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Winston Churchill on the American Constitution

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WINSTON CHURCHILL ON THE AMERICAN CONSTITUTION

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> I am not a lawyer, but I have obeyed a lot of laws, and helped to make a few.[1]
>
> — *Winston S. Churchill*

Though best known for leading Britain during World War II, Winston Churchill was a keen observer of constitutional law.[2] Most of his insights concerned the unwritten conventions of the British Constitution,[3] but Churchill also commented extensively on the American Constitution.[4] Intellectual curiosity and a desire to forge a closer alliance between Great Britain and the United States were at the root of Churchill's interest in the institutions of what he called "The Great Republic."[5] As with all things Churchill, his observations on our Constitution were sometimes inspiring, sometimes illuminating, and sometimes noxious.[6]

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[1] Winston S. Churchill, America and Britain (Apr. 7, 1954), *in* 8 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 8559, 8559 (Robert Rhodes James ed., 1974) [hereinafter CHURCHILL SPEECHES] (accepting an Honorary Doctorate of Law from the Board of Regents of the State University of New York).

[2] There are many books about Churchill's life, though in my opinion the best single-volume biography from a British perspective is ROY JENKINS, CHURCHILL: A BIOGRAPHY (2001).

[3] *See, e.g.*, KEVIN THEAKSTON, WINSTON CHURCHILL AND THE BRITISH CONSTITUTION (2004).

[4] *See, e.g.*, Winston Churchill, *What Good's a Constitution?*, COLLIER'S WEEKLY, Aug. 22, 1936), at 22, 39–40.

[5] *See, e.g.*, WINSTON CHURCHILL, THE GREAT REPUBLIC: A HISTORY OF AMERICA, at XV (Winston S. Churchill ed., 2001) [hereinafter THE GREAT REPUBLIC] (noting that Churchill often referred to America as The Great Republic); The English-Speaking Peoples (Mar. 8, 1946), *in* 7 CHURCHILL SPEECHES, *supra* note 1, at 7293–94 (calling Virginia "a cradle of the Great Republic"). The fact that Churchill's mother, Jennie Jerome, was American may also have been a factor. *See* THE GREAT REPUBLIC, *supra*, at IX.

[6] *Compare* Their Finest Hour (June 18, 1940), *in* 6 CHURCHILL SPEECHES, *supra* note 1, at 6231, 6238 ("Hitler knows that he will have to break us in this Island or

This Article provides the first comprehensive analysis of Winston Churchill's views on American constitutional law. In his multi-volume *A History of the English Speaking Peoples*, Churchill discussed the drafting and the ratification of the Constitution in detail.[7] In a series of op-eds and magazine articles based on his trips to the United States, Churchill brought his acute political sense to bear on the operation of the Constitution during Jim Crow, Prohibition, and the New Deal.[8] And in speeches to British and American audiences over many decades, Churchill frequently turned to our Constitution as both a model and a foil.[9]

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lose the war. If we can stand up to him, all Europe may be free and the life of the world may move forward into broad, sunlit uplands. But if we fail, then the whole world, including the United States, including all that we have known and cared for, will sink into the abyss of a new Dark Age made more sinister, and perhaps more protracted, by the lights of perverted science."), *with* A Seditious Middle Temple Lawyer (Feb. 23, 1931), *in* 5 CHURCHILL SPEECHES, *supra* note 1, at 4982, 4985 ("It is alarming and also nauseating to see Mr. Gandhi, a seditious Middle Temple lawyer, now posing as a fakir of a type well-known in the East, striding half-naked up the steps of the Vice-regal palace, while he is still organizing and conducting a defiant campaign of civil disobedience, to parley on equal terms with the representative of the King-Emperor. Such a spectacle can only increase the unrest in India and the danger to which white people there are exposed.").

[7] *See* WINSTON S. CHURCHILL, 3 A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE AGE OF REVOLUTION 210–14 (1957) [hereinafter AGE OF REVOLUTION]. Churchill was a prolific author and won the Nobel Prize in Literature in 1953. The following quote from Churchill captures why I love what I do:

> The fortunate people in the world—the only really fortunate people in the world, in my mind,—are those whose work is also their pleasure. The class is not a large one, not nearly so large as it is often represented to be; and authors are perhaps one of the most important elements in its composition. . . . Whether a man writes well or ill, has much to say or little, if he cares about writing at all, he will appreciate the pleasures of composition. To sit at one's table on a sunny morning, with four clear hours of uninterruptible security, plenty of nice white paper, and a . . . pen. . . . that is true happiness. The complete absorption of the mind upon an agreeable occupation—what more is there than that to desire?

The Joys of Writing (Feb. 17, 1908), *in* 1 CHURCHILL SPEECHES, *supra* note 1, at 903, 903.

[8] *See* Winston S. Churchill, *What I Saw in America of Prohibition*, DAILY TELEGRAPH (Dec. 2, 1929), at 10 [hereinafter *Prohibition*]; Winston S. Churchill, *The Constitutions of Great Britain and the United States*, DAILY MAIL (June 6, 1935), at 12 [hereinafter *Constitutions of Britain and the United States*].

[9] *Compare* Parliament Bill (Nov. 11, 1947), *in* 7 CHURCHILL SPEECHES, *supra* note 1, 7563, 7565 (arguing against the curtailment of the House of Lords' power to delay legislation by citing that "[t]he American Constitution, with its checks and counterchecks, combined with its frequent appeals to the people, embodied much of the ancient wisdom of this island"), *with* America and Britain, *supra* note 1, at 8559 ("[I]t is a fact that American law is more wedded to the older versions of English law than is the case in Britain, where in the first half of the nineteenth century a great

From these rich sources, three relevant themes emerge for modern jurisprudence and constitutional design. First, Churchill emphasized the continuity between British tradition and the great eighteenth-century texts written here, most notably in his innovative claim that the Declaration of Independence was the supreme articulation of the common law.[10] Second, Churchill argued that judicial review was essential in the United States due to its unusual diversity—an explanation that challenges James Madison's analysis of factions in *Federalist No. 10*.[11] Third, Churchill contended that the failures of the Fifteenth and Eighteenth Amendments—Black voting and Prohibition—during the 1920s were the result of a supermajority with good intentions enacting broad changes that were too unequally spread across society to sustain their enforcement.[12] His hard-headed realism about how lopsided effects in constitutional law can cripple its authority even when reforms have supermajority backing is a lesson that should receive more attention, in part because that lesson can help to justify some of the antimajoritarian aspects of our constitutional structure.

Part I of this Article examines Churchill's views on constitutionalism and the parallels that he drew between the legal principles of Britain and America. Part II explores the

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deal of technical modernization was effected. Although I like old things better than new, I believe our revised version has many conveniences in procedure.").

[10] *See, e.g.*, "The Third Great Title-Deed" of Anglo-American Liberties (July 4, 1918), in 3 CHURCHILL SPEECHES, *supra* note 1, at 2613, 2614 [hereinafter Third Great Title-Deed] (hailing the Declaration of Independence as a common-law landmark comparable to the Magna Carta and the English Bill of Rights).

[11] *See What Good's a Constitution?*, *supra* note 4, at 40; Liberty and the Law (July 31, 1957), *in* 8 CHURCHILL SPEECHES, *supra* note 1, 8682, 8683; *see also* THE FEDERALIST NO. 10, at 64–65 (James Madison) (Jacob E. Cooke ed., 1961); *see infra* text accompanying notes 113–121.

[12] *See Prohibition*, *supra* note 8; *see also* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); U.S. CONST. amend. XVIII, § 1 ("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."), *repealed by* U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed."); Shelby Cty. v. Holder, 570 U.S. 529, 536 (2013) (describing the impotence of the Fifteenth Amendment until 1965); *cf.* Guido Calabresi, Foreword, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 130–31 (1991) (making some related points about disparate impact and judicial review).

evolution of Churchill's thought on a crucial difference between these kindred systems—judicial review—and his hypothesis that diversity explains the distinction. Finally, Part III focuses on Churchill's attack on Prohibition and his surprising connection of that failure to the establishment of a central pillar of Jim Crow.

I. A COMMON CONSTITUTIONAL HERITAGE

In an address to a joint session of Congress a few weeks after the United States declared war on Nazi Germany, Churchill declared: "I have been in full harmony all my life with the tides which have flowed on both sides of the Atlantic against privilege and monopoly, and I have steered confidently towards the Gettysburg ideal of 'government of the people by the people for the people.' "[13] This Part looks at Churchill's constitutional beliefs and his rhetoric stressing the bonds between British and American democracy in furtherance of that alliance. The most striking example was his claim that the Declaration of Independence is one of these bonds rather than a fracture, which muted the anti-colonial understanding of Jefferson's text in line with Churchill's wholehearted support for imperialism.[14]

A. Upholding Liberal Democracy

To understand Winston Churchill's constitutional philosophy, we must first clear up the common misunderstanding that he saw democracy as a second-best solution. The misunderstanding stems from his line to the House of Commons, which is often

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[13] A Long and Hard War (Dec. 26, 1941), *in* 6 CHURCHILL SPEECHES, *supra* note 1, at 6536, 6536; *see* Parliament Bill, *supra* note 9 ("Government of the people, by the people, for the people, still remains the sovereign definition of democracy."); *see generally* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992) (thoroughly analyzing the Gettysburg Address). One notable example of Churchill's fight against privilege was his effort to end the absolute veto of the unelected House of Lords over legislation. *See* Parliament Bill (Feb. 22, 1911), *in* 2 CHURCHILL SPEECHES, *supra* note 1, at 1692, 1694–96, 1700; *see also* Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. L. REV. 303, 319–22 (2011) (providing some background on the debate that led to the Parliament Act of 1911).

[14] *See, e.g.*, The Anglo-American Alliance (July 4, 1950), *in* 8 CHURCHILL SPEECHES, *supra* note 1, at 8031, 8032 (hailing "the Declaration of Independence, which has become a common creed on both sides of the Atlantic Ocean"); *see also* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 212 (1997) (discussing the decline in the revolutionary thrust of the Declaration over time).

quoted as "democracy is the worst form of government—except for all the others."[15] What he actually said was:

> [I]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time; but there is the broad feeling in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters.[16]

In other words, Churchill rejected the jaded view that democracy was worthwhile due only to the absence of the flaws that plagued other political systems.[17] He instead celebrated, albeit imperfectly, liberal principles such as the right to vote, jury trial, freedom of speech, and religious freedom throughout his career.[18]

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[15] *See, e.g.*, Barack H. Obama, Remarks at Stavros Niarchos Foundation Cultural Center in Athens, Greece (Nov. 16, 2016); Eric A. Posner & E. Glen Weyl, *Voting Squared: Quadratic Voting in Democratic Politics*, 68 VAND. L. REV. 441, 447 (2015).

[16] Parliament Bill, *supra* note 9, at 7566.

[17] A more precise statement of Churchill's belief in democracy's strength was:

> "In a society where there is democratic tolerance and freedom under the law, many kinds of evils will crop up, but give them a little time and they usually breed their own cure." I do not see any reason to doubt the truth of that.
>
> There is no country in the world where the process of self-criticism and self-correction is more active than in the United States.

America and Britain, *supra* note 1, at 8560 (quoting his American mentor Representative Bourke Cockran); *see id.* at 8559–60 ("I am a great believer in democracy and free speech. Naturally when immense masses of people speak the same language and enjoy the fullest rights of free speech they often say some things that all the others do not agree to. If speech were always to be wise it could never be free, and even where it is most strictly regulated it is not always wise.").

[18] *See* Prolongation of Parliament (Oct. 31, 1944), *in* 7 CHURCHILL SPEECHES, *supra* note 1, at 7020, 7023 ("At the bottom of all the tributes paid to democracy is the little man, walking into the little booth, with a little pencil, making a little cross on a piece of paper—no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of that point."); Capital Punishment (July 15, 1948), *in* 7 CHURCHILL SPEECHES, *supra* note 1, at 7686, 7696 ("We do not allow the decision of guilt or innocence to be decided in the first instance by trained legal minds or persons of exceptional education. The prime guarantee of British justice is the honest opinion of the ordinary man or woman."); *What Good's a Constitution?*, *supra* note 4, at 40 ("[T]he right of freedom of speech and publication is extended, under the [British] Constitution, to those who in theory seek to overthrow established institutions by force of arms so long as they do not commit any illegal act."); Prayer Book Measure (June 14, 1928), *in* 5 CHURCHILL SPEECHES, *supra* note 1, at 4441, 4442 ("To refuse to a religious community a wider latitude in spiritual matters is a very objectionable step for any modern Legislature to take. It appears to be contrary to the spirit of religious toleration which, I am quite sure, would rule the House of Commons in the case of any other faith or sect among the hundreds which exist side by side within the circuit of the British Empire."). For thoughts on

In assessing constitutional legitimacy, Churchill took a pragmatic stance tempered by respect for tradition.[19] To a Dutch audience in 1946, he gave his "conception of free democracy based upon the people's will and expressing itself through representative assemblies under generally accepted constitutional forms."[20] He named some

> simple, practical tests by which the virtue and reality of any political democracy may be measured. Does the Government in any country rest upon a free, constitutional basis, assuring the people the right to vote according to their will, for whatever candidates they choose?[21]

For example: "Is there the right of free expression of opinion, free support, free opposition, free advocacy and free criticism of the Government of the day? Are there Courts of Justice free from interference by the Executive or from threats of mob violence, and free from all association with particular . . . parties?"[22] "Will these courts," he asked,

> administer public and well-established laws associated in the human mind with the broad principles of fair play and justice? Will there be fair play for the poor as well as for the rich? Will there be fair play for private persons as well as for Government officials? Will the rights of the individual, subject to his duties to the state, be maintained, asserted and exalted?[23]

Churchill's lukewarm support of women's suffrage, *see* THEAKSTON, *supra* note 3, at 101–12.

[19] For Churchill's views on the value of tradition, *see* The Sinews of Peace (Mar. 5, 1946), *in* 7 CHURCHILL SPEECHES, *supra* note 1, at 7285, 7288 ("[C]ourts of justice, independent of the executive, unbiased by any party, should administer laws which have received the broad assent of large majorities or are consecrated by time and custom."); "The Sandys Storm" (July 11, 1938), *in* 6 CHURCHILL SPEECHES, *supra* note 1, at 5992, 5995 (quoting Benjamin Disraeli's maxim that "[n]ations are ruled by force or by tradition" and adding: "[t]here is no humiliation in bowing to tradition"); "A Sense of Crowd and Urgency" (Oct. 28, 1943), *in* 7 CHURCHILL SPEECHES, *supra* note 1, at 6869 (arguing that the bombed House of Commons chamber should be rebuilt in exactly the same form in part because "[l]ogic is a poor guide compared with custom").

[20] The United States of Europe (May 9, 1946), *in* 7 CHURCHILL SPEECHES, *supra* note 1, at 7318, 7321.

[21] *Id.* at 7321–22; *see* The Sinews of Peace, *supra* note 19 ("[T]he people of any country have the right, and should have the power by constitutional action, by free unfettered elections, with secret ballot, to choose or change the character or form of government under which they dwell.").

[22] The United States of Europe, *supra* note 20, at 7322.

[23] *Id.* Churchill listed nearly the same tests in a 1936 magazine article that is discussed in Part II. *See What Good's a Constitution?*, *supra* note 4, at 39.

Churchill's invocation of fair play as a constitutional principle is worth dwelling on for a moment because that idea has largely dropped out of legal discourse.[24] Unlike "the rule of law," the ideal popularized by the British theorist A.V. Dicey that is now an important way of describing what liberal democracy epitomizes, "fair play" connotes a substantive standard that informs all government actions, not just judicial decisions.[25] When President Franklin D. Roosevelt delivered a speech on the 150th anniversary of the Constitutional Convention, he explained:

> The surest protection of the individual and of minorities is that fundamental tolerance and feeling for fair play which the Bill of Rights assumes. But tolerance and fair play would disappear here as it has in some other lands if the great mass of people were denied confidence in their justice, their security and their self-respect.[26]

The Supreme Court of the United States adopted fair play as a standard in its canonical personal jurisdictional decision—*International Shoe Co. v. Washington*—but that is the only way in which fair play still plays a self-conscious role in law.[27]

Churchill's next linchpin for constitutional democracy was an independent judiciary, which he called "the foundation of many things in our island life."[28] "The only subordination which a judge knows in his judicial capacity," he stated, "is that which he owes to the existing body of legal doctrine enunciated in years past by his brethren on the bench, past and present, and upon the laws passed by Parliament which have received the Royal Assent."[29]

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[24] *See, e.g.*, Justin Tosi, *A Fair Play Account of Legitimate Political Authority*, 23 LEGAL THEORY 55 (2017).

[25] *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179–91 (7th ed. 1908).

[26] *See* Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), *in* 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 366 (Samuel I. Rosenman ed., 1941).

[27] 326 U.S. 310, 316 (1945) (referring to "traditional notions of fair play and substantial justice").

[28] Judges' Remuneration Bill (Mar. 23, 1954), *in* 8 CHURCHILL SPEECHES, *supra* note 1, at 8544, 8547 (arguing for a pay increase for judges).

[29] *Id.* ("The relations between the Judiciary and the Legislature are also exceptional and privileged. Parliament has deliberately maintained the judges in a special position, not only by charging their salaries to the Consolidated Fund so that they do not fall within the annual scrutiny of Parliament, but also by eschewing any claim to criticise a judge's conduct in his judicial capacity except on a special Motion for an Address to the Crown for the judge's removal.").

As a result,

> [t]he service rendered by judges demands the highest qualities of learning, training and character. . . . A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted.[30]

He once wrote,

> Our judges extend impartially to all men protection, not only against wrongs committed by private persons, but also against the arbitrary acts of public authority. The independence of the courts is, to all of us, the guarantee of freedom and the equal rule of law.
>
> It must, therefore, be the first concern of . . . a free country to preserve and maintain the independence of the courts of justice, however inconvenient that independence may be, on occasion, to the government . . . .[31]

If an emergency required limits on judicial authority through a suspension of the writ of habeas corpus, Churchill held that only a nation's legislature could authorize such a constitutional departure.[32] In an address to the American Bar Association in 1957, he said:

> National governments may indeed obtain sweeping emergency powers for the sake of protecting the community in times of war or other perils. These will temporarily curtail or suspend the freedom of ordinary men and women, but special powers must be granted by the elected representatives of those same people by Congress or by Parliament, as the case may be.[33]

Such powers "do not belong to the State or Government as a right. Their exercise needs vigilant scrutiny, and their grant may

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[30] *Id.* at 8548.

[31] *What Good's a Constitution?*, *supra* note 4, at 39.

[32] *See* Liberty and the Law (July 31, 1957), in 8 CHURCHILL SPEECHES, *supra* note 1, at 8682–83.

[33] *See id*; *see also* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.) ("An Act for the better secureing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas."); *cf.* The King's Dominions (Apr. 20, 1939), *in* 6 CHURCHILL SPEECHES, *supra* note 1, at 6105, 6107 ("In the British Empire we not only look out across the seas towards each other, but backwards to our own history, to Magna Charta, to Habeas Corpus, to the Petition of Right, to Trial by Jury, to the English Common Law and to Parliamentary Democracy. These are the milestones and monuments that mark the path along which the British race has marched to leadership and freedom.").

be swiftly withdrawn."[34] On the day that Britain declared war against Nazi Germany, Churchill said:

> Perhaps it might seem a paradox that a war undertaken in the name of liberty and right should require, as a necessary part of its processes, the surrender for the time being of so many of the dearly valued liberties and rights. . . . We are sure that these liberties will be in hands which will not abuse them, which will use them for no class or party interests, which will cherish and guard them, and we look forward to the day . . . when our liberties and rights will be restored to us, and when we shall be able to share them with the peoples to whom such blessings are unknown.[35]

Indeed, a recent study shows that Churchill exercised more restraint in the use of detention without charge during World War II than FDR did for his Administration's broad internment of Japanese Americans.[36]

B. Invoking the Constitution of the Great Republic

When expressing his constitutional ideas, Churchill was fond of drawing connections with our Constitution.[37] He was well-versed in the subject, as he showed in a chapter entitled "The American Constitution" in one of his final books.[38] The ex-Prime Minister described the backdrop of the Constitutional Convention, the views of some of its leading members, and summarized the proposal itself before noting:

> [A] written constitution carries with it the danger of a cramping rigidity. What body of men, however far-sighted, can lay down precepts in advance for settling the problems of future genera-

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[34] Liberty and the Law, *supra* note 32, at 8683; *see* 5 WINSTON S. CHURCHILL, 5 THE SECOND WORLD WAR 679 (1951) (quoting a cable that Churchill sent to the Home Secretary stating that the suspension of habeas corpus "must be interpreted with the utmost vigilance by a Free Parliament"); *id.* at 680 (quoting another cable in which Churchill said that suspension was "contrary to the whole spirit of British public life and British history").

[35] War (Sept. 3, 1939), *in* 6 CHURCHILL SPEECHES, *supra* note 1, at 6152, 6153.

[36] *See* Amanda L. Tyler, *Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens During World War II and Their Lessons for Today*, 107 CALIF. L. REV. 789, 796 (2019); *see also* Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding aspects of the President's Executive Order on the detention of Japanese-Americans).

[37] *See, e.g.*, Liberty and the Law, *supra* note 32, at 8682 ("It has often been pointed out that the 5th and 14th Amendments of the American Constitution are an echo of the Magna Carta.").

[38] *See* AGE OF REVOLUTION, *supra* note 7, at 252–66; *cf. What Good's a Constitution?*, *supra* note 4, at 40 (quoting the Convention debates).

> tions? The delegates at Philadelphia were well aware of this. They made provision for amendment, and the document drawn up by them was adaptable enough in practice to permit changes in the Constitution. But it had to be proved in argument and debate and generally accepted throughout the land that any changes proposed would follow the guiding ideas of the Founding Fathers. A prime object of the Constitution was to be conservative; it was to guard the principles and machinery of [the] State from capricious and ill-considered alteration. In its fundamental doctrine the American people acquired an institution which was to command the same respect and loyalty as in England are given to Parliament and Crown.[39]

Churchill went on to describe the ratification debates in detail.[40] He paid special attention to Madison's *Federalist No. 10*, which was quoted at length for its description of factions.[41] "*The Federalist* letters," Churchill wrote, "are among the classics of American literature. Their practical wisdom stands pre-eminent amid the stream of controversial writing at the time."[42]

While acknowledging the political skills of the Framers, Churchill held that the Constitution was largely a restatement of British common sense. "At first sight," he wrote, "this authoritative document presents a sharp contrast with the store of traditions and precedents that make up the unwritten Constitution of Britain. Yet behind it lay no revolutionary theory."[43] The text was instead based on

> Old English doctrine, freshly formulated to meet an urgent American need. The Constitution was a reaffirmation of faith in the principles painfully evolved over the centuries by the English-speaking peoples. It enshrined long-standing English ideas of justice and liberty, henceforth to be regarded on the other side of the Atlantic as basically American.[44]

Churchill's view that the Constitution enshrined British thinking was a staple of his later speeches.[45] In a 1950 campaign address, he said:

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[39] AGE OF REVOLUTION, *supra* note 7, at 252–57.
[40] *Id.* at 257–60.
[41] *See id.* at 258–59.
[42] *Id.* at 258.
[43] *Id.* at 256.
[44] *Id*.
[45] The Crown and Parliament (May 27, 1953), *in* 8 CHURCHILL SPEECHES, *supra* note 1, at 8485, 8486.

> The wisdom of our forebears for more than 300 years has sought the division of power in the Constitution. . . . The great men who founded the American Constitution expressed this same separation of authority in the strongest and most durable form. Not only did they divide executive, legislative, and judicial functions, but also by instituting a federal system they preserved immense and sovereign rights to local communities and by all these means they have maintained—often at some inconvenience—a system of law and liberty under which they have thrived.[46]

Three years later, he claimed that "no Constitution was ever written in better English" than America's Constitution.[47] "The key thought alike of the British constitutional monarchy and the republic of the United States," he stated, "is the hatred of dictatorship. Both here and across the ocean, over the generations and the centuries the idea of the division of power has lain at the root of our development. We do not want to live under a system dominated either by one man or one theme."[48]

While there is some truth in Churchill's view of Anglo-American constitutional unity, there was a political motive that probably led him to exaggerate those connections.[49] Perhaps the strongest of his many strong opinions was that a close partnership between the United States and Britain was essential for world peace.[50] Churchill expressed this idea when Hitler was the

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[46] Woodford Adoption Meeting (Jan. 28, 1950), *in* 8 CHURCHILL SPEECHES, *supra* note 1, at 7907, 7912; *see* "A Hush over Europe" (Aug. 8, 1939), *in* 6 CHURCHILL SPEECHES, *supra* note 1, at 6149, 6151 ("The architects of the American Constitution were as careful as those who shaped the British Constitution to guard against the[ir] whole life and fortunes, and all the laws and freedom of the nation, being placed in the hands of a tyrant. Checks and counter-checks in the body politic, large devolutions of State government, instruments and processes of free debate, frequent recurrence to first principles, the right of opposition to the most powerful governments, and above all ceaseless vigilance, have preserved, and will preserve, the broad characteristics of British and American institutions.").

[47] The Crown and Parliament, *supra* note 45.

[48] *Id.*

[49] Churchill was aware that there were differences between the two Constitutions. *See* WINSTON S. CHURCHILL, 2 THE WORLD CRISIS 693 (Free Press 2005) (1939) (stating that only the United States Constitution "secures to its supreme executive officer, at once the Sovereign and the Party Leader, such direct personal authority"); *Constitutions of Britain and the United States*, *supra* note 8 (noting "the profound differences between the Constitutions under which the two English-speaking democracies have come to dwell").

[50] *See, e.g.*, Winston S. Churchill, *The Union of the English-Speaking Peoples*, NEWS OF THE WORLD, May 15, 1938, *reprinted in* THE GREAT REPUBLIC, *supra* note 5, at 310–18; Anglo-American Unity, *in* 7 CHURCHILL SPEECHES, *supra* note 1, at 6823, 6823–27.

enemy and repeated that view when Stalin was the danger.[51] In his renowned "Iron Curtain" speech that anticipated the Cold War, he gave

> the crux of what I have travelled here to say. Neither the sure prevention of war, nor the continuous rise of world organisation will be gained without what I have called the fraternal association of the English-speaking peoples. This means a special relationship between the British Commonwealth and Empire and the United States.[52]

One way to foster that special relationship was by highlighting the commonalities between British and American law.

C. Reimagining the Declaration of Independence

The best example of Churchill's creativity in reading our basic texts involved the Declaration of Independence.[53] In Pauline Maier's splendid account of the Declaration's history, she observed that by World War II Jefferson's manifesto for revolution against the Crown was viewed as "a part of the British inheritance as it is of ours."[54] "[J]ust imagine George III's amazement," she wrote, "at learning that the Declaration of Independence would one day become a constructive part of the British heritage!"[55] The wartime alliance helps explain the evolution in

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[51] *See* The Atlantic Charter (Aug. 24, 1941), *in* 6 CHURCHILL SPEECHES, *supra* note 1, at 6472, 6473 (trumpeting his first meeting with President Roosevelt as symbolizing "something even more majestic—namely; the marshalling of the good forces of the world against the evil forces which are now so formidable"); *see also* Address to the United States Congress (Jan. 17, 1952), *in* 8 CHURCHILL SPEECHES, *supra* note 1, at 8323, 8329 ("[O]ne thing which is exactly the same as when I was here last. Britain and the United States are working together and working for the same high cause. . . . Let us make sure that the supreme fact of the twentieth century is that they tread the same path.").

[52] *See* The Sinews of Peace, *supra* note 19, at 7289; *see also id.* at 7290 ("From Stettin to the Baltic to Trieste in the Adriatic, an iron curtain has descended across the Continent.").

[53] *See* Election Address (Oct. 15, 1951), *in* 8 CHURCHILL SPEECHES, *supra* note 1, at 8265, 8268 (" 'All men are created equal,' says the American Declaration of Independence. 'All men shall be kept equal,' say the British Socialist Party."); The Twentieth Century—Its Promise and Its Realization (Mar. 31, 1949), *in* 7 CHURCHILL SPEECHES, *supra* note 1, at 7801, 7803 (quoting the "famous American maxim 'Governments derive their just powers from the consent of the governed' "); *What Good's a Constitution?*, *supra* note 4, at 39 ("[T]he founders of the American Republic in their Declaration of Independence inculcate as a duty binding upon all worthy sons of America 'a frequent recurrence to first principles.' ").

[54] *See* MAIER, *supra* note 14 (quoting Archibald MacLeish, who was the Librarian of Congress during World War II).

[55] *Id.* at 213.

the Declaration's meaning, but Churchill was the most prominent public figure to make the argument that the Declaration should be understood as an Anglo-American authority on a par with the Magna Carta and the English Bill of Rights.[56] In so doing, he advanced the special relationship and blunted the Declaration's message of anti-colonialism at a time when the British Empire was still robust.[57]

On the Fourth of July in 1918, Churchill gave his first speech on the Declaration of Independence in support of a resolution providing, in part, that the British people "rejoice that the love of liberty and justice on which the American nation was founded should in the present time of trial have united the whole English-speaking family in a brotherhood of arms."[58] "A great harmony exists," he said,

> between the spirit and language of the Declaration of Independence and all we are fighting for now. A similar harmony exists between the principles of that Declaration and all that the British people have wished to stand for, and have in fact achieved at last both here at home and in the self-governing Dominions of the Crown.[59]

"The Declaration of Independence is not only an American document," Churchill explained.[60]

> It follows on the Magna Charta and the Bill of Rights as the third great title-deed on which the liberties of the English-speaking people are founded. . . . They spring from the same source; they come from the same well of practical truth, and that well is here by the banks of the Thames, in this island which is the birthplace and origin of the British and American race.[61]

He closed by repurposing the Declaration's pledge of "our lives, our fortunes, and our sacred honour" as a mantra for the Allied effort in World War I.[62]

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[56] *See, e.g.*, Third Great Title-Deed, *supra* note 10, at 2613–16; *see also* The Bill of Rights 1688, 1 W. & M. c. 2 (Eng.).

[57] *Cf.* A New Experience—Victory (Nov. 10, 1942), *in* 6 CHURCHILL SPEECHES, *supra* note 1, at 6692, 6695 ("I have not become the King's First Minister in order to preside over the liquidation of the British Empire.").

[58] Third Great Title-Deed, *supra* note 10, at 2613.

[59] *Id.* at 2614.

[60] *Id.*; *see* AGE OF REVOLUTION, *supra* note 7, at 189 ("The Declaration was in the main a restatement of the principles which had animated the Whig struggle against the later Stuarts and the English Revolution of 1688 . . . .").

[61] Third Great Title-Deed, *supra* note 10.

[62] *Id.* at 2616.

Into the 1950s, Churchill continued to invoke the Declaration of Independence to support Anglo-American cooperation.[63] The Iron Curtain address made the point this way:

> [W]e must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus [Act of 1679], trial by jury, and the English common law find their most famous expression in the American Declaration of Independence.[64]

A year later in *Life* magazine, Churchill repeated his call for a special relationship between Britain and the United States and defended the anticommunist Truman Doctrine by asking Americans "to march forward unswervingly upon the path to which [d]estiny has called them, guided by the principles of the Declaration of Independence, expressed so carefully and so pregnantly in the balanced, well-shaped language of the 18th century, by the founders of the greatest State in the world."[65] And in 1950, he gave an Independence Day address and stated that both nations

> must forever be on our guard, and always vigilant against [tyranny]—in all this we march together. Not only, if need be, under the fire of the enemy but also in those realms of thought which are consecrated to the rights and the dignity of man, and which are so amazingly laid down in the Declaration of Independence, which has become a common creed on both sides of the Atlantic Ocean.[66]

Notably absent from Churchill's reading of the Declaration as a common law text was any mention of its revolutionary themes.[67] On one level this makes sense because he was trying to downplay the divisions between Britain and America. On another level, though, Churchill's zeal for Britain's empire could not be reconciled with Jefferson's statement of national self-determina-

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[63] *See* The Anglo-American Alliance, *supra* note 14.

[64] The Sinews of Peace, *supra* note 19.

[65] Winston S. Churchill, *If I Were an American*, LIFE MAG., Apr. 14, 1947, *reprinted in* THE GREAT REPUBLIC, *supra* note 5, at 390; *see* DAVID MCCULLOUGH, TRUMAN 547–49 (1992) (describing President Truman's pledge to support pro-Western governments in Greece and Turkey against Soviet aggression after Britain no longer could).

[66] *See* The Anglo-American Alliance, *supra* note 14.

[67] *See* THE DECLARATION OF INDEPENDENCE para 2. (U.S. 1776) ("[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .").

tion. In his 1918 speech, he acknowledged that in the Declaration of Independence "we lost an [e]mpire, but by it we also preserved an [e]mpire. By applying its principles and learning its lesson we have maintained our communion with the powerful Commonwealths our children have established beyond the seas."[68] Some of Great Britain's former colonies would probably beg to differ with this rosy description. In any event, by weaving the Declaration of Independence into the common law, Churchill sought to tame this radical authority and gave the text an evolving rather than a fixed construction.[69]

II. DIVERSITY AND JUDICIAL REVIEW

This Part explores Churchill's unorthodox explanation for judicial review in the United States and for its absence in Great Britain. While he admired the flexibility of the uncodified British Constitution, during the New Deal he reached the conclusion that judicial review of our "fixed" Constitution was essential because of America's diversity.[70] Churchill's diversity hypothesis contradicts Madison's reasoning in *Federalist No. 10* and is a testable hypothesis for future research about how judicial review is practiced across the world and in the fifty states.[71]

A. Flexible vs. Fixed

Until the 1930s, Churchill criticized written constitutions as too rigid.[72] In a 1908 speech, he stated: "No country in the world has such a flexible Constitution as ours. The Constitutions of France, Germany, and the United States are far more rigid, far

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[68] *See* Third Great Title-Deed, *supra* note 10.

[69] *See* WINSTON S. CHURCHILL, 1 A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE BIRTH OF BRITAIN 225 (1956) ("This slow but continuous growth of what is popularly known as 'case law' ultimately achieved much the same freedoms and rights for the individual as are enshrined in other countries by written instruments such as the Declarations of the Rights of Man and the spacious and splendid provisions of the American Declaration of Independence and constitutional guarantees of civil rights.").

[70] *See What Good's a Constitution?*, *supra* note 4, at 40; *see also* Liberty and the Law, *supra* note 32, at 8683 (making the same point).

[71] *See infra* text accompanying notes 101–103.

[72] *See Prohibition*, *supra* note 8 (criticizing the "rat-trap rigidity of the American Constitution"); *supra* text accompanying note 39. In this respect, Churchill was following in a tradition in British commentary on the United States Constitution. *See* WALTER BAGEHOT, THE ENGLISH CONSTITUTION 30 (photo. reprt. 2007) (1873) (stating that under the American Constitution "[t]here is no elastic element, everything is rigid, specified, dated.") (emphasis omitted).

more fortified against popular movements than the Constitution under whose gradual evolution this peaceful, law-abiding country has dwelt secure for so many centuries."[73] Two decades later, he said:

> I am not one of those who either hope much or apprehend much from the attempt to develop constitutional arrangements for the British Empire of a rigid character. The whole advantage of our position has been that we have been able to get on without writing things down on paper. The British Empire could not have been built up by anything that could be written on parchment.[74]

And in a book on World War I first published in 1927, Churchill wrote:

> The rigid Constitution of the United States, the gigantic scale and strength of its party machinery, the fixed terms for which public officers and representatives are chosen, invest the President with a greater measure of autocratic power than was possessed before the war by the Head of any great [s]tate.[75]

What did Churchill mean when he called our Constitution rigid? In part, he was referring to the fixed terms of elected officials, which stood in contrast to Parliament's freedom to set the length of its own term.[76] He also noted the supermajority requirement to ratify an Article V amendment.[77] But Churchill also believed that judicial review made a constitution fixed. Not long after the Supreme Court issued *A.L.A. Schechter Poultry Corp. v. United States*[78] in 1935, he wrote an op-ed on "The Constitutions of Great Britain and the United States."[79] In the op-ed, he told British readers that "the Supreme Court has given a unanimous judgment which stultifies and largely paralyzes the whole vast policy of social and economic change embodied in

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[73] Election Address (Apr. 14, 1908), *in* 1 CHURCHILL SPEECHES, *supra* note 1, at 943, 953.

[74] The Empire (Oct. 18, 1926), *in* 4 CHURCHILL SPEECHES, *supra* note 1, at 4103, 4104.

[75] THE WORLD CRISIS, *supra* note 49, at 679.

[76] The current law on that question is the Fixed-Term Parliaments Act 2011, c. 14, § 1 (UK), which can, of course, be changed by Parliament.

[77] *See What Good's a Constitution?*, *supra* note 4, at 40 (noting that constitutional amendments were ratified "after prodigious struggles, on only a score of occasions during the whole history of the United States").

[78] 295 U.S. 495 (1935).

[79] *Constitutions of Britain and the United States*, *supra* note 8.

President Roosevelt's National [Industrial] Recovery Act."[80] This was possible because

> [in the United States] a written Constitution [is] enforced by a Supreme Court according to the letter of the law, under which anyone may bring a test case challenging not merely the interpretation of a law, but the law itself, and if the Court decides for the appellant, be he only an owner of a few chickens, the whole action of the Legislature and the Executive becomes to that extent null and void.[81]

"It is very difficult," Churchill wrote,

> [f]or us . . . to realize the kind of deadlock which has been reached in the United States. . . . Imagine—to take an instance nearer home—some gigantic measure of insurance as big as our widows' pensions, health and employment insurance rolled together, which had deeply interwoven itself in the whole life of the people, upon which every kind of contract and business arrangement had been based, being declared to have no validity by a court of law.[82]

The Depression and the New Deal clarified Churchill's thinking on the purpose and enforcement of constitutional law. Although he worked closely with President Roosevelt during World War II, Churchill was a fairly detached observer of FDR prior to becoming Prime Minister in 1940.[83] For example, in a 1934 article, he praised the "renaissance of creative effort with which the name of Roosevelt will always be associated" but added that "[a]lthough the dictatorship is veiled by constitutional forms, it is none the less effective."[84] Two years later, he made the following bold prediction about the looming clash between FDR and the Supreme Court:

> [A]fter all the complaints against the rigidity of the United States Constitution and the threats of a presidential election on this issue, none of the suggested constitutional amendments has so far been adopted by the Administration. This may explain why the "Nine Old Men" of the Supreme Court have not been more seriously challenged. But the challenge may come at a later date, though it would perhaps be wiser to dissociate it

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[80] *Id.*

[81] *See What Good's a Constitution?*, *supra* note 4, at 40.

[82] *Id.*

[83] *See* Winston Churchill, *While the World Watches*, COLLIER'S, Dec. 29, 1934, at 24, 24.

[84] *Id.*

> from any question of the age of the judges, lest it be the liberal element in the court which is weakened.[85]

FDR blundered and did exactly what Churchill warned against. By making his "Court-packing" plan contingent on age (a new Justice would be added for each current one over the age of seventy), Roosevelt undercut support within the Court and among many potential allies in Congress.[86]

B. What Good's a Constitution?

Churchill's deepest reflection on constitutionalism came in a *Collier's* magazine article published in August 1936.[87] He opened that piece with a fiery denunciation of socialism in Nazi Germany and in the Soviet Union.[88] But Churchill said that the United States also suffered from "an extension of the activities of the Executive . . . . There have been efforts to exalt the power of the central government and to limit the rights of individuals."[89] He explained the basic question presented by these developments

> is whether a fixed constitution is a bulwark or a fetter. From what I have written it is plain that I incline to the side of those who would regard it as a bulwark, and that I rank the citizen higher than the State, and regard the State as useful only in so far as it preserves his inherent rights.[90]

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[85] *What Good's a Constitution?*, *supra* note 4, at 40. Churchill was presumably talking about Justice Louis Brandeis, who was eighty years old when the Court-packing plan was introduced. *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 714–15 (2009). Chief Justice Charles Evans Hughes, who was seventy-five when the Court packing plan was being debated in 1937, also sided with the Administration in some of the most divisive cases. *See* JAMES F. SIMON, FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL 11 (2012) (stating that Hughes was born in 1862); *see also* R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 374–92 (1935) (Hughes, C.J., dissenting) (rejecting the Court's invalidation of the Railroad Retirement Act); Perry v. United States, 294 U.S. 330 (1935) (upholding, in an opinion by the Chief Justice, President Roosevelt's controversial devaluation of Treasury bonds).

[86] *See, e.g.*, JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 338–39 (2010); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 187–90 (Octagon Books 1979) (1941).

[87] *See What Good's A Constitution?*, *supra* note 4, at 22.

[88] *See id.* ("In Germany, for instance, the alliance between national patriotism, tradition and pride on the one hand, and discontent about the inequalities of wealth on the other, made the Weimar Constitution 'a scrap of paper.' "); *id.* at 39 ("Much the same thing has happened in Russia. The powerful aid of national sentiment and imperialist aspirations has been invoked to buttress a decaying Communism.").

[89] *Id.* at 39.

[90] *Id.*

Churchill's praise for a fixed constitution, which marked a change from his prior views, may have been motivated by the spread of totalitarianism. But why did Britain not also need a codified constitution to preserve liberty?

Churchill's answer was that America's diversity required a fixed constitution. "When one considers the immense size of the United States," he explained,

> and the extraordinary contrasts of climate and character which differentiate the forty-eight sovereign states of the American Union, as well as the inevitable conflict of interests between North and South and between East and West, it would seem that the participants of so vast a federation have the right to effectual guarantees upon the fundamental laws, and that these should not be easily changed to suit a particular emergency or fraction of the country.[91]

Quoting James Wilson at the Constitutional Convention, he said that "[t]he founders of the Union, although its corpus was then so much smaller, realized this with profound conviction. They did not think it possible to entrust legislation for so diverse a community and enormous an area to a simple majority."[92] "The so-called 'rigidity' of the American Constitution," Churchill reasoned, "is in fact the guarantee of freedom to its . . . component parts."[93] Moreover, "[i]t may well be that this very quality of rigidity, which is today thought to be so galling, has been a prime factor in founding the greatness of the United States."[94] To frame a "constitution for a 'United States of Europe' for which so many thinkers on this side of the ocean aspire, fixed

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[91] *Id.* at 40.

[92] *Id.* (" 'To control the powers and conduct of the legislature,' said a leading member of the Convention of 1787, 'by an overruling constitution was an improvement in the science and practice of government reserved to the American States.' "); *see also* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 361 (Merill Jenson ed., 1976) (providing the original Wilson quotation).

[93] *What Good's a Constitution?*, *supra* note 4, at 40; *see id.* ("That a set of persons, however eminent, carried into office upon some populist heave should have the power to make the will of a bare majority effective over the whole of the United States might cause disasters upon the greatest scale from which recovery would not be swift or easy.").

[94] *Id; see id.* (" 'Taking the rigidity out of the American Constitution' means, and is intended to mean, new gigantic accessions of power to the dominating centre of government and giving it the means to make new fundamental laws enforceable upon all American citizens.").

and almost unalterable guarantees would be required by the acceding nations."[95]

By contrast, Churchill cast Britain as a homogeneous nation that did not need judicial review.[96] In his 1957 speech to the ABA, he spelled this idea out more clearly: "I speak, of course, as a layman on legal topics, but I believe that our differences are more apparent than real, and are the result of geographical and other physical conditions rather than any true division of principle."[97] "The Supreme Court survived and flourished in the United States," Churchill explained, "England was too compact and too uniform a community to have need of it. But the Supreme Court in America has often been the guardian and upholder of American liberty. Long may it continue to thrive."[98] To return to his 1936 essay, Churchill conceded that the "free" and "flexible" British Constitution could not be applied to the diverse lands that were self-governing dominions or outright colonies in the Empire.[99] But "[i]n this small island of Britain we make laws for ourselves," by which he meant that an omnipotent Parliament did not threaten freedom there.[100]

There are discordant echoes of *Federalist No. 10* in Churchill's thinking. Madison contended that smaller and more uniform communities would be more likely to oppress people.[101]

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[95] *Id.*

[96] *Cf.* Calabresi, *supra* note 12, at 125–26 ("England has long described itself as a homogeneous country in which discrimination was a problem that could be adequately handled through ordinary political processes."). Northern Ireland, Scotland, and Wales probably never saw Britain as Churchill did, and England is certainly not homogeneous today. *See id.* at 128 (expressing doubt in the 1990s that England was a monoculture). This probably means that judicial review is now necessary in Britain. The United Kingdom Supreme Court's opinion invalidating the lengthy prorogation of Parliament over Brexit is a step in that direction. *See* R v. Prime Minister [2019] UKSC 41, [70] (appeal taken from Eng. & Scot.)

[97] Liberty and the Law, *supra* note 32, at 8683. Chief Justice Warren attended Churchill's speech. *See The Law Society's Dinner at Guildhall in London, July 31*, 43 A.B.A. J. 911, 911–12 (1957) [hereinafter *The Law Society's Dinner*].

[98] Liberty and the Law, *supra* note 32, at 8683. In the official collection of Churchill's speeches, he is quoted in the ABA address: "Forty-nine states, each with fundamental rights and a different situation, is a different proposition [for judicial review]." *Id.* The *ABA Journal* quotes the line, though, as "[f]orty-eight states . . . ." *The Law Society's Dinner*, *supra* note 97, at 914. I do not know which is correct rendition of Churchill's remarks, though the basic point is the same.

[99] *What Good's a Constitution?*, supra note 4, at 40.

[100] *Id. See also* Liberty and the Law, *supra* note 32, at 8683 (stating that parliamentary sovereignty was "all very well in an island which has not been invaded for nearly 2,000 years.").

[101] *See* THE FEDERALIST NO. 10, *supra* note 11, at 63–64 ("The smaller the society, the fewer probably will be the distinct parties and interests composing it; the

Larger, more diverse states would be less likely to produce tyranny because the diverse elements would be hard-pressed to assemble a majority coalition.[102] Churchill said the opposite. He thought that diversity made majority abuses more likely and thus judicial review, which Madison did not discuss in *The Federalist*, more essential.[103] Madison did recognize that constitutional structures were important to impede a national faction,[104] so one could say that Churchill was just buttressing that principle with judicial review. But the British Constitution contains few structural impediments to majority rule, as most of the relevant powers are concentrated in the House of Commons. Still, Churchill did not consider this a significant problem because Britain was small and compact.[105]

While Churchill gave judicial review its due for larger and more diverse societies, he closed his article on a cautionary note that was almost certainly a critical comment about some of the Court's decisions striking down aspects of the New Deal. "The rigidity of the Constitution of the United States," he wrote,

> is the shield of the common man. But that rigidity ought not to be interpreted by pedants. In England we continually give new interpretation to the archaic language of our fundamental institutions, and this is no new thing in the United States. The judi-

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fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.").

[102] *See id.* at 64 ("Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.").

[103] *What Good's a Constitution?*, *supra* note 4, at 40. Consider an analogy to en banc review in federal circuit courts. A circuit that is relatively homogeneous with a small number of judges does not need to resort to en banc review because a given panel of that court will probably not disagree sharply with a different panel. As a circuit grows more diverse with more judges, the need for en banc review is greater because the possibility that one panel will be an outlier is greater. En banc review can be understood as judicial review of a panel decision in this context.

[104] *See, e.g.*, THE FEDERALIST NO. 51, *supra* note 11, at 349–51 (James Madison).

[105] On the other hand, after the Labor Party won the 1945 election and embarked on a sweeping program of nationalization, Churchill did grumble about the need to limit "single-chamber" democracy. Election Address (Feb. 4, 1950), *in* 8 CHURCHILL SPEECHES, *supra* note 1, at 7914, 7915 ("There is another element of instability in our British life which does not exist in most of the other free countries of the world. There is no written constitution."). What he meant, though, was that the Conservative Party should be returned to power. *See id.* ("I rest my hopes on a new Parliament.").

> ciary have obligations which go beyond expounding the mere letter of the law. The Constitution must be made to work.[106]

"So august a body as the Supreme Court in dealing with law," he concluded, "must also deal with the life of the United States, and words, however solemn, are only true when they preserve their vital relationship to facts."[107]

Was Churchill right to connect diversity with judicial review? The answer is unclear and calls for empirical study. Such an inquiry will be difficult, though, if the comparisons are made between different nations. For instance, how should diversity be measured among democracies? Can common-law and civil-law systems be compared in a sensible way? What other variables may explain the frequency of judicial review? This Article cannot answer all of these questions. Nevertheless, two examples provide modest support for Churchill's claim. One of the most—if not *the* most—diverse democracies in the world is India. Consistent with what may be labelled Churchill's "diversity hypothesis," the Indian Supreme Court is widely seen as one of the most aggressive in exercising judicial review.[108] Meanwhile, one of the least—if not *the* least—diverse democracies in the world is Japan. And the Japanese Supreme Court is widely seen as one of the most reluctant to use judicial review, as the diversity hypothesis would suggest.[109] These two data points, though, are insufficient to establish a correlation between diversity and judicial review.

Another empirical study might look at how judicial review differs among the fifty states. State constitutional law is an understudied field.[110] While there is at least one thoughtful analysis of how state courts interpret statutes,[111] no corresponding article exists on how state courts undertake constitutional review

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[106] *What Good's a Constitution?*, *supra* note 4, at 40.

[107] *Id.*

[108] See Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT'L & COMPAR. L. REV. 55, 95–96 (2009).

[109] *See* David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1426 (2011) (exploring why the Japanese Supreme Court uses judicial review so rarely).

[110] *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1–6 (2018) (making this point and seeking to rectify that deficit).

[111] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

under state constitutions.[112] Nevertheless, because the legal culture among the states is more similar than the legal culture across national boundaries, one obstacle to a successful examination of the diversity hypothesis would be reduced. Likewise, claims about the relative diversity in each state, or at least the ones being compared, may be simpler than assessing relative diversity across nations. Again, though, this Article does not undertake such an interstate comparison.

Assuming for the sake of argument that Churchill's diversity hypothesis is correct, what are the consequences for judicial review? In a 2019 dissenting opinion, Justice Kagan argued that "it is hard to overstate the value, in a country like ours, of stability in the law."[113] What the Justice meant by "a country like ours" is not clear, but one possible reading is that the United States is a more diverse country now than when Churchill was writing in the 1930s. Perhaps then, in an increasingly diverse society the fixed quality of its constitution becomes more critical.[114] This could be true for several reasons. First, using unwritten conventions as a substitute for fixed constitutional guarantees is less plausible since more diverse states lack the common culture necessary to agree on norms.[115] Second, diverse societies may disagree more often or more deeply about what nebulous constitutional provisions mean.[116] Third, a wider range

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[112] A complicating factor is that some state constitutions are easy to amend through ballot propositions and others are not easy to amend. Judicial review in practice might differ significantly between these two types of states. Some states also rely more heavily on elected judges than others, which may account for some distinctions.

[113] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

[114] One objection to this argument is that British courts traditionally applied *stare decisis* strictly, as Churchill himself noted. *See* Liberty and the Law, *supra* note 32, at 8683 (stating that his island had "a small legal profession, tightly bound by precedent"); W. Barton Leach, *Revisionism in the House of Lords: The Bastion of Rigid* Stare Decisis *Falls*, 80 HARV. L. REV. 797, 797–98 (1967) (stating that from 1898 to 1966 the House of Lords maintained that they could overrule their own precedents). *Stare decisis* in this context, though, was dictated by parliamentary sovereignty rather than by a principle that the British Constitution should be fixed. Another way of putting this is that British courts were always applying the strong presumption of *stare decisis* that American courts use only for statutory cases. *See, e.g.*, Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015) (stating that "*stare decisis* carries enhanced force when a decision . . . interprets a statute").

[115] For a fine discussion of constitutional norms, see Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847.

[116] With respect to Article Five amendments, one might expect that a more diverse society would have a harder time achieving the supermajority necessary for

of opinion or interests in a state may increase the chances that, without a constitutional barrier, a majority will enact policies that are unintentionally harmful to a minority.[117] Fourth, the presence of more "discrete and insular minorities" may create tensions that raise the risk of discrimination in the absence of fixed constitutional restrictions.[118]

But if our growing diversity means that the Constitution should become more rigid, there is more than one way of achieving that end. One is interpretation according to original public meaning.[119] If the meaning of the text is generally settled by its understanding at the time of ratification, then greater stability can result if courts apply that meaning consistently.[120] On the other hand, a faithful application of original public meaning means that contrary precedents or practices must sometimes be overruled if they were based on other interpretive premises.[121] In effect, originalism holds out the promise of long-run certainty at the expense of disruption in the here and now. Another way of making the Constitution more rigid is through a strict adherence to *stare decisis*. Indeed, Justice Kagan was referring to *stare decisis* in her statement that a country like ours needs stability in the law.[122] Judges must adapt precedents to new facts, but a strong presumption that precedent will be followed fosters certainty if courts apply the common-law method in good faith. Trust in that good faith, however, might be eroded by diversity, as the common-law method is itself largely a distil-

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ratification. Thus, in this sense the Constitution does tend to become more rigid as diversity grows. An argument can be made that diverse states should not let constitutional amendments be ratified by a single ballot proposition that requires only majority support, in the way that states like California permit.

[117] In other words, a majority may be unaware that a particular action is injurious to a viewpoint that is very different from and not represented in the ruling coalition.

[118] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). This kind of wrongful discrimination could be undertaken with the goal of assimilation.

[119] *See, e.g.*, Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 4–5, 7 (2015).

[120] For a recent discussion of how the application of original public meaning can nonetheless change over time, see generally LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019).

[121] Another concern is that the original public meaning of a constitutional provision can be open-ended (for instance, "due process of law") or ambiguous, such that it does little to fix legal concepts in a meaningful sense. That said, originalism does provide greater certainty in some circumstances than a common-law approach.

[122] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

lation of unwritten norms. Thus, the implications of the diversity hypothesis for the practice of judicial review are uncertain.

In sum, Churchill's comparative analysis of judicial review should be assessed by empirical scholarship. If correlation and causation are proved between diversity and the practice of judicial review in a democracy, then further thought should be given to any normative consequences that may flow from that conclusion beyond the basic need for judicial review.

III. PROHIBITION, JIM CROW, AND UNEQUAL EFFECTS

This Part discusses how Churchill's disdain for Prohibition led to his epiphany that the unequal distribution of constitutional principles can harm constitutional authority.[123] To make that claim, he drew a direct connection between the failure of the Eighteenth Amendment and the impotence of the Fifteenth Amendment in the 1920s. In both cases, Churchill wrote that an overwhelming majority with honorable motives was undone by enacting a broad reform that was too unevenly spread.[124] The result of that unequal spread was that the political support needed to sustain the constitutional rule could not be maintained. Churchill's holistic observation about law's practical limits supports one explanation for Reconstruction's weakness before the 1960s and provides a justification for some anti-majoritarian features in the American constitutional structure.[125]

A. The Bootlegger and the Klansman

Fresh off a lecture tour of the United States in 1929, Churchill wrote an op-ed in *The Daily Telegraph* outlining his

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[123] Churchill's view of Prohibition was probably influenced by his beverage tastes. *See* JENKINS, *supra* note 2, at 356 (stating that Churchill "did not drink as much as he was commonly thought to do, although this is not incompatible with his being a fairly heavy and consistent imbiber"); *see also* Prohibition and Civil Liberties (Mar. 17, 1930), *in* 5 CHURCHILL SPEECHES, *supra* note 1, at 4726, 4726–27 ("[T]here is one feature of the prohibition movement which excites my indignation. There are still people in the United States who obtain indulgence in alcoholic liquor, and among those people I heard the expression 'hooch' sometimes used. It caused me great pain. What an expression to describe one of the gifts of the gods to man.").

[124] *Prohibition*, *supra* note 8.

[125] *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 100–02 (2004) (explaining how the "Great Migration" of Blacks from the South to the North promoted civil rights); *see also* Shelby Cnty. v. Holder, 570 U.S. 529, 534–36, 556–57 (2013) (invalidating the preclearance coverage formula of the Voting Rights Act in part because not all parts of the nation were covered).

views on Prohibition. "The attempt of the Legislature to prevent by a stroke of the pen 120,000,000 persons from drinking spirits, wines, or even beer," Churchill said, "is the most amazing exhibition alike of the arrogance and of the impotence of a majority that the history of representative institutions can show."[126] He then added that

> [t]he extreme self-assertion which leads an individual to impose his likes and dislikes upon others, the spasmodic workings of the electoral machine, the hysteria of wartime on the home front, and the rat-trap rigidity of the American Constitution have combined to produce on a gigantic scale a spectacle at once comic and pathetic.[127]

Churchill also told the British public that "[m]illions of people of every class who vote dry, and thereby assume moral responsibility for all that the attempted enforcement of Prohibition involves, do not hesitate to procure and consume alcoholic beverages whenever they require them."[128]

Churchill then reflected upon what this state of affairs said about majority rule in a constitutional democracy. "Obviously," he began, "there are limitations upon the power of legislative majorities. It is easy to pass a law."[129] In considering those intrinsic limits, leaders must realize that

> [n]o folly is more costly than the folly of intolerant idealism. Follies which tend towards vice encounter at every stage in free and healthy communities enormous checks and correctives from the inherent goodness and sanity of human nature; but follies

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[126] *Prohibition*, *supra* note 8.

[127] *Id.* The point about wartime hysteria was astute, as many observers attribute the adoption of the Eighteenth Amendment to anti-German sentiment directed at brewers who were almost exclusively of German descent. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 416 (2005); *see also* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 100 (2010) (quoting a pro-Prohibition activist who argued in 1918: "We have German enemies across the water . . . . We have German enemies in this country too. And the worst of all our German enemies, the most treacherous, the most menacing, are Pabst, Schlitz, Blatz, and Miller.").

[128] *Prohibition*, *supra* note 8; *see id.* ("Such a divorce between the civic act and private conduct would only be possible in a sphere where the vote of the legislative institution did not correspond to the moral convictions and deep-seated habits of the nation.").

[129] *Id.*

> sustained by lofty ideas go far, and set up strange and sinister reactions.[130]

He added that

> [a] law which does not carry with it the assent of public opinion or command the convictions of the leading elements in a community may endure, but cannot succeed; and under modern conditions in a democratic country it must, in the process of failure, breed many curious and dangerous evils.[131]

He then made what initially looks like a shocking comparison between Prohibition and the absence of Black suffrage in the South during the 1920s. Here is the relevant passage in full:

> The melancholy era which followed the victory of the North in the American Civil War affords a glaring example. Inspired by the noblest ideals—the abolition of slavery—animated by fierce war hatred and party lust, the conquerors decreed that [B]lack and white should vote on equal terms throughout the Union, and the famous Fifteenth Amendment was added to the Constitution of the United States. Overwhelming force was at their disposal, with every disposition to use it against the prostrate and disarmed Confederacy. The North were no more inconvenienced by the voting of a few handfuls of [Black people] scattered among their large population, and being outvoted on all occasions, than is a teetotaler by Prohibition.
>
> But the South had different feelings. After years of waste, friction, and actual suffering, the Fifteenth Amendment was reduced by a persistent will-power of the minority and through many forms of artifice and violence to a dead letter. The Southern [Black people] have the equal political rights it was the boast of the Constitution to accord them; but for two generations it has been well understood that they are not to use them in any State or District where they would make any difference.[132]

Churchill concluded that "[a]s with the Fifteenth, so will it be with the Eighteenth Amendment."[133]

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[130] *Id.; see id.* ("When standards of conduct or morals which are beyond the normal public sentiment of a great community are professed and enforced, the results are invariably evasion, subterfuge, and hypocrisy.").

[131] *Id.* (invoking the Declaration of Independence by asking whether it is "necessary for the purposes of 'life, liberty, and pursuit of happiness' that vast sums of money should be spent, and hordes of officials employed against sober and responsible citizens who wish to do no more than drink wine or beer as they would in any other country in the civilized world").

[132] *Id.*

[133] *Id.*

There is a great deal to unpack here, but let us begin with the racist premises underlying Churchill's history of the Fifteenth Amendment.[134] In the 1920s, the dominant view of white historians was that Reconstruction was an exercise in Northern vengeance characterized by rampant graft.[135] This scholarship, with an assist from the silent film *Birth of a Nation*, fixed on "the national consciousness an image of Reconstruction as a disastrous error, an era of misgovernment and corruption, the lowest point in the saga of American democracy."[136] Indeed, when Ron Chernow published his acclaimed biography of Ulysses S. Grant in 2017, Grant's Administration remained tarnished by a reputation for incompetence and corruption that was a favorite narrative of Southern apologists for Jim Crow.[137] From this mythology, Churchill absorbed the idea that Reconstruction was motivated in part by "fierce war hatred and party lust" and produced "waste, friction, and actual suffering" among Southern whites.[138] It is hard to fault him for relying on the conventional wisdom, though given his own positive views of white supremacy he was clearly not a skeptic here as on other issues.[139]

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[134] *See* WINSTON S. CHURCHILL, 4 A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE GREAT DEMOCRACIES 306–13 (1958); *see id.* at 310–11 ("[Black men] voters were in a majority in five states. Yet the [Black man] was merely the dupe of his ill-principled white leaders.").

[135] The first devastating response to this consensus did not come until later. *See* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 329, 648–49 (Transaction Publishers 2013) (1935).

[136] Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1589 (2012); *see* Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 292–94 (2019) (exploring the influence of the racist "Dunning School" of Reconstruction history on the Court's opinions); *see also* KLARMAN, *supra* note 125, at 66 ("The tremendous popularity of D.W. Griffith's epic film *Birth of a Nation* (1915), which glorified the Confederacy, vilified Reconstruction, and portrayed blacks as 'women chasers and foul fiends,' typified the national racial mood.").

[137] *See* RON CHERNOW, GRANT 856 (2017) ("For a long time after the Civil War, under the influence of southern historians, Reconstruction was viewed as a catastrophic error, a period of corrupt carpetbag politicians and illiterate black legislators, presided over by the draconian rule of U.S. Grant.").

[138] *See Prohibition*, *supra* note 8; *see also supra* note 132 and accompanying text.

[139] *See, e.g.*, LARRY P. ARNN, CHURCHILL'S TRIAL: WINSTON CHURCHILL AND THE SALVATION OF FREE GOVERNMENT 104 (2015) (describing Kenyans in 1906 as "lighthearted, tractable, if brutish children . . . capable of being instructed and raised from their present degradation" (alteration in original) (quoting WINSTON SPENCER CHURCHILL, MY AFRICAN JOURNEY 37–38 (1909))); *see also id.* ("The Indians of East Africa are mainly of a very low class of coolies, and the idea that they should be put on an equality with the Europeans is revolting to every white man throughout British Africa." (quoting Letter from Winston S. Churchill to Edwin Montagu

Nonetheless, Churchill's account of how the Fifteenth Amendment unraveled was not a whitewash and connects up with an important point that is stressed by modern work on Reconstruction.[140] He noted that there were few Blacks in the North in 1870 and therefore the effect of the suffrage extension was sharply different in each region.[141] Why did this disparity matter? Part of the answer is that white Southerners were eager to resist this constitutional requirement.[142] The other is that white Northerners were less eager to defend the requirement because there was no natural political constituency in those states for doing so—in other words, Black voters.[143] In other words, the Fifteenth Amendment created a large unequal effect that proved fatal to its enforcement.[144] This disparity did not change until the Great Migration of Blacks from the South to the North began after World War I.[145] Over time, the presence of more Black people in the North put pressure on politicians there—who needed their votes—to take stronger action on voting rights and enforce the Fifteenth Amendment.[146]

(October 8, 1921), *in* 10 THE CHURCHILL DOCUMENTS: CONCILIATION AND RECONSTRUCTION, APRIL 1921–NOVEMBER 1922, 1644 (Martin Gilbert ed., 1977))).

[140] *See Prohibition*, *supra* note 8. Churchill did not mince words about the fact that the South used trickery and violence to nullify Black suffrage. *Id.* (observing correctly that the Fifteenth Amendment was a legal fiction in the South by the 1920s).

[141] *See id.* Churchill described this with the pejorative expression that Northern whites were not "inconvenienced" by Black voting in their states. *See id.*

[142] *See* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 37–38 (2010).

[143] KLARMAN, *supra* note 125, at 12.

[144] Section 2 of the Fourteenth Amendment, which contained a less coercive means to produce Black suffrage in the South, fared no better. *See, e.g.*, Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process,* 86 GEO. WASH. L. REV. 774, 788–90 (2018) (providing some background on Section 2).

[145] *See, e.g.*, KLARMAN, *supra* note 125, at 100 (stating that the Great Migration's "contribution to . . . racial change was substantial" because "they [Black men] relocated from a region of pervasive disenfranchisement to one that extended suffrage without racial restriction.").

[146] *See, e.g.*, William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 80 (1999); *see also* MCCULLOUGH, *supra* note 65, at 590 (quoting a political memorandum to President Truman advising him that "the northern [Black] vote today holds the balance of power in Presidential elections for the simple arithmetical reason that [Black people] not only vote in a block but are geographically concentrated in the pivotal, large and closely contested electoral states such as New York, Illinois, Pennsylvania, Ohio, and Michigan").

In a sense, Churchill was making a public choice claim about the Constitution before public choice theory was first articulated.[147] Public choice theorists argue, in part, that elected officials tend to enact policies with concentrated benefits for a relatively small group and diffuse costs for everyone else because that combination yields a stable base of support.[148] Those receiving the benefits have a strong incentive to maintain the policy and can organize more easily to express that support.[149] Meanwhile, those bearing the costs find organizing harder (due to their numbers) and lack a strong motive to act. Churchill was describing the contrary situation. The costs of the Fifteenth Amendment were concentrated—in the South—and the benefits outside of the South were diffuse. In that sort of case, resisting the law is much easier and more probable while sustained enforcement is more challenging and less likely.[150] Granting suffrage to Black men in the South created a concentrated benefit for them, of course, but they could not defend their rights against violent local whites without significant support from the North.

Churchill's other original thought was that the Fifteenth and the Eighteenth Amendments suffered from a similar defect.[151] Prohibition also skewed sharply along geographic lines, even though the divide there was between cities that supported drinking and rural areas that did not.[152] A broader point in Churchill's op-ed was that a ban on alcohol consumption created an unequal effect because teetotalers were unaffected by that policy, but the people who enjoyed drinking were fighting mad. Once again, this led to a yawning enforcement gap, as the minority was willing to

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[147] Public choice theory is often credited to a 1951 book by Kenneth J. Arrow, who later won the Nobel Prize in Economics. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

[148] *See, e.g.*, W. Michael Schuster, *Public Choice Theory, the Constitution, and Public Understanding of the Copyright System*, 51 U.C. DAVIS L. REV. 2247, 2252 (2018).

[149] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 7 (1965) (laying out the basic framework for organized action).

[150] This is only true if the group bearing the costs is sufficiently large. When those targeted by regulation are individuals or very small groups, any unequal burden may instead raise constitutional fairness concerns. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3 (prohibiting bills of attainder).

[151] Another link between the Fifteenth and Eighteenth Amendments is that they were both the immediate products of a major war, which may explain why elected officials did not fully appreciate the enforcement issues that would ensue. *See supra* text accompanying note 127.

[152] See OKRENT, *supra* note 127, at 104.

defy openly the Constitution, but the majority was unwilling to bear the cost of defense.

B. Addressing Sharply Unequal Constitutional Effects

Read in light of Churchill's comments on Prohibition and on the Fifteenth Amendment, the Constitution's provisions impeding pure majority rule look better because they may help confer constitutional legitimacy.[153] A goal of the legislative process should be to ensure that Article V amendments or broad constitutional constructions rest on as equal a distribution of public opinion as possible.[154] The oft-criticized Senate, which gives each state two votes notwithstanding its population, serves that purpose by increasing the chances that a proposal will have support that is geographically spread throughout the country.[155] The high hurdle of Article V, which provides that a supermajority of the House of Representatives, the Senate, and the state legislatures or conventions must agree for the ratification of a constitutional amendment, does the same.[156]

With respect to slavery, the Framers took this burden-spreading idea one step further. The Direct Tax Clauses, which were designed to make the federal taxation of enslaved people more difficult, accomplished that object through the requirement that the costs of a slave tax could not be concentrated.[157] These

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[153] The Takings Clause also equalizes the burden of legislation by forcing the state to pay for projects rather than to concentrate the costs on individual property owners. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Calabresi, *supra* note 12, at 93.

[154] *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 10–13 (2018) (giving an overview of constitutional constructions). At some point, of course, a lack of majority support poses its own legitimacy problems. The point is that majority support and observing the proper forms do not, standing together, make a constitutional reform stick.

[155] *See* U.S. CONST. art. I, § 3, cl. 1. The House of Representatives (unintentionally) reflects this principle as well; each state, no matter its population, is entitled to at least one representative, which results in those states being overrepresented as compared to the largest states. *See* Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125, 1132 (2011). The Senate filibuster with respect to legislation also arguably serves the goal of ensuring that constitutional constructions rest on equally distributed support, though I continue to believe that the filibuster should be suspensory rather than absolute. *See* Magliocca, *supra* note 13, at 304–05 (using the House of Lords as a model).

[156] See U.S. CONST. art. V.

[157] *See id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."); *see also id.* art. I, § 9, cl. 4 ("No Capitation,

clauses state that a capitation, or head, tax must be collected from *every* state according to its respective population.[158] This meant that a federal slave tax would also be paid by taxpayers in states without enslaved people. Thus, a slave tax would not create concentrated costs on slaveowners in the slave states and diffuse benefits in free states that would benefit from slave tax revenue without paying the tax. Instead, a slave tax would be distributed in an equal way across the nation. Not surprisingly, Congress imposed a slave tax only once, in 1798, and the tax was only fifty cents per slave.[159]

One way of viewing these power-sharing arrangements is as early forms of consociationalism. Consociationalism refers to a constitution that gives formal rights and veto power to minority groups.[160] The idea behind such a design is that majoritarianism and individual rights—even when supplemented by tolerance norms—may not provide adequate assurance for some distinctive minorities.[161] Another justification is that, in diverse nations, the absence of formal minority trumps will lead to badly unstable

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or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."). On the link between the Direct Tax Clauses and slavery, see Hylton v. United States, 3 U.S. (3 Dall.) 171, 177 (1796) (opinion of Patterson, J.). *See also* Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 684 (1895) (Harlan, J., dissenting) (stating that the Clauses were "originally designed to protect slave property against oppressive taxation"); *id.* at 687 (Brown, J., dissenting) (stating that the Direct Tax Clauses were "adopted for a special and temporary purpose, that passed away with the existence of slavery").

[158] Prior to the abolition of slavery, state populations for direct taxes were calculated through a complex formula that included the infamous Three-Fifths Clause for slaves. U.S. CONST. art. I, § 2, cl. 3 (stating that apportionment "shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons").

[159] *See* Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 543 (1869).

[160] *See, e.g.*, AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES 5 (1977) (providing the first academic assessment of this governance structure); *see also* Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV 1445, 1520 (2016) ("Consociationalism involves constitutional design for societies divided along social, ethnic, religious, or linguistic lines, and uses entrenched structures such as federalism, power sharing executives, and proportional representation to ensure the representation of different groups.").

[161] The intellectual godfather of this approach was John C. Calhoun, who developed his theory of "concurrent majorities"—in other words, allowing a majority of a minority to block a national majority—because he thought that the Constitution did not provide enough security for slavery. *See* JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 35 (1851).

constitutional law.[162] On this point, there is a link between Churchill's claim about the need for judicial review in diverse states and his concern about the two constitutional amendments that were ratified over the objections of a minority with intense preferences. In both cases, he was posing the basic question about whether a majority has "a right to do anything which it can get voted by the legislature."[163] Put another way, the diversity in a society may become so great that the agreement of a broader range of interests is required for constitutional legitimacy.

Federalism is another structural feature that helps span this divide. By allowing each state to have a different rule on certain issues, federalism creates a closer fit between a policy preference and the political will needed to enforce that preference on a disgruntled minority. A state majority is generally more capable of enforcing its law over a state minority than a national majority over state majorities. An even better match comes if a state pursues federalism within its political or geographic subdivisions.[164] Prohibition provides a fine—though belated—example, as after the repeal of the Eighteenth Amendment some states allowed each county to decide for itself on alcohol consumption.[165]

Given that the Constitution contains safeguards that prevent a constitutional amendment from being ratified when its concentrated costs and diffuse benefits might render enforcement problematic, how did the Fifteenth and Eighteenth Amendments become law? One answer is that the Fifteenth Amendment was proposed during the absence of some of the ex-Confederate states from Congress.[166] Furthermore, these same states were required to ratify the Fifteenth Amendment for readmission to the Union.[167] As a result, a more lopsided base of support was used to obtain ratification due to the special circumstances that followed the Civil War. For the Eighteenth Amendment, the problem was that many of the state legislatures that voted for

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[162] Whether consociationalism actually reduces social strife is a question that is beyond the scope of this Article.

[163] THE GREAT REPUBLIC, *supra* note 5, at 271.

[164] *See generally* Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (exploring different aspects of this question).

[165] *See, e.g.*, Andrew J. Miller, *Crafting a Better Industry: Addressing Problems of Regulation in the Craft Beer Industry*, 2019 U. ILL. L. REV.1353, 1363.

[166] *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–2015, at 179 (2016).

[167] *See id*. at 181 (listing those states as Mississippi, Texas, Virginia, and Georgia).

ratification were malapportioned in a way that greatly understated their urban population.[168] Indeed, the Twenty-First Amendment used a ratification mode of state conventions rather than state legislatures to avoid this distortion.[169] For the Eighteenth Amendment as well, then, the normal democratic checks within the Article V process were weaker.

Accordingly, Churchill's comparison of the Fifteenth and Eighteenth Amendments yields important insights into the structure and function of the Constitution. Democracy, even when supported by a supermajority, is not a sufficient condition for constitutional success. We must "[recognize] the imperfections which vitiate even the best representative institutions" and accept the need for a relatively equal distribution of constitutional law.[170]

CONCLUSION

Winston Churchill was not fond of lawyers. Speaking in 1926 to colonial leaders of the British Empire, he said that their "discussion of . . . constitutional points . . . is healthy, natural, and timely, and absolutely appropriate to the occasion, so long as the discussion is carried on, as it would be, between colleagues and friends, apart from people such as lawyers who were seeking to find difficulties."[171] Later, in an op-ed on the Magna Carta, he wrote: "King John was the kind of tyrant most obnoxious to England. He was a legal expert."[172] But lawyers were fond of Churchill. As Chief Justice Earl Warren said in a tribute following the former Prime Minister's speech to the ABA, he did "more to subordinate brute force to the rule of law than any man of our time."[173]

Churchill's extensive commentary on our Constitution opens up several fruitful avenues for research. The first involves the relationship between the uncodified British Constitution and the unwritten aspects of America's higher law. Considerable atten-

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[168] *See* OKRENT, *supra* note 127, at 104–05; *see also* Reynolds v. Sims, 377 U.S. 533, 565–66 (1964) (holding that state legislative malapportionment violates the Equal Protection Clause).

[169] *See* AMAR, *supra* note 127, at 416–17; *see also* U.S. CONST. amend. XXI, § 3 (specifying ratification by state conventions).

[170] *Prohibition*, *supra* note 8.

[171] The Empire, *supra* note 74.

[172] Winston S. Churchill, *The Greatest Half-Hour in Our History*, DAILY MAIL, Apr. 13, 1934, at 12.

[173] *The Law Society's Dinner*, *supra* note 97, at 951.

tion is paid to how the Framers were influenced by the examples of the Crown and Parliament when they wrote the text, but far too little is given to how the subsequent evolution of British constitutional practice shaped our construction of the text.[174] Indeed, most of Churchill's analysis was based on a comparison of Britain and the United States in the twentieth century. This Article illustrates the benefits of that approach and the need for more work along those lines. A second open question involves Churchill's hypothesis that diversity and judicial review are connected. International or intrastate studies with appropriate controls can determine if diversity can explain the frequency or intensity of judicial review. If such a link can be established, then further thought should be given to how that point may relate to appropriate procedures for constitutional amendment. Third, Churchill's discussion of Reconstruction and Prohibition raises the question of how the unequal distribution of a constitutional principle can detract from that principle's authority. More broadly, Churchill's thought should inform constitutional reforms to make them durable by, perhaps, fashioning them more narrowly or more evenly.

Lastly, Churchill's constitutional observations illustrate the virtue of thinking through America's entire legal experience and not just those rare moments where the bulk of that text was drafted and ratified. His was a very British sensibility in line with the gradual evolution of his nation's political order since time immemorial. As Churchill said on the eve of Elizabeth II's coronation in 1953: "Like nature we follow in freedom the paths of variety and change and our faith is that the mercy of God will make things . . . better if we all try our best."[175]

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[174] For example, the tradition of designating the President's closest advisors as "the Cabinet" and sometimes giving the Cabinet a special status is drawn from Britain and not from anything in the text of the original Constitution. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169–70 (1803) (making the first Supreme Court reference to the heads of the Executive Department as the Cabinet).

[175] The Crown and Parliament, *supra* note 45.