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SPEAKERS

Yuan Yi Zhu, Richard Johnson, Anthony Sanders



Anthony Sanders 00:25

And now for something completely different. Yes, this is still Short Circuit: your podcast on the federal courts of appeals. I'm still your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. But today, we're not going to be talking about the US Constitution or indeed, even state constitutions. We're going to be talking about the granddaddy of them all: the British Constitution. Yes, the United Kingdom has a constitution. What that Constitution is, whether it's written or unwritten, or a bunch of other things, is up for debate. And we are going to be discussing that today on Short Circuit, which we're recording on Thursday, April 27, 2023. And the reason why we're going to be talking about those special subjects is we have a couple special scholars with us today, a couple incredibly erudite and prolific young scholars who have just put together a brilliant new book on the UK Constitution and how it's been evolving and how, perhaps, it should not be evolving as fast as it has been recently. The book is *Skeptical Perspectives on the Changing Constitution of the United Kingdom*. And I am so excited to introduce these two scholars to you. Now, Short Circuit listeners may know, from what I've discussed from time to time, that I am a British citizen, part British citizen. I have a passport to prove it, but not an accent. I still have family back in the UK and so I keep an eye on what's been going on over there. And it seems like they've had a lot to talk about, about their Constitution, their order in the world, where they should be going, whether they should make their Constitution a bit more written, as they say. I know that's a controversial way to describe things and so we're going to be digging into that with these two scholars. So first, I want to introduce Yuan Yi Zhu. Now, Yuan may be known to any of you who spent some time on Twitter. He is a scholar of all kinds of subjects, including international law, but also he talks about heraldic dress in long lost courts of the U.K. and all kinds of interesting subjects. So I encourage you to follow him for those reasons if nothing else. He is Assistant Professor of International Relations and International Law at Leiden University Institute of Political Science. He's written widely in scholarly and popular publications. He's written a lot recently on Canada's assisted suicide program, which we're not talking about today, but if you want to get up to speed on those issues, you definitely need to see what Yuan has written about. He also has positions at Oxford and the University of British Columbia. And he has degrees from McGill University in Cambridge, and the top all that off, he is a Canadian. So Yuan, welcome to Short Circuit.

Y

Yuan Yi Zhu 04:09

Thank you, Anthony.

A

Anthony Sanders 04:11

And next, I'm very excited to introduce Richard Johnson. So Richard is a senior lecturer in US politics and policy at Queen Mary College, University of London, but he is English. So he is what we call an Americanist: studying the United States from a different perspective. He also has taught at numerous places: Lancaster University, Yale, Cambridge, and Beijing Foreign Studies University. He has degrees from Cambridge and Oxford. His research interests is race and democracy in the United States, but he has numerous other interests, including the history of the British Labour Party. And if you follow him on Twitter, you'll get a lot of fun facts about early British Labour Party history, which is fun to follow. So Richard, welcome to Short Circuit.

R

Richard Johnson 05:12

Thank you very much, pleasure to be here.

A

Anthony Sanders 05:14

Now, both of you, please take it away. First, let's talk about why you put together and wrote this volume. And also, what the motivation was for your various contributors to want to say what they said.

R

Richard Johnson 05:34

I think I'll get us going on that by talking a little bit first about just why, as an Americanist, I've taken an interest in the UK Constitution. Part of that is as a citizen and someone who's interested in and active in British politics. But I was surrounded by people actually at Oxford, where Yuan and I met, who were experts in the Constitution, very fine experts in the US in the UK Constitutions. But I found there was a sort of cozy consensus about quite dramatic changes that have occurred to the British Constitution in the last generation, changes that were highly contentious. And I still would argue in many ways, contingent, but treated as quite sacrosanct. And I was frustrated that there weren't enough voices in academia who were actually looking at the changes that we've seen since 1997, both brought on by Labour and the conservatives, and said, hang on a second, are these particularly wise? Have they delivered the benefits that they were purported to deliver, and what's been lost by these changes as well? And so, in terms of the actual book itself, the origins of it came actually due to COVID, where during COVID, I wasn't able, in fact, allowed to go to the United States for a long time to do my research on US politics. And so, I applied for a grant to do some UK based research. And I put together a conference on the UK Constitution that Yuan was one of the contributors to and then from that conference, I brought some of the participants from that conference and others together to put this book together. And neither you nor I are British politics academics in that sense, so I

thought it was important for us to bring in people who were experts in British politics and public law and also some practitioners as well. So that was the idea for me behind kind of initiating the block idea.

A

Anthony Sanders 07:47

And Yuan, anything you'd like to add to that?

Y

Yuan Yi Zhu 07:51

Yes, or just add to what Richard said. In UK academia but also in UK media and among this sort of political class, there tends to be a consensus that the existing Constitution is old fashioned and frosty and embarrassing and that reform is really the only way forward. And what tends to happen is once the reforms have not delivered what it promised to deliver, the answer ends up being well, actually, it didn't work. Let's have more reform. So for instance, we'll have an example now with the Labour Party having instituted a devolution to Scotland and to Wales. We see view of making the UK stronger together. And all the state wants to encourage is Scottish and Welsh nationalism. And now, the Labour Party has a new report saying, actually, the solution to this is even more devolution, and so there is this sort of thread where devolution beget more devolution. And we really wanted to push a bit back against this idea that change is the only way forward. And just to add to that, Richard and I actually met in Oxford, but we have very different political views. We are active in different political parties and our contributors, as well belong to different political parties and have very different views. But we are all a united base that says the existing Constitution has many virtues, which have not been sufficiently explored. And regardless of our party political affiliation, do we think that it is something worth maintaining?

A

Anthony Sanders 09:25

Yeah, that's something I wanted to add. You come from outside of constitutional politics. You come from different politics, but you and the others have come together on on these issues. Well, let's look at those issues from a primarily United States audience who, you know, probably have heard in the past that Britain has this thing called a constitution. Don't really know what it is. They've seen the House of Commons on TV from time to time. They know there's a new king getting coronated in a few days, but other than that, maybe it's all a little bit hazy. So, the big question I'm going to start with is, what is the British Constitution?

R

Richard Johnson 10:08

Well, there's a line I can't remember. I think it's Jennings who said that the supremacy of Parliament is the Constitution. Or perhaps, one way I might put it for an American audience is that the UK Parliament is not just a legislature, but it's an ongoing constitutional convention. It's as if the framers at Philadelphia never left. And so the core principle behind the UK Constitution is that whatever Parliament legislates is ipso facto constitutional because it comes out of the sovereign Parliament. Parliament has complete freedom to legislate on whatever matter it

might wish to legislate on, except for binding its successor. And of course, that's maybe, you know, it seems a very simple answer. It has a lot of different elements to it. But for me, that's the core idea of the British Constitution.

A

Anthony Sanders 11:15

Now, I know often the British Constitution is described as an unwritten constitution. And I know that there are people who believe in the British Constitution and bristle at that a little bit because there's a lot that's written. You could fill a whole volume with it. And in fact, publishers do. So what do people mean by unwritten and what bits are written, even assuming that if Parliament really wanted to, it could change all manner of what we call this Constitution? How should we think about how the Constitution is written? And what are its primary components?

R

Richard Johnson 11:59

Well, I guess the reason why people think it's unwritten is because it's not codified in a single document like the US Constitution, or indeed, most constitutions around the world. But I actually flip this around for a moment, which is to say that every constitutional system has unwritten elements to it.

A

Anthony Sanders 12:19

Absolutely.

R

Richard Johnson 12:20

The US Constitution is just over 7,000 words. There's not enough material in those articles and 27 amendments to actually sufficiently get you to precisely governing that entire country. And so there are so many aspects of precedent and constitutional understanding and convention that helped make the US Constitution work. And so every system, including the United States, has an unwritten constitution alongside its written elements. The difference in the UK is that the written elements have never been put together in a single code. And we argue in the book that you could do that, in theory, it would be largely a sort of secretarial exercise. But there are plenty of statutes that pertain to things like the relationship between the House of Commons and the House of Lords, or the composition of the House of Lords, or the franchise, or devolution, or the Acts of Union, or legislation that sets out how long a particular session of Parliament can last. These are all already written and exist and people can consult them. And these can be put together. But the key difference that we identify from most other systems is not actually whether it's written or unwritten, but it's about the sense of a hierarchy of law. The defining aspect I mentioned about the UK constitution at the start is that we don't entrench a law against another law. So we're not saying that constitutional laws are superior to non-constitutional laws. Anything that Parliament does, Parliament can also undo through the same process that it brought it in. For me, that's the key distinction rather than the written or unwritten element.

A

Anthony Sanders 14:24

I'm remembering from my reading of H.L.A Hart, which was quite a long time ago, and in his whole description of the queen in Parliament, there's a rule of recognition, he called it, about seeing the queen in Parliament, which is basically the relationship between the parliamentary sovereignty that you described, Richard, that there's a kind of a prior law to that to seeing that as the lawmaking body. So Yuan, is there some ultimate statute that describes how all that happens? Or is that kind of like a meta unwritten part of British constitutionalism that just everyone understands? Somehow the House of Commons passes things. There's royal assent, which we know hasn't been a problem in a long time, and that that is the law. There's no, like, document that was signed in 1787 that describes that that is the law. How should we think about that?

Y

Yuan Yi Zhu 15:33

No. So the short answer is no. I think a few years ago there was an attempt to have Parliament pass a law saying that Parliament is sovereign, but of course, that is entirely circular. If Parliament says Parliament is sovereign, and Parliament is sovereign because of that? But if you say Parliament is sovereign, through Parliament, then that actually might limit Parliament sovereignty, so it's all very circular. I very much prefer its explanation given by Sir William Wade, who was a very distinguished constitutional scholar, who said that, firstly, parliamentary sovereignty is at the core of the UK Constitution. But he actually makes the point that potentially, sovereignty at the end of the day is not a legal fact as much as it is a political fact. Right? Parliamentary sovereignty is universally accepted by all political actors as the basis for the whole system. But fundamentally it is a matter for politics, not for law. And the only way in which you could really get rid of that is if you had a fundamental revolution, in political terms, in how people conceived of the UK. If that were to happen, then the rule of parliamentary sovereignty could fall away, and UK would have a more, shall we say, conventional constitution, which is codified and written and which has a hierarchy. But the UK has never had such a fundamental revolution. And indeed, even when the UK was a Commonwealth under a republican head of state under Cromwell, the fundamental principle underpinning parliamentary sovereignty was not really displaced to any great extent. So it has been a remarkably resilient political fact, which is at the bottom, which really underpins all of the system, which we're describing in constitutional terms in the UK.

A

Anthony Sanders 17:24

I'm glad you mentioned Cromwell and all the history of the 17th century that implies, which some of our listeners may be familiar with: the battles with the Stuart monarchs, and then eventually, the Glorious Revolution near the end of the century that kind of formalized what we now think of largely as the British Constitution. Part of that was the relationship between England and Scotland, at the time, and then later codified in the Act of Union. And you mentioned this unwritten aspect of, at that time, the British Constitution, but Scotland has a bit of a different background, right? And Scotland is very much now part of, thankfully in my mind, the United Kingdom. How do we think about Scotland, and indeed, the other parts of the UK as part of this written or unwritten constitutional order? And you also mentioned devolution, which we'll get into in a little bit, as a recent constitutional change. But how should we think about the traditions coming out of England, but also the traditions coming out of Scotland coalescing in what we now think of as the British Constitution? And whichever one wants to take that.

Y

Yuan Yi Zhu 18:49

It's a really interesting question. Scotland especially has always had a special place in the UK Constitution, which I think is fair to say was not always the case for Wales or for Northern Ireland. And I'm gonna get to this in a minute. But essentially, what happened with Scotland was that Scotland was an independent kingdom. And at one point, the royalty succession for England and Scotland came to be vested in one person. At the beginning of the 18th century, the kingdoms of England and Scotland were, quote, unquote, forever unified by acts of English and Scottish Parliament, its the Acts of Union, and that created Great Britain, which then added Ireland to become the United Kingdom. Scotland has very distinctive constitutional traditions. And if you look at the actual union, there are provisions which protect its existence, of for instance, a separate Scottish judiciary and so on. Those protections are not forever. So for instance, in the Acts of Union there is a clause which says that Scotland is entitled to send X number of hereditary peers of noblemen to the House of Lords, which was done away with in 1999. So these protections are not permanent. They can be amended by the Parliament of the UK, like any other statute. But most of them have been preserved, which means that today, Scotland has its own legal system, which is very different from that of England. Scotland has also its own parliament, but that is a very new development. But this was one of the reforms introduced by New Labour. And that has been controversial, for all sorts of reasons. But Scotland, in many ways, is distinctive, but Scotland nevertheless remains part of the UK constitutionally. So, this is confusing because in the UK, people will say that the UK is comprised of four countries. And it's important to remember that when somebody, in the UK context, says that Scotland is a country, he or she doesn't mean a country in the sense of France or Italy as an internationally recognized state. It is very much of a domestic UK vocabulary to refer to the separate historical trajectories of Scotland and England and other parts of the country. As to Wales and Northern Ireland, very quickly, Wales was conquered by England in the Middle Ages and until the 19th century, Wales had no separate legal existence. But with the rise of Welsh nationalism and the rise of ideas of devolution and cultural particularism, Wales has been given its own legislature, which is subordinate to the UK Parliament. And as for Ireland, its largely the same story. Ireland was conquered by England. Ireland was basically run like a colony for a very long time. When Southern Ireland became independent, Northern Ireland elected to remain in the UK. And today, Northern Ireland is governed under a fairly special system, which guarantees that neither the Catholics or Protestants will have the final say in the system. But Northern Ireland remains, as well, a part of the UK as a sovereign, internationally recognized state.

A

Anthony Sanders 22:06

That was a very erudite answer to a question that some of our listeners may know from Ted Lasso when he asked, how many countries are in this country? The answer is four, but it's a little complicated. I warned these two that I would be asking this. This is my little pet question because some of my background is spending time in the British Channel Islands. So the Channel Islands are this weird part of the British Isles that are not part of the United Kingdom, but nevertheless, are the subject of The Crown. And the Isle of Man is kind of like that too. These funny jurisdictions, how would you put them within the constitutional order? And maybe more importantly, what does that kind of say about, I don't know, the flexibility or the multiplicity of the British Constitution?

Y

Yuan Yi Zhu 23:06

Right, so the Channel Islands and the Isle of Man are what are known as Crown Dependencies in UK law. It just means that they're not part of the UK, but they are related to the UK because of ultimate constitutional responsibility for them rests with the king or queen of the United Kingdom. So they have a relationship to the UK through the crown, but they're not part of the UK. They have their own systems of government which are very, very, very ancient. They have their own customs. They have their own parliament. The UK Parliament occasionally makes laws which affect them. So for instance, under the British Nationality Act, people who are from the Channel Islands are British citizens, and that is something which the UK will have some say over. The UK is also responsible for their defense and for their international relations. So they're very much not internationally independent entities. They are related to the UK but not part of the UK, which is a sort of very strange relationship. And the reason for this is because of fundamental feudalism. The Channel Islands are the last remnants of the Duchy of Normandy. As some of your listeners may remember, William the Conqueror, or Williams the Bastard as he used to be called, was Duke of Normandy in 1066. He killed the last king of Wessex and took over England. And with that, he took with him the Duchy of Normandy. And obviously, Normandy is now in France. It was conquered by another dynasty and then France became a republic, but the Channel Islands are the remnants of that ancient Duchy of Normandy. The Isle of Mann was a feudal territory. You could be Lord of Mann. You could buy and sell his lordship. And I think it's the 18th century that its lordship was bought by the crown, and so the kings and queens and subjects of the kingdom have been lords ever since. So again, it really has its origins in feudalism. And as a matter of fact, its the island of Sark, which is part of the Channel Islands, was legally speaking a feudal system until 2004. In 2004, it's only people who could vote were the people who were feudal landowners. The European Court of Human Rights, I think, said, this is very antidemocratic. We have to get rid of it. And actually, what happened was the islanders who actually were by and large were fine with it. They got really angry, and in the first election still voted overwhelmingly in favor of candidates who are in favor of feudalism, which I think American listeners found absolutely insane. It just really illustrates how some quirks still survive in the UK system and how, even though if you think about how this seems absolutely irrational, but the people who are involved very often don't find them to be anything but really troubling relics of the past, if that.

A

Anthony Sanders 26:09

Yeah, I went to Sark as a child. And think this is still the case, but there were no cars there. But they did allow tractors, so you could get a tractor ride from the docks to the village. There were quite a lot of tractors I found on the island. One last question before we turn to the subject of the book. One thing that American lawyers always think about their English constitutional heritage is the common law. And of course, the common law, more than maybe anything else, is part of the English system that was transferred to America and is part of the background of our states and even informs often how federal law is interpreted. Is the common law thought of as part of British constitutionalism? Or is it simply the way the legal system works? And of course, it can be supplanted by Parliament just like state legislatures can supplant the common law here. Or is it a bit more than that because it has been such a central place in in British lawmaking for so long?

Y

Yuan Yi Zhu 27:24

TUAN TI ZHU 27:24

So it's complicated, like most things here. The common law's place in the UK English system has evolved over time. If you go back to the 17th century, for instance, there was this view that a common law was given by God and it could even supplant acts of Parliament. Edward Coke, with whom American lawyers might be familiar, was impeached partially because he said that common law could not be supplanted by a statute. This view was rejected in the 18th century through people like Blackstone, who really came up with an articulation of the idea of parliamentary sovereignty. So common law has taken sort of a secondary place. Common law has been in many areas displaced by acts of Parliament. But I would say that aspects of the common law are still very important. There are too many principles of the common law that any English lawyer and UK lawyer you would recognize as being fundamental to the UK constitution, or principles which can be again supplanted by Parliament at any time. But in practice, they are recognized as being either constitutional or quasi-constitutional, certainly having a place which should not be lightly interfered with. But this idea of the common law as the Constitution has, I think, had its day and is not the dominant school of thought in the UK and hasn't been for a very long time.

A Anthony Sanders 29:00

It was transferred, as some of us argue, to the American colonies, and it's been debated over here ever since. But we'll leave that one for a different podcast. So let's turn to the arguments in the book. And, Richard, if you could maybe lay out for us some of these changes. You said 1997 was this starting of these changes, which of course was when Tony Blair and New Labour came into power. So what are some of these changes? And then what is skepticism towards that, particularly, from someone such as yourself who's part of the labor coalition?

R Richard Johnson 29:41

Yeah, so one thing I'd argue is that when New Labour came into power in 1997, it had a very modest economic reform agenda. You know, this was not the Labour Party of Attlee or Wilson, the previous Labour prime ministers who were elected in landslides in 1945, and Wilson won in a landslide in 1966, who came in and whacked up the taxes on the rich and used it to fund a massive redistributory expansion of the welfare state and nationalize major industries. That was not Tony Blair's agenda. And in some ways, I think to compensate for that, Blair pursued a fairly radical constitutional agenda instead. One therefore, that wouldn't cost him a lot of money but would seem radical, certainly would be a change from the previous 18 years of conservative government. If he wasn't going to be that different from them on the economics, he could be quite different from them on the Constitution. And the biggest of these changes in Blair's first term were devolution to Scotland, Wales, and Northern Ireland, as well as changes to the composition of the House of Lords. And there was a failed attempt to change or to examine changing the electoral system as well, which only ended up manifesting itself in how we elected members of the European Parliament. So, Blair brought in proportional representation for those elections. And eventually, proportional representation was rolled out in the devolved parts of the UK for non UK elections but not for electing MPs. Since 1997, there have been other reforms Blair, in his second ministry, started to pursue that gave the judiciary a more distinctive standing, separate from Parliament, with the Constitutional Reform Act 2005 that creates the UK Supreme Court. And then after Blair and Brown, when the Conservatives come in 2010, in coalition with the Liberal Democrats, they pursue further electoral reforms. These include a referendum on changing the electoral system, further devolution, and also

removing the prerogative power of the prime minister through the royal prerogative to decide to dissolve Parliament before the end of a parliamentary term I'd call an election. And, in effect, what I suppose we might say, all of these constitutional changes, to a different degree, weaken the centrality of the king in Parliament, or that time the queen in Parliament, and to try to fragment power and disperse power away from, I would argue, the House of Commons, as the engine of modern British politics. And to try and get as close in the entrenchment of law without quite getting all of the way through, say, the Human Rights Act and the way that was then used to give the judiciary greater scope for scrutiny over parliamentary legislation. And, in effect, this was, I would argue, an enormous challenge to the core concept of the British Constitution. And this idea that Yuan had mentioned that the idea that our Constitution is a political constitution, and that this was an attempt to put it on a more legalistic footing. We in the book think was not necessarily a particularly wise move, and at least requires us to think critically about what has been lost by making those changes, where more often than not, in academia, the cry is normally Blair and Cameron didn't go far enough. So we're trying to actually say, well, we think they probably went too far and look at it from the other direction.

A

Anthony Sanders 34:40

Now, I can hear our listeners who love the Institute for Justice and all the civil rights lawsuits we file and love the US Constitution screaming about the value of written constitutions and judicial review and all that. Don't worry everyone, we're going to get to that. It's good to hear about this perspective from the UK with a very different system. But before we get into those screams, I have a question for Yuan that is part of these changes, but it's maybe a little bit of a push back on your push back to these recent reforms that Richard described. So there's a view of the British Constitution that of course, has changed many times in the past. And that when it really came together, as you described in the early 18th century, you had a separation of powers, you had the House of Commons, but you had a really robust House of Lords. And the crown still would do stuff. The king had agency back then, or Queen Anne, or whoever it may be. Over time, it's become more democratic in a real way. And so the House of Lords hasn't had what you guys call a veto player, I think, in the system. So the House of Lords hasn't had a veto on legislation in a long time, they can slow things down, they can't really do much else, whether they're appointed or hereditary. And the crown, of course, hasn't really had much of a play in that in a while. Could it be that the modern British Constitution or the pre-1997 Constitution was a bit of an aberration in history, in that you had so much power in this one body that is democratically elected every few years but is not constrained in the way that in most constitutional systems you have a separation of powers? And that this is kind of trying to readjust to what, in some ways, used to be a balance of power and has been different for a while?

Y

Yuan Yi Zhu 36:56

That's a really good question. So it is true that the nature of Parliament, right, if we're going to be talking about parliamentary sovereignty, it's the nature of Parliament has changed. Parliament used to be conceived as very much of a tripartite institution. It was the king as an independent actor hostile towards the aristocracy and the commoners. Since the House of Commons, people used to compare it in the 18th century to the Holy Trinity, to the seamless robe of Christ, and to really talk about religious quasi blasphemous terms, arguably. And of course, the crown fell away as an independent actor. This only happened surprisingly late. Until

the early 20th century and mid 20th century, the crown would still play a public part in politics. The House of Lords declined with the sediment of democracy and the decline of agriculture holding land and aristocracy. Since 1999, most members of the House of Lords are actually not aristocrats in the traditional sense. They are people who are appointed for public services for life and not hereditary. So it is true that the nature of parliament has changed, but I would be very careful to say that the House of Commons, because of these changes, is somehow unconstrained with powers and can do whatever it wants. This is a very common cliché, that if you have a Prime Minister who has a majority in the House of Commons, he or she can do whatever they want. And if you look at the recent history of the UK Constitution of British politics, that is that is clearly not true. Liz Truss was pushed out of office after two months, even though she had a large majority, Boris Johnson was pushed out even though he had a strong majority. The last prime minister to resign on his or her own terms must have been Harold Wilson. It is the 1970s, 50 years ago, to find a prime minister who really left on his own terms and was not pushed out. The reason for that is actually the House of Commons is not a unitary rubber stamp, let's say North Korea or Chinese parliaments where everybody votes in the party line, even if you have majorities. The majority is comprised fundamentally of several 100 individuals who have their own agendas, they have their own views, even though they belong to the same parties, or are very much waiting to push back against things they don't like. So even within the House of Commons itself, there are checks and balances. For instance, we were talking with somebody who used to run what is known as legislative affairs, and she was explaining to us how even if you have the majority, you only have so many hours in every day, and you only have so many sitting days per year. And because of that, you can only pass so many acts of Parliament. And if there is opposition from a group, even if it's a minority very often, a bill you have to be amended or dropped because simply, you have to economize time. This is one aspect of the Constitution, which people very seldom talk about because it is very much granular, but it is really the sort of thing which, within the House of Commons, provides checks and balances. Of course, not checks and balances in the sense of things which are written in Constitution that are enforced by judges who are in fancy dress. But nevertheless, they are, I would argue, very effective, which means that the House of Commons is not a sort of rule by mob. It is a very complex mechanism, which has internal checks and balances.

A

Anthony Sanders 40:41

So let's get to those judges in fancy dress that you just referred to. So Americans, for all their bickering about what judges should do on the Supreme Court or in the states or in the lower courts, there seems to be a broad consensus that they like some kind of judicial review. They just don't like the outcomes of all the cases. And this the same is true in many other countries. I know Canada has had its own ongoing fearsome debate about judicial review recently. Coming from your British perspective, is your critique of trying to introduce more of that into the UK a bit of a "it's not broken, don't fix it" type of argument, like maybe constitutional judicial review, higher law, all that, it was developed a long time ago in other countries, it kind of works, that's fine for you, but not fine for us? Or do you think it is more broad, that other countries are missing something by not having a more political constitution? And either of you who wants to take that.

R

Richard Johnson 41:58

I am someone who's hesitant to try to be overly prescriptive to other political systems. I think the context and the spirit of the laws is really important. I don't think there's a perfect political

model that can just be transplanted without any reference to the traditions and practices of what has come before. It would be difficult, I think, to say right now it's time for the United States to throw away the document of 1787 and try the UK system as it exists today. I just don't think that's plausible. I do in general, though, have a suspicion of powerful judges. And that comes out more of a core democratic principle about who should be the driver of the rules that govern us. And the concern I always have with constitutional entrenchment is that for sometimes rather technical, formal reasons, future generations end up being trapped into following rules that the majority wouldn't actually wish to follow but have to follow them because those were the rules that were set by previous generations. And the second part of it that I have a concern about is that I do believe, as a democrat, a small d democrat, in the principle of accountability for the application for making laws, and having a strong judiciary that can throw out laws that a majority of the legislature passes and then not really being able to hold those actors to account I think is troubling. And I'm typically more concerned about the tyranny of the minority than I am about the so called tyranny of the majority. So, for me, I have kind of a principled concern about it. But at the same time, I wouldn't want to say that the way that we do it in the UK is the only way that it can be done around the world and everyone needs to try and adopt the UK model.

A

Anthony Sanders 44:43

Well, to follow up on that, as a student of US race relations in American history, you of course know the story of the reconstruction Congress and the coming of the 13th and 14th Amendments that, at times, were not enforced very well. But eventually, to some extent, were enforced in a way that a lot of people would argue protected minorities. So would you say that is a counter example to your story, or maybe it's overhyped? Or again, is that an example of it can work in one place and not another?

R

Richard Johnson 45:21

Well, I actually would slightly disagree in a sense. So I wrote a book called *The End of the Second Reconstruction*, which starts at the end of the Civil War and goes up to the present day. It looks at the role of the judiciary in the protection of racial minorities in the United States. And the argument I put in the book is that the Warren Court of the 50s and 60s is largely an aberration of the practices of the US Supreme Court, with respect to the protection of the rights of racial minorities and working class Americans. The much longer history of the Supreme Court has been one that tends to work against those vulnerable minority groups and in favor of privileged minority groups. And that the failure of reconstruction, in many ways, was led by the Supreme Court, in many cases, willfully misinterpreting the legislation that Congress had passed after the Civil War that was intended to be an expansive reading of the rights of racial minority. And the Court struck those laws, or in some cases, such as in the Civil Rights Act in 1883, tossed them out entirely as unconstitutional. And so I look at the long history of United States and I don't see in general, what did the Warren Court do? The Warren Court was reversing the egregious decisions that earlier Supreme Courts had made, and that if the Court hadn't been involved at all and that the Civil Rights Act of 1866 and Civil Rights Act of 1875 had been allowed to stay in place and flourish, then perhaps the course of American history might have looked quite different.

A

Anthony Sanders 47:13

Well, we at IJ won't disagree with your characterization of post reconstruction Supreme Court. The Slaughterhouse cases still have not been reversed. We are quick to remind everybody. But we'll leave the rest of our disagreements aside, and I'm going to move to Yuan to maybe talk a little bit about how judicial review has been more of a thing since 1997 in the UK. Particularly, it's not constitutional judicial review in the sense that we think of it in the US and Canada, but it has been more of a squabble with Parliament, you might say. So describe maybe how critics in your book take issue with how that's been done.

Y

Yuan Yi Zhu 48:05

Right, so judicial review for most of the constitutional history of the UK was not a factor. It barely existed, if at all, and it really is a post order of two phenomenon and two landmarks. Firstly, in a series of cases from the 1970s to the early 1990s, British soldiers created a new model system of judicial review. And this was all done through court decisions and through secondary legislation, or through rules of the court and so on. So there was no explicit political parliamentary consent to that. But that was the first step. The second big step was the advent of the Human Rights Act, which was one of New Labour's main achievements, one of their main measures of constitutional reform. And what this did was to incorporate the European Convention of Human Rights into UK law and to give the power to UK judges to say that an act in parliament is incompatible with the European Convention. Now on paper, it is a very weak form of judicial review, right? In America, if an act of any legislature is against the US Constitution, any court has the power to strike it down. In the UK, the most a court can do is to say this provision is incompatible with the ECHR. So on paper, it's very weak, but in practice, in political terms, declarations of UK courts as to incompatibility are always followed by Parliament without exception. This means even so in theory, the system which the UK had under the HRA, the Human Rights Act, was a compromise between parliamentary sovereignty and compliance with the ECHR. In practice, the system really amounts to a strong form of judicial review whereby if the courts say something, Parliament will scramble and change its law. So essentially, the introduction of judicial review in the UK has been done by stealth. It has not had the sort of legitimacy which is involved with codifying it through a open process. It happened very much in increments. We have several chapters in our book about the implications for legitimacy, not only of the political system but also the judges. Because, in many ways, one of the critiques I find to be most compelling is about democratic legitimacy. If you really wanted to confide the task of safeguarding the rights and fundamental values to a council of wise people, you will not necessarily pick people whose only qualifications were that were really good lawyers, right? Being a judge almost always means that you were a good lawyer who made lots of money. And certainly, legal skill is valuable and important. But there's so many other things which are part of this broad tapestry, this rich tapestry of governance, which are not legal, which cannot be reduced to a technical exercise. And I think one of the dangers of judicial review in this form is that we risk conflating the task of governance, the clash of values, and other mental worldviews to a technocratic exercise of box checking and legal reasoning, which is merely one form of reasoning, and which certainly is not the only one which we should want to rely on if we are to remain a self governing democratic people.

A

Anthony Sanders 51:58

So, two final big issues I want to get in in our limited time, and either if you can take them. First of all. we talked earlier briefly about devolution. So Wales now has a parliament. Scotland has a

parliament. Scotland's is much more powerful than Wales. Northern Ireland has its own history that we could do several podcasts on. But in your volume, what are some of the problems with devolution? From an American's perspective when we think of federalism, we think, generally it's better to have power wielded at a lower level. And so you can have various reasons for that. What has been the problem though with this renewed devolution in Wales and Scotland?

R

Richard Johnson 52:51

Well, when devolution was brought about, the argument that was most made for it was that it would help to bring the United Kingdom together. A New Labour minister rather infamously said that devolution would call it stone dead. In fact, we kill off Scottish separatism. And really what devolution has done is it has provided a blueprint for an independent Scottish state, and to a lesser extent, an independent Welsh state. And that the kind of political fallout from this has been that the Scottish Parliament in particular has embarked on a project of differentiation from the rest of the United Kingdom. And that the Scottish Government, as it has now become known, has set about to take institutions that were once UK wide institutions, whether that's the institutions of the welfare state, or the institutions of culture and media, and to make them distinctively Scottish in a way that is not just about cherishing Scotland's distinctive history, but I think in many ways is part of a political project to show how different Scotland is from the rest of the United Kingdom. And so rather than bring the United Kingdom closer together, devolution has handed separatists the toolkit to build the project of independence. So on a pragmatic level, I think it's been a disaster, actually, in terms of that idea of holding the UK together. On a more principled point, actually, my antipathy to devolution partly comes from my study of federalism in the United States and how federalism, or devolution in the UK, leads to an arbitrary fragmentation of the welfare state. And it means that people's access to public goods and services becomes quite different. For the arbitrary question of which side of an internal border you live on, Jamila Michener at Cornell has done some fantastic work in her book, *Fragmented Democracy*, about Medicaid and how access to Medicaid varies dramatically from state to state, and it's not to the benefit of poor Americans, that is the case. And as someone on the left of politics, someone who believes that the quality of services and the nature of services that you receive should not differ whether you live on one side or the other of the Scottish or Welsh borders with England, is quite troubling from that standpoint as well.

A

Anthony Sanders 56:27

And now from the right, what is your problem with devolution, other than that this gang of Scottish National Party people took over one of its bodies?

Y

Yuan Yi Zhu 56:40

Well, I could echo much of what Richard has said, right? It's the whole idea behind devolution was to end the conflicts over the breakup of the UK and create an alternative basis of power through which secessionist within the UK can advance their agenda. Now today's Scottish government would have embassies in many countries of the world. It has a so-called foreign policy and among other things. Looking at somebody who comes from a tradition of the right, which believes fundamentally in the value of the union of the United Kingdom that is a very undesirable development. So in that aspect, I would very much agree with Richard as to the

more sort of pragmatic, policy based arguments. I am not in principle against federalism. I think that there are places where federalism does work and has value. I'm from Canada, which is a country which really wouldn't exist or function without a federal system because of the geography, because of the various separate histories of the different parts of the country, the very distinct character of Quebec and so on. I don't have a principled objection to federalism. However, I think in the UK context, because the UK is a country which has evolved the way it did historically because of its size, it's very easy to forget how small the UK is really. You can go from Edinburgh to London, in what, four or five hours or by train? And because of the fact that the common institutions of the UK, besides institutions of the welfare state will be forced and so on, have been developed on a UK wide basis and because there is such a thing as a UK wide identity, I think that to artificially create devolution is sort of a halfway house to federalism, right? It's not federalism, per se, but it has the appearance of federalism really just simply doesn't work in UK context. In UK context, if you did want to give power to localities, you would not necessarily proceed on the basis, I think, of the four nations, and within England, of the very artificial regions. You would really want to do something more granular. You will really want to go to the local institutions, local democracy. To its credit, the current UK Government has been, I think, more aware of this. The UK government has begun, for instance, to bypass the Scottish government and to invest directly in Scottish local government when it asked for infrastructure projects because fundamentally, there's a sense in parts of Scotland and actually in parts of Wales as well, that they have simply replaced rule from London, ruled from a very distant capital, to rule from Edinburgh or Cardiff, which in many ways is not much of an improvement. If you live in the Orkney Islands at the very tip of Scotland, the distance between you and London and between you and Edinburgh are, I mean, London is further away, but it's not necessarily much of an improvement from your point of view in terms of having somebody who's responsive to your needs and interest. So in short, if there is to be a devolution of powers in the UK, it should be done in bases, which should be much more localized and should not be done on the basis of other nations, which really ends up undermining the principle of a coherent UK which is able to respond to national challenges as a United Kingdom.

A

Anthony Sanders 1:00:47

I know. I think slightly tongue-in-cheek in the past, historian Tom Holland has put forward the idea of the seven kingdoms that we would administer the UK through or something more regional. But I encourage people to check out the book for many of these ideas. One final question, so this is what some of our libertarian skeptical government big on judicial review listeners may be screaming right now. It's trying to channel them a little bit. So it seems like at bottom, your support for the political constitution, apart from the historical backing for it, is that it really works to channel what the people want. That's why you can have a large majority in the Commons, and yet, it falls apart because it responds to public opinion. Countering that, there has been a lot of work done in political science and other fields over the years that what we call democracy is not as responsive of the quote, will of the people as we would think. Right? There's public choice theory that tells us that you have concentrated benefits for special interest groups that get that at the expense of the larger majority of the people who aren't paying attention. As to the political system, you have more esoteric things like Arrow's theorem or the Condorcet paradox that show you that politics isn't going to work exactly how you would expect it to. Of course, a lot of people point the finger at first past the post, which you can have a plurality government in the UK. I think Tony Blair in 2005 was reelected with 35% of the vote, which a lot of people think is a problem. Of course, coalition governments have their own

problems too. So either of you, what's your response to the critique that democracy itself is not as democratic as it's made up to be? So putting all your eggs in the basket of democracy, being your Constitution, actually isn't leaving you with what you think it is.

R

Richard Johnson 1:03:14

I don't think either of us are under any illusions that the system that we advocate is a perfect one or one that doesn't have its idiosyncrasies or flaws within it. But I do think that it is one that people fought to bring about and to preserve. I mean, my grandfather was born at the start of the 20th century. When he was born, neither of his parents had the right to vote, and they were born in England and Newcastle. His mother, because she was a woman, and his father, because he had no property, was the working class and hadn't been fully enfranchised at that point. And I think just over a century since that time, we've come a long way as a country. And the vote itself for me is not just symbolically important, but it is extremely substantively important because it is that one point at a general election where all of the inequalities of wealth and power and influence fall away. And I think particularly for people like my grandparents who didn't have any particular influence beyond that, if you have no influence in industry or in culture or what have you, then actually that vote becomes even more important. And the concern that I have with the changes that we've seen since 1997 is that weakens the power of that vote because it takes decisions out of the body to which those votes translate into power, and they become more fragmented and more mysterious and more ultimately inaccessible. And so, although yes, there are plenty of theories and theorems that show various paradoxes of voting and so on, ultimately, I still think that for most people, in a practical, meaningful and substantive way, going and casting their vote for the MP, with that MP knowing that at the end of that Parliament, however long it may be up to five years, but it could be much shorter, they've got to go back to those same voters, and account for what they've done or not done, is tremendously powerful and empowering. And it's a system that I think we shouldn't move away from without a great deal of consideration. My concern is that we've started to walk away from that system, as you answered earlier, by stealth without a real reckoning by the British public or their approval.

A

Anthony Sanders 1:06:20

Yuan, any concluding thoughts, Burkean thoughts, perhaps, about your long-lived Constitution?

Y

Yuan Yi Zhu 1:06:29

Perhaps just adding to what Richard was saying and to what you're asking, I'm certainly very sympathetic to the concerns by your libertarian listeners, as to majority minorities and how that affects the protection of rights. Speaking as somebody who's very obviously a minority, I sort of have no illusion as to this being a potential problem and having been problem. What I would say is this: in order for the rest of the minorities to be effectively safeguarded, they require more than the of blessing of judges; they require a broad societal consent. And the best way to secure a broad societal consent for the protection of minority rights, and by minority I mean a minority of any sorts, not only ratio or ethnic or religious, but in any sense, the best way to ensure protection of the minority rights is by the creation of a broad political consensus. And that sort of consensus tends to emerge as a result of political and legal contestation and of

electoral politics, of which voting is very much a central part of when you have rights which are invented out of thin air by judges who are not accountable and who are constituted as the weakest branch of government. That is not a secure base on which to rest. We have plenty of examples from the history of Europe, for instance in the 20th century, when very elaborate schemes of minority protection, backed by very elaborate schemes of a traditional power, unraveled very quickly simply because of the lack of a broad, popular based consensus in favor of those rights. And I would argue that the more we focus our intention on convincing the judiciary, it's less we are doing in favor of creating this absolutely necessary political consensus. At the end of the day, that actually can backfire as we have seen very often through history. So in short, I'm mindful of the concerns of your libertarian listeners, but a pitch I really want to make is that democracy isn't the enemy. Democracy is very much the channel through which we have to work through in order to secure the rights of the minorities and of the unpopular.

A

Anthony Sanders 1:09:07

Well thank you both for this fantastic conversation. I'm so glad that our listeners got a taste of how things actually work over there in the UK and also the contrast between how things have worked, and then the American or Canadian systems and what we might see in the future. We will put a link in the show notes to the book and also to both of Yuan and Richard's pages. I often talk about the British Constitution as a bit of a foil in some of my writing on the US Constitution, but I do try to pay it due respect at the same time. I'll put a link up to a little essay where I talked about those two contrasts in the last year. In the future, I want all our listeners to check out both of these gentlemen either on Twitter or wherever else they write. They write some fantastic stuff that you can learn a lot from. In the meantime, I may be chastised for this, but for old times sake, I'm going to close with God Save the King, and you can check out the coronation. That's going to be a lot of fun, I'm sure, if you're interested in the British Constitution in a few days, but in the meantime, as I always say, I hope that all of you get engaged.