
VIRGINIA JOURNAL
OF
INTERNATIONAL LAW
DIGEST

Volume 58



Essay

May Britain Trump America When It Comes
to Democracy?

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ESSAY

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INTRODUCTION

It is a truism among many Americans that theirs is an exceptional country.¹ This is particularly so with respect to freedom and democracy, which have long been described as being part of a distinctive American experiment.² Indeed, from its very beginnings as a nation, America has emphasized the contrasts between its approach to government and the example set by its British predecessor. The Declaration of Independence asseverates that governments “deriv[e] their just powers from the consent of the governed,” and casts the nascent country as one formed in search of freedom from “a history of repeated injuries and usurpations” suffered at the hands of the British King, “all having in direct object the establishment of an absolute Tyranny over these States.”³ The Constitution drafted in the years following the American Revolution furthered and formalized the

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1. See, e.g., Steven G. Calabresi, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1344–45 (2006) (arguing that “it is quite literally un-American to think the United States is not a special place”).

2. See, e.g., George Washington, First Inaugural Address (Apr. 30, 1789) (“[T]he preservation of the sacred fire of liberty and the destiny of the republican model of government are just considered, perhaps, as deeply, as finally, staked on the experiment entrusted to the hands of the American people.”).

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

contrast with the British model: it was ordained and established by “the People” themselves;⁴ it provided for an elected president rather than a hereditary monarch;⁵ and it invested the legislative authority of the upper chamber in a Senate rather than a House of Lords.⁶

So began America’s proud history of democratic exceptionalism—at least according to the traditional narrative. But does the traditional narrative obscure more than it reveals? Just how democratic is America relative to Britain as a matter of historical constitutional structure and contemporary political reality? This Essay explores those questions through the lens of national elections in the United States and the United Kingdom in 2016 and 2017. The Essay argues that contrary to conventional assumptions, many structural features of the United States Constitution are strikingly undemocratic in comparison to the United Kingdom Constitution. As a result, the “consent of the governed” may actually play a far larger role in electing national leaders and defining national priorities in the very country against which the Framers rebelled.

I. DEMOCRACY AND CONSTITUTIONAL CONTEXT

Celebrations of the United States Constitution’s democratic character take a number of forms. For instance, several proponents of the idea that the Constitution should be interpreted according to its original meaning have supported their arguments by appealing to the democratic process by which the text was adopted.⁷ Article VII provided that the Constitution would become effective only upon ratification by a super-majority of nine states, and even then it would be binding only on those states that had approved the document.⁸ Ratification took place in special conventions called by the states after robust public debate about the new constitution’s merits.⁹ The Constitution is thus arguably “the product of a more deeply democratic process ... [and its] rules have earned the right to be treated as

4. U.S. CONST. pmbi.

5. U.S. CONST. art. II, § 1.

6. U.S. CONST. art. I, §§ 1, 3.

7. See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (describing popular sovereignty argument as “the most common and most influential justification for originalism”); Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL’Y 29, 39 (2011) (“There are a variety of normative theories associated with originalism. Perhaps the most prominent ... is grounded in a theory of popular sovereignty and democratic lawmaking.”).

8. U.S. CONST. art. VII; see also MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 412–17 (2017) [hereinafter KLARMAN, *THE FRAMERS’ COUP*] (discussing ratification provisions and mechanisms).

9. See KLARMAN, *THE FRAMERS’ COUP*, *supra* note 8, at 397–545 (providing detailed discussion and analysis of ratification process).

the will of the people and accordingly trump those laws passed through the ordinary political process.”¹⁰

Along with its democratic origins, the Constitution’s democratic elements and effects have likewise been emphasized. Supreme Court Justice Stephen Breyer has argued that belief in “the principle of participatory self-government”¹¹ and “confidence in democracy as the best check upon government’s oppressive tendencies”¹² were key elements of political thought in the founding era. These principles helped give rise to a document that promotes democratic government by insisting that Congress meet at least once annually, requiring elections every two to six years, basing representation on a regular census, and by gradually extending the right to vote to all adults regardless of sex, race, or religion.¹³ Breyer finds that democratic themes pervade the Constitution to such a degree that they provide the foundation for his own jurisprudential vision under which “courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts.”¹⁴

Yet a number of commentators have also highlighted the limits of the Constitution’s democratic character. Richard Posner, for example, has reviewed Justice Breyer’s arguments and has raised the question: if the Framers of the Constitution had so much confidence in participatory self-government, “why is there so little democracy, and none of it direct democracy, in the document they wrote?”¹⁵ Posner notes that the original text of the Constitution created no right to vote and provided for direct election only with respect to the members of the House of Representatives; the President, Vice President, and members of the Senate were all to be elected by other means.¹⁶ Moreover, “[t]here was not a trace of direct democracy in the Constitution: no provision for initiatives, referenda, or recalls.”¹⁷ The document was therefore “incompletely democratic” at best.¹⁸

Michael Klarman has shed even greater light on the Constitution’s democratic deficiencies—in its drafting, its ratification, and its substantive provisions. To begin, the drafting convention itself arguably exceeded its

10. Lash, *supra* note 7, at 1444.

11. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 21 (2005).

12. *Id.* at 23.

13. *Id.* at 9.

14. *Id.* at 5.

15. Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 *YALE L.J.* 1699, 1703 (2006) (reviewing BREYER, *supra* note 11).

16. *Id.* at 1702.

17. *Id.* at 1703.

18. *Id.* at 1702.

mandate; Congress had authorized a convention to revise the existing Articles of Confederation, not to draft an entirely new framework of government.¹⁹ The work of the convention was also conducted entirely in secret.²⁰ While this secrecy drew criticism from Thomas Jefferson and stood in contrast to transparency requirements that applied to much state legislative business,²¹ Klarman argues that the delegates knew that “[t]o open their proceedings to the public could kill their nationalist and antipopulist project before it had legs.”²²

When it came to ratification, the drafters did opt to submit the document for popular approval through special conventions rather than through the state legislatures.²³ But even these conventions fell short of prevailing democratic norms in important respects. Klarman maintains that Federalist leaders sought to limit the impact of popular sentiment in a number of ways, such as by favoring state conventions over referenda or town meetings; by opposing the instruction of delegates; and by resisting efforts to condition ratification on prior amendments.²⁴ In sum, “[o]nly a ratifying process that was less participatory than the governance norms employed in many states could have secured endorsement of a constitution that was less democratic in its substance than were all state constitutions of the era.”²⁵

As to substance, the limited democratic nature of the Constitution’s provisions relating to elections has been noted above. Klarman situates these provisions in a drafting process that was primarily about “clashing interests rather than dispassionate political philosophizing.”²⁶ One prominent interest group was strongly influenced by crises over tax and debt relief in states like Massachusetts and Rhode Island.²⁷ In an effort to prevent further debt relief measures, the Constitution prohibited states from issuing paper money or impairing the obligation of contracts.²⁸ But the Framers’ reactions to these measures also had a broader effect:

19. See KLARMAN, *THE FRAMERS’ COUP*, *supra* note 8, at 311.

20. *See id.* at 136–37, 252–53.

21. *See id.* at 252–53.

22. *Id.* at 253.

23. *See id.* at 414–16.

24. *Id.* at 618.

25. *Id.*; see also James Fox, *The Framers’ Coup as a Challenge for Originalism*, BALKINIZATION (Apr. 11, 2017), <https://balkin.blogspot.com/2017/04/the-framers-coup-as-challenge-for.html> (arguing that Klarman’s analysis of the ratification process “poses a crucial challenge to one of the foundational justifications for originalism”).

26. KLARMAN, *THE FRAMERS’ COUP*, *supra* note 8, at 600.

27. *See id.* at 604–06.

28. U.S. CONST. art. I, § 10; see also KLARMAN, *THE FRAMERS’ COUP*, *supra* note 8, at 606.

Because the Framers blamed relief legislation on ‘democratic licentiousness,’ they designed the federal government to be insulated from the populist politics that had produced such measures in the states. Thus, they opted for huge districts for congressional representatives, and indirect elections and lengthy terms in office for both senators and presidents. They also rejected, for federal legislators, instruction, mandatory rotation, and recall. In addition, they created a powerful executive armed with a veto power that could be used to block any populist economic measures that might somehow sneak through a legislature designed to squelch them.²⁹

To be sure, the Constitution has become more democratic over time as a result of formal amendment and judicial interpretation. Senators are now directly elected by the people,³⁰ Representatives must serve equal numbers of citizens within each state,³¹ and voting rights have been strengthened and expanded.³² However, the 2016 presidential and congressional elections demonstrate that significant democratic shortcomings still remain in the American system. Perhaps the most glaring example is the persistence of the Electoral College as the method of electing the President. Under this system, the nation’s chief executive is not subject to popular election, but is rather chosen by a panel of electors whose members are appointed by each state in numbers that correspond to that state’s representation in the House and Senate.³³ Given that each state receives equal representation in the Senate regardless of its population,³⁴ one result of this system is that the votes of citizens in some states have less impact than the votes of citizens in other states.³⁵ Another result is that a person may win the Electoral College vote even while losing the popular vote.³⁶ In the 2016 election, Donald Trump won the Electoral

29. KLARMAN, THE FRAMERS’ COUP, *supra* note 8, at 606–07; *see also* Sandy Levinson, *Reflections on “Reflection and Choice” by “We the People,”* BALKINIZATION (Apr. 14, 2017), https://balkin.blogspot.com/2017/04/reflections-on-reflection-and-choice-by_14.html (reviewing KLARMAN, THE FRAMERS’ COUP).

30. U.S. CONST. amend. XVII.

31. *See* *Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964) (“We hold that . . . the command of Art. I, § 2 that Representatives be chosen ‘by the People of the several States’ means that, as nearly as is practicable, one [person’s] vote in a congressional election is to be worth as much as another’s.”).

32. *See* U.S. CONST. amend. XV (prohibiting voting rights discrimination on basis of race); U.S. CONST. amend. XIX (prohibiting voting rights discrimination on basis of sex).

33. *See* U.S. CONST. art. II, § 1.

34. *See* U.S. CONST. art. I, § 3.

35. *See* KLARMAN, THE FRAMERS’ COUP, *supra* note 8, at 626.

36. *See id.* (noting that winner of the popular vote has failed to win the Electoral College four times in American history).

College vote and therefore the presidency—even though he lost the popular contest to Hillary Clinton by a margin of nearly 3 million votes.³⁷

The 2016 election similarly highlighted the enduring democratic deficiencies in the United States Senate. Although the Senate has been subject to popular election for more than a century, it continues to be made up of an equal number of Senators for each state without regard to population.³⁸ This can lead to situations in which a party that wins a majority of votes overall can nevertheless fail to win a majority of seats in the chamber.³⁹

The system also leads to shockingly large disparities in the numbers of individuals represented by each member of Congress' upper chamber. To take the most extreme case, each Senator from California represents approximately 37 million residents, whereas Senators from Wyoming represent only about 568 thousand residents.⁴⁰ As Michael Klarman argues, such “malapportionment ... was difficult to justify in 1787 and is impossible to defend in a more democratic age that seems to take for granted—in most other contexts—the principle of one person, one vote.”⁴¹

These lingering undemocratic features of the United States system become all the more striking when contrasted with the British system. Direct comparisons to constitutional drafting and ratification are not easily made, for “the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law.”⁴² Rather, Britain’s “constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions.”⁴³ Nevertheless, this process of development

37. See *Official 2016 Presidential General Election Results*, FEDERAL ELECTION COMMISSION, <https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf> (reporting final tally of Electoral College and popular votes for each candidate).

38. See U.S. CONST. amend. XVII.

39. See, e.g., Aaron Blake, *Democrats Won the Senate Popular Vote! Which is Both True and Terribly Misleading*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/29/the-most-bogus-stat-of-the-2016-election-how-democrats-won-the-senate-popular-vote/?utm_term=.89af79cbb6de; Paul Singer, *Democrats Won Popular Vote in the Senate, Too*, USA TODAY (Nov. 10, 2016), <https://www.usatoday.com/story/news/politics/onpolitics/2016/11/10/democrats-won-popular-vote-senate-too/93598998/>.

40. See *Apportionment Population and Number of Representatives by State: 2010 Census*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/population/apportionment/files/Population%20Population%202010.pdf>.

41. KLARMAN, *THE FRAMERS' COUP*, *supra* note 8, at 626.

42. *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [40] (appeal taken from N. Ir., Eng., and Wales).

43. *Id.*; see also ANTHONY KING, *THE BRITISH CONSTITUTION* 5–6 (2007) (identifying and discussing documents and statutes that have become part of the British Constitution over time).

illustrates some of the ways in which Britain has become more democratic than the former colonies that broke away ostensibly in search of greater popular sovereignty.

The basic constitutional structure of national government in the United Kingdom bears some similarities to that in the United States. There is a legislative branch of government (made up of both Houses of Parliament), an executive branch (made up of ministers who are answerable to Parliament), and a judicial branch (made up of an independent judiciary).⁴⁴ However, these branches are not constitutionally coequal—rather, as the United Kingdom Supreme Court has recently reaffirmed, “Parliamentary sovereignty is a fundamental principle of the UK Constitution.”⁴⁵ This principle has its origins in a series of statutes passed in the seventeenth century,⁴⁶ and has been interpreted to mean that “Parliament has the ‘right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation.’”⁴⁷ As a result, both the executive power and the judicial power must be exercised in a manner that is consistent with parliamentary legislation.⁴⁸

But Parliament is itself accountable to the people. Statutory law provides that elections are to be held at least every five years,⁴⁹ at which point voters are able to choose a Parliament that can simply repeal or revise any legislation passed by a previous government.⁵⁰ The people thus share sovereignty with Parliament.⁵¹ Moreover, British voters are able to exercise their sovereignty in electoral districts that afford much higher levels of representation than are enjoyed by their American counterparts: the United Kingdom House of Commons consists of 650 seats⁵² for a

44. See Miller, [2017] UKSC 5 at [41]; see also René Reyes, *Legislative Sovereignty, Executive Power, and Judicial Review: Comparative Insights from Brexit*, 115 MICH. L. REV. ONLINE 91, 92–93 (2017) (discussing relationship among branches of government and arguing that parliamentary sovereignty is best understood as an evolving rather than fixed principle in UK constitutional law).

45. Miller, [2017] UKSC 5 at [43]; see also Reyes, *supra* note 44, at 92–93.

46. See Miller, [2017] UKSC 5 at [41] (referencing statutes).

47. *Id.* at [43] (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 38 (8th ed. 1915)); see also Reyes, *supra* note 44, at 92–93 (discussing and analyzing scope of parliamentary power).

48. See Miller, [2017] UKSC 5 at [42]–[45].

49. See Fixed-term Parliaments Act 2011, c. 14.

50. See KING, THE BRITISH CONSTITUTION 21 (“The second corollary of Dicey’s doctrine [of parliamentary sovereignty] was that parliament, however hard it might try, could not in any way bind its successors.”).

51. See *id.* at 36, 284–85 (discussing relationship between parliamentary sovereignty and popular sovereignty).

52. See Parliamentary Constituencies Act 1986, c. 56. See also *Parliamentary Constituencies*, PARLIAMENT, <http://www.parliament.uk/about/how/elections-and-voting/constituencies/> (explaining current distribution of seats among England, Scotland, Wales, and Northern Ireland).

national population of 65 million⁵³ (an average of 100,000 per seat), whereas the United States House of Representatives consists of 435 seats⁵⁴ for a national population of 325 million⁵⁵ (an average of over 722,000 per seat).

Popular sovereignty also manifests itself in other ways in the British system. In particular, direct democracy occasionally plays an important role in addressing key questions in British constitutional law and policy. Referenda have been held on issues such as whether certain government powers should be devolved to local assemblies⁵⁶ and on whether Scotland—which has been part of the United Kingdom since 1707⁵⁷—should be an independent nation.⁵⁸ Most recently, in June 2016, a nationwide referendum was held on whether Britain should remain a member of the European Union.⁵⁹ Notwithstanding the fact that Prime Minister David Cameron supported continued membership in the EU, voters opted to leave by a margin of 52% to 48%.⁶⁰ Cameron promptly announced his resignation as Prime Minister and was succeeded by Theresa May,⁶¹ whose government secured parliamentary passage of a bill authorizing ministers to formally commence the “Brexit” process.⁶²

The ongoing Brexit debate further demonstrates the extent to which consent of the governed directly influences national law and policy. In April 2017, even though she held a majority in Parliament and had obtained legislative approval to give notice of Britain’s withdrawal from the EU, Theresa May called for an early general election to secure a public

53. See *Overview of the UK Population: March 2017*, OFFICE FOR NATIONAL STATISTICS, <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/mar2017>.

54. See Apportionment Act of 1911, Pub. L. 62–5.

55. See *U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/popclock/>.

56. See *Miller*, [2017] UKSC 5 at [117]; KING, *THE BRITISH CONSTITUTION* 179–214.

57. See Union with England Act 1707 c. 7; see also KING, *THE BRITISH CONSTITUTION* 5.

58. See *Miller*, [2017] UKSC 5 at [117].

59. See *id.* at [2]. See also Reyes, *supra* note 44, at 91–92 (discussing effects of referendum).

60. See *Brexit: David Cameron to Quit After UK Votes to Leave EU*, BBC NEWS (June 24, 2016), <http://www.bbc.com/news/uk-politics-36615028>.

61. See *PM-in-Waiting Theresa May Promises ‘a Better Britain’*, BBC News (July 11, 2016), <http://www.bbc.com/news/uk-politics-36768148>.

62. The UK Supreme Court held that passage of the bill was necessary to trigger Brexit because the statute authorizing the referendum did not provide that the results would be legally binding. “Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.” *Miller*, [2017] UKSC 5 at [121]. See also Reyes, *supra* note 44.

mandate for her plans.⁶³ The opposition Labour Party supported the Prime Minister's motion despite opinion polls showing that it stood to lose a significant number of seats, with Labour leader Jeremy Corbin stating that he “welcome[d] the prime minister's decision to give the British people to chance to vote for a government that will put the interests of the majority first.”⁶⁴

The leaders of both major parties have thus chosen to place their numbers and agendas in the House of Commons at risk by creating more opportunity for democratic participation than is required under current law.⁶⁵ But how are these democratic sensibilities affected by the House of Lords? Does the persistence of an unelected chamber of nobles undermine the idea that the United Kingdom may be more democratic than the United States? To the contrary, a closer look at the upper legislative chambers in each nation indicates that the United States Senate may well be less democratic than its United Kingdom counterpart. The extreme degrees to which the Senate departs from democratic norms of proportional representation have already been mentioned. Additional departures from democratic principles may be seen in the Senate's use of filibuster rules, which can make it extremely difficult to pass legislation even if a political party controls the presidency and both houses of Congress.⁶⁶ By contrast, the House of Lords cannot prevent the passage of legislation with which it disagrees—it can merely delay it.⁶⁷ The Brexit process again provides an instructive example. When the House of Commons passed a 150-word bill leaving responsibility for most of the details of Brexit to government ministers, the House of Lords passed amendments that would require parliamentary approval of the final terms of any departure agreement.⁶⁸ The Commons rejected these amendments and the Lords passed a clean bill in short order.⁶⁹ Despite its remaining

63. See Anushka Asthana and Peter Walker, *Theresa May Calls for General Election to Secure Brexit Mandate*, THE GUARDIAN (Apr. 19, 2017), <https://www.theguardian.com/politics/2017/apr/18/theresa-may-calls-for-general-election-in-bid-to-secure-brexit-mandate>.

64. *Id.*

65. In the absence of a parliamentary motion for early elections supported by a two-thirds majority, the next election would not have taken place until 2020. See Fixed-term Parliaments Act 2011, c. 14.

66. Examples include efforts to pass the Affordable Care Act under President Obama and to repeal it under President Trump. See, e.g., Thomas Kaplan and Robert Pear, *House Passes Measure to Repeal and Replace the Affordable Care Act*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/2017/05/04/us/politics/health-care-bill-vote.html>; Robert Pear and David M. Herszenhorn, *Obama Hails Vote on Health Care as Answering 'the Call of History'*, N.Y. TIMES (March 21, 2010), <http://www.nytimes.com/2010/03/22/health/policy/22health.html?pagewanted=all>.

67. See KING, THE BRITISH CONSTITUTION 297–300.

68. See Reyes, *supra* note 44, at 98.

69. See *id.*

aristocratic trappings, the House of Lords imposes few limitations on democratic governance.

A word should be added about the monarchy. Although the king was the target of many of the Founders' complaints in the Declaration of Independence, the British monarch has been without significant executive or legislative power at least since the 1860s.⁷⁰ The United Kingdom Supreme Court has reiterated that while some powers are still referred to as being part of the Royal prerogative, these powers are exercised by government ministers who are accountable to Parliament—and even these powers must be exercised in a manner consistent with parliamentary legislation and the common law.⁷¹ In effect, “[t]he United Kingdom today, although still a monarchy in form, is all but a republic in fact, with the monarch as a sort of unelected non-executive with the added luxury (or burden) of life tenure.”⁷²

This section has now demonstrated a number of ways in which the United Kingdom may be said to be more democratic than the United States. But democracy is not, of course, the only value in modern constitutional government. Values such as liberty, equality, and justice are also of fundamental importance. The next section briefly considers the extent to which some of these values have been promoted and protected through the democratic process in each nation.

II. TOO MUCH DEMOCRACY?

The Framers of the United States Constitution were well aware of the potential dangers of too much democracy. Some of these dangers related to the ability of citizens to make informed choices about their elected leaders. With respect to presidential elections, “most of the delegates did not trust the people with such an important task,” with one going so far as to declare that “it would be as unnatural to refer the choice of a proper character for chief magistrate to the people, as it would be to refer a trial of colors to a blind man.”⁷³ Other dangers arose from the possibility that majorities and their democratically elected leaders might be insufficiently attentive to minority interests. James Madison warned of the need “not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part...If a majority be united by a common interest, the rights of the minority will be

70. See WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 53 (Miles Taylor ed., Oxford University Press 2001) (1867).

71. See *Miller*, [2017] UKSC 5 at [45]–[48]. See also Reyes, *supra* note 44, at 94–96.

72. KING, *THE BRITISH CONSTITUTION* 341.

73. KLARMAN, *THE FRAMERS' COUP*, *supra* note 8, at 228.

insecure.”⁷⁴ Thomas Jefferson and John Adams—both of whom approved of the draft of the Constitution that emerged from the convention—each also believed that a bill of rights should have been included to protect against government overreach.⁷⁵ In the subsequent ratification debates, the call for amendments guaranteeing certain freedoms became a dominant theme.⁷⁶

The First United States Congress duly passed a series of such amendments, ten of which were ratified by the states and became the Bill of Rights in 1791.⁷⁷ Most of these provisions have been incorporated against state and local governments through the Fourteenth Amendment and are enforceable through judicial review.⁷⁸ In Britain, on the other hand, there is no bill of rights or other set of legal rules that formally constrain Parliament⁷⁹—for (as noted above) parliamentary sovereignty is practically plenary in scope. There is also much less of a role for judicial review. While the United Kingdom judiciary is an independent branch of government that occasionally plays a lawmaking function, “it is not open to judges to apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, i.e. by Acts of Parliament.”⁸⁰

Britain thus lacks some of the structural and substantive safeguards for minority rights that have long been part of the American constitutional order. Yet the absence of these safeguards has not led to a comparatively lower degree of freedom and protection in the United Kingdom for minorities and other groups lacking in political power. Indeed, Britain has often been ahead of America in expanding the scope of many rights and liberties. Consider the case of same-sex marriage. In Britain, Parliament legalized same-sex civil partnerships nationwide in 2004 and same-sex marriages in England and Wales in 2013 through the legislative process.⁸¹ In America, the Supreme Court did not legalize same-sex marriage

74. THE FEDERALIST PAPERS at 323 (James Madison) (Clinton Rossiter ed., 1961). *See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xi-xv (1998) (discussing relationship between protection of minority interests and the Bill of Rights).

75. KLARMAN, THE FRAMERS’ COUP, *supra* note 8, at 546.

76. *See id.* at 546–555.

77. *See id.* at 590.

78. *See, e.g.,* McDonald v. City of Chicago, Ill., 561 U.S. 742, 764–765 (2010) (“The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated.”).

79. *Cf.* KING, THE BRITISH CONSTITUTION 129–135 (discussing and distinguishing between legal and political constraints imposed on Parliament by the Human Rights Act).

80. *Miller*, [2017] UKSC 5 at [42]. *See also* Reyes, *supra* note 44, at 96–97 (discussing limits on judicial review in Britain).

81. *See* René Reyes, *The Mixed Blessings of (Non-)Establishment*, 80 ALB. L. REV. 405 (2017) (comparing pathways to legalization of same-sex marriage in Britain and America).

nationwide until almost two years later in *Obergefell v. Hodges*⁸² (with the Chief Justice noting in dissent that only eleven states and the District of Columbia had adopted the practice as result of referenda or legislation rather than judicial decision).⁸³

The United Kingdom has been even further ahead of the United States in other areas that manifest a national commitment to equality and justice. Parliament created the National Health Service in 1946,⁸⁴ and today even Britain's Conservative Party professes support for its founding principles of free care at the point of use available to everyone based on clinical need.⁸⁵ For its part, Congress passed the more modest Affordable Care Act⁸⁶ only in 2010. The Act barely survived constitutional challenge in 2012⁸⁷ and has been the target of repeal efforts by the current Republican administration.⁸⁸ In the criminal justice context, Parliament ended capital punishment in the United Kingdom over forty years ago.⁸⁹ Although the United States Supreme Court has imposed some important limits on the imposition of capital punishment in America,⁹⁰ it has also "time and again reaffirmed that capital punishment is not per se unconstitutional" and has allowed the practice to continue.⁹¹ Perhaps most notably, Britain abolished slavery in 1833⁹²—several decades before the American Civil War and the subsequent Reconstruction Era amendments to the United States Constitution.⁹³

Further examples of British liberalism and egalitarianism could no doubt be adduced. Counterexamples of American commitments to individual rights and freedoms could also surely be cited. However, the aim of this section is not to offer an exhaustive comparison of the policies and practices of each nation. Instead, the aim is merely to illustrate that the theoretical dangers of democracy that have frequently animated political

82. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

83. *Id.* at 2615 (Robert, C.J., dissenting).

84. *See* National Health Service Act 1946, 9 & 10 Geo. VI c. 81.

85. *Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future* at 66 (2017), CONSERVATIVES, <https://www.conservatives.com/manifesto>.

86. Pub. L. No. 11-148 (2010).

87. *N.F.I.B. v. Sebelius*, 567 U.S. 519 (2012) (upholding Act's key individual coverage mandate by vote of 5 to 4).

88. *See* Kaplan and Pear, *supra* note 66.

89. *See* Murder (Abolition of Death Penalty) Act 1965 c. 71.

90. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (holding unconstitutional the imposition of death penalty on offenders who were under 18 years of age at time they committed their crimes); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding unconstitutional the imposition of death penalty on offenders who are mentally retarded).

91. *Glossip v. Gross*, 135 S.Ct. 2726, 2739 (2015) (upholding state's use of lethal drug injection protocol as means of carrying out death sentence).

92. *See* Slavery Abolition Act 1833, 3 & 4 Will. IV c. 73.

93. *See* U.S. CONST. amends. XIII-XV.

thought in America have not often been realized in the form of abuses by a tyrannical majority in Britain. Even in the absence of structural and legal checks on its more robust form of democracy, the United Kingdom appears to have done at least as well as the United States in promoting liberty, equality and justice for its citizens in a wide range of contexts. The next section offers some concluding thoughts about the implications of these observations for the tradition of American exceptionalism.

CONCLUSION

During the 2016 United States presidential campaign, Donald Trump frequently invoked the theme of “making America great again.”⁹⁴ Hillary Clinton responded by arguing that “America has never stopped being great.”⁹⁵ Both slogans seem to contain echoes of the venerable idea that America has been and should continue to be an exceptional place. But the foregoing discussion has indicated that America may not be so exceptional after all with respect to democracy. Despite the rhetoric of the Declaration of Independence and conventional narratives about popular sovereignty in the founding era, recent scholarship has highlighted a number of ways in which the United States Constitution was designed to limit rather than promote democracy. Many of these undemocratic features remain to this day, including the dramatic malapportionment of the Senate and the continuing use of the Electoral College rather than the popular vote to select the President. By contrast, the British constitutional order has continued to evolve in such a way as to lead to greater popular participation in government: the people share robust sovereignty with Parliament, they vote in smaller and more representative districts, and they have a direct voice in fundamental issues of the day through referenda. Nor have Britain’s democratic majorities run roughshod over its minorities. To the contrary, the United Kingdom has often taken a more proactive role than the United States in protecting and expanding the rights of its citizens equally.

To say that America may not be democratically exceptional is not to say that Americans should not be proud of their country. But perhaps pride should be complemented by a greater degree of humility than has

94. See, e.g., Karen Tumulty, *How Donald Trump Came up with ‘Make America Great Again,’* WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/politics/how-donald-trump-came-up-with-make-america-great-again/2017/01/17/fb6acf5e-dbf7-11e6-ad42f3375f271c9c_story.html?hpid=hp_hp-top-table-main-trump-came-up-with-make-america-great-again%3Ahomepage%2Fstory&tid=ss_tw&utm_term=.21572345f11b.

95. See Amy Chozick and Patrick Healy, *Hillary Clinton Wins South Carolina Primary*, N.Y. TIMES (Feb. 27, 2016) <https://www.nytimes.com/2016/02/28/us/politics/south-carolina-primary.html?mcubz=0>.

generally defined the national character. For it is only by recognizing relative weaknesses as well as strengths that a nation can realize its fullest potential for greatness.