Writing a British Constitution
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The structure of government itself: The centuries-long dissolution of the British political philosophy

In the first lecture in this series, we discussed the primary function of the law which is, in my view, not to protect those who have sufficient power to protect themselves, or to guide righteous people as they act kindly and in good faith. Rather, it is to hold up a hand against those who are abusing power to the detriment of a weaker minority. In other words, to protect the vilified minority from the venom of Populism.

In this, the third lecture, we look at the structure of the US government, which is actually much closer to the U.K. government structure in 1776 than is the contemporary British system of government. Yet the US Constitution adopted a variation on the monarchical British system, a "republican" (with a small r) structure, all about "checks and balances", that was intentionally designed to prevent tyrannical rule by one branch (most predictably the "Executive"). At the same time, the method for changing the constitutional was made intentionally complex so as to prevent the same threat of tyranny posed by a single, all-powerful branch.

It is ironic that we consider this issue as Donald Trump comes back into power, supported by a Republican majority in both the Senate and the House, as well as by a 6-3 majority on the Supreme Court. This is precisely the kind of threat from which the Founders sought to protect the nation, and the next four years will tell how effective their planning was.

My own bet is on the republic surviving. It is not the first time it has faced such a threat. The last occasion involved Franklin Roosevelt (FDR). In his first term, he was supported by majorities in both houses of Congress but frustrated by a conservative Supreme Court. His effort to restrict the Court's power by constitutional amendment failed, and his legislative plan to "pack the court" to overcome their intransigence could not get past even a congress dominated by Democrats. But by the time he reached his third term he had appointed sufficient liberals – led ironically by Alabama's Hugo Black, a former KKK member – that his legislative agenda was no longer blocked by an activist Court. However, by then, when he was elected for a third term in 1940, Republicans had made common cause with conservative Democrats to put the brakes on FDR, equating him with Karl Marx and Vladimir Lenin.[1] Hence even though FDR won the popular and electoral college vote by a margin that Donald Trump could only dream of, the system operated to prevent his excesses. Indeed, when he died, the constitution was rapidly amended to limit a president to two terms. See U.S. CONST. Amend. XXII (passed 1947, ratified 1951).

Turning back to the U.K., one can only hope that the nation has a structure in place sufficient to protect us from a wave of populism. Right now, I am not sure it does, yet it is perfectly possible to ensure one – less challenging, perhaps, than creating a bill of rights. The issue of rights can be contentious. When people complain about judges, they are often upset that somebody has acted in a way that protects the vilified minority from the whims of the political populist. This tends to happen when steps are taken to protect the rights of asylum seekers, Muslims, 'criminals' and others, which may provoke hateful rants in the tabloids.

However, one reason that the U.K. has drifted along in a rather incoherent way when it comes to the structure of our government, is that most of us don't really understand it all, and we certainly don't get worked up about how many members of the House of Lords there are, or the machinations of redrawing the electoral lines. Yet the essence of the republican form of government is that the checks and balances are thrown up against the "tyranny of the majority" that would be allowed by "pure democracy". The problem in the U.K. is that this does not happen enough.

In Britain, things change without anyone really thinking what the philosophical nature of the process is. Sometimes, for example, the legislature (parliament) has incrementally taken away power from the executive (the monarch); sometimes one part of the legislature (the House of Commons) has taken away the power of the other (the Lords), as is happening as I write this. On no occasion does this happen after the kind of constitutional debates that took place in 1787 in the United States. Hence, today the tri-partite system of government in the U.K. is unrecognizable when contrasted to the system of government in force in Britain in 1787. The monarch has essentially no power at all. The Lords (once the most powerful of the British houses) has only the authority to delay legislation.

If the party in power has a large majority, there is virtually nothing that stops the Cabinet from taking a particular course. In the end, government by cabinet gives enormous, virtually unchecked power to the Office of the Prime Minister.

a. The Cabinet Problem

Let us just consider how the Cabinet runs. Ministers in the cabinet are typically drawn from members of parliament that belong to the ruling party. It is the tool of the Prime Minister, fashioned in a way that dooms us to being governed by dabblers and amateurs. In the U.S., most cabinet ministers serve at the will of the President, but they can only be replaced by an appointment proposed by the President, with the "advice and consent" of the Senate. They are affirmatively *not* elected; rather, they are drawn in theory from citizens who have expertise in the area for which they take responsibility. That does not always happen of course: whether Robert F. Kennedy Jr. is truly qualified to opine on America's health service, let alone oversee it, is open to question. We will all watch his confirmation hearings with interest. But the concept is that dubious appointments are often halted at such a hearing. Perhaps this will not happen often enough as January turns into February 2025, but at least hearings will be held, and the Republican majority in the Senate is slim (effectively 53-47). When Donald Trump floated the idea of "recess appointments" to avoid this review, he ran smack into the written constitution, and he was forced to beat a retreat.

In the U.K., it is not clear what rules guide the appointment of ministers. It is not as if ministers must all have the imprimatur of democratic electability – even if that were a useful qualification for the executive branch that must run a country. When Rishi Sunak wanted a new Foreign Minister, David Cameron became just one in a long line of people appointed to the House of Lords.

Meanwhile, cabinet members are changed at the will of the Prime Minister. There is not even a set number of cabinet positions – currently there are 22, changed as succeeding Prime Ministers decide there is a need for a new one.

My own experience over the years with U.K. ministers has not been a particularly happy one. It is not that everyone appointed has been inept, but one would expect that the people in charge of implementing particular policies would have a deep, life-long experience in that area. I have dealt with Home Secretaries who had very little experience with a prison system; Foreign Secretaries who did not have much sense as to what other countries were up to; and Justice Secretaries who appeared to have little interest in justice.

Yet one obstacle to sensible government is the endless shuffling of cabinet jobs. The most brilliant person in the world could not be expected to run new department of government effectively every year or two. There were 40 ministerial resignations from Theresa May's government in the three years of her government (July 2016 to July 2019). There have been a number of recent examples of ministers being in jobs for short periods, none more risible perhaps than when Greg Clark was accidentally appointed president of the Board of Trade for four days in Theresa May's government in 2016, a job that was meant to go to Liam Fox.[2]

More seriously, when it comes to education, we have had at least five major reorganizations in the last 25 years, with the person in charge being changed 17 times since 2001. In case you do now know, the current minister is Bridget Phillipson, and while she seems no less qualified than all the people before her, neither does anything spring out of her life's experience to make her especially qualified. At least she is not going to re-inflict rote learning on our children,[3] a pet project promoted by Michael Gove, the longest serving minister this century, at 4 years, 2 months and 3 days; and she has outlasted one of her predecessors, Michelle Donelan, who lasted just 36 hours in the job in July 2022.

If some ministers are short lived, some just get to try out a new job, in wholly different field, every few months. In just over a decade, Margaret Beckett played five major roles – business secretary, leader of the

House of Commons, environment secretary, foreign secretary and housing minister.[4] If someone came to you to apply for a job with a resumé showing five significant career changes in ten years, you would not find it reassuring.

Much of the churn in ministers is because of how and why they are appointed, according to Andrew Turnbull, who was cabinet secretary from 2002 to 2005:

> *"Ministers get appointed to new jobs not on the basis of how good they are at doing their current job - it's more about visibility. Being good at media work is crucial as is having lots of eye-catching initiatives," he said. "It's a dysfunctional system but it's there because politics is a competitive game and control of promotions is a key source of power for prime ministers."*[5]

All in all, if we were thinking deeply about creating a cabinet system from scratch, there is little chance we would come up with this. It is an absurd system that has arisen over decades due to the rudderless evolution of the British government.

I do not suggest all we need to do is amend the cabinet system. That would be merely to tinker with one facet of a system that has lost its philosophical framework. Rather, we should be looking at the entire structure of our government. This is not, in my view, as radical or unmanageable as one might think: the structure of government is probably less contentious than the Bill of Rights. Populist elections are not won by accusing someone of advocating proportional representation; and nobody was ever accused of being Woke for questioning how a cabinet minister is appointed.

b. How do other Fundamental changes in the Structure of the U.K. come about

By and large, the gradual merging of the three branches of government in the U.K. into one, headed by the Prime Minister, has happened by small steps over the last 300 years – essentially, over the timeline of the existence of the United States. Yet in some ways the process is accelerating now - in areas that are very familiar to us all.

i. The Catastrophic Brexit example

Brexit is the obvious example. Britain joined the European Union in 1973. This was a major constitutional change to the country, and there was no clarity as to whether such a major step could be taken without a referendum. However, a national vote was held in 1975, where an overwhelming majority (67%-to-33%) chose to remain in the union. Importantly, the “Yes” vote prevailed in every part of the country.

In 2016, a second referendum was conducted, resulting in the U.K.’s shock withdrawal from the EU. The European Union Referendum Act 2015 was passed rapidly through parliament without much dissent (only the Scottish Nationalist Party voted against it) and with surprisingly little consideration of the finer issues that might come up. The widely shared criticism of the process is that it was ill-thought out, but it can also be viewed through the lens of a failure to protect against a tyrannical majority. Hence my criticisms below are not a reflection of any notion that I could have created a better system in the short time allowed – but that we all need to think much more carefully before changing the world in a radical way.

In 2016 time the vote was very close (51.9%-to-48.1%) and, importantly, Scotland and Northern Ireland (and London) voted to remain, while the rest of England and Wales voted to leave. Essentially, the larger population of England dictated the result for two other countries in the Union. Is this the way it should be? Why did the Referendum Act not require a majority in each of the four countries, as had happened in 1975? This issue has expended some printer’s ink and poured fuel on the SNP’s independence fire.

However, less time has been spent on other communities who were most impacted by the referendum. Some minorities saw their preferences simply overridden. Of U.K. voters in Gibraltar 95.9% voted remain; the delicate balance of their connection to Spain was ignored. Many expats living across Europe were not even allowed to vote, while the votes of others changed their lives forever.[6] Indeed, some have argued that if some five million expats had been allowed to vote as the polls predicted they would have, the outcome of the referendum would have been reversed, and Nigel Farage, Boris Johnson and Michael Gove would have been left complaining on the touchline.[7]

Then there is the issue of who funded the Leave campaign, a question that is becoming even more relevant now with Elon Musk apparently set to underwrite the Reform Party to the tune of $100 million. While the 2015 act vaguely referenced campaign contributions, this had no impact on how five rich white men gave Leave roughly 62% of its funding;[8] yet once the vote was in, some of the richest supporters of Brexit left the

country.[9] That is not to say that identifying who should be allowed to fund any election is a simple matter (or that the U.S. has a better answer to this particular issue), but it was given very little thought in 2015.

ii. The gradual dissolution of the Union

Brexit is not the only example of a major change in the structure of the U.K. – indeed, it is not the only one in the last few years. Devolution is another. I am not saying I oppose it. If I were Scottish, I would definitely have voted for independence even before the English majority ripped away the benefits of membership in the EU.

But how is the evolution of devolution meant to work? When the Scots voted no (55%-to-45%) in 2014, a major voice opposing the SNP was former-PM Gordon Brown. While he insisted that promises made would be promises kept, he was not actually in a position to deliver them. His successor, Ed Miliband, sensibly suggested a constitutional convention to think through how such matters should be implemented. David Cameron, however, felt pressures from the ever-Nationalist Nigel Farage from the right, and saw the chance of outflanking the Labour Party by proposing in parallel that one element of Scottish devolution should be that only English MPs should vote on English issues:

> *David Cameron's big idea of English-only MPs voting on English laws could severely hamper a Labour government. There is no doubt the prime minister has made a play for tactical advantage over Labour.*[10]

In other words, Cameron was not thinking in broad terms, merely looking for an immediate political benefit.

My own human rights work that has referenced Scotland showed me the complex sovereignty issues that have never really been debated. For example, a Scottish airport was used for refueling by the American planes that were going on “rendition-to-torture” flights during the ‘War on Terror’ and we were trying to expose them. The Scottish parliament, run by the SNP, was sympathetic to our mission, and wanted a police investigation into this criminal activity, which they could indeed initiate because they had been given “police powers”. However, the necessary evidence was mostly in the U.S., and Westminster had “foreign policy” powers. The last thing that the English-dominated Foreign Office wanted to do was to upset the “Special Relationship” with Washington, no matter how much Scotland wanted to get hold of the evidence, so nothing would be done to achieve justice.

And so, the issues continue to mount – I do not pretend to provide the answers here, but we should pause before we allow any more massive changes to the structure of our country to come about in such a haphazard manner. And it is worth considering whether those who wrote the U.S. Constitution in 1787 already had a better idea of it than we do today.

How the Americans went about it in 1787 – Imperfectly, but providing plenty of lessons for Britain in 2025

The original U.S. Constitution, the foundational document of the nation, was hammered out by months of sometimes-furious debate. Fifteen years ago, I saw a play called *We the People* about the constitutional debates, at *the Globe Theatre*. The play’s author Eric Schlosser later described his piece as "like 12 Angry Men, about a group of people locked in a room in a very hot summer." The play might not be everyone’s cup of tea, but it totally captivated me – with its story of heated, yet well-informed, discussion of how to make a country work.

It goes without saying that the original signatories of the U.S. Constitution were far from representative. There were then 13 States and one, Rhode Island, did not even send a delegate, as some viewed the whole constitutional endeavor as a power grab being made by those who merely wished to replace King George III. Fifty-five people were present for all or much of the four months in Philadelphia’s stiflingly hot Independence Hall from June to September 1787. Only 42 were present for the signing, and three refused to put them names to the document. All 39 signatories (indeed, all those involved) were white men.

The most obvious people who lacked any representation were non-whites (both slave and free) and women. Young people were also notably absent from the “Founding Fathers”, with the 26-year-old Jonathan Dayton, of New Jersey, the youngest.

Nevertheless, it is an extraordinary document. Obviously, it has flaws. In an earlier essay, we have

already identified one element of the Constitution that nobody their right mind would want to replicate. This is Article IV, Section 2, Clause 3 provides:

> *No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*

This essentially it preserved the 'right' of a White Man to own Black Slaves – if some unfortunate person from Mississippi should escape the clutches of the 'Master' and get to a Free State, the law required that the enslaved person should be returned.[11]

This was a hotly debated issue in 1787. Many people wished to abolish slavery for once and for all. For example, George Clymer of Pennsylvania was a fervent abolitionist. Even Richard Bassett from Delaware was a slave owner, turned abolitionist. But people like Daniel Carroll Jr, a plantation owner from Maryland, would have none of it. Benjamin Franklin, a slave owner in his youth, had been arguing for an end to the practice since 1750, but in light of the efforts to reach consensus on the Constitution, he refused to argue for abolition at the Convention.

The idea that slavery should have been validated in any way in the foundational document of the United States is abhorrent, of course, though nobody in the U.K. is really in a position to cast the first stone – the British were, of course, the primary progenitors of slavery in North America. The stain was not entirely erased by the Thirteenth Amendment, which reflects the manner in which the Constitution was altered as time (in this case too much time) went by:

> *Neither slavery nor involuntary servitude,* ***except as a punishment for crime whereof the party shall have been duly convicted,*** *shall exist within the United States, or any place subject to their jurisdiction.*

This was passed by the Congress of the Northern States on January 31, 1865, while the Civil War still raged, but it was not ratified by sufficient states until December 6 of the same year, when the South had been defeated. But obviously the scars inflicted on the entire nation by two centuries of slavery were not erased by these words. And it is often overlooked that "involuntary servitude" (i.e., slavery) was retained for people in prison, where it exists to this day.

Equally the basic right to vote was denied to women until the Twentieth Century, and the Equal Rights Amendment, proposed in 1923, passed by Congress in 1972, and finally "ratified" by enough states in 2020, is still not in force.

Despite these profound flaws and others, we must remember that this took place nearly 250 years ago. Some of the founders were of great political intellect. Virginia and New York each only offered up one delegate, but they were well represented – by George Washington and Alexander Hamilton. Pennsylvania sent the oldest delegate, Benjamin Franklin, then 81.

After the draft was completed, Hamilton was joined by James Madison (later the fourth President), as well as John Jay (who was not a signatory but would later become Chief Justice of the Supreme Court) in writing the *Federalist Papers*, in an effort to help persuade the states to sign onto it. I first read their arguments in university in the U.S., and more thought went into their various papers than you will find in 200 years of *Hansard*.[12]

The fundamental point of a constitution is to make sure everyone gets along okay with each other

I have myself dabbled with setting up very miniature constitutional structures in school and university settings. I won't pretend I have ever created nirvana, but the basic goals remain the same: how to make sure everyone gets along, how to ensure that the strong cannot dominate the weaker members, how to make people want to remain in our little union, and how to ensure that it works efficiently towards its ultimate goals. The students and I find inspiration in the opening words of the U.S. Constitution:

> ***We the People*** *of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

c. The "republican" form of government

To try to achieve this aim, one goal was to prevent rule by majority faction. In this sense, the U.S. is very much a republican (nowadays with a small R) form of government, rather than a boundless democracy where the tyranny of the majority may trample on the vilified minority. Thus, in Article IV, s.4:

> *The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*

This is the keystone of both the structural constitution and the Bill of Rights: ultimately, checks and balances where three branches would have essentially co-equal power, and the ability to hold a stop sign up to another branch when it got out of hand.

i. The Executive

The most obvious different between the U.S. and U.K. is the election of the President to hold the power of the Executive. Pursuant to Art II s1 Clause 1:

> *The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years…*

By 1776, there had been a century of significant erosion of the power of the King going back to the Glorious Revolution. But as much as anything this whetted the appetite of a republican for more. At 56 years, the tenure of George III remains the longest of any male monarch. While not fully evident by 1776 his mental health was already in some question, yet he still had great authority and backed his ministers in their unpopular effort to impose greater direct rule on the 13 American Colonies. Hence, along with the Declaration of Independence came the 27 Grievances against George III personally, which included the denial of the powers of local assemblies, and the right to vote; and the imposition of taxes without representation.[13]

Beyond ridding themselves of the monarchy, other steps were taken by the U.S. founders along the lengthy road to abolishing some of the class divisions that were, and remain, rife in Britain. The prohibition against titles of nobility appears twice.[14] The same clause bans any office holder from accepting gifts from abroad,[15] a prescient provision that might well be adopted and expanded to bar presents Elon Musk and others might make to those in the U.K.[16] The rule governing the U.S. President comes close to banning such gifts, since Article II s1 cl 7 provides:

> *The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.*

The general principle is clear: elected officials should not make decisions based either on a fear that their salary will be enhanced, or cut off, by interested parties. They are paid enough as it is.

ii. The Legislative

Yet by far the strongest blow against the class structure came with the creation of the Senate, replacing the hereditary House of Lords. If the purpose of a bi-cameral legislature is to ensure a balance of views, the structure of the Senate is obviously a sensible solution. As provides:

> *The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.*[17]

The idea was that Senators would be elected every 6 years as opposed to Representatives every two years. Thus, whatever populist whims might govern a biennial House election would be mitigated by the fact that Senators were elected for three times as long, with only a third of them up for reelection at the same time as the House.

It is difficult to argue that the U.K. would not be better off with something along these lines, rather than the absurd mishmash we currently see in the House of Lords. Even recent "reforms" are led more by short-term political considerations than by any real sense of what a sensible government would look like. As the Guardian wrote on Christmas Day 2024, Keir Starmer eliminated the remaining hereditary peers and created 38 new life peers. While getting rid of the hereditaries might seem a small step in the right direction, it was actually just a political calculation: when he took office, there were 272 Conservative peers overall,

versus 186 Labour, so the Tories were 86 up on him. Of the 88 hereditaries who had remained in the Lords, 45 were Tories and only 4 were Labour, so this incremental "reformation" cut the Tory majority to 45, and the appointment of additional life peers slashed it even further to 21. "The significance of removing the hereditaries is therefore not only constitutional but also partisan. Fair enough, you may feel. But the combined effect of the abolition of the hereditaries with the creation of a disproportionate number of Labour life peers is obvious."[18]

In other words, it was yet more of the rather random tinkering, driven by immediate political rather than philosophical concerns, that does little to change the fundamentally undemocratic nature of the House of Lords.

Yet why not go much further – long since? Up to 26 of the 42 diocesan bishops and archbishops of the Church of England serve as "Lords Spiritual" (not including retired bishops who sit by right of a peerage). Right now, there are 25 of them, but in this day and age, what political philosophy lies behind having C of E bishops in our government structure? The data suggests that roughly 600,000 people go to a C of E service each Sunday, which is less than one percent of the population. A third of them are over 70. Why does this tiny proportion of the country have such an influence? And why should the Catholics not be represented, given that more people (about 1.75 million) attend mass each week than C of E churches? Or Muslims? Or Shamanists who, according to the 2021 Census, are the fastest growing religious group in the U.K.?[19]

Indeed, there is a better argument that 26 publicans should be elevated to the Lords – since Britain has more pubs than any other country, and many more people attend them each week. Or perhaps Gary Lineker and 25 other representatives of Premier League football clubs, who expect 1.5 million weekly supporters?

Yet the composition of the Lords is only one issue. For example, an equal question is the respective power of the U.S. Senate versus the U.K. Lords – if the second house is to balance the extremes of the first, it must have something akin to the Senate's power, rather than the relatively toothless pausing power of the Lords.

The U.S. Founders were keenly aware of other issues that ring true today. For example, when Boris Johnson wanted to Prorogue Parliament, apparently to limit debate on his Brexit bill, few of us knew what the word "prorogue" meant. However, the U.S. Constitution specifically addressed this because of what had happened in relatively recent memory of its drafters. King James I (of England, VI of Scotland) ran into difficulties with his first parliament in 1604, and the experience evaporated the euphoria shared by many that came with the union of the two countries with his accession the year before. This culminated with him proroguing (or dismissing) the parliament on July 7th. He was upset that they had not achieved full union, nor had they voted him the funds he wanted.

For parliament to be independent, the Colonists felt, clearly the executive could not be allowed to dissolve it; but then neither should a rogue branch of the government, perhaps the Senate, stymie the House. Hence Article I, Section 5, Clause 4 provides:

> *Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.*

Once again, the U.K. could learn a lot from the 250-year-old experience of its breakaway American cousins.

iii. The Judiciary

Another area where the Colonists listed a series of grievances against the King was with respect to the judiciary. The Act of Union of 1700 had prevented the King from unilaterally removing judges in Britain, which was an early step towards establishing true judicial independence. 76 years later, the Colonists voiced objection to many other corruptions of the judiciary, including the imposition of judges appointed and paid by the King, the denial of jury trials, and the transportation of dissenters to the U.K. for essentially rigged trials far from the scene of the alleged offence.

This gave rise to the founders' focus on ensuring a judiciary that had true power to ensure justice, and that was not in control of any politician. Thus, Article III s1 provided:

> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*

Judges were to be appointed by the President but would only take office with the Advice and Consent of the Senate. Article II, s.2, cl.2. They would serve life tenure and can only be removed by impeachment.

The appointment of judges is always a thorny issue. Some U.S. states use an election system for judges, which may well be the worst possible way to go about it; around the world we see a range of political intervention in judicial selection. For example:

> *"The German Constitutional Court is effectively appointed by the parliament, with each house of the legislature appointing an equal number of members to the Constitutional Court."*[20]

While the U.S. selection system worked relatively well for a long time, it has become more politicized of late, especially in the recent experience with Donald Trump seeding the Court with opponents of abortion, backed by a Republican majority in the Senate. Most U.S. states have adopted merit commissions systems that are relatively free of politics, as they "usually provide a list of three candidates for each vacancy for the state governor to choose from … [which] still gives the council much power…"[21]

Until quite recently, the U.K. had a judicial appointments system that was similarly subject to political influences as "judges are appointed by a government minister (typically the Minister of Justice or Attorney General)", but now has moved towards a judicial appointments commission.[22]

One plus of the U.S. federal process is that it is rendered transparent by the contentious confirmation hearings in the Senate. This is far less true of the U.K. system where most people would be hard-pressed to name a justice on the Supreme Court, let alone say how the high court judges are picked.

Yet even these issues are not as significant as the principle of *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803), which made it clear that the Supreme Court has the power to strike down any action by either of the other branches that it deems contrary to the constitution. This is ultimately key to the power of the judiciary – compared to the misconceived U.K. notion of "Parliamentary Supremacy" which sets parliament as so omnipotent that it can simply override a judicial decision that it does not like.

d. Amending the Constitution

Another important feature of the U.S. system is how the foundational document, the Constitution, may be changed. This is about to become even more significant than ever, with Donald Trump's desire to skirt a number of constitutional provisions, including perhaps the 22nd Amendment's limitation of a President to two terms.

The amendment process is found in its own part, Article V:

> *The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress…*

This is a complex process. Generally, both the Senate and the House must debate a proposed amendment, publicly and at length, and can only submit a suggestion where a supermajority of two-thirds of both agree. Then it passes to the second phase, where three-quarters of the states must ratify it.

It is intentionally complex. The structure of society should not be altered on a whim. It allows, though, for mistakes to be remedied. The 18th Amendment – Prohibition – was passed by Congress in the height of the Great War and ratified two years later in 1919:

> *After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.*

It's stated goal was to produce a more sober and sensible society, and yet it was responsible for Speakeasies and Al Capone. Thus, it was repealed quite rapidly in 1933, with ratification of the 21st Amendment taking less than ten months.

Obviously, those who disagreed with Brexit might wish that we had a more complex way to propose systematic changes to our nation's structure than some doodles on the back of David Cameron's cigarette

packet, and that we could also see that changing one's mind does not amount to "too much democracy".

Concluding considerations

I need to conclude with a few caveats. First, I am only touching on a few of the issues we could discuss. For example, one might look closely at the electoral system. If one did, there would be an interesting discourse on the American use of the Electoral College to choose a president. This is not well understood in the U.K., but is still open to debate: how could Donald Trump have won the election in 2016 when Hillary Clinton garnered more votes nationwide?[23]

Of course, criticize though we may, the U.K. first-past-the-post system is far more bizarre. In 2024, Labour secured 9,708,716 votes, which was just 33.7% of the total, but which resulted in 412 seats (63.4%). Reform got 14.3% of the vote compared to 12.2% for the LibDems, yet they had only 5 seats while the LibDems got 72. Nick Clegg's abortive effort to change the electoral system in 2011 was derailed when David Cameron's Conservatives agreed only to a little-understood "Alternative Vote" system rather than true Proportional Representation – despite the fact that Scotland, Wales and London all had proportional systems imposed upon them as part of the devolution of powers.

Second, I don't for a moment think the US Constitution is a perfect document or that it has been amended in all the ways it should be. For example, quite why the US have not yet accepted an Equal Rights Amendment for women is beyond me. But that is for another, later lecture.

Third, while we have many rights in the U.S. that are denied to the British, that does not mean that Americans or their lawyers use them effectively. There is an evolving quality of public defence in most states, but it has always been true that those who use their rights most are those who least need it – primarily the wealthy.

Fourth, the proof of any pudding is in the eating: the next four years will be a test of the power of the U.S. Constitution, as Donald Trump, aided and abetted by Republican majorities with the other three main arms of government, seeks to implement his often contentious programmes. But if the republic survives – as I am confident it will, as it did in the wake of the January 6th fiasco – then it will be largely due to this foundational document.

With these caveats, though, the case seems to me to be very powerful that Britain would benefit from a rigorous constitutional debate.

[1] See, generally, Fried, *Roosevelt and his Enemies*, pp. 120–23 (2001).

[2] Callum May, *Minister Greg Clark was briefly given wrong job*, BBC News (July 22, 2026), available at https://www.bbc.co.uk/news/uk-politics-36869726 (accessed 2024.12.28).
[3] Michael Gove's notorious criticism of "left wing ideologues" undermining education is well known. Theirs was the view, he thought, that schools "shouldn't be doing anything so old-fashioned as passing on knowledge, requiring children to work hard, or immersing them in anything like dates in history or times tables in mathematics. These ideologues may have been inspired by generous ideals but the result of their approach has been countless children condemned to a prison house of ignorance". Graeme Paton, *Conservative Part Conference: schoolchildren 'ignorant of the past', says Gove,* Daily Telegraph (Oct. 5, 2010), available at https://www.telegraph.co.uk/education/educationnews/8043872/Conservative-Part-Conference-schoolchildren-ignorant-of-the-past-says-Gove.html (accessed 2024.12.28). I leave it to the reader to decide whether this criticism is well-founded.
[4] Anthony Reuben, *How Often to Ministers Change Jobs*, BBC News (Sept. 2, 2019), available at https://www.bbc.co.uk/news/uk-politics-49278729 (accessed 2024.12.28).
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[6] Owen Bowcott, *British expats lose legal battle for right to vote in EU referendum*, The Guardian (26th April, 2016), available at https://www.theguardian.com/politics/2016/apr/28/british-expats-lose-legal-battle-right-to-vote-eu-referendum (accessed 2024.12.28).

[7] Lisa Smith, *What If British Expats Had Voted In The Brexit Referendum?*, iExpats (Investing Expats) (Sept. 15, 2019), available at https://www.iexpats.com/what-if-british-expats-had-voted-in-the-brexit-referendum/ (accessed 2024.12.28) ("Although the polls may not have been scientific, the anecdotal evidence collected by the Financial Times, global expat network Angloinfo and similar groups reflected at least seven out of 10 expats would vote remain, against 20% for leaving and the rest sitting on the fence as don't knows. With around 5 million Brits scattered around the world, that expat vote could have weighed in with 3 million or more remain votes and just a million for leave.").
[8] Caroline Mortimer, *Brexit campaign was largely funded by five of U.K.'s richest businessmen*, Independent (24th April, 2017), available at https://www.independent.co.uk/news/uk/politics/brexit-leave-eu-campaign-arron-banks-jeremy-hosking-five-uk-richest-businessmen-peter-hargreaves-robert-edmiston-crispin-odey-a7699046.html (accessed 2024.12.28).
[9] For example, Jim Ratcliffe supported Britain leaving the EU, and then duly left Britain himself to relocate in Monaco. See Rupert Neate, *Sir Jim Ratcliffe, U.K.'s richest person, moves to tax-free Monaco,* The Guardian (Sept. 25, 2020), available at https://www.theguardian.com/business/2020/sep/25/sir-jim-ratcliffe-uks-richest-person-moves-to-tax-free-monaco-brexit-ineos-domicile (accessed 2024.12.28).
[10] See, generally, *Scottish referendum: Gordon Brown vows 'powers will be delivered'*, BBC News (20th Sept. 2014), available at https://www.bbc.co.uk/news/uk-scotland-scotland-politics-29289035 (accessed 2024.12.28).
[11] Many of the early decisions surrounding the "Full Faith and Credit Clause", which mandates that each state must respect the laws of the other, involved rulings that New York, for example, should return a slave to Mississippi. I used these decisions to good effect in the case of Sam Johnson in 1988, where Mississippi did not want to respect the New York decision that a prior conviction could not legitimately be used to enhance a capital conviction to the death penalty. But there are still ways in which this will spark debate in the years to come – in the tension between a state like California (which approves of abortion) and Texas (which makes it illegal even to leave the state to have an abortion in a place like California)
[12] Indeed, the history of *Hansard* is an interesting one. Briefly, until well after the American revolution, the debates in the British Parliament were highly secretive, and there were many cases where people were prosecuted for reporting on them. Indeed, the issue came to a head in 1771 when Brass Crosby, the relatively radical Lord Mayor of London, refused to proceed against a printer by the name of John Miller who dared publish reports of parliamentary proceedings. Crosby was subsequently ordered to appear before the House to explain his actions, and committed to the Tower of London for his pains. But when he was brought to trial, several judges refused to hear the case and after protests from the public, Crosby was released. Thomas Hansard began publishing the parliamentary reports in 1809 – but a year later William Cobbett was prosecuted for "Seditious Libel", and Hansard himself was a co-defendant. The practice of publishing a record of parliament only gradually became accepted as time went by after that, starting in a very ad hoc way.
[13] Ironically, given today's populist bent, Grievance 7 was that "[h]e has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners…" George III – again ironically given his German heritage – had tried to stem the influx of Germans into the colonies, afraid that they were bringing with them their republican ideals.
[14] Article 1, Section 9, Clause 8 ("No Title of Nobility shall be granted by the United States") and Section 10 Clause 1 ("No State shall … grant any Title of Nobility.).
[15] Article 1, Section 9, Clause 8 ("no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.").
[16] For a very recent example, see, e.g., Pippa Crerar, *The public expected us to be squeaky clean ... now they think we're all the same': how freebiegate rocked Labour*, The Guardian (December 27, 2024), available at https://www.theguardian.com/lifeandstyle/2024/dec/27/the-public-expected-us-to-be-squeaky-clean-now-they-think-were-all-the-same-how-freebiegate-rocked-labour (accessed 2024.12.27).
[17] Originally Senators were elected by the State legislatures, Article I, Section 3, but this was changed by the 17th

Amendment in 1913.

[18] Editorial, *The Guardian view on the House of Lords: ministers risk a hollow reform with a partisan approach*, The Guardian (Dec. 25, 2024), available at https://www.theguardian.com/commentisfree/2024/dec/25/the-guardian-view-on-the-house-of-lords-ministers-risk-a-hollow-reform-with-a-partisan-approach (accessed 2024.12.27).

[19] See generally https://en.wikipedia.org/wiki/Religion_in_England#:~:text=After%20Christianity%2C%20the%20religions%20with,fastest%20growing%20religion%20in%20England .

[20] https://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf.

[21] https://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf.

[22] https://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf. See also The Supreme Court, Appointment of Justices, https://www.supremecourt.U.K./about/appointments-of-justices.html#:~:text=Applicants%20are%20shortlisted%20based%20on,selected%20to%20fill%20the%20vacancy..

[23] Trump had 62,984,828 votes (46.1%) to Clinton's 65,853,514 (48.2%), yet he won 304 Electoral College votes compared to her 227.