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Constitutional Paternalism: The Rise and (Problematic) Use of Constitutional 'Guardian' Rhetoric

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Constitutional Paternalism: the rise and (problematic) use of constitutional 'guardian' rhetoric

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This article examines the origins and use of constitutional 'guardian' language, contending that the use of such language—which is now employed primarily in relation to the judiciary—is overly paternalistic and encounters both normative and consequentialist difficulties. The piece first attempts to pin down when 'guardian' language first arose, and when it took hold. It analyses written constitutions use of such language, finding that very few constitutions employ it—especially in relation to the judiciary. It then looks to judicial decisions from a number of jurisdictions, finding that some evidence points to a spike in this language within the past three decades. Then, it looks to legal scholarship, which demonstrates a sharp increase in such language over the past 3-4 decades. The second half of the piece discusses why using such language matters, arguing that the use of 'guardian' language is unnecessarily factional, and dissuades other constitutional actors from participating in constitutional maintenance and protection. Also, the judiciary's understanding of guardian may be more legal than general, thus displaying the development of constitutional paternalism that is evident in many jurisdictions. Ultimately, the piece concludes that the judiciary—although serving a considerably important constitutional role—does not possess the exclusive right to assert 'constitutional guardianship' status.

Introduction

> 'It is common to speak of the judiciary as part of the system of checks and balances which contains and constrains the power of the government; or as one of the three principle institutions of the State, each of which acts to limit the powers of the other two. The image has a pleasing and mechanistic appearance, suggesting some objective hidden hand which holds the constitution in perpetual equilibrium. The extent to which the image reflects reality is less obvious'.
>
> - John Griffith[1]

In constitutional systems the world over, it is difficult to find a label that rises above the lofty heights of 'constitutional guardian'. Although diverse in application, this description implies that whoever attains such status also bears ultimate responsibility for the care and maintenance of the state's most important legal and political principles. In contemporary times, judiciaries throughout the world are now commonly lauded as the constitutional 'guardians' of their respective jurisdictions.[2] But there are significant questions as to when this language arose and what impact it may have on the constitutional settlement. This paper examines the use and implications of

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[1] JAG Griffith, *The Politics of the Judiciary* (5th ed)(1997), p 335.

[2] See, e.g., M Scheinin, H Krunke, and M Aksenova, *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar, 2016).

constitutional guardian rhetoric. It does so by analysing when and where the guardian language arose, and why the constitutional guardian language matters. Regarding the latter, I argue that the use of this language is factional and overly paternalistic, and dissuades other state actors—especially citizens—from participating in such constitutional guardianship. After all, the protection and health of a constitutional state is a *collective* endeavour, and is not limited to one particular person or branch—regardless of what particular powers they may possess. And yet by most accounts investigated below such constitutional guardian language is increasing, with the vast majority of this language in reference to the judiciary being the anointed guardians. The use of such language has taken hold over the past few decades, but the effects of such language on the constitutional state have not been fully addressed. This inquiry seeks to remedy that.

The question as to who are the true constitutional 'guardians' has been extensively debated in other jurisdictions,[3] but the idea is quite new for some common law jurisdictions where the judiciary has not played a dominant role for a number of reasons: e.g., the UK does not have a codified constitution, New Zealand has only a statutory constitution and bill of rights, and Australia has a written constitution but no bill of rights. And even though the judiciary in the US has played a major role throughout the nation's history, much recent constitutional scholarship has focused on constitutionalism outside the courts, or even taking the constitution away from the courts.[4] In my own jurisdiction of the UK, there has been consistent talk in recent years of drafting a written constitution.[5] No doubt such constitutional guardianship language would increase if this happened, as we would be increasingly forced to think in constitutional, as opposed to legal and political, terms. Thus, while this paper takes a comparative approach, it does so through a UK lens.

The quote by John Griffith that begins this piece was last published in 1997, just one year before the UK Parliament enacted the Human Rights Act (HRA) 1998. Although it is now impossible (as Prof Griffith has since passed away), it would be interesting to see if he still held this view. The HRA has become more entrenched over the past couple decades, and beyond this, the UK has established a new Supreme Court (UKSC). Granted, the UKSC is—at least in theory—a mirror of the former Law Lords, which does not contain all the trappings of a 'normal' supreme or constitutional court, especially in the sense that they cannot strike down primary legislation. And yet, the courts can now make declarations of incompatibility under the HRA,[6] and a number of rulings over the last couple decades portray the UK judiciary as not merely the servants of a sovereign Parliament, but as the protectors of certain constitutional values, such as the rule of law.[7] But even with the HRA and these subsequent developments, it remains highly questionable as to whether any court within the UK, even the Supreme Court, should be provided with the status of constitutional 'guardian'.

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[3] L Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015); J Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951-2001* (Oxford: Oxford University Press, 2015).

[4] See, e.g., M Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000).

[5] This arose primarily around the 800th anniversary of the Magna Carta (See, e.g., R Blackburn, 'Enacting a written constitution for the United Kingdom' (2015) *Statute Law Review* 1. However after the referendum outcome regarding the UK's decision to leave the EU, some have advocated it as a means of entrenching constitutional values, such as EU membership.

[6] Human Rights Act 1998, s. 4. Aileen Kavanagh even argues that, post-HRA 1998, UK judicial review can no longer be classified as 'weak' (A Kavanagh, 'What's so weak about "weak-form review"? The case of the Human Rights Act 1998' (2016) *International Journal of Constitutional Law* 1008.

[7] *R (on the application of Evans) v Attorney General* [2015] UKSC 21; *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

Although the UK maintains an unwritten constitution, it is not immune from the use of guardian-esque language, especially as the prospect of a codified constitution continues to grow.[8] Lady Hale, now president of the UK Supreme Court (UKSC) has given a couple public speeches on the topic,[9] including one entitled: 'The Supreme Court: Guardian of the Constitution?',[10] where she begins by questioning whether the UKSC fulfils this role, and ends by noting that to a certain extent, the Court functions as '*the* guardians of the UK Constitution' (my emphasis).[11] This latter assertion arose within the context of the major Brexit case, *Miller v. Secretary of State*,[12] in the sense that the government had stopped arguing that the issue was not justiciable. This, at least in Lady Hale's eyes, added fuel to the UKSC's constitutional 'guardian' status.

Outside of the UK context, however, the tendency for judges and others to proclaim courts constitutional guardians or guardians over various rights and freedoms is much more pronounced.[13] This rise in judicial assertiveness corresponds with the rise in a number of other legal barometers that academics have documented throughout the years: including the number of written constitutions, the number of statutory and constitutional bills of rights, the number of constitutional courts, and the wide powers that these constitutional courts wield.[14] It is no surprise that over the past couple decades we have seen books entitled *The Global Expansion of Judicial Power*,[15] *Governing with Judges*,[16] and *Towards Juristocracy*.[17] This paper complements these works, providing further evidence that legal mechanisms and legal actors are the favoured routes for constitutional adjudication nowadays. Indeed, a highly legal—as opposed to political—form of constitutionalism is, increasingly, the world that we live in. Whether this turn has been beneficial for the health of many democracies, however, remains up for debate.

When did the 'guardian' language arise?

In the common law context, there are major questions as to when the use of constitutional guardian language began, and subsequently when it took hold. Some may trace it back to Sir Edward Coke in *Dr Bonham's Case*, who said that 'in many cases the common law will controul acts of parliament and sometimes adjudge them to be utterly void'.[18] These were strong words in 1610, and remain strong today. And without a doubt, there is a guardian-esque tinge that the common law is provided in this statement, as statutory law appears subservient to judicial discretion.

[8] Such a document was proposed in Scotland before their 2014 independence referendum, and there have been a number of calls for a UK-wide document after the vote to leave the EU.
[9] One was: Lady Hale, 'Who Guards the Guardians?' Public Law Project Conference (14 October 2013), https://www.supremecourt.uk/docs/speech-131014.pdf.
[10] Lady Hale, 'The Supreme Court: Guardian of the Constitution?', Sultan Azlan Shah Lecture 2016 (9 November 2016), https://www.supremecourt.uk/docs/speech-161109.pdf.
[11] See, (forthcoming) Brian Christopher Jones, 'Lady Hale and Dissonant Constitutionalism' (2018) *King's Law Journal*.
[12] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5.
[13] See, e.g., KL Sheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for Rule of Law in Post-Soviet Europe' (2006) *University of Pennsylvania Law Review* 1757.
[14] See, e.g., T Ginsburg, 'Written Constitutions Around the World' (2015) 15(3) *Insights on Law & Society*, https://www.americanbar.org/publications/insights_on_law_andsociety/15/spring-2015/written_constitutions.html.
[15] CN Tate and T Vallinder, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).
[16] AS Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).
[17] R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2007).
[18] SE Thorne, 'Dr Bonham's Case' (1938) 54 *Law Quarterly Review* 543, 544.

However after the Glorious Revolution in 1688 and the entrenchment of parliamentary sovereignty, the precedent fell off in the British context.[19] Blackstone, writing shortly after the Glorious Revolution, does not repeat Coke's assertion, and never refers to judges as guardians throughout his *Commentaries*. He even acknowledges at one point that jurymen were the 'the surest guardians of public justice'.[20] Others may look to *The Federalist* No. 78, in which Hamilton mentions the judiciary's 'duty as faithful guardians of the Constitution'.[21] But this, in my view, would be a mistake. Hamilton does not say that judges are *the* faithful guardians of the Constitution, but merely that the judiciary 'was' or 'would be' faithful guardians, just like any other branch—not to mention citizens—could have been. Although that language arose in a highly influential set of writings on the Constitution, neither the US federal Constitution of 1789 nor any subsequent US state constitutions explicitly refer to the judiciary as 'guardians'. The closest that many US state constitutions get to labelling guardians is by noting that all political power is vested in citizens, and some constitutions entail quite strong language in this regard. For example, Sec. 2 of the Connecticut Constitution notes, 'All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient'.[22] Similar language is also evident in states that joined the Union at a later date, such as New Mexico and Alaska.[23] Thus, although the language was present at America's founding, it certainly did not catch on either from either a federal or state perspective.

Another major point at which this type of language could have arisen is in *Marbury v Madison*.[24] But although *Marbury* furthers the rhetoric around ultimate constitutional authority and serves as a template to expand the judiciary's constitutional jurisdiction, similar to the way that *Bonham's Case* does, it did not explicitly use the phrase 'guardian' in reference to the judiciary. But across the pond the power of the American judiciary was certainly evident, and these guardian connections were more explicitly made. Writing in the late 19th century, A.V. Dicey confronted the idea of guardianship. When describing the US system of federalism and the judiciary's role, he stated that 'the Bench of judges is not only the guardian but also at a given moment the master of the constitution'.[25] Although this term received criticism, Dicey stuck with it through multiple editions. But even after Dicey's writing, and for most of the early and mid-20th century, prominent 'guardian' characterisations of the judiciary—for whatever reason—do not take hold. Thus, we must look elsewhere.

In a somewhat different (i.e., non-common law) context, a great twentieth century debate ensued, mostly in the 1920s and 1930s, between Hans Kelsen and Carl Schmitt on the subject of constitutional guardianship. Ultimately, Schmitt argued that the executive is the proper constitutional guardian, while Kelsen contended that a constitutional court should be recognised as such.[26] However, this debate mostly revolved around the German context, and the prospect of

[19] That did not stop American judges and scholars from picking it up, as it is commonly cited in the American context as a justification for judicial review. See, e.g., RH Helmholz, 'Bonham's Case, Judicial Review, and the Law of Nature' (2009) 1(1) *Journal of Legal Analysis* 325, 327.
[20] JH Langbein, 'Blackstone on Judging', in W Prest (ed), *Blackstone and his Commentaries: biography, law, history* (Oxford: Hart, 2014), p. 71.
[21] The Federalist Papers, No. 78 (Hamilton).
[22] Conn. Const. Sec. 2.
[23] New Mexico Const. Sec. 2, and Alaska Const. Sec. 2.
[24] *Marbury v Madison*, 5 U.S. 137 (1803).
[25] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982), p. 100.
[26] Vinx, *The Guardian of the Constitution*, 2015), p. .

the legislature or other constitutional actors being such guardians—a category in which the UK likely falls—was not fully addressed. In the long run, or at least, at the moment, Kelsen seems to have won out, and not just in the German context. The number of constitutional courts throughout the world has risen dramatically,[27] and this is especially true on continental Europe.[28] Indeed, the ancillary powers of these bodies continues to grow, as the courts are further trusted to police a wider amount of the political process, such as whether political parties should be dissolved.[29] But the Kelsen-Schmitt debate—though certainly significant to our discussion here—arises well before the use of such constitutional guardian language appears to have taken hold, as we will see below. Thus, this time period—the early to mid-twentieth century—can also be discounted as when the language took hold.

Without having any smoking gun to establish when the idea of constitutional guardianship became more commonplace, this inquiry seeks alternative methods for examining this phenomenon. Below I survey official devices, such as written constitutions around the world and legal judgments from a number of common law jurisdictions, in an attempt to determine when (and where) this language really caught on.

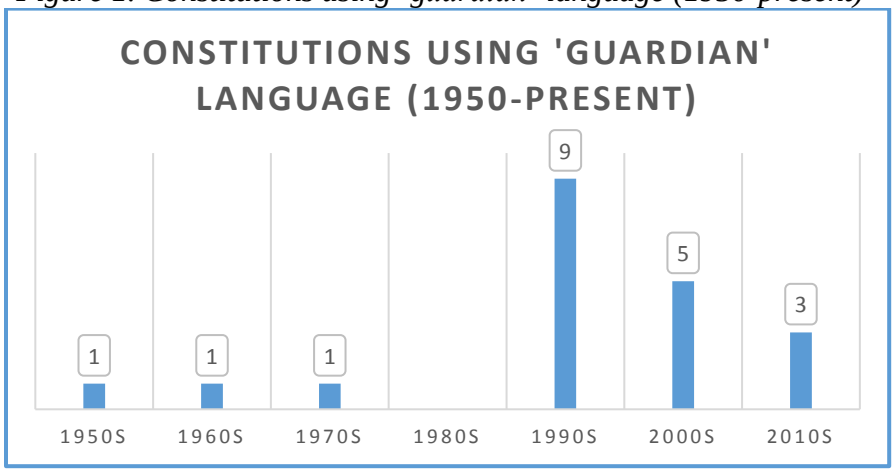
Written constitutions using 'guardian' language

If constitutional 'guardian' language for the judiciary has become more widely adopted, then we should look to its most formal possible origins: written constitutions. It may be that these documents have granted judiciaries this pre-eminent status. A reasonable normative position is that if judiciaries and others are using this language in relation to the judiciary, then these documents will have granted them this status. To determine if this is the case, the following section examines a number of written constitutions in order to establish whether these documents are explicitly granting this status to judges. Of course, this current inquiry takes into consideration only constitutions that are currently in force, and not past constitutions that have been replaced.

Undeniably, the vast majority of written constitutions throughout the world lack any type of explicit 'guardian' language.[30] However in constitutions that do employ 'guardian' language—not all of which is directed at the judiciary—most all were implemented in the past three decades: Bhutan (2008); Burkina Faso (1991); Burundi (2005); Chad (1996); Djibouti (1992); Gabon (1991); Hungary (2011); Mali (1992); Mauritania (1991); Paraguay (1992); Rwanda (2003); Senegal (2001); Sierra Leone (1991); Somalia (2012); Swaziland (2005); and Togo (1992).[31] Only three constitutions that use explicit 'guardian' language pre-date 1990: France (1958), Uruguay (1967) and Micronesia (1978). Thus, in terms of explicit guardian language, Figure 1 below shows that this took hold around the 1990s, and that it has continued—albeit to a limited extent—ever since. Even if we just take the most recent decade (2010-present), which is not yet over, the number of written constitutions using explicit guardian language equals the total that came into force from 1950-1989.

[27] See, e.g., Hirschl, *Towards Juristocracy*.
[28] Sweet, *Governing with Judges*, pp. 133-37.
[29] T Ginsburg and Z Elkins, 'Ancillary Powers of Constitutional Courts' 87 *Texas Law Review* 1431.
[30] Of course, beyond the 'protecting and defending' nature of guardianship, some constitutions do use the term in a more legal manner, in relation to children or incapacitated adults.
[31] These were amalgamated using the following website: https://www.constituteproject.org/. Not all of these instances necessarily identify the judiciary as the guardian of the constitution, but they all do use 'guardian' language in relation to one or more branches. The specifics of such language (i.e., who they identify as guardians) are discussed further below. Also, some of the constitutions on the Constitute Project website are translations, and that needs to be taken into consideration as well.

*Figure 1. Constitutions using 'guardian' language (1950-present)**



* Based on a search for 'guardian' language on the Constitute Project website.

Some very judicially-friendly constitutions (i.e., those that contain wide-ranging powers for supreme or constitutional courts), such as Germany's or Taiwan's, do not include 'guardian' language. But different constitutions use different wording, and there are some notable variations. When it comes to articulating judicial authority, the stock phrase that many constitutions employ is that power to interpret the constitution is vested in the judiciary or in a particular set of courts. This is still the most common language present in constitutions. For example, Germany's Basic Law states, 'The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder'.[32] Taiwan's Constitution reads: 'The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and ordinances'.[33] Although these are common expressions, both of these acknowledgements express the more traditional conceptions of judicial power that is widespread in older constitutions: judges as faithful—or ultimate—interpreters of a constitution, rather than judges as constitution makers or 'guardians' of the document.

Newer constitutions are more factional, providing wider and more explicit powers to constitutional courts in lieu of the other branches. For instance, they may explicitly state that a constitutional court is the 'only' or 'final' arbitrator concerning particular matters. The South African Constitution states that the Constitutional Court 'makes the final decision whether a matter is within its jurisdiction'[34] and also 'makes the final decision whether an Act of Parliament…is constitutional'.[35] There are also specifically enumerated powers that only the Constitutional Court possesses,[36] which are indeed quite wide in terms of assessing compliance with the Constitution. But even then, it does not explicitly refer to the Court as *a* guardian, or even *the* guardian of constitutional values. Other constitutions use different language to hint at or imply such 'guardianship'. For example, the Czech Republic Constitution reads: 'The Constitutional Court is

[32] German Basic Law, Art. 92.
[33] Taiwan Const., Art. 78.
[34] South African Const., Art. 167(3)(c).
[35] South African Const., Art. 167(5).
[36] South African Const., Art. 167(4).

the judicial body responsible for the protection of constitutionality'.[37] These examples demonstrate that some constitutions go beyond the faithful or ultimate 'interpreter' language, either explicitly expanding the powers of constitutional courts or hinting at some type of enhanced 'protector' role. The Czech and South African constitutions are significant because they also came about in the midst of the 1990s, which is when constitutional guardian language spiked.[38]

A few of the constitutions included in Figure 1 explicitly identify guardians outside of the judicial context. Senegal's 2001 constitution explicitly states, 'The President of the Republic is the guardian of the Constitution',[39] and Hungary's states that the President, 'shall embody the unity of the nation and be the guardian of the democratic functioning of the state organisation'.[40] Other constitutions that explicitly identify the president as 'guardian of the constitution' are: Mali,[41] Mauritania,[42] Sierra Leone,[43] and Somalia.[44] Of course, nominating just one person, such as a president, is just as problematic—or perhaps worse—than nominating one branch to do the 'guarding'. Nevertheless, some of the constitutions that nominate the president as 'guardian' also later mention that the judiciary is the guardian of particular rights or liberties. In fact, this latter qualification of guardianship is the most common type of anointment for the judiciary. For example, the French Constitution notes that the judiciary is 'guardian of the freedom of the individual';[45] the Rwandan Constitution states that 'The Judiciary is the guardian of human rights and freedoms';[46] and Chad's Constitution asserts that the judiciary 'is the guardian of the freedoms and of individual property and sees to the respect of the fundamental rights'.[47] Swaziland is perhaps the most inclusive—and forthcoming—in terms of its constitutional language, noting in the preamble, 'Whereas all the branches of government are the Guardians of the Constitution, it is necessary that the Courts be the ultimate Interpreters of the Constitution'.[48] This language focuses on guardianship as a collective matter, but singles out the judiciary in terms of interpretation.

Only two constitutions openly anoint the judiciary as the *sole* constitutional guardians, rather than qualifying this guardianship to particular rights, liberties or freedoms. Paraguay's Constitution asserts that 'The Judicial Power is the guardian of the Constitution. It interprets it, it complies with it and it has it complied with',[49] and Bhutan's notes, 'The Supreme Court shall be the guardian of this Constitution and the final authority on its interpretation'.[50] The Paraguay Constitution suggests an extremely wide role for the judiciary, noting the interpretative and compliance role,[51] while the Bhutan Constitution merely elaborates on the traditional interpretative role that we have commonly ascribed to the judiciary. Thus, although other constitutional language

[37] Czech Republic Const., Art. 83.
[38] The Czech Constitution came into force in 1993, and the South African Constitution came into effect in 1996.
[39] Senegal Const., Art. 42. It then later notes, 'The judicial power is the guardian of the rights and freedoms defined by the Constitution and the law' (Art. 91).
[40] Hungary Const., Art. 9(1).
[41] Mali Const., Art. 29.
[42] Mauritania Const., Art. 24.
[43] Sierra Leone Const., Art. 40(3).
[44] Somalia Const., Art. 871.
[45] French Const., Art. 66.
[46] Rwanda Const., Art. 43.
[47] Chad Const., Art. 143.
[48] Swaziland Const., Preamble.
[49] Paraguay Const., Art. 247.
[50] Bhutan Const., Art. 111.
[51] The compliance role is a bit odd to mention, as judiciaries are usually beholden to the executive in terms of ensuring compliance with their decisions.

may imply or indeed all but articulate constitutional 'guardianship'—given the vast amount of powers some constitutional courts are provided—only two written constitutions formally and explicitly express this. This newfound labelling of various constitutional guardians may display power struggles in action, which is something that I am concerned with as regards this factional language. Given that executive branches are often the ones that attempt constitutional reform, it is unsurprising that some of the newer constitutions anoint them as guardians (e.g., in Hungary the Fidesz party enacted a new constitution after their sweeping election victory in 2010, and it may not be surprising that the guardian language is used in relation to the 'democratic functioning of state operation').

However I would like to dwell on the Swaziland preamble for a moment, which appears quite unique in its language. For one, it acknowledges that all branches are constitutional guardians, something that no other written constitution explicitly does. Secondly, it explicitly and directly lays out that the courts will be the ultimate interpreters; and it does this in the *preamble*. Most judicially-friendly constitutions, in which a supreme or constitutional court wields significant power, do not mention the power of the courts until much later, where it may be ignored or given much less significance. For example, the German Basic Law does not articulate the power of the judiciary until Article 92,[52] and in the Japan Constitution this is not done until Article 76.[53] This is quite typical in terms of where judicial power is often placed in constitutions. Even the Paraguay and Bhutan constitutions, which anoint the judiciary as the *sole* guardians of their Constitutions, do not do so until Article 247 and Article 111, respectively. Leaving this language to the middle or end of a constitution, rather than acknowledging the guardians up front, is a major defect of many written constitutions. It certainly begs the question: why would a constitution stick vastly important matters—such as ultimate constitutional guardianship—in places that many citizens would never care to look?[54] One reason may be that if judicial supremacy was acknowledged up front, such constitutions would be less likely to be enacted. Or perhaps judicial review is so entrenched nowadays that states take for granted that judiciaries will possess wide ranging powers, such as legislative strike down or other ancillary powers. Either way, at least the Swaziland preamble candidly acknowledges that the judiciary plays a major role in constitutional maintenance. It is also worth noting the discrepancy between this language in the Swaziland constitution and that found in many US state constitutions. As noted above, an extremely common provision in US state constitutions is to note that all political power originates in 'the people',[55] and no constitution that I found explicitly notes the power of the judiciary in the preamble or any of the earlier provisions that focus on constitutional power and authority. This provides an interesting dichotomy about where constitutional practice currently resides. Given that many US state constitutions were written in the 19th and 20th century, more contemporary constitutions—such as those of Bhutan, Paraguay and Swaziland—may be willing to acknowledge judicial power in a more robust and explicit manner.

Legal judgments using 'guardian' language

Another place where this explicit guardian language arises is in legal judgments. While in the constitutions section above I was able to look at all guardian language and filter out the references to 'legal guardian' as opposed to a 'constitutional guardian', in this section I had to take a different

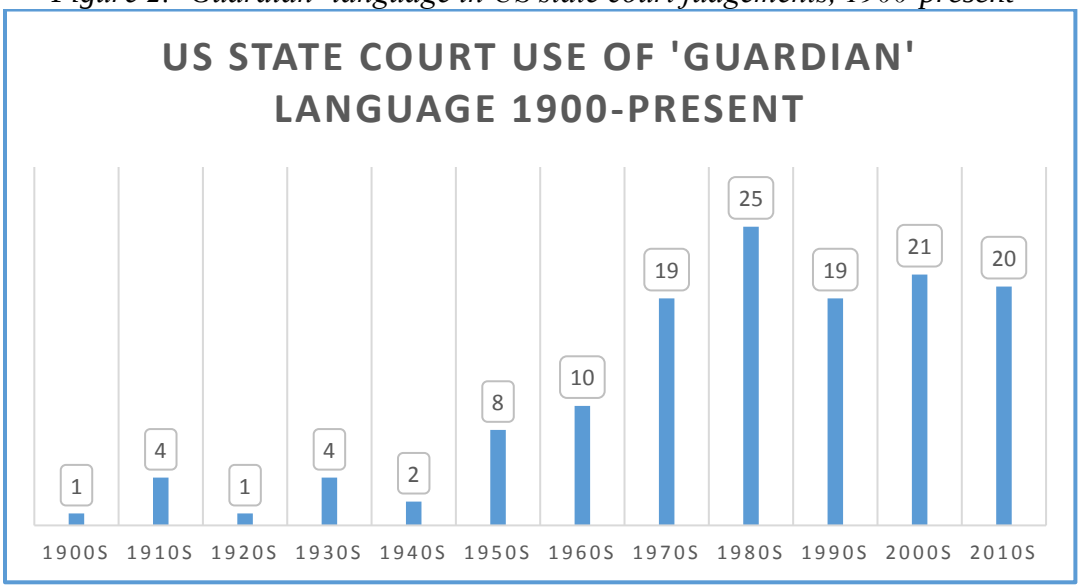
[52] German Basic Law, Art. 92.
[53] Japan Const., Art. 76.
[54] Assuming, of course, that citizens still read and consult constitutions.
[55] See notes 20 and 21 above.

approach. In order to ensure consistency across jurisdictions, the searches below in relation to legal judgements only include the phrase 'guardian/s of the constitution'. Given the wide amount of legal judgments that discuss 'legal guardianship' in relation to children or incapacitated adults, searching for this phrase helped me narrow the statistical inquiry.

The survey included three common law jurisdictions (the United States, Canada, and Australia), and we can see that although some of the explicit guardian language pre-dates the complementary language that we see in contemporary constitutions, most of it aligns with its use over the past couple decades. For example, one of the main articulations of the courts as a guardian came in the 1971 US Supreme Court case of *Perez v Ledesma*.[56] Here a concurring opinion by Justice Brennan notes that the federal courts are 'the primary guardians of constitutional rights'.[57] In general, however, the federal US judiciary has not been overly assertive in terms of its 'guardian' status, and the wording has been seldom used throughout the years, especially by the US Supreme Court.

The same does not necessarily hold true in US state courts, which have employed the terminology a fair amount.[58] This comes as a bit of a surprise, given that no US state constitution explicitly labels the judiciary a constitutional guardian. Figure 2 below tracks the use of guardian language in state court judgments. Here guardian language did not start gaining steam until the 1950s, and did not begin to peak until the 1970s, when it almost doubled from the previous decade. That could potentially be a product of *Perez v Ledesma* noted above, but given that this was federal, and not state, court usage, the likelihood that *Perez* sparked the increase would seem a bit counterintuitive.

*Figure 2. 'Guardian' language in US state court judgements, 1900-present**



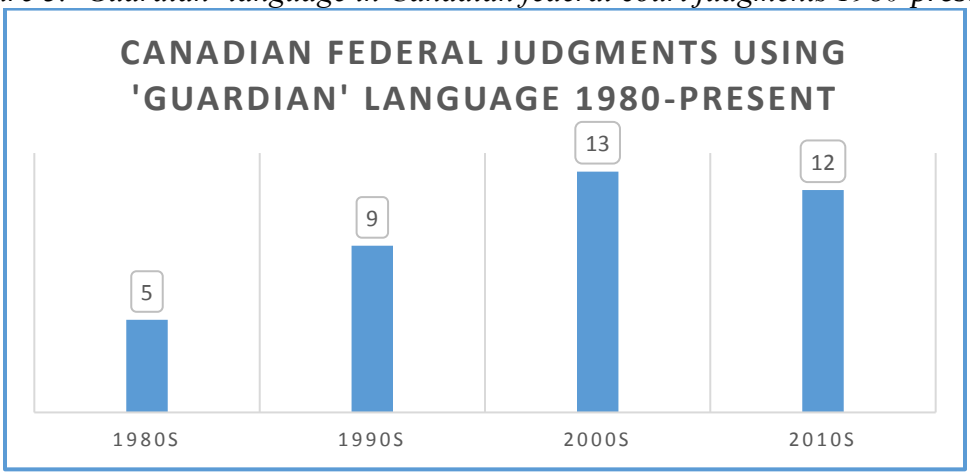
* Based on a Westlaw search of the phrase 'guardian of the constitution' in US state court judgements (n=147).

[56] *Perez v. Ledesma*, 401 U.S. 82 (1971).
[57] *Id.*, at 104. This passage was later cited in *Steffel v Thompson*, 415 U.S. 452 (1974).
[58] Although, it is acknowledged that given the vast amount of cases that come before the state courts, this total the numbers presented below are only a small sliver of that total. Nevertheless, the data reinforces the trend seen in other areas regarding the use of constitutional guardian language.

Given that virtually all US state constitutions were written before the rise in constitutional guardian language took hold, it is unsurprising that judiciaries, or state Supreme Courts, are not labelled in this manner. Nevertheless, the trend from the 1970s onwards seems quite consistent.

Also in North America, the federal Canadian courts have been very active over the past few decades in employing such language. In the case of *Hunter v Southam Inc* [1984], undertaken shortly after the implementation of the Canadian Charter of Rights (1982), the leading judgment noted: 'The task of expounding the constitution is crucially different from that of construing a statute…The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind'.[59] This language appears to have caught on, and as Figure 3 demonstrates below, has slowly increased over time.

*Figure 3. 'Guardian' language in Canadian federal court judgments 1980-present**



* Based on a Westlaw search of the phrase 'guardian of the constitution' in AU federal court judgements (n=39).

In Australia, the concept of guardianship was first introduced in the *Australian Communist Party Case* (1951), with the explicit assertion that 'The Court is the guardian of the Constitution'.[60] Although this bold language arose in the mid-twentieth century, the phrase was only used three times by the High Court from 1960-1999.[61] Yet in the 2000s, it was used in five High Court judgments,[62] thus almost doubling its use throughout the previous four decades. This spike in use is relatively strange: unlike the Canadian experience, where there was a slow build, Australia's rise in the 2000s appears to have come out of nowhere. And yet, even with the spike in the 2000s, such language has not been used once by the High Court in the 2010s.

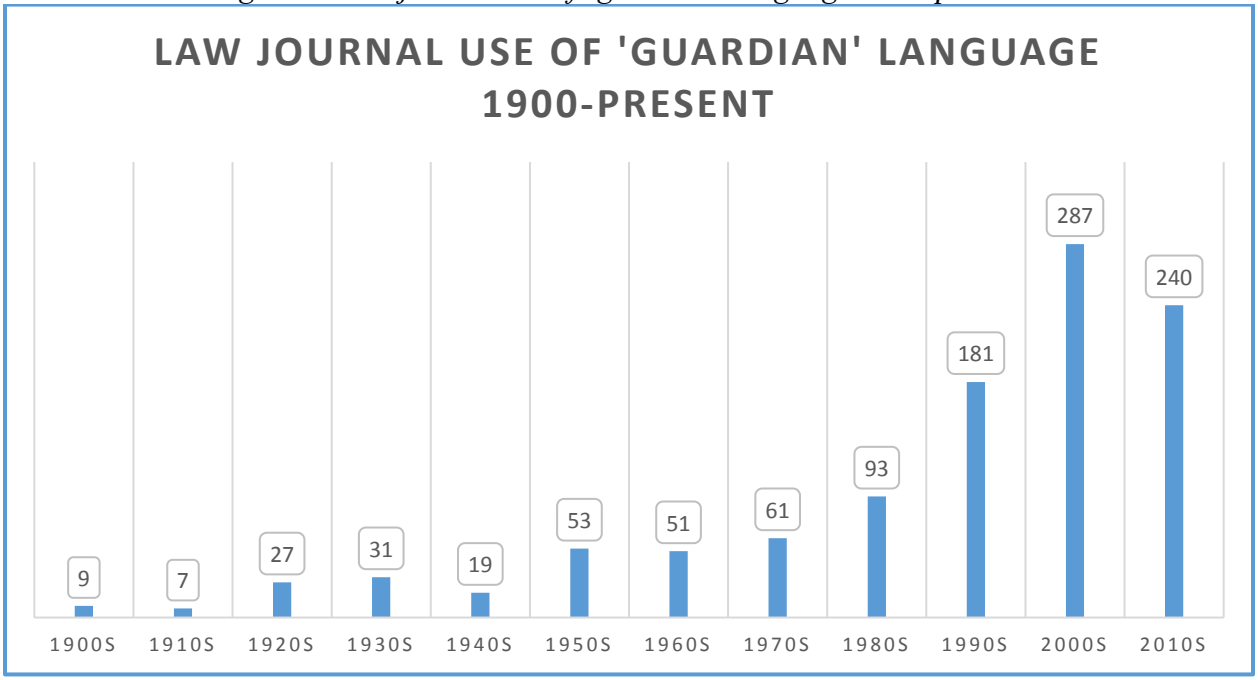
Law journal and news articles using 'guardian' language

Finally, this inquiry examined the use of 'guardian' language in law journal scholarship and news articles. For the law journal section, I used Hein Online's Law Journal Library to search for the

[59] 2 S.C.R. 145 (Can.).
[60] *Australian Communist Party v Commonwealth* (1951).
[61] *Western Australia v Hamersely Iron Pty Ltd (No 2)*, 120 CLR 74 [1969]; *Victoria v The Commonwealth and Connor*, 134 CLR 81 [1975]; Kruger v Commonwealth, 190 CLR 1 [1997].
[62] The five judgments are: *Chief Executive Officer of Customs v El Hajje* 224 CLR 159 [2005]; *Forge v Australian Securities and Investments Commission* 228 CLR 45 [2006]; *New South Wales v Commonwealth* 229 CLR 1 [2006]; *Thomas v Mowbray* 233 CLR 307 [2007]; *MZXOT v Minister for Immigration and Citizenship* 233 CLR 601 [2008].

phrase 'guardian of the constitution'. The results produced 1,074 results in total, which came from law journals around the world.[63] Of course, it is acknowledged that the amount of legal periodicals grew considerably throughout the twentieth century, and just from that alone we are likely to see a decade on decade increase in the use of such language. That being said, the data displays evidence that the use of the phrase took hold primarily in the past few decades.

*Figure 4. Law journal use of 'guardian' language 1900-present**



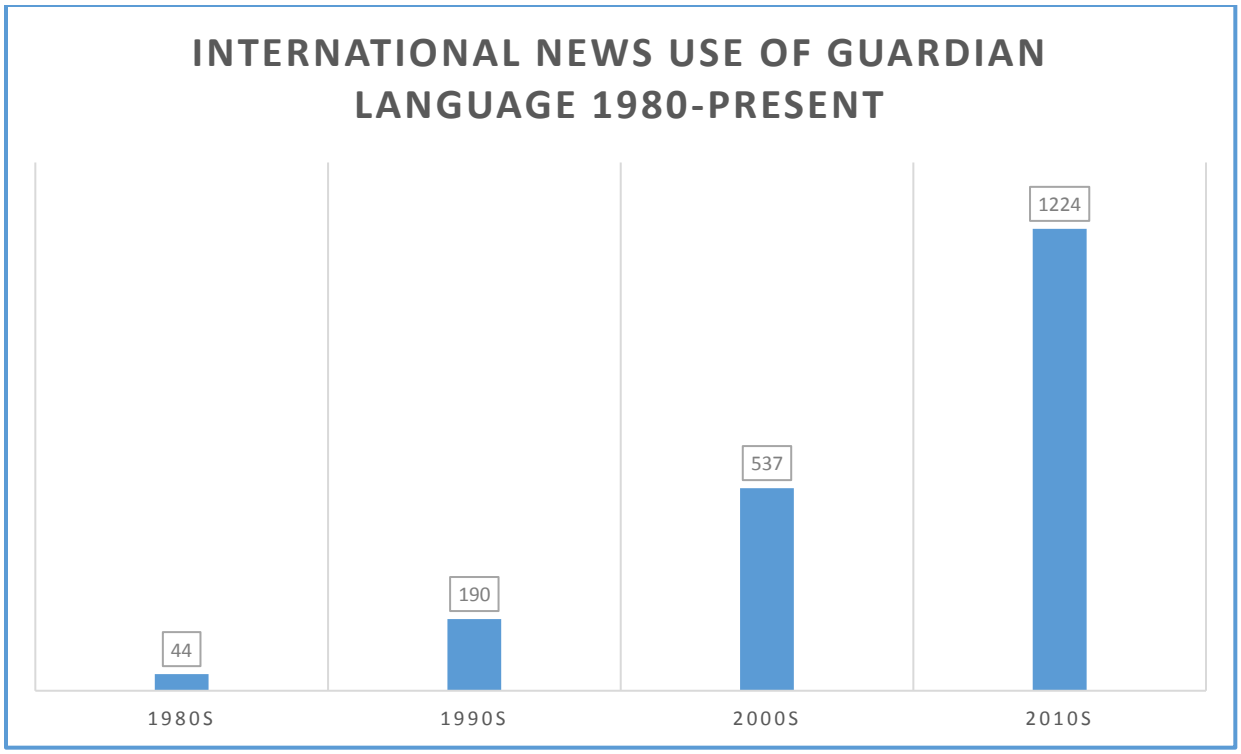
*Based on a Heinonline Law Journal Library search for the phrase 'guardian of the constitution' (n=1074).

Figure 4 shows an initial steep increase in the 1990s, and then again in the 2000s. The phrase's use almost doubled from the 1980s to the 1990s. The current decade is not yet over, but has already produced close to 250 mentions of the phrase. This data demonstrates that it is not merely just official documents that may be affecting the use of such language. Constitutions and legal judgments have shown increasing use of guardian-esque language, but the language of legal academics has not been immune to such changes. However, it is difficult to know which one may be driving the other. It may be that the courts and legal academics are feeding off of one another, and that is why we have seen an increase which occurs around the same period.

International news articles were also searched in terms of their use of guardian-esque language. For this, I used Westlaw's News feature, which includes news from all available areas: Africa, Asia, Australia & New Zealand, Canada, Europe, Latin America, Middle East, the United States, and the United Kingdom. Here I was constrained to searching from 1980 to the present, but overall there were 1,995 results.[64] The data, as shown in Figure 5 below, displays a dramatic increase of language during this time period.

*Figure 5. International news use of 'guardian' language 1900-present**

[63] The search was performed on 24 May 2018.
[64] The search was performed on 22 June 2018.



* Based on a Westlaw search of the phrase 'guardian of the constitution' in the International News feature (n=1,995).

The use of the phrase more than doubled from the 1990s-2000s, and has already done the same from the 2000s-2010s. What can be gleaned from this data as regards the news media is that they are not necessary the ones driving this language around constitutional guardianship. Given the low numbers in the 1980s and 1990s, they appear to be taking their cues from other sources, such as constitutions, legal judgments, or legal scholarship.

Ultimately, pinning down the initial use of 'guardian' language has not been easy, and may very well be impossible. There are indications that it was present before and around the American founding, through the *Federalist Papers* and even in some state court judgments.[65] There remains no doubt that decisions such as *Bonham's Case* and *Marbury* were and continue to be a strong force for such thinking. However after examining current (i.e., in force) constitutions, surveying legal judgments from a few jurisdictions, and searching law journal and media use of the language, the majority of evidence suggests that a more widespread use of such language took hold over the last three to four decades. Additionally, it seems that official documents, such as constitutions and legal judgments, may be driving the use of such language, as the media definitely appear to be reacting to changes in the other areas.

Why does the 'constitutional guardian' language matter?

There are two main reasons I believe that this language matters. The first is because it is overly assertive and unnecessarily factional in the manner that it is used. Although constitutional power struggles are nothing new,[66] such language often emanates from a branch—the judiciary—that in

[65] For an example of some early state court judgements, see: *Riley v Riley*, 1808 WL 87 (Connecticut) and *Commonwealth v Lewis*, 1814 WL 1392 (Pennsylvania).
[66] H Pitkin 'The idea of a constitution' (1987) 37 *Journal of Legal Education* 167 at 168.

many constitutions has been identified as the ultimate *interpreters* of a constitution rather than ultimate *guardians*. This is especially true in common law jurisdictions, where supreme or apex courts are not explicitly provided the same extensive powers as modern constitutional courts. And there is a distinct difference between interpretation and guardianship. Interpretation of the constitution is an undeniably important—but no doubt narrower—role for the judiciary than guardianship. A guardianship role goes beyond interpretation, suggesting that the judiciary possesses powers to actively protect and defend the constitution. And as will be displayed below, courts do not only refer to themselves as merely guardians that protect or defend, but as *the* ultimate constitutional guardians within their respective jurisdictions. But can ultimate constitutional guardianship be limited to merely the judicial role? In using this language courts often attempt to unnecessarily exclude or dissuade other constitutional actors, thus displaying a factional attitude towards the constitution. The second, and no less relevant consideration, is that its use is exceedingly and unnecessarily paternalistic. The manner in which the courts have used guardian language displays that they have adopted a more legal, as opposed to general, conception of constitutional 'guardian'. Using overly paternalistic language may have other, less conspicuous, effects. Such language can lull citizens into the belief that they no longer have to be 'watchdogs' of the constitutional order, as the courts or other branches will take care of constitutional violations and failings. Ultimately, given these two combined elements, I argue that guardian language usurps individual (and also a collective) responsibility for protecting constitutional values and norms, and makes citizens overly reliant on one person or branch of government to do the 'guarding'.

Unnecessarily factional language

The renowned case of *Marbury v Madison*[67] did much more than provide the US judiciary the ability to strike down congressional legislation: linguistically, it laid the groundwork for how judges—including those in other jurisdictions—could go about expanding their power. Through its bold assertion that it is 'emphatically' the judiciary's job to say what the law is,[68] and its repeated reference to and idolisation of a written constitutional document, the judgment now serves as a well-worn and time-honoured script for justifying constitutional intervention. Indeed, it laid a basic groundwork for factional constitutional language. But it is no secret that Marshall relied 'on more indirect arguments' when making his case,[69] much of which revolved around rhetoric, as opposed to any legal precedent or constitutional provision that he could use to justify judicial review or the striking down of congressional legislation. The Chief Justice spouted such lines as: 'the Constitution is written',[70] 'the very foundation of all written Constitutions',[71] and 'in America where written Constitutions have been viewed with so much reverence'.[72] These lines appear to be a direct rebuke of the UK constitutional structure, which at the time—and as it still does today—contained 'written' statutory law but no codified constitution. This lack of a codified constitution significantly contributes to the fact that UK judges do not possess strike-down powers for primary legislation. Chief Justice Marshall recognised this, using the strong rhetorical powers associated with a written constitution, and undeniably factional guardian language, to make his case for increased judicial authority. His decision justifying a judicial strike-down power by extolling the

[67] 5 U.S. 137 (1803).
[68] Id., at 177.
[69] A Tucker, 'Constitutional Writing and Constitutional Rights' (2013) P.L. 352; BC Jones, 'Preliminary Warnings on Constitutional Idolatry' (2016) P.L. 84.
[70] *Marbury v Madison*, 5 U.S. 137 (1803), p. 176.
[71] *Marbury v Madison*, 5 U.S. 137 (1803), p. 178.
[72] *Marbury v Madison*, 5 U.S. 137 (1803), p. 178.

virtues of the American Constitution is one of the most influential and widely cited judicial decisions in history.[73]

There remains little doubt that the legendary decision continues to inspire judges to be more proactive in asserting judicial authority. Combine this with a growing assertiveness—both within the judiciary and in relation to it—to use the 'constitutional guardian' label, and some interesting effects can be seen in other common law jurisdictions. An incredible contemporary example of factional language being used comes from Israel, where in the case of *Bank Mizrahi* the Supreme Court decided its Basic Law contained 'supra-legal' constitutional status, abruptly transforming the country from 'a state based on the English model of parliamentary sovereignty' into a 'constitutional state',[74] and therefore considerably enhancing judicial review.[75] This analysis focuses on the speech of the President of the Supreme Court at the time, Justice A. Barak. In a move that seems taken directly from *Marbury*, the judge praised the enactment of the *Basic Law: Human Dignity and Liberty*, as if it alone granted judicial review of the constitutionality of statutes; although, similar to the US Constitution, it said nothing explicit on the matter of judicial review. Barak's extraordinarily forceful and idealistic rhetoric goes well beyond that used by Justice Marshall. For example, he declares that, 'there is now the possibility that the constitutional change will be internalized; that human rights will become the "daily bread" of every girl and boy', continuing:

> 'The prospect is of recognition of the Court's role as guardian of the constitution, balancing the constitutional values established in the constitution and supervising the constitutionality of administrative activity. The prospect is of the ascent of the glory of human rights, and enhanced goodwill and fellowship among human beings, each born in the image of the Creator'.[76]

Barak devotes two pages in his speech to discussion of *Marbury*, dramatically noting that the 'doctrine is a cornerstone of the American constitutional system. Remove it and the entire structure collapses'.[77] That is a bit of an overstatement, considering that the American Constitution does not even mention judicial review. But he does not just focus on American judicial review. He notes that the judicial review of constitutionality has spread throughout the world, and that the 'twentieth century is the century of judicial review'.[78] Here he states, 'judicial review of the constitutionality of the law is the soul of the constitution itself. Strip the constitution of judicial review and you have removed its very life. The primacy of the constitution therefore requires judicial review'.[79] Speaking about separation of powers and the courts invalidating statutes he argues, 'Adjudication according to the constitution, rather than according to the law, can incidentally lead to the invalidation of a law. This invalidation is not a violation of the separation of powers, but rather its realization'.[80] And speaking on the role of judicial review and democracy, he cracks, 'The substantive answer is that the judicial review of constitutionality is the very essence of democracy', and that 'whoever argues that judicial review is undemocratic is in effect arguing that the

[73] See, e.g., M Tushnet, 'Marbury and Madison Around the World' (2004) *Tennessee Law Review* 251.
[74] Navot, "Israel" in *How Constitutions Change* (2013), p. 198.
[75] Y Rabin and A Gutfeld, '*Marbury v. Madison* and Its Impact on Israeli Constitutional Law' (2007) 15 *Univ. of Miami International & Comparative Law Review* 303, 318-330.
[76] *Bank Mizrahi*, para. 109 (Barak).
[77] *Bank Mizrahi*, para. 75 (Barak).
[78] *Bank Mizrahi*, para. 80 (Barak).
[79] *Bank Mizrahi*, para. 78 (Barak).
[80] *Bank Mizrahi*, para. 79 (Barak).

constitution itself is undemocratic'.[81] Ultimately, Justice Barak believes that judges, and specifically judicial review itself, express the 'values of the constitution' by articulating 'the fundamental conceptions of society as it moves through the shifting sands of history'.[82] Apparently such expressions do not come from constitutions themselves, or from interpretations by the other branches, let alone from citizen understandings. If another legal judgment exists that has so willingly transposed the essence of *Marbury*'s factionalism without a hint of critical examination on judicial review itself—let alone any acknowledgement of the potential risks of enhanced constitutional review—I have yet to see it.

That is not to say convincing examples of such language have not arisen in other jurisdictions. In Australia, the High Court noted the following in a 2006 judgment: 'It is that potential that demands from this Court, which is the guardian of the Constitution, a response protective of the text and structure of the document. If this Court does not fulfil its protective role under the Constitution, what other governmental institution will do so? What other institution has the power and the will to do so?'[83] This case builds on a previous one that employed *Marbury*-esque language in terms of justifying intervention: *Cormack v Cope*.[84] There the High Court noted that, 'We are not here dealing with a Parliament whose laws and activities have the paramountcy of the Houses of Parliament in the United Kingdom. The law-making process of the Parliament in Australia is controlled by a written Constitution'.[85] They continue by noting, 'the Parliament of Australia is not uncontrolled, but controlled by the Constitution'.[86] And further, 'Whilst it may be true the Court will not interfere in what I would call the intra-mural deliberative activities of the Parliament, it has both a right and a duty to interfere if the constitutionally required process of law-making is not properly carried out'.[87] These quotations follow earlier judgments, such as in *Ceylon*, where the Court noted, 'The Court has a duty to see that the Constitution is not infringed and to preserve it inviolate'.[88] Much of this language, especially some of the lines from *Cormack*, sound like the echoes of *Marbury*, where the *written* nature of the constitution is consistently praised and the role of the courts is emphasised, as opposed to a specific constitutional provision that would justify intervention.

The same type of factional language is seen in Canadian jurisprudence, especially after the passage of the Charter of Rights and Freedoms in 1982. When striking down their first major law under the Charter, Dickson J. began his speech by stressing, 'The Constitution of Canada, which includes the Canadian Charter of Rights and Freedoms, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect'.[89] Dickson further noted, 'The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind'.[90] Notice the use of 'the', rather than 'a' when describing the courts as guardians. In a more recent case, *Manitoba Métis Federation Inc. v. Canada (Attorney General)*(2013), the Court repeatedly stresses their

[81] *Bank Mizrahi*, para. 80 (Barak).
[82] *Bank Mizrahi*, para. 81 (Barak).
[83] *New South Wales v Commonwealth*, 229 CLR 1 [2006], para 544.
[84] *Cormack v Cope Queensland v Whitlam*, 131 CLR 432 (1974).
[85] *Id*., para. 18.
[86] *Id*., para. 18.
[87] *Id*., para. 19.
[88] *Ceylon v Queensland* (1965) AC, quoted in *Cormack*, para. 18.
[89] *Canada (Director of Investigation and Research, Combines Investigation Branch) v Southam Inc.* 1984 CarswellAlta 121, para. 1.
[90] *Id*., para. 16.

guardianship status. It writes that, 'this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct'.[91] But that is not all. Perhaps the most revealing line is this: 'The courts are the guardians of the Constitution and…cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less'.[92] Thus the court does not only assert that they are the proper guardians, but also proclaims that three extremely important constitutional values (legality, constitutionality, and rule of law) are on their side, and presumably no one else's. And for good measure, the judgment ends by noting, 'It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown…The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises'.[93] Again, there are deep echoes of *Marbury* throughout this judgment. But even more significant than that, the language used in the examples above displays a strong sense of factionalism not only towards the other branches, but also to citizens.

Overly paternalistic understanding of 'guardian'

The second main consideration as to why this language matters goes to the heart of the constitutional state, and is a more consequentialist argument: its use undercuts any type of 'we the people' or collective importance that may be present or through which the constitution itself represents. For if we can agree on one thing about constitutions and the operation of constitutionalism, it is this: the protection of the constitutional state is a collective, rather than individual (i.e., down to one particular branch), requirement.[94] For the realities of a constitutional state differ markedly from the protection of, say, a particular convention (such as the ECHR), or even to the application of particular treaties (such as those governing the EU). In a constitutional state, citizens are inherently connected to upholding constitutional norms and values. If citizens—for whatever reason—do not value this process, and become over reliant on the judiciary in terms of enforcing constitutionalism or upholding constitutional values or norms, then an overemphasis on courts and ultimately the judicial interpretation of what the constitution is takes shape. And when this over reliance on the judiciary becomes the norm, constitutional paternalism inevitably develops.

Of course, certain portions of any constitution may be allocated to various bodies or individuals, but even then, to label such entities 'guardians' would be a mistake, considering that every constitution has amendment procedures—however rigorous they may be. Should the people or the people's representatives decide that certain constitutional entities are not functioning properly, they then have the opportunity to amend those functions. In no constitution I have read does the judiciary—or even an all-powerful constitutional court—have explicit constitutional amending powers; although in certain jurisdictions the judiciary does contain the power to determine whether

[91] *Manitoba Métis Federation Inc. v. Canada (Attorney General)* 2013 SCC 14, para. 135.
[92] *Id*., para. 140.
[93] Id., para. 153.
[94] See, e.g., L Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004).

constitutional amendments are indeed constitutional.[95] Also in most jurisdictions the judiciary does not even have the power to articulate what constitutional rights they must enforce (e.g., freedom of speech, prohibition on torture, etc.), as these are usually provided for in the constitution or through a bill of rights.[96] The constitutional amendment process may add or subtract specific rights to those documents, but it is certainly not the judiciary that gets to determine what is added or deleted. In a very real sense, the judiciary is constrained by what is located in those documents—even if they do not particularly like what is in there. Thus, if we are to be accurate in terms of labelling 'guardians', we would have to say that a state's citizens (or representatives), ultimately, are the true guardians, as they have the power to formally amend the constitution. But even then, given the collective nature of constitutional operation, using such guardian language is problematic.

The legal significance of the term 'guardian' is also highly relevant to this situation, especially if it is the courts, rather than politicians or others, who are declaring themselves guardians. Although general usage the term usually equates to 'a person who protects or defends something',[97] the word has a long and distinguished history in law. The *Oxford Dictionary of Law* states that 'guardian' means, 'One who is formally appointed to look after a child's interests on the death of the child's parents…A guardian automatically has parental responsibility for the child'.[98] But guardianship is not necessarily limited to children. Adults who have mental illness or mental capacity issues can also come under some type of guardianship. Ultimately, this type of guardianship provides individuals the right to make decisions for those they are responsible for.[99] In providing this decision-making authority, the guardian is provided power. Thus, in legal terms, to be classified as a 'guardian' equates to being given certain decision-making powers. This legal conception of 'guardian' is undoubtedly more paternalistic than the general use of the term as one that 'protects or defends' a document or the constitutional principles located within. The legal perspective often equates to a situation where someone needs help or assistance, as something has gone wrong (i.e., a child's parents have died, or an adult is suffering from a mental illness).

The question is how the courts view their guardian type of role. Do they see it as a more general type of 'protecting and defending', in which other constitutional actors could also take part in such a collective activity, or do they view it in a more legal manner, in which they would be provided decision-making authority to make particular decisions, because something has 'gone wrong'? Under the first understanding, the Court would view themselves in line with a more traditionalist separation of powers role, or perhaps even a more modern departmentalist role,[100] which is a more acceptable view in terms of their constitutional authority. However a relatively strong argument can be put forward that in many jurisdictions the courts view themselves in line with a more legal understanding of 'guardian'. As noted above in the Australian High Court decision in *New South Wales*, the Court had the nerve to say, 'If this Court does not fulfil its protective role under the Constitution, what other governmental institution will do so? What other institution has the power

[95] Y Rosnai, 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea' 61 *American Journal of Comparative Law* 657 (2013).

[96] Of course, the vagueness with which some of these constitutions or bills of rights are written give the judiciary significant leeway in determining what to enforce. Australia, which is examined throughout this paper, remains one of the few countries that still lacks an official bill of rights.

[97] Oxford Dictionaries, 'guardian', https://en.oxforddictionaries.com/definition/guardian.

[98] J Law and EA Martin, *A Dictionary of Law* (7th ed)(Oxford: Oxford University Press, 2009), p.

[99] Interestingly, this type of guardianship is often mentioned in constitutions.

[100] For a view on departmentalism, see RC Post and R Siegel, 'Popular Constitutionalism, Departmentalism, and Judicial Supremacy' (2004) *California Law Review* 1027.

and the will to do so?'[101] The final sentence is telling: the Court does not believe that any other institution has the power and the will to protect the constitution. Such language suggests that, at least in the Australian constitutional context, the judiciary takes a more legal conception of their 'guardian' role. So it seems does the Canadian Supreme Court. Above we saw above, the Court has identified three constitutional principles as positively within the legal sphere: legality, constitutionality and rule of law,[102] and they further noted that the Constitution 'demands that courts be empowered to protect its substance and uphold its promises'.[103] This language asserts that it is the judiciary, as opposed to a collection of branches or citizens, which are ultimately responsible for certain constitutional decisions. And let us not forget the reasoning of Justice Barak in Israel's landmark *Bank Mizrahi* case, which describes judicial review as the 'soul' of the constitution, and that it is judicial review alone that can articulate the constitution's values.[104]

The same may not be true in the UK, at least for now, as in their official capacity the courts have shown little willingness to explicitly assert themselves as guardians, let alone over the UK's long standing unwritten constitution that is based around parliamentary sovereignty. This suggests a less paternalistic—and more collective—role for the courts to play. However outside of official legal judgments, some members of the judiciary seem more willing to broach the idea of constitutional guardianship,[105] and the UKSC has been more willing to articulate specific constitutional principles that they may look after, similar to how the Canadian Supreme Court conceives of their constitutional role. However in the UK context this appears to have been done not with the legal form of guardianship in mind, but with more of the 'protecting and defending' nature of guardianship. Nevertheless, changes could be on the horizon.

Conclusion

As judiciaries and other constitutional actors increasingly use factional 'constitutional guardian' language to expand judicial power, a form of constitutional paternalism has emerged throughout many jurisdictions. We have undoubtedly seen a significant rise in the use of 'guardian' language on multiple fronts: in constitutions, in legal judgments, in academic writings and throughout various media outlets. From the statistical analysis above, it appears that this is a relatively recent phenomenon. Although the language of constitutional guardianship has been around since the founding of the American republic, such language did not seem to take hold until the late 20th century. Such language has arisen without much consideration as to what this type of language entails, and what effects it may have on those within the constitutional state. Normatively, most constitutions do not formally label guardians. Constitutions that do explicitly mention it tend to conceal such language by putting it not front and centre, but in the middle or latter portions of such documents, thus obscuring its relevance. In the judicial realm, there is evidence that judgments have become more factional than previously, and this may be down to the use of guardian-esque rhetoric. Further, the language of many judgments takes on more of a legal, as opposed to general, conception of the term 'guardian', which implies that something has 'gone wrong', and it is up to the judiciary to 'fix' or 'remedy' it. The use of guardian-esque language, I believe, epitomises what we should *not* do in terms of policing constitutions, as its unnecessarily paternalistic qualities may lull citizens—who are in fact the ultimate 'guardians'—into constitutional complacency.

[101] *New South Wales v Commonwealth*, 229 CLR 1 [2006], para 544
[102] *Manitoba Métis Federation Inc. v. Canada (Attorney General)* 2013 SCC 14, para. 135.
[103] *Id*., para. 153.
[104] *Bank Mizrahi*, para. 81 (Barak).
[105] (forthcoming) BC Jones, 'Lady Hale and Dissonant Constitutionalism' (2018) *King's Law Journal*.

Additionally, the more that various entities, and especially the judiciary, assert 'guardianship' over particular areas of a constitution, the more such assertions amount to little more than trivial power struggles, as opposed to authentic attempts to protect certain constitutional powers or functions. Ultimately, if this 'guardian' language has now become commonplace within the constitutional state, we should strive to understand its relevance and potential effects. Constitutional guardianship, after all, is not something we should take lightly, especially when its collective status appears to be crumbling.