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ARTICLES

NONE, ONE OR SEVERAL? PERSPECTIVES ON THE UK'S CONSTITUTION(S)

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AN inaugural lecture is the occasion when the University of Cambridge can look its gift horse in the mouth, weighing the new professor in the balance against his or her distinguished predecessors. The Rouse Ball Professorship of English Law has been held in the past by a long series of distinguished scholars, from Sir Percy Winfield to my immediate predecessor, Sir Jack Beatson whom we are delighted to welcome back today. Their work has influenced generations of lawyers. They certainly influenced me. Before I encountered *Criminal Law: The General Part*,[1] a great little volume by Professor Glanville Williams, *Learning the Law*, was my "Guide, Philosopher and Friend" (as it still says on the cover of the latest edition, now edited by my colleague Professor Tony Smith)[2] as I approached the study of law. Another Rouse Ball Professor, the late Sir William Wade, had a formative effect on my understanding of land law and administrative law both through his famous books, *Megarry and Wade on the Law of Real Property* (now edited by a former Fellow of Downing College, Dr. Charles Harpum)[3] and *Administrative Law* (now in the hands of my colleague Dr. Christopher Forsyth),[4] not to mention the lectures that I attended as an undergraduate in (softly be it said) the University of Oxford. Two wonderfully stimulating and enjoyable books by the Emeritus Rouse Ball Professor and Emeritus Vice-Chancellor of this University, Sir David Williams (who is also

* Rouse Ball Professor of English Law in the University of Cambridge and Fellow of Downing College, Cambridge. This is a revised version of the inaugural lecture delivered in the Faculty of Law of the University of Cambridge on Thursday 10 March 2005. I am grateful to Mrs. Beverley Ireland and Dr. Kirsty Allen for providing information about the history of the Rouse Ball Professorship, and to Mr. David Akers for thought-provoking comments on the lecture.

[1] Glanville Williams, *Criminal Law: the General Part*, 2nd edn. (London 1961).

[2] Glanville Williams, ed. A.T.H. Smith, *Learning the Law*, 12th edn. (London 2002).

[3] Charles Harpum (with Malcolm Grant and Stuart Bridge), *Megarry and Wade's Law of Real Property*, 6th edn. (London 2000).

[4] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 9th edn. (Oxford 2004).

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happily with us today), nurtured my nascent interest in public law and civil liberties: I read *Not in the Public Interest*[5] and *Keeping the Peace*[6] not thinking that one day I would follow the author's footsteps in this Chair (or perhaps one should say buttock-prints). Sir Jack Beatson, as well as being an outstanding scholar of the law of contract and restitution, is an eminent administrative lawyer, and was the instigator and first Director of the Centre for Public Law in this University (of which I have the honour to be Acting Director this year while the Director, Dr. Forsyth, is on leave). Having benefited from Sir Jack's lectures when he was teaching in Oxford, and from his published work and many illuminating discussions since then, I now benefit from Sir Jack's decision to move on to yet more distinction as a High Court judge. There is thus a sense of great continuity of scholarship among the holders of the Chair, emphasised by an email from the late Professor Peter Birks, an inspirational figure, shortly before he died reflecting on the fact (and, I hope, deriving some quiet satisfaction from it) that he had taught ("if such it may be called") two Rouse Ball Professors (Sir Jack and me) during his career.

The man who made possible this line of scholarship by endowing the Chair, Walter William Rouse Ball,[7] was both a mathematician and a lawyer. Born on 14 August 1850 in South Hampstead, he matriculated at Trinity College, Cambridge in 1870, became a Scholar and First Smith's Priseman in 1871, and took his B.A. as Second Wrangler in 1874. But by then he had already taken the degree of M.A. at University College London in 1873, becoming a Fellow of U.C.L. in 1874. In 1875 he was elected to a Fellowship of Trinity, but he had been admitted to the Inner Temple in 1871 and in 1875 was already reading for the Bar. He was called in 1876 and practiced for two years as an equity draftsman and conveyancer. In 1878, however, he returned to mathematics, his first love, and to Trinity, where he remained as a College Lecturer and, from 1891, Director of Studies in Mathematics until his death in 1925 at the age of 74. As a mathematician, he was best known for his work on the history of mathematics, publishing a monograph on the genesis of Newton's *Principia Mathematica* and amassing what was said to be the largest collection in Great Britain of portraits of mathematicians. He was also an historian of Trinity College and of its First Boat Club, and served as Treasurer of the University Boat Club. But

[5] D.G.T. Williams, *Not in the Public Interest: the Problem of Security in Democracy* (London 1965).
[6] D.G.T. Williams, *Keeping the Peace: the Police and Public Order* (London 1967).
[7] On W.W. Rouse Ball, see J. and J.A. Venn, *Alumni Cantabrigienses*, Part II 1750–1900, vol. 1 (Cambridge 1940), p. 136; obituary in *The Times*, 6 April 1925.

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Rouse Ball never lost his interest in law, and by his will he endowed two Chairs: one of Mathematics, and the other of English Law.

My subject today has a degree of continuity with the public-law work of several previous Rouse Ball Professors (including Sir William Wade, Sir David Williams and Sir Jack Beatson). Rouse Ball himself was not a constitutional lawyer, but I like to think that the constitution is a subject that would have appealed to him. Among his other activities, puzzles of different kinds fascinated him. He wrote a book called *Mathematical Recreations and Essays*, and founded the Pentangle Club for "Cambridge men interested in conjuring". Perhaps he would have been entertained by the constitution, which seems to me to flourish in the gaps between appearance and reality: that which is not is made to appear to be, and the processes producing that which is will often be disguised by showmanship and magic incantations. For, as both Peter Ackroyd and Professor Ian Ward have pointed out, England and its constitution are islands of visions.[8] When one widens the angle to look at the constitution of the United Kingdom, rather than just of England, we encounter a sea of conflicting visions. *The* constitution, as a single set of rules, is very hard to pin down. I should make it clear at the outset that I am not talking about the absence of a codified constitutional document. That is a relatively trivial, formal matter. I am concerned not with the form but with the substance and function of constitutional rules: what they require and what they do. In the UK's constitution, as in all constitutions, what appears on the surface is often an illusion, and what appears to be absent is sometimes present (although often in an unexpected form).

In every constitution there are gaps between appearance and reality. One of these in the United Kingdom relates to so-called Acts of Parliament. Formally, legislation is made by Her Majesty. The relationship between her and the two Houses of the Westminster Parliament is summed up in the words of enactment at the beginning of each Act as follows:

> BE IT ENACTED by The Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows: ...

(We can pause, parenthetically, to note a curious feature of this formulation: the mention of the Queen's most excellent majesty

[8] Peter Ackroyd, *Albion: the Origins of the English Imagination* (London 2002), pp. xix, 20–21; Ian Ward, *The English Constitution: Myths and Realities* (Oxford 2004), esp. chs. 1 and 5.

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summons a picture of Her Majesty looking through her wardrobe, saying, "Now should one wear one's most excellent majesty, or the old one that one uses for pottering round the garden? No, one has to enact legislation today; it must be the most excellent one, with all the velvet and ermine." Does the monarch have a range of different qualities of majesty to choose between?)

Where an Act is passed under the authority of the Parliament Acts 1911 and 1949, like the Hunting Act 2004, the words are different:

> BE IT ENACTED by The Queen's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Acts 1911 and 1949, and by the authority of the same, as follows: ...

Now the appearance that the enacting of the legislation is done by the Queen is correct as a matter of legal theory, but we know that the initiative usually lies with the Government, and that the legislative process is under the control of the two Houses and the Government, working together (or sometimes against each other). The Hunting Act 2004 is not the result of a decision by Her Majesty to clothe herself in her most Excellent Majesty and visit Parliament to suggest that, in the light of representations by the royal corgis that foxhounds and beagles were wasting too much of their time chasing wild mammals round the countryside when they could be better employed studying to become sheepdogs or legal philosophers, it was expedient for Parliament to prohibit the hunting of wild mammals with dogs. The Act was the product of long, difficult and acrimonious debates conducted along three axes: between different members of the Government; between the Government, the Parliamentary Labour Party and other politically aligned and non-aligned elements in the two Houses; and between the two Houses as collective bodies. To this extent, the words of enactment at the beginning of the Hunting Act 2004 do less than justice to the work done by the House of Lords: the statutory formula hides the fact that the Lords Spiritual and Temporal offered their advice, although in the event most of it was rejected by the House of Commons.

We all know that, in reality, the Queen enacts what the two Houses have approved (or, in the case of a Bill presented for royal assent under the Parliament Acts 1911 and 1949, the House of Commons has approved). There is a constitutional convention that Her Majesty exercises her prerogative power as legislator only on the advice of her Prime Minister and in accordance with the text approved by Parliament. This is the result of a long battle between the Crown and Parliament, reaching a climax in the civil war of the

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mid-seventeenth century, and effectively sealed by the Bill of Rights 1689. The convention makes it possible to speak of legislation as a process with some representative legitimacy, and, since the extension of the electoral franchise in the century or so following 1832, also a degree of electoral legitimacy. If Her Majesty were to exercise her legislative power in a way that failed to comply with the convention she might commit no legal wrong, but she would be acting unconstitutionally. There is no doubt about this.

The gap between the appearance and the reality gives rise to no uncertainty in relation to this matter, unless one is a newly-arrived visitor from another planet. Yet it is a major gap, and it is important that it should be there. It allows a formal, legal process of monarchical legislation that would be unacceptable today on account of its clash with values of democratic constitutionalism to operate in accordance with those values and to be regarded as being consistent with them.

The gap is important for practical and theoretical reasons relating to the nature of constitutions. All constitutions deal with the business of governing, a dynamic and, to a great extent, political and pragmatic process. As a result constitutional law is political, in that it is concerned with the allocation of public power and has to explain or rationalise the allocation and exercise of that power, even when the practical day-to-day operation of government has moved away from the formulae embodied in formal rules and texts. Conventions of the constitution are means of holding in check the tension between the formal, legal appearance of the constitution and the current practice. By framing the practices in terms of rules of the political elite and theorizing their relationship to legal rules, both the political elites and the legal elites can recognise and accommodate to each other the competing demands of law and politics. Thus we can talk of constitutional law as incorporating certain conventions. Professor Peter Hanks, the scholar of Australian public law, has spoken of constitutional law as follows:

> It can be described (with reasonable accuracy) as a set of rules which define the institutions of government, assign to them areas of operation, set limits to their functions, establish their inter-relationships and prescribe the relative rights and obligations of other, non-governmental, interests. This dual character—political and legal—is not unique to constitutional law ... But constitutional law's combination of these elements is more overt, more conscious and more central—indeed, symbiotic: the very reason for the development and existence of these rules is to define, organise, contain and enhance the exercise of political power; and the content of these rules

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> responds to historical, social, economic and political developments.[9]

This might make it seem that the constitutional rules are largely descriptive: they merely systematise and tabulate existing allocations of power and practices that have arisen through historical, social, economic and political pressures. Indeed, Professor F.F. Ridley has argued that the United Kingdom's constitution is of this kind. It is said to be descriptive rather than prescriptive, and to lack those normative elements—fundamental values and deeply rooted principles—that other countries normally self-consciously choose to shape their constitutional rules. What is now regarded as traditional constitutional law in the United Kingdom contains perhaps only one fundamental principle: parliamentary sovereignty (and even the consensus as to this is under challenge). The content of parliamentary sovereignty is hotly contested, but at its core it means that Parliament is hierarchically superior to all other legislative bodies in the UK, and can require us to do or refrain from doing anything as long as that requirement is enshrined effectively in the text of an Act of Parliament. It appears to be a value-free response to the problems posed by the absence of consensus about core values. Its main merit, and also its principal disadvantage, is that it leaves all values "up for grabs" in a political free-for-all. It turns the law of the political jungle into a principle of constitutional democracy, constraining it only by providing institutional structures (the Houses of Parliament, government and to some extent the courts) that appear to hold the key to the inner sanctum wherein lies unlimited power, and which competing factions must therefore struggle to control. Constitutional conventions can similarly be perceived as an expression and ex post facto legitimation of practices rather than principles. They reflect observed regularities of behaviour: a practice or tradition is established as a result of conflict over visions of the proper relationship between institutions, and acquires authority through tradition, acceptance and practice.

Yet constitutions—even the UK's—are never merely descriptive. It is true that they must offer a reasonably convincing picture of the real allocation of power, yet at the same time they are expected to confer authority and legitimacy on the process of governing. When St. Augustine asked, "What are states without justice but robber-bands[10]

[9] P.J. Hanks, *Australian Constitutional Law Materials and Commentary*, 4th edn. (Sydney 1990), p. 2 (reference omitted).

[10] Not, as one of my students once wrote, "rubber bands", although that gives a good sense of the need for elasticity in constitutions (a matter enlarged upon below).

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enlarged?"[11] he was putting his finger on a key question for political theory. The difference between bands of robbers and states is that states are, or should be, organised through their constitutions in such a way as to limit the robber-band's capacity to use its powers in arbitrary, anti-social and unaccountable ways. In short, constitutions subject states to moral values and principles, thereby converting brute force into legitimate authority. They do this partly by adhering to traditional modes of operation where those have acquired their own authority over time, and partly by explaining, interpreting, or changing those modes in the light of currently acceptable normative standards.

From this, we can identify four roles for constitutions. The first is institutionalisation. The constitution establishes institutions within the body politic, allocates functions to them, and confers on them the powers and duties appropriate to those functions, ensuring that so far as possible the limits of each institution's powers and duties are indicated (although not necessarily defined). The second role is to prevent institutions from acting improperly by providing ways of ensuring that they adhere to their powers and duties, or are held accountable for any lapse. Bits of the body politic, like parts of human bodies, can sometimes expand in undesirable directions, and need to be restrained. We can call this the "corsetry" function, the corset taking the form of such procedures as judicial review and parliamentary or electoral accountability.

The first two roles feed into the third, namely the conferral of a particular kind of respectability or legitimacy by cloaking in appropriate garb those features of the body politic that might, if left exposed, be regarded as improper or even indecent. This is done by the conscious adoption of principles of government designed to appeal to the morality of both the elites and the masses within the state. These elements turn an act of naked aggression into an arrest or lawful imprisonment, the refusal of support to the indigent into an act of state prudence, and the conspiracy of a cabal into an exercise of responsible government by a cabinet accountable to a more or less representative legislature. They fulfil for the state purposes similar to those of good clothes, hiding what cannot be revealed in polite company and presenting the body politic in such a way as to avoid public embarrassment or discomfort. We can call this the decency-preserving or legitimating function, and its importance can be seen analogically in the tale of the Emperor's new clothes.

[11] *Confessiones*, iv.

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Finally, the clothes (including the corset) must be sufficiently comfortable and adaptable to avoid the need for a completely new wardrobe each time the body politic changes its shape. This flexibility is provided by a number of mechanisms which, for want of a more descriptive name, we can call the knicker-elastic function. This elasticity cannot be unlimited, or the constitution would be unable to perform its first two roles, but it must be sufficient to allow adaptation to the pressures that arise naturally from the dynamic development of an organic state structure.

Rules which merely described in normative form an observed regularity of behaviour would not be capable of achieving the third and fourth of these purposes. Constitutional rules have a strongly normative basis. It is true that, if one looks only superficially at the legal history of the constitution divorced from the underlying intellectual, social and political history of the country, the United Kingdom seems to have had a remarkable record of not using theory as a basis for designing public institutions, but rather using the current shape of public institutions to generate theories. The largely value-free character of the theory of parliamentary sovereignty, noted earlier, strengthens the impression that our constitution has grown pragmatically, largely unaffected by political theories and moral or social principles. Our constitutional players can seem like John le Carré's character Brock, in *The Russia House*: "He was born in Glasgow but of Lithuanian parents, and abstract concepts made him angry."[12] However, in reality, we are as alert as anyone to normative constitutional theories. My time working in the Houses of Parliament convinced me that many Members and Officers of each House had a very clear idea about such theories. The undoubted fact that there are great differences of opinion as to the values that underpin, or should underpin, the constitution must not hide the importance of political, moral and social theories in the shaping of the constitution.

History demonstrates that the principal justifying theories of the constitution have been the subject of sustained and committed debate and, occasionally, military action over an extended period. The main planks of the constitution were established by a conscious struggle over the allocation of power and the theoretical justifications for its exercise. The pre-eminence of Parliament in our legislative arrangements was not established by law. It developed through the pressures of economics, politics, religion, and public finance as the Crown became increasingly dependent on Parliament to authorise the raising and expenditure of money for state

[12] London 1990, p. 47.

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purposes, particularly waging war, through the sixteenth and early seventeenth centuries, and it was ultimately established by civil war in the mid-seventeenth century. Nevertheless, the success of Parliament was neither opportunistic nor unrelated to moral and political theories. The power of the monarch to legislate without Parliament was partly curbed by the judges on the basis of anti-absolutist legal and political theories, as the *Case of Proclamations*[13] (an example of the influence of constitutional theory and law on land-use planning controls) demonstrates. (In the same way, the courts had earlier laid the foundations for judicial independence of the executive in *Prohibitions del Roy*.[14]) Support for Parliament against the King was founded on carefully constructed and widely debated arguments of political and religious theories. Professor Christopher Hill provided copious illustrations of this in his work.[15] For example:

> ... a great revolution cannot take place without ideas. Most men have to believe quite strongly in some ideal before they will kill or be killed ... The Bible, especially the Geneva Bible with its highly political marginal notes, came near to being a revolutionist's handbook, not for the last time in history. Mr. Hampden, we are told, had his vade-mecum in Davila's *History of the Civil Wars of France*. Sir John Eliot's vade-mecum was Sir Walter Ralegh's *Prerogatives of Parliaments*; Ralegh's *History of the World* is the only book Oliver Cromwell is known to have recommended. John Lilburne had the Bible in one hand, the writings of Sir Edward Coke in the other. The Levellers looked back to the heretical tradition, to the Lollards and Foxe's martyrs. Milton drew on Knox and Buchanan. The republican Henry Nevile spoke of "honest John Calvin" as the originator of the ideas of him and his like .... [T]he crucial name is that of Francis Bacon ...[16]
>
> A full account of the intellectual origins of the English Revolution would have to discuss the "liberal" constitutional ideas which descend from Fortescue through Christopher St. Germain, Thomas Starkey, and Sir Thomas Smith ...[17]

The King's supporters similarly relied on political and religious theory, but different theories, founded on a different vision of the state. In the King's case, heavy reliance was placed on the divine right of kings and the importance of effective central government for the common weal. Parliamentarians relied on principles of a ruler's obligations towards his or her subjects, and in some cases on ideas of individual or collective self-determination which in the case

[13] (1611) 12 Co. Rep. 74.
[14] (1607) 12 Co. Rep. 63.
[15] See *e.g.* Christopher Hill, *Intellectual Origins of the English Revolution* (London 1972), *passim*.
[16] *Ibid.*, pp. 1–2 (footnotes omitted).
[17] *Ibid.*, p. 270.

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of groups such as the Levellers (not popular with either main party) produced democratic theories and claims similar to those advanced by the Chartists in the nineteenth century.[18]

The contrasting theories of Thomas Hobbes and John Locke illustrate the way that intellectual debate supported and motivated constitutional actions in a time of revolutions. Both were concerned not to describe the workings of the state but to elucidate what makes a *good* state. Both offered very clear constitutional prescriptions. Both dwelt extensively on an analogy between the relationship between rulers and their subjects and the role of a father and his power over his children, the family being seen as a microcosm of the state. Both recognised that fathers ought to exercise their power benevolently for their children's good, but there the similarity between them ended. For Hobbes, it was absurd to think of a father as owing a duty to his children that could be enforced by the children removing and replacing the father should he fail to act in accordance with their own conception of their best interests. Instead, children and subjects alike owed a duty of obedience to the parent or sovereign, however that sovereignty was acquired, untrammeled by legal constraints imposed by subjects.[19] By contrast, Locke, foreshadowing modern theories of child-rearing and parental responsibility,[20] saw the power of a father as having no legitimate purpose if not exercised for the good of his children, and thought that the rulers of states held all their powers by virtue of a social contract with their subjects, who could in extreme circumstances legitimately enforce a ruler's obligations by replacing him or her. The obligation of a child to honour his or her parents is not an unqualified obligation of obedience, and the same is true of a subject's obligations to the political sovereign.[21] Although the civil war put a (temporary) seal on the ascendancy of one vision of the good state, what legitimated the Protectorate was not the victory in war (except so far as one saw the hand of God in it), but the legitimating theories which had led people to fight the war and guided the shape of the post-war settlement.

The same applies to the subsequent restoration of the monarchy. It did not reverse the ascendancy of the ideas underpinning the result of the civil war, as the subsequent revolution of 1688–89 showed. Instead, it accommodated them within a form of monarchical constitutionalism. The law still treated the Crown as the legislature—as we saw earlier when looking at the words of

[18] I am grateful to Mr. D.F. Akers for drawing this point to my attention.
[19] Thomas Hobbes, *Leviathan*, Part II, ch. XX.
[20] See *e.g. Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] A.C. 116, HL.
[21] John Locke, *First Treatise of Civil Government*, ch. VI, §§ 50–72; *Second Treatise of Civil Government*, ch. VI, §§ 52–76.

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enactment at the beginning of Acts of Parliament—but it was now clearly the Crown in Parliament. In the relationship between Parliament and the Crown, Parliament had established the upper hand both legally and politically. The practices changed, visions of the constitution were reconceptualised to take account of what had become political reality, and to some extent the new relationship was embodied in the text of the Bill of Rights 1689 and, later, the Act of Settlement 1701. Increasingly debate turned to the grounds for the legitimacy of Parliament, as the growing importance of theories of representative democracy led to the political disputes that spawned extensions to the electoral franchise for the House of Commons and the primacy of the Commons over the Lords reflected in the Parliament Acts 1911 and 1949 and current proposals for reform of the House of Lords.

This brief historical sketch shows that constitutional rules do not merely restate regularities of political behaviour in normative form. The rules have moral and political theory rationales. As Professor Joseph Raz has shown, rules are reasons for action, and legal rules are intended to be exclusive reasons for action, overriding competing reasons for legal purposes; but the strength of a rule is related in part to the strength of the reasons for treating it as a rule.[22] In short, the rationale of a rule is an important part of the strength of the rule, contributing to what Professor H.L.A. Hart called its "internal aspect".[23] Rules without rationales may perform perfectly well in their constitutive and institutional functions (constituting the state and establishing institutions), but they will be far less effective in exercising both their "decency-preserving" or legitimating and their "knicker-elastic" functions.

To a considerable extent this bears out the analysis of Walter Bagehot in *The English Constitution*.[24] It is fair to say that what he called the "dignified" institutions of the constitution—those with traditional authority to which people feel a special loyalty, such as the monarchy—serve to confer legitimacy on the reality of the more dynamic parts. But there is a tension (as in the case of the legislative power, noted earlier) between three possible sources of constitutional authority: law, which can be changed but is relatively formal; tradition, which is a vision or interpretation of history seen in the light of contemporary political, social and moral normative theories; and current political practice and theory. This reflects a more fundamental conflict between visions of the constitution and

[22] Joseph Raz, *Practical Reason and Norms* (London 1975), ch. 1.
[23] H.L.A. Hart, *The Concept of Law*, 2nd edn. (Oxford 1994), pp. 56–57.
[24] Walter Bagehot, *The English Constitution*, edited and with an introduction by R.H.S. Crossman (London 1963), p. 61.

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of the good state, like the differences of opinion noted earlier between Hobbes and Locke. We must recognise that the constitution is not simply a collection of normative principles. It is a forum or structure within which conflicting principles can be debated and their implications explored in practice.

The nature of all the sources of constitutional authority (law, traditions and practices) and the content of the principles to which they lend legitimacy are open to disagreement. Let us take tradition as an example. There are at least two different visions of tradition. Professor Andrew Lintott has argued that in republican Rome *mos*, or custom, was sometimes seen as ancient tradition hallowed by long usage and attractive to conservatives in contrast to modern and sometimes whimsical legislation; while at other times it was seen as a tradition in continuous development, so that today's innovation could properly become tomorrow's respected precedent.[25] Professor Lintott's conclusion applies equally to the United Kingdom's constitution today:

> ... the constitution of the Republic was not something fixed and clear-cut, but evolved according to the Roman's needs by more means than one. It was also inevitably controversial: there were frequently at least two positions which could be taken on major issues ... .[26]

The adherents to those positions do not select them arbitrarily. They rest on visions, or conceptualisations, of the good state. In argument, each protagonist presents them in the way best calculated to make the constitution appear to fit his or her preferred vision. By way of example, we can return to the royal prerogative. In the United Kingdom the prerogative is no longer a set of powers and duties special to the monarch. Because of the convention that nearly all prerogatives are exercised in accordance with the advice of the Prime Minister, prerogative power is now almost wholly an instrument of executive government. In a way this makes the prerogative more democratically legitimate than before, as the Prime Minister is, by convention, always an elected member of the House of Commons, and is accountable to that House for the use made of the prerogative. On the other hand, that accountability is not by any means perfect, and, even when there is accountability, the House does not always have control over decision-making. For example, the power to enter into treaties is normally exercised without reference to Parliament, and the decision to go to war does not require parliamentary assent as a

[25] Andrew Lintott, *The Constitution of the Roman Republic* (Oxford 1999), p. 4 *et seq.*
[26] *Ibid.*, p. 7.

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matter of law (although it is just possible that, following the parliamentary debates that preceded the second Gulf War in 2003, there is now a constitutional convention that no military invasion of another country will be initiated without parliamentary approval).

The prerogative can sometimes be used to legislate without recourse to Parliament. This reflects an executive-centred vision of the policy-making and implementation elements in the constitution, and can be hard to reconcile with a vision of the constitution in which the Crown in Parliament holds the key legislative place. Take the clash between the government of Mrs. Thatcher and Parliament over a criminal injuries compensation scheme in 1988. The government wanted to move from a compensation scheme established under the royal prerogative that compensated claimants according to their individual losses[27] to a scheme based on a tariff system: fixed payments for each kind of injury, such as a broken arm, a lost eye, and so on. In the 1987–88 session of Parliament, the government introduced a Criminal Justice Bill including provisions to achieve this. (It is at least arguable that there is now a constitutional convention that in each session of Parliament there shall be at least one Criminal Justice Bill.) But Parliament insisted, against governmental opposition, on amending the Bill to make compensation continue to be payable by reference to the victim's actual loss. Eventually the Queen was advised to enact the Act, and the provisions became sections 108 to 117 of the Criminal Justice Act 1988. However, the provision in question was not to come into force until the responsible Secretary of State brought it into force by making a commencement order under section 117. Instead of making a commencement order, the Secretary of State purported to use his powers under the royal prerogative to put in place a tariff scheme by amending the existing prerogative scheme. A union representing victims of criminal injuries challenged the lawfulness of the amendments to the prerogative scheme in *R.* v. *Secretary of State for the Home Department, ex parte Fire Brigades Union*.[28]

For the Union, it was argued that it was not constitutionally or legally proper for the Secretary of State to use prerogative powers to circumvent the terms of an Act of Parliament, even one that was not yet in force. This argument divided the Court of Appeal two-one and the House of Lords, our highest court, three-two. The majority each time decided that the Secretary of State had no legal

[27] See *R.* v. *Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864, DC.

[28] [1995] 2 A.C. 513, HL. Leading counsel for the Union was a former member of the University of Cambridge Faculty of Law, Patrick Elias QC, now Sir Patrick (Mr. Justice) Elias.

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obligation to bring the provisions of the Act into force at any particular time, but nevertheless held that the Secretary of State had abused his power, and so acted unlawfully, when he used the prerogative to introduce a scheme knowing that it was inconsistent with the one that had been approved in an Act of Parliament, albeit an Act that was not yet in force.

What was going on in this case? As in nearly all cases that reach the House of Lords, there were at least two very arguable points of view. In the House of Lords, the dissenting judges (Lord Keith of Kinkel and Lord Mustill) argued that an Act of Parliament was of no effect until it came into force, and was powerless to restrict the scope of prerogative powers before that moment. The majority (Lord Browne-Wilkinson, Lord Lloyd of Berwick and Lord Nicholls of Birkenhead) argued that, once Parliament had expressed its view in the approved form (through Act of Parliament), it became an abuse of power, which the courts could restrain on an application for judicial review, to wield prerogative powers in a manner inconsistent with the Act, even before the Act came into force.

This was not a simple, seventeenth-century-style clash between parliamentary sovereignty and the royal prerogative, because parliamentary sovereignty can be exercised only through an Act that is brought into force. It was instead a conflict between two visions of the constitution: one giving primacy to Parliament over the executive more generally than does the doctrine of Parliament's legislative supremacy; the other in the tradition of allowing greater weight to the wishes of the executive. On this occasion, it might seem that the political primacy of Parliament won out, although it would be wrong to say that Parliament itself was a winner: Parliament was not a party to the proceedings, and had no opportunity to put its own view of what ought to happen in those circumstances before the judges.

Another important point, besides the clash of constitutional visions, emerges from this saga for our present purposes. It is significant that all the judges thought it clear enough to need no discussion that it was appropriate for them to decide the case. That judgment itself involved a choice between constitutional visions, this time relating to the judicial role, even though the judges themselves may not consciously have registered the fact. Although in form a challenge by a union to an executive act, the case was in substance part of a spat between the government and Parliament, in relation to which there was no self-evidently correct legal answer. Why did the judges feel they had to get involved? Perhaps, and this is mere speculation, the courts took a different view of the constitution

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from both Parliament and the Executive. For the courts, the central element in its vision is the rule of law, and particularly that part of it that requires that a dispute raised by a party as to its legal rights and obligations should be decided by an independent and impartial tribunal, unless it is clearly not justiciable.

The judges viewed the constitution from a perspective which put the obligations and functions of the judicial branch in the centre of the viewfinder. They need not have done this. In the USA it might have happened differently. There, when the Executive branch refused to agree to AT&T, the telecommunications company, releasing to a sub-committee of the House of Representatives under a subpoena documents about allegedly unauthorised wiretaps, the Federal circuit court refused to decide the question as a legal matter. The court considered that each party—the House of Representatives and the Executive—was acting in a non-arbitrary way on the basis of a thoroughly sustainable view of its own constitutional powers and obligations. It was not for the court to adjudicate on a clash of constitutional absolutes. Instead the court encouraged the two branches to enter into negotiations with each other. These eventually resolved the issue.[29]

This highlights a difference of approach to the appropriate method of resolving constitutional disputes between organs of the state. Where a view of the constitution centred on the rule of law prevails as in *R.* v. *Secretary of State for the Home Department, ex parte Fire Brigades Union*, it will be likely to lead to an adjudicative method of resolving differences. This stems from an assumption that there must be one authoritatively established answer to constitutional disputes. This is not necessarily limited to questions of pure law. Where the existence or scope of a constitutional convention, such as collective cabinet responsibility, is relevant to a question of law, such as the existence of a duty of confidentiality in respect of proceedings in Cabinet or the constitutionality of a new constitution for Canada, the courts will form a view of the scope of the convention.[30] In theory, the convention is established by consensus among actors in the political arena, and the courts merely take some form of judicial notice, for their own limited purposes, of that consensus. In reality, there may be no consensus, yet the courts have to assume or pretend that some consensus is to be found. In those circumstances, the judiciary creates a vision of the constitutional convention that is effective, at least for the court's own purposes.

[29] *US* v. *AT&T*, 551 F. 2d 384 (DC Cir 1976); *US* v. *AT&T*, 567 F. 2d 121 (DC Cir 1977).
[30] *Attorney General* v. *Jonathan Cape Ltd.* [1976] QB 752; *Re Amendment of the Constitution of Canada* (1982) 125 D.L.R. (3d) 1, SC of Canada.

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It follows that the view one has of constitutional principles, their content and their weight, depends on where one stands in the set of institutional relationships that make up the state. Judges see things differently from members of the executive, who in turn see things differently from the two Houses. Any doubt on this score is set at rest when one considers, for example, the vehement denunciation by the then Home Secretary, Mr. David Blunkett M.P., of the decision of Collins J. in *R. (on the application of Q.)* v. *Secretary of State for the Home Department*[31] that depriving asylum-seekers of all means of support so that they were reduced to destitution amounted to degrading treatment contrary to Article 3 of the European Convention on Human Rights. (Mr. Blunkett also attacked the judge himself.) The judiciary, quite properly, has a view of the constitution which makes the rule of law central; from the perspective of the executive, the efficient implementation of the policies of a government that is accountable to Parliament is central. I know this from personal experience: when working as a judge of the Constitutional Court of Bosnia and Herzegovina, I regard the work of the judiciary as central, and would probably do so even if the first line of Article VI.3 of the Constitution did not provide, "The Constitutional Court shall uphold this Constitution." On the other hand, when I was an Officer of the two Houses of Parliament I, like other Officers and staff (and, I believe, most Members) of each House, regarded the position of the legislature as central.

For the United Kingdom Parliament, the centrality of its own role goes well beyond ideas such as parliamentary sovereignty in legislation. It extends to the whole of its work as the mechanism for the political accountability of government. When I was working for the Joint Parliamentary Select Committee on Human Rights one of my tasks was to draft letters from the Chair of the Committee, the Rt. Hon. Jean Corston MP, to ministers asking for information or replies to the Committee's questions about the compatibility of Bills or draft Bills with human rights. Initially, being polite and well brought up, I couched these letters in polite (some would say obsequious) terms: "The Committee would be most grateful ...", or "The Committee would greatly appreciate a reply by ...". These expressions were ruthlessly excised by the Lords and Commons Clerks of the Committee, who reminded me that the ministers are accountable to Parliament, not the other way round: the two Houses are the boss, and ministers must do as they are told. Language in a letter that suggested otherwise would be

[31] [2003] EWHC Admin. 195, Admin. Ct., subsequently affirmed [2003] EWCA Civ. 364, [2003] 2 All E.R. 905, CA.

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constitutionally inappropriate, and might lead ministers to get ideas above their stations. It is unlikely that quite the same view is held within government Departments, but that does not mean that the attitude of parliamentarians is wrong. It is just that different perspectives produce different views of the relative significance of various institutions of the state.

The reason for this is simple. People tend to visualise the world with themselves at its centre. We would not be taking our own institutional responsibilities seriously were we not to put them in the forefront of our world view. That does not mean that we are required to lack a sense of proportion when considering the powers and responsibilities of others, but as conscientious public servants we cannot avoid viewing other people and other institutions through a prism made up of our own institutional concerns. The phenomenon is merely the institutional manifestation of a truism of human psychology.

So far I have offered examples of people's visions of the constitution differing according to the institution of which each person forms part. But one's geographical perspective can also alter one's vision. We can take two examples: the relationship between Parliament and the EU, and the relationship between elements in the United Kingdom's devolved constitution.

The legislative authority of Parliament has undoubtedly been limited by the European Communities Act 1972 and the United Kingdom's membership of the EEC and more recently the EC and EU, because of the doctrine of the supremacy of Community law developed by the Court of Justice of the European Communities (CJEC).[32] While the Queen in Parliament can still legislate much as it pleases, that legislation will not be authoritative and enforceable if and to the extent that its provisions turn out to be inconsistent with directly effective Community law. For this reason the courts have a duty not to apply, and indeed to restrain the enforcement of, provisions in an Act of Parliament which, if enforced, would leave the United Kingdom in breach of such Community law.[33] Nevertheless, it has been suggested that such legislation would be judicially enforceable in the United Kingdom if an Act of Parliament provided expressly that it was to have effect notwithstanding any inconsistency with Community law.[34] This is

[32] For a concise introduction see Evelyn Ellis in David Feldman (ed.), *English Public Law* (Oxford 2004), pp. 156–172, paras. 2.177–2.211.

[33] *R.* v. *Secretary of State for Trade and Industry, ex parte Factortame Ltd.* [1990] 2 A.C. 85, HL; *R.* v. *Secretary of State for Trade and Industry, ex parte Factortame Ltd. (No. 2)* [1991] 1 A.C. 603, CJEC and HL; *R.* v. *Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 A.C. 1, HL.

[34] See *e.g. Macarthys Ltd.* v. *Smith* [1979] 3 C.M.L.R. 44, CA, at p. 47 *per* Lord Denning MR.

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credible if one is sitting in Westminster and viewing the legislation from a United Kingdom (or more accurately English) perspective, in the light of a constitutional vision dominated by the nineteenth-century tradition of the United Kingdom as a unitary nation state and a Diceyan view of parliamentary sovereignty. However, it is quite incredible if one views it from the perspective of the CJEC in Luxembourg, with a vision of relationships in an enlarging Europe which puts the goal of harmonisation and its main tool, the supremacy of Community law, at the centre of the picture. Which view is correct? This question can be answered only if there is a means of authoritatively determining the outcome of the disagreement. In this case there is such a procedure. It is very likely that a court in the United Kingdom, faced with a provision that is apparently inconsistent with directly effective Community law and expressed to be enforceable notwithstanding any such inconsistency, would quickly make a reference to the CJEC under Article 234 of the EU Treaty. There can be no doubt that the Court of Justice would say that Community law must be enforced notwithstanding the Act of Parliament, or that the court in the United Kingdom would accept that judgment as the final and authoritative word on the subject (unless and until the United Kingdom were to withdraw from the EU and repeal the European Communities Act 1972). Accepting that both Acts of Parliament and directly effective Community law are justiciable in courts in the United Kingdom entails accepting the need for some hierarchically superior judicial body to have the last word on such questions of law, and the combined effect of the European Communities Act 1972 and the EU Treaty is to makes it clear that the CJEC is that body. If anyone fails to recognise this it can only be because of an inability to take account of all the perspectives from which the United Kingdom's constitution must now be viewed.

Devolution in the United Kingdom offers another example of the constitution as a mechanism for discourse between people with different visions of relationships of power and authority organised on a geographical basis. It is well known that the structures of devolution to Scotland, Northern Ireland and Wales are "asymmetric". In other words, the Westminster Parliament devolved different powers and responsibilities to each of those countries. This makes it inevitable that relationships between devolved and central authorities will be seen differently when visualised from Edinburgh, Belfast and Cardiff respectively. Indeed, the whole constitution looks different from those perspectives. For example, from a Scottish perspective there is a codified (or at least partly codified) constitution, based on the Scotland Act 1998. Seen from Northern

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Ireland, the codification is very unstable, as shown by the suspension of devolution and the resumption of direct rule by central government and Parliament; in Wales, the limited form of devolution (only executive, rather than legislative, devolution) makes the codification look even more incomplete than in Scotland. None the less, the relative stability and comprehensiveness of the devolution settlement in Scotland produces a distinctive view of the United Kingdom's constitution there, and the differences between Scotland, Northern Ireland and Wales emphasise the character of the United Kingdom's constitution as a field of often conflicting visions.

This is nothing new. Even before devolution there was a distinctive view of the constitution in Scotland. From a Scottish perspective, discussions of parliamentary sovereignty were complicated by the fact that the Westminster Parliament as perceived from Scotland in the light of Scottish history was not the same as the same body viewed from England. Scotland and England and Wales were independent sovereign nations until 1707, with their separate legislative bodies. From a Scottish perspective, the effect of the Treaty of Union of 1706 and the two Acts of Union (one passed by the Scottish Parliament and one by the English in 1706) was to dissolve both states and their respective institutions, including their legislatures, and to constitute a new sovereign state, the United Kingdom of Great Britain, with its new institutions, including the new Westminster Parliament. There could be no assumption that the new Parliament would have the same characteristics and competencies as either the former Scottish Parliament or the former English Parliament, and there have been regular assertions from Scottish judges and others that the powers of the current Westminster Parliament are limited in law to some degree by the terms of the Treaty and Acts of Union 1706, which are fundamental law.[35] English constitutionalists, by contrast, so far as they have thought about the matter at all have tended to assume that English institutions continued unchanged, save for the addition of Scottish responsibilities and powers and Scottish representation.

The difference in the devolution era is that there is a text on which people can base their analysis of relationships between Scotland, Whitehall and Westminster. This is usually lacking in

[35] See *e.g. MacCormick* v. *Lord Advocate* 1953 S.C. 396, Ct. of Session, at p. 411 *per* Lord Cooper; *Gibson* v. *Lord Advocate* [1975] C.M.L.R. 563, Ct. of Session, esp. *per* Lord Keith; T.B. Smith, "The Union of 1707 as Fundamental Law" [1957] P.L. 99; J.D.B. Mitchell, "Sovereignty of Parliament—yet again" (1963) 79 L.Q.R. 196; Neil MacCormick, "Does the United Kingdom have a Constitution? Reflections on *MacCormick* v. *Lord Advocate*" (1978) 29 N.I.L.Q. 1; Elizabeth Wicks, "A new Constitution for a new State? The 1707 Union of England and Scotland" (2001) 117 L.Q.R. 109. For a different view, see C.R. Munro, *Studies in Constitutional Law*, 2nd edn. (London 1999), ch. 5.

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uncodified parts of constitutional law. However, the text only provides a focus for discussion, and a way of legitimizing conclusions by presenting them as the outcome of an interpretation of an authoritative text. The text itself provides a way of formulating and approaching the questions, but (even in a purportedly codified constitution) does not always provide the answers: these tend to lurk in the gaps between the terms of the text, or between form and reality.[36] The Scotland Act 1998 is no exception. For instance, certain matters are reserved to the legislative competence of the Westminster Parliament, including employment rights and duties and equal opportunities.[37] On the other hand, the observation and implementation of obligations under international conventions (including human rights treaties) and Community law are not reserved; nor are the encouragement of equal opportunities and the observance of equal opportunity requirements.[38] In areas of overlapping or concurrent responsibility, how are potential clashes to be avoided? The answer has been to develop certain more or less formal agreements and conventions between the devolved and central institutions. Some of these have been reduced to writing and published as Concordats, and the arrangements include an agreement that the Westminster Parliament will not legislate for Scotland in relation to a devolved matter unless the Scottish Parliament has passed a motion (a "Sewel motion") agreeing to the Westminster Parliament doing so.[39] One cannot understand the constitutional relationships between central and devolved authorities without taking account of these arrangements. These aspects of the constitution exist in the gaps left in the law, and reflect a Scottish view of the relationships as much as an English one.

The judges, too, have different visions of the devolution settlement according to their geographical location. Scottish judges seem to see things from a devolutionary perspective in Scotland, while English judges appear to remain more centralist in their constitutional attitudes. Two cases directly or indirectly involving devolution issues illustrate these divergent perspectives. Both cases concern the effect of the right to a fair hearing within a reasonable time in criminal cases under Article 6.1 of the ECHR. The Scotland

[36] I have developed this idea in an earlier inaugural lecture: "Courts, Constitutions, and Commentators—Interpreting the Invisible" (1993–94) 16 Holdsworth Law Review 37.
[37] Scotland Act 1998, s. 30 and Sched. 5, Part II, sections H1 and L2.
[38] Scotland Act 1998, s. 30 and Sched. 5, Part I, para. 7, and Part II, section L2.
[39] These arrangements are published on the Department of Constitutional Affairs Website, www.dca.gov.uk/constitution/devolution/guidance.htm. See Richard Rawlings, "Concordats of the Constitution" (2000) 116 L.Q.R. 257; Alan Page and Andrea Batey, "Scotland's other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution" [2002] P.L. 501.

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Act 1998, section 57(2) provides that a member of the Scottish Executive has no power to do anything incompatible with Convention rights. Her Majesty's Advocate is a member of the Scottish Executive and is responsible for the conduct of the system of prosecutions in Scotland. In *H.M. Advocate and another* v. *R.*[40] the issue was whether it followed that undue delay in bringing a prosecution operated in Scotland as an absolute bar to prosecution. Being a devolution issue, there was an appeal to the Judicial Committee of the Privy Council, which sat with three Scottish judges (Lord Hope of Craighead, Lord Clyde, and Lord Rodger of Earlsferry) and two judges whose experience had been within the English system (Lord Steyn and Lord Walker of Gestingthorpe). By a three-two majority, the Privy Council decided that the right to a hearing within a reasonable time acted as a bar to prosecution in the context of the devolution system. The majority consisted of the three Scottish judges; Scots law has always been more rigorous in enforcing time limits for criminal proceedings than English law, and the division suggests a difference between Scottish and English constitutional attitudes.

English courts took different views of the issue in cases not involving devolution issues. In view of the special structure of the devolution settlement, there is no good reason why Scotland and England should not have gone their own ways, as long as each of them gave at least as much protection to the right to a hearing within a reasonable time as is required by Article 6 of the ECHR. Yet when the Attorney-General decided to seek an authoritative ruling as to whether unreasonable delay was an absolute bar to a prosecution in England, a specially augmented Appellate Committee of the House of Lords sat with nine Law Lords (instead of the usual five) to decide *Attorney-General's Reference (No. 2 of 2001)*.[41] Of these, seven could be described as "English" judges (Lords Bingham of Cornhill, Nicholls of Birkenhead, Steyn, Hoffmann, Hobhouse of Woodborough, Millett, and Scott of Foscote) and only two were Scots (Lord Hope of Craighead and Lord Rodger of Earlsferry). The House held by a seven-two majority (with the Scottish Law Lords dissenting) that it would not be appropriate to stay criminal proceedings on the ground of delay unless the delay made a fair hearing impossible. Disregarding the constitutional differences between England and Scotland by reason of the devolution legislation, and giving little weight to the drafting of ECHR Article 6.1 which makes it clear that the right to a fair hearing and the right to a hearing within a reasonable time are

[40] [2002] UKPC D3, [2004] 1 A.C. 462, PC.
[41] [2003] UKHL 68, [2004] 2 A.C. 72, HL.

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different and complementary rights, the English majority went out of its way to express the view that their conclusion was irreconcilable with the decision of the Privy Council in *H.M. Advocate and another* v. *R.*[42]

This attempt by "English" judges to impose a particular view of the practical impact of Article 6 of the ECHR on Scottish judges is more than an exercise in English legal imperialism. It reveals that the English judges have not developed a vision or conception of the United Kingdom's constitution that gives particular weight to the nature of the devolution settlement. A probably outdated unitary vision of the state was dominant. This is not particularly surprising (as noted earlier, people are inevitably affected by their geographical perspectives) but as an exercise in the development of constitutional law it is disappointingly monoscopic: House of Lords passed up an opportunity to recognise that in different parts of a devolved state a multiplicity of constitutional visions may be equally valid.

This brings us back to the question that my title poses. Does the United Kingdom have no constitution, one constitution, or several competing constitutional visions? It follows from the earlier discussion that constitutional arrangements at any one time are the result of a clash between competing visions, each of which has normative weight and is concerned with the legitimacy and authority of constitutional rules, not merely the accuracy of a description of an allocation of power. There can be no one source of authority for constitutional rules: authority and legitimacy stem from the process of argument about and justification for the rules. Only if a rule is justiciable or legislatively enacted will it be possible to have a single authoritative answer to the question, "What does the constitution require in this case?" And in any constitution, even that authoritative answer will only ever be contingent and mutable, open to change through further argument, legislative repeal, reinterpretation, or constitutional amendment.

If there are only competing visions, does that mean we do not have a constitution at all? I think not. The constitution can best be seen as the machinery through which we give authority to, choose between, and accommodate conflicts between visions, rather than a set of settled rules. The notion that there are authoritative sources of constitutional rules must allow room for dissent and for the dissenting view to become the prevailing view, albeit temporarily. Only in this way can the constitution discharge its decency-

[42] See [2003] UKHL 68, [2004] 2 A.C. 72, HL, at paras. [30] (Lord Bingham of Cornhill), [43] (Lord Steyn), [44] (Lord Hoffmann), [127] (Lord Hobhouse of Woodborough), [129] and [139] (Lord Millett), [140] (Lord Scott of Foscote).

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preserving function (clothing power with legitimacy) and its knicker-elastic function (allowing sufficient flexibility to meet changing demands and adjust to new visions). For the United Kingdom's constitution (or any other constitution) to work successfully in this way, there must be a commitment to peaceful methods of resolving, temporarily and contingently, a constantly changing set of conflicts between visions. This is constitutionalism: a state of mind in which all the participants in the process of government accept, or say that they accept, that conflicts must be worked out through a combination of political and legal processes, that they must be justified by reference to a fair reading of principles that command a significant degree of consensus among the institutions of the state, that those principles must be capable of fitting, more or less, the observable regularities of behaviour in both the political and the legal institutions of government, and that they must be justified publicly by reference to a normative vision of the good state.

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