. Hence more than a few might wonder, “But where are the legal limits on what the elected parliament can do?” And the answer is, the limits on parliament are not legal. They are moral and political. New Zealanders vote for MPs who more-or-less share their moral worldview. And if shared morality is too ephemeral for your likings as a power-constraint, well the limits put on MPs by the desire to get re-elected are powerful limits indeed. Democracy is a potent check on power, indeed it was for Jeremy Bentham the most crucially important check on power.²⁷

26. Because of course there will be locked in norms even in pure parliamentary sovereignty jurisdictions such as New Zealand. For instance, even to have politics one must have rules that constitute the legislature – what the legislature will be; how it is selected; how it passes laws and so forth. This sort of procedural constitution will be locked in. It may not be procedurally hard to change or secured with too difficult a lock, needing only 50 per cent plus one of the elected legislators to be altered, but it is still locked in. Thanks to Larry Alexander for this example.

27. See, for example, PHILIP SCHOFIELD, *Utility and Democracy: The Political Thought of Jeremy Bentham*, Oxford, 2006. Now some readers may well balk, still thinking that having

Notice, as well, that outcomes can be locked-in without a formal written constitution with its designated judicial interpreters. Take this example, which applies to every single country that still has Queen Elizabeth II as its head of state (so not just New Zealand, but also Australia, Canada, chunks of the Caribbean, a few island outposts and the United Kingdom itself). Every law student in those countries quickly learns that to pass a Bill into law it has successfully to undergo three readings in Parliament (which might be unicameral as in New Zealand or bicameral with an unelected Upper House as in Canada and the UK or bicameral with a US-style Senate as in Australia).²⁸ After that it needs to be signed by the Queen or by her representative in that country the Governor-General. And soon those law students learn that it is a rock solid certainty that the Queen will sign all such thrice-passed Bills into law and onto the statute book. This outcome is locked in. It is more certain than most any outcome related to the US Bill of Rights and what the top judges there will say it means. Indeed, this is a locked in truth that no Kiwi or Canadian or Brit or Australian ever doubts for one moment. Yet, and here is the point, nowhere is it laid down in a written constitution or required by law that the Queen must sign these thrice-passed Bills into law. There is no formal legal recourse were she to refuse. And yet that will not happen. That the Queen (or Governor General) will sign is a core constitutional principle; more, it is an absolutely settled rule that is less likely to be broken than is just about any legally laid down provision in the Lisbon Treaty or the US Constitution with their formal authoritative interpreters in the courts.

Now surely that counts as a locked in outcome of the sort that the Alexander/Kay/Perry understanding sees as lying at the heart of constitutionalism. Just as surely it falls on the informal, rather than formal, side of the divide. Of course this example counts as a convention. In the Westminster world we think of

legal and constitutionalised limits on elected MPs, on what the legislature can do, is needed. For such readers, notice that all those legal limits have to be overseen by real life people. So in the United States they are overseen by the United States Supreme Court, by nine judges. And if you live in the United States what sort of limits are there that control what those nine ex-lawyers can do? Well, there are moral limits, the attachment felt by such top judges to applying the law as written and so in accordance with their oaths of office – as opposed to just making things up at the point-of-application because some outcome or other seems morally superior to them, or preferable on other grounds. Oh, and there are political limits, as in the extent to which they can withstand criticism in the press when they go wayward. But let us say – and this is hypothetically speaking you understand – but let us say that you think that in some recent case a majority of those top judges (say five out of nine because all top courts happen to be brutally majoritarian institutions, five votes always beating four no matter the quality of the reasoning) just made something up. They pretended to be interpreting the United States Constitution when supposedly “discovering” some implied but nowhere enumerated fundamental new right that these top judges then used to invalidate some law that had been on the statute books for ages. In other words, you think the judges lied or made it up. Are there any legal or constitutional limits on those top judges, other than political and moral limits? Of course not. In any set-up you will end up having some group of real life human beings whose actions are constrained, or not constrained, solely by morality and politics. So pick your poison. In New Zealand with its unwritten parliamentary sovereignty constitution it is the legislature that lacks legal limits.

28. This ‘every law student quickly learns’ claim may be partly wishful thinking on my part, alas. In Canadian law schools my experience is that the focus on the Charter of Rights is such that the legislative process is hardly considered worth teaching at all. Indeed, judicial review is the central focus, the overwhelming focus, of constitutional law courses.

conventions as rules that are not enforced in the courts. There are plenty of others. There is the near century-old convention that the legally unlimited Westminster Parliament in London would not legislate for the self-governing Dominions unless such legislation were asked for. There is the more recent convention regarding how post-devolution Scotland is treated within the UK, namely that the legally unlimited Westminster Parliament allows Scotland to control her own affairs in the devolved areas – to the point that a plausible argument can be made that there is more *de facto* federalism (in the sense of the subsidiarity principle or actual local decision-making and income taxing power) in the formally unitary UK than there is in the officially and *de jure* federal jurisdiction of Australia.²⁹ There may even have grown up a convention that the Westminster Parliament will abide by the results of referenda,³⁰ which by-the-by provides a strong basis for thinking the UK Supreme Court got the recent Brexit decision in the *Miller* case³¹ wrong.³² And if you wish to determine in the Westminster world whether there in fact exists a convention, a non-justiciable rule, Sir Ivor Jennings famously proposed³³ this tripartite test: **1)** Are there precedents? **2)** Do the actors believe they are bound by a rule? **3)** Is there a good reason for this rule?

Let me make two further points about conventions, these rules that are not justiciable in the courts. First off, remember what Hart pointed out in his *The Concept of Law*³⁴ when comparing law to the rules of a sporting game, namely that such rules can often work perfectly fine without a designated, authoritative adjudicator. For many years I regularly played pick-up basketball, and in various countries, and this worked better than passably well without any need for a referee – without the need for an authoritative interpreter and applier of the rules – despite the odd fellow competitor who (shall we say) seemed incapable of calling fouls on himself. Indeed, 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 and the attitude becomes ‘I can do whatever the ref lets me get

29. For a hard-hitting argument that the High Court of Australia has emasculated the States in favour of the centre, indeed that it has one of the most pro-centre track records in the federalist world and has thereby gone a long way to gutting federalism in practice, see JAMES ALLAN/NICHOLAS ARONEY, An Uncommon Court: How the High Court of Australia has undermined Australian Federalism, *Sydney Law Review*, 30, 2008, pp. 245-294.

30. See GAVIN PHILLIPSON, Brexit, Prerogative and the Courts: Why did Political Constitutionals Support the Government Side in *Miller*?, *University of Queensland Law Journal*, 36, 2017, p. 324. As Phillipson there points out, ‘in every referendum held in the UK in the post-war period, the result has been respected’ (ibid., p. 324). These include the referenda to enter the EEC (1973), to opt for devolution in Scotland (1997), Wales (1997 and 2011) and Northern Ireland (1998), to consider shifting the voting system from First-Past-the-Post to preferential or Alternative Vote (2011), to decide Scottish Independence (2014) and indeed (since Parliament went on to trigger Article 50) the one to opt for Brexit and leave the EU (2016).

31. *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] WLR 583.

32. As I argue in passing in JAMES ALLAN, Democracy, Liberalism and Brexit, *Cardozo Law Review*, 39, 2018, p. 879.

33. Sir IVOR JENNINGS, *The Law and the Constitution*, 5th ed., London, 1959, p. 135.

34. See H.L.A. HART, *The Concept*.

away with'. Of course make the stakes high enough in sports and the need for a referee, for a Hartian Rule of Adjudication, usually becomes compelling. But the point is that rules frequently can, and do, work without referees and judges. And that is what conventions are – non-justiciable rules that are felt to be binding by the actors. Any enforcement is itself informal. It will ultimately be political, not legal.

Accept that, however, and it goes some way to giving you grounds to be careful about just what sort of temptation it is you will be giving in to when you equate informal constitutionalism with unwritten constitutionalism. That is because all forms of constitutionalism, from the most formal version of a US-style written constitution set-up all the way over to the New Zealand and pre-1972 (and perhaps post-Brexit) British parliamentary sovereignty unwritten constitutions, make use of non-justiciable rules (of which conventions are the best example) and non-justiciable areas of Executive decision-making. Some countries just do so more than others. That does not change the fact that once we decide that non-justiciable rules can be included within the ambit of informal constitutionalism then it follows that all constitutional jurisdictions, to some extent at least, make use of the informal variety at least on occasion.³⁵

The second point to make about conventions, and this will be obvious I suppose, is that they are not deliberately laid down. You cannot trace their genealogy back to a group of people who are treated as having the legitimate, authoritative power to make this or that rule and who then deliberately decide to do just that for future generations. Conventions are more unplanned than that; they are more Hayekian; they just grow up. And though they may have the effect of locking you in, the basis for the constraints they impose seems to me to differ somewhat from why the formal sort of constitutional rules overseen by judges (at any rate by those judges committed to a locked-in view of constitutionalism rather than to living-treeism) are felt to be constraining. If you are locked in by some component of informal constitutionalism, by a big ticket convention say, it is because of value judgments being made today that are focused almost exclusively on today. There is less concern for the past, and for value judgments made in the past. Or put differently, what motivates obedience to conventions has little if anything to do with 'distrust of our future politics'.³⁶

35. The obverse or flip-side of that is that all forms of constitutionalism, even the most locked-in model with strong judicial review under an entrenched bill of rights, ultimately rest on acceptance today, in the present. As Larry Alexander notes, wake up tomorrow in an America that wholly rejects the Constitution of 1789 and its amendments (hence, no longer accepts what the authors did back then) and it will have gone the way of the Articles of Confederation. This is Hart's point about the Rule of Recognition, the ultimate test of legal validity, that in the final analysis it depends upon what is accepted *today* (for Hart by the officials in society). In other words, the difference when it comes to constitutionalism between New Zealand and the US is one of degree. It is a real and important difference to be sure. But it is simply a matter of degree.

36. See LARRY ALEXANDER (ed.), *Constitutionalism: Philosophical*.

4. The Role of Politics in Constitutionalism

Whether or not I have managed to draw out some of the differences between informal and formal constitutionalism, I shift now to look at the role of politics in both sorts of set-ups. For the former, that role is plain. As I noted above, in New Zealand's unwritten (and so as informal as it gets) constitutional structure democratic politics – elections and voting – are the main check on power. There, politics plainly matter because in the case of parliamentary sovereignty jurisdictions it is democratic politics that resolve virtually all of the big ticket social policy issues in society. Similarly, if we move from those very few unwritten constitution jurisdictions to democracies more generally, and think about conventions (which can be seen as a circumscribed, more particular aspect of informal constitutionalism), we see that there too what ultimately enforces conventions – or every once in a while allows what they lay down to be gainsaid – is politics. The reason the Westminster parliament in London leaves the Scottish parliament free to deal with devolved areas of responsibility and is not tempted to move to repeal the devolution statute (which it is legally free to do at any time) is politics. It is an awareness of what the political repercussions would be. Likewise when the Westminster Parliament opted without request by the then Rhodesia (and indeed contrary to that government's wishes) to legislate for that country, and in direct breach of the convention to leave the self-governing Dominions to their own affairs – indeed did so knowing full well that what London enacted would be ignored and could not be enforced – this breach of convention was motivated by domestic politics, namely disgust with apartheid domestically.³⁷ Again, when the Queen and Canada's, Australia's and New Zealand's Governors-General always sign Bills into law they probably never for a moment consider not doing so. But if they did, they would ultimately proceed to sign anyway because of an awareness of politics and what the political repercussions would be.

Turn, though, to the role of politics in democratic jurisdictions with formal constitutional structures and of course you see differences, variety and heterogeneity. But nevertheless there are trends that can be noted and generalisations that can be made. I am happy to indulge in both. And one of the first things one observes across at least the common law democratic world (though much less so in New Zealand, and a good deal less so in Australia) is the rise of judicial power. Unelected judges are becoming ever more powerful, at least outside the United States where they have been very powerful for quite some time and so had little scope to expand their influence further.³⁸ This trend

37. See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC).

38. This trend is noted by those who approve of it, and by those like me who disapprove. See, for just one of many writers, RAN HIRSCHL, The Judicialization of Mega-Politics and the Rise of Political Courts, *Annual Review of Political Science*, 11, 2008, p. 93 and RAN HIRSCHL, The Judicialization of Politics, Robert Goodlin (ed.), *The Oxford Handbook of Political Science*, Oxford, 2009. If one were looking for a five word encapsulation of the democratic world's post-WWII trends in this area, I would opt for 'the triumph of American constitutionalism' – powerful judges, sometimes gainsaying and over-ruling the elected branches, most often when claiming to be interpreting a catalogue of entitlements in the language of rights.

has also been described in this way:

...as a ‘judicialisation of politics’: a growing intrusion of the judiciary into realms once the preserve of the executive and legislative and a corresponding transfer of power to the courts. Policy decisions that were once the exclusive preserve of democratic institutions are now ultimately resolved by judges, often in the guise of determinations about rights. This judicialisation has expanded to include matters of the utmost political significance that define whole polities.³⁹

In the context of the United Kingdom this rise of judicial power has been said to be ‘a function in part of the exercise of political responsibility (notably, dubious political choices to confer new powers and responsibilities on domestic courts and to accept the jurisdiction of foreign courts) and in part of how many judges, lawyers and scholars are coming to understand the idea of judicial power itself [and this all] undercut[s] democratic self-government’.⁴⁰

In this final bit of my paper I will focus on that last claim, that many (in some jurisdictions most) judges, lawyers and legal academics around the democratic world, and especially those in jurisdictions with formal constitutional structures including a justiciable bill of rights, have come to endorse this trend of increasing judicial power with its ratchet-up of the judicialisation of politics. For examples of this increased judicial power I could point to the Court of Justice of the European Union,⁴¹ the Supreme Court of Canada, the UK Supreme Court, then move to uber-activist top courts in India and Israel, and still have plenty of other examples up my sleeve. But instead let me relate this ratchet-up trend back to our theme of constitutionalism, remembering that the core attraction of constitutionalism revolves around achieving predictability, certainty and locked-in outcomes. And let me say again what I foreshadowed near the start of this paper, namely that in order for any constitutional set-up to deliver that certainty and those locked-in outcomes one needs also to suppose or believe that written rules can convey fixed meanings – that decisions made in the past

39. NICHOLAS ARONEY/ BENJAMIN SAUNDERS, On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Power in Australia, *University of Queensland Law Journal*, 36, 2017, p. 221 (internal footnotes removed).

40. RICHARD EKINS/ GRAHAM GEE, Putting Judicial Power in its Place, *University of Queensland Law Journal*, 36, 2017, p. 375.

41. See GUNNAR BECK, Judicial Activism in the Court of Justice of the EU, *University of Queensland Law Journal*, 36, 2017, p. 333. This SOAS Reader in EU Law and London-based German legal academic there describes the CJEU as an exemplar of ‘extreme judicial activism’ (ibid., p. 333), as indulging in ‘expansive reading[s] of its own jurisdiction’ (ibid., p. 333), as taking an ‘ultra-flexible approach’ to legal sources (ibid., p. 341), as ‘prepared to defy conventions of legal argumentation and free itself from any methodological constraints on judicial decision-making’ (ibid., p. 351), as adopting an ‘ultra-flexible approach [that] affords [it] the interpretative freedom to operate “lawlessly”’ (ibid., p. 353) while finally concluding that ‘[l]aw, for the CJEU, is essentially the continuation of politics by other means’ (ibid., p. 353).

by those considered to have the legitimate authority to do so have the capacity to lock us in today. I do believe that. But in addition to that it also requires a certain type of interpretation at the point-of-application – one that locks in decisions made by constitution-makers in the past – not some ultra-flexible, living-tree, ‘politics by other means’ interpretive approach. Constitutionalism, real constitutionalism as opposed to judicial power travelling under the pretence of being constitutionalism, requires everyone to be locked in to outcomes (some they will like and some they will dislike). It requires the locking in of those outcomes to cover not just the 99.99 per cent of the rest of us in society, but the top judges too. Yet what I fear this judicialisation of politics indicates is that on many top courts today, at least across the common law democratic world, that sort of ‘locking us all in’ constitutionalism is just smoke and mirrors.

Let me put it this way. If the choice were between 1) a constitutionalism that actually would lock in certain outcomes, so that latter day judges would be delivering intended outcomes that were specified in an authoritative text written in the past, on the one hand, and 2) a New Zealand-style ‘anything goes’ parliamentary sovereignty democracy, on the other, well I would choose the latter. But it would be a close call for me and I could certainly understand the attractions of the former, for all the Alexander/Kay/Perry specified reasons. Indeed I would expect to be in a minority in rejecting that sort of option 1). But if, instead of that choice, the first alternative were transmogrified into a 1B) pseudo-constitutionalism under which unelected judges ‘do politics’ and when so inclined simply deliver *their* social policy druthers (no doubt dressed up so as to pay lip service to the now vanished 1) constitutionalism) then it would no longer be a remotely close call for me.⁴² If both choices are just politics, so that really it is just a question of the size of the franchise, with one option giving all voters an equal say and input (a system otherwise known as democracy) and the other amounting to a kitararchy and aristocracy (just with the landed gentry replaced by lawyers and by unelected judges doing politics amongst themselves) that admittedly locks all the 99.99 per cent of the rest of us into what the judges happen to think is best, then at the very least proponents of such a transmogrified pseudo-constitutionalism can expect pushback. They can expect occasional cries of illegitimacy and they can expect people to vote for political parties and politicians that will try to do something about it. I daresay we have seen some of that in the last few years.

Another of our symposium speakers, Steven Smith, has put that revised 1B) choice this way, that if we go down that road:

42. I should note that I think it is now plausible to assert that many people (including a good many lawyers and judges) in the Anglosphere just naturally think that 1B) is the main form of constitutionalism; indeed they take this almost for granted. Sure, they would not put it as bluntly as I do. Still, for them the main purpose of constitutionalism is not so much entrenchment as ensuring that ‘the elite’ have a means to check the majority and thereby ensure ‘justice’ and ‘principle’ are better advanced by people who are qualified to know what these mean (namely, them). Such people are likely to want to distinguish between ‘grubby interest-pursuing politics’ and ‘the majestic governance of principles’. I thank Steven Smith for this point.

...the overall result will be that the Constitution as an instrument by which 'We the People' govern ourselves will to that extent have been displaced by a sort of Rorschach constitution onto which legal elites can project policies or principles that they favour and then, under the guise of 'the Constitution,' impose those policies or principles on the rest of us.⁴³

Or put differently, if written constitutionalism or formal constitutionalism collapses into little more than just judicial politics, then it seems to me that democracy will be hard to keep down over time. It will out, and will do so not just in the politicisation of how judges are selected (though we can expect that too). Put differently again, if that is the actual choice then informal constitutionalism looks a lot more appealing to me than any disguised *IB* formal constitutionalism that pretends to be delivering the virtues of locked in certainty and predictability but instead only delivers whatever predictability it does to the extent that we citizens can guess the political preferences of the top judges. That is a sort of politics, no doubt. But for my tastes it is a sort that is too circumscribed, too elitist (in the bad sense), too puffed up, too lawyer-centric, and all too likely to deliver bad long term consequences.

43. STEPHEN SMITH, *The Image of Liberty*, pp. 10-11 (on file with the author, publication pending).