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The Courts and Legislation: Anglo-American Contrasts (George P. Smith, II, Distinguished Professorship-Chair of Law)

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George P. Smith, II, Distinguished Professorship
Chair of Law

On April 12, 2000, Sir David Williams delivered the following lecture at the Indiana School of Law–Bloomington in accordance with The George P. Smith, II, Distinguished Visiting Professorship–Chair of Law and Legal Research endowment. The Chair was established by George P. Smith to broaden students' exposure to scholars and judges of national and international reputation and to allow distinguished visiting scholars the opportunity to do research at Indiana University and share their ideas with the faculty and students of the Indiana University School of Law and Indiana University. George P. Smith, an Indiana native, received his B.S. degree in business, economics, and public policy in 1961 from Indiana University and his J.D. from the Indiana University School of Law in 1964. He was awarded an LL.M. from Columbia University in 1975 and an Honorary Degree from Indiana University in 1998. George P. Smith has been a professor of law at The Catholic University of America, in Washington, D.C., since 1977.

The Courts and Legislation: Anglo-American Contrasts

Sir David Williams*

Just seven years less one day ago, my wife and I arrived for the first time in Bloomington, Indiana, and on April 15, 1993, I had the honor of delivering the Ralph Follen Fuchs Lecture on the subject of "Law and Administrative Discretion." It is a delight to be back on campus at a law school which is thriving, and my wife and I appreciate the warm welcome that has been

* Sir David Williams was Vice-Chancellor of the University of Cambridge, 1989-96; President of Wolfson College, Cambridge, 1980-92; and Rouse Ball Professor of English Law, 1983-92. He is now a Fellow of Emmanuel College, Cambridge. In March and April, 2000, he was the George P. Smith, II, Distinguished Visiting Professor at the Indiana University School of Law–Bloomington.
extended by Dean Aman and Professor Carol Greenhouse and by so many others who are involved in the academic and administrative life of the school.

Dean Aman, of course, is a well-known and highly respected scholar in Cambridge, England, where he has held visiting fellowships at Wolfson College, where in 1999 he delivered the Earl A. Snyder Lecture in International Law, and where he has contributed so effectively at law conferences—most recently in February of this year when he delivered a paper on information, privacy, and technology. Also a familiar figure in Cambridge, England, is Professor George P. Smith, II, a versatile and much-traveled scholar and a person of outstanding generosity. It is a privilege to occupy the Chair that he has endowed to further academic research.

In delivering this lecture today I am conscious, towards the close of the academic year, of the possible fatigue that can follow a series of colloquia and lectures. For those who attend today, I therefore promise to avoid both the "eternal volubility" that was attributed to Luther Martin of Maryland, a delegate at Philadelphia in 1787, and the "fatal blight of fluency" which Asquith detected as the weakness of a particular unsuccessful member of Parliament. In other words, I propose to turn to the subject of this lecture with "all deliberate speed."

Today, with the leave of this audience, I shall consider the courts and legislation against the background of the astonishing program of constitutional change that commenced when the Labour government assumed power less than three years ago. This program encompasses a significant number of issues. Among other things, it addresses proposed electoral reforms that will affect both the House of Commons and the House of Lords, the devolution of power to a Scottish Parliament and a National Assembly in Wales, a provision for the first directly-elected mayor (the election of the Mayor of London will take place next month after an electoral campaign of singular contortions and ferocity), the establishment of a new-style Assembly in Northern Ireland (albeit suspended in a haze of assertions, counter-assertions and posturing over the decommissioning of arms), the pending introduction of a Freedom of Information Law, the incorporation into national law of the European Convention on Human Rights, and further developments in British membership of the European Union in light of the 1997 Treaty of Amsterdam and the increasing authority of the European Parliament.

Although it is customary to talk of the British Constitution—which, incidentally, was once used as a test for sobriety—and sometimes to speak of it with approval, we have no formal constitution. James Bradley Thayer, for
instance, spoke of the "strange contrivances" of the British Constitution, seeing it as "a marvelous outcome of instinct, of a singular sense and apprehension, feeling its sure way over centuries."\(^1\) By contrast, John Ruskin, one of the legendary figures of the nineteenth century, expressed the opposite view when he told a lecture audience at Oxford: "The British Constitution of which you are so proud, why—it is the vilest mixture of humbug, iniquity and lies that Satan ever spewed out of hell."\(^2\)

Whatever the validity of such assertions, it remains true that the British courts do not engage in constitutional adjudication as such. Their interpretative role relates to statutes, as Professor William D. Popkin explained in his recent scholarly work *Statutes in Court*.\(^3\) For some theorists, nothing has changed in constitutional fundamentals since Albert Venn Dicey, who was once described as the high priest of the Constitution, published his *Law of the Constitution* in 1885.\(^4\) Britain still has no written constitution, and the separation of powers is only fitfully recognized. Moreover, there is no federal structure in the United Kingdom; Parliament is supreme and, accordingly, parliamentary legislation is not subject to judicial review. The contrast with the United States would be startling were it not for the fact that each of those descriptive statements—all stated in a negative sense save for the doctrine of parliamentary supremacy—must to some extent be qualified. The courts, however, adhere to the view that their role, outside the surviving common law, is to interpret and apply acts of Parliament.

The process of interpretation remains both challenging and exciting, but to this day it is often seriously underestimated when assessing the role of the courts. In the United Kingdom, administrative law is to a large extent an exercise in statutory interpretation. Ernst Freund of the University of Chicago argued in 1917 that the interpretation or construction of legislation is "essentially supplementary legislation,"\(^5\) and an Australian legal scholar has spoken—in the context of statutory interpretation—of the "notion of the courts as a junior legislative partner" as "much more satisfactory than the

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concept of a handmaiden doing no more than unthinkingly carry out the legislature’s command.\textsuperscript{6}

In a country such as the United Kingdom, which lacks a constitution but is nonetheless experiencing massive constitutional change, how then can the courts bring to bear a recognition of the constitutional impact of this program of change? The answer is that, while all statutes are equal, some are more equal than others and therefore demand special treatment. In administrative law, where tens of thousands of different statutory provisions must be considered, the courts take account of the constitutional niceties when the actions of Ministers of the Crown in highly sensitive policy areas are questioned, when agencies seek to take advantage of unduly restrictive clauses enacted by Parliament, and when human rights are directly affected by executive action. Some recent cases provide illustrations. In one in which the police authority claimed that they were not empowered to provide financial assistance to two retired police officers who faced private prosecutions for manslaughter and wilful neglect of duty arising out of the tragic Hillsborough football ground disaster of 1989, the court took account of the complex interlocking roles of Chief Constable, Home Secretary, and police authority in ruling that they were so empowered.\textsuperscript{7} In another case, the Court of Appeal took a broad view of procedural irregularities in an immigration process and emphasized the relevant statutory framework “considered as a whole.”\textsuperscript{8} And in a third case, decided in January of this year, the Court of Appeal expressly adopted a purposive approach to statutory construction (even Hansard can now be consulted where appropriate), reaffirming the presumption that Parliament does not in the absence of clear and unambiguous words eliminate or interfere with property rights without compensation.\textsuperscript{9} It also emphasized that the courts strictly review the power allegedly given to the executive to amend primary legislation. Provisions so empowering the executive are traditionally known as Henry VIII clauses because, as one government committee commented, Henry “is regarded popularly as the impersonation of executive autocracy.”\textsuperscript{10} The Court of Appeal has, however, recently called

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\item \textsuperscript{6} DENNIS CHARLES PEARCE, STATUTORY INTERPRETATION IN AUSTRALIA 148 (1974).
\item \textsuperscript{7} R v. Director of Public Prosecutions, \textit{ex parte} Duckenfield, 2 All E.R. 873 (1999).
\item \textsuperscript{8} R v. Immigration Appeal Tribunal, \textit{ex parte} Jeyeanthan, 3 All E.R. 231 (1999).
\item \textsuperscript{9} R v. Secretary of State for the Environment, Transport and the Regions, \textit{ex parte} Spath Holme Ltd., 1 All E.R. 884 (2000).
\item \textsuperscript{10} Report of the Committee on Ministers’ Powers, Cmd. 4060 (1932).
\end{itemize}
for narrow and strict construction of such clauses. We will return to King Henry later in this lecture.

Exceptional circumstances inevitably affect statutory interpretation. During the Second World War, for example, the Home Secretary was authorized under defense regulations to detain a person where he had reasonable cause to believe that the person was of hostile associations, but the House of Lords, by a 4-1 majority, went against previous understandings and interpreted the words “reasonable cause” subjectively rather than objectively. In a powerful dissent, which has subsequently been vindicated, Lord Atkin suggested that the arguments advanced by the Attorney General on behalf of the Home Secretary might have been addressed acceptably to the Court of King’s Bench in the time of Charles I. He claimed to know of only one authority that might support the construction adopted by his colleagues: “‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean, neither more nor less.’”

The importance of human rights in the context of statutory interpretation has taken on a new and pronounced significance by virtue of the Human Rights Act of 1998. The incorporation of the European Convention (the “Convention”) provides the United Kingdom for the first time with a Bill of Rights, which differs from that of the United States in the sense that it does not permit judicial review of parliamentary legislation. However, the courts are empowered to apply the Convention to primary and secondary legislation whenever enacted. Where primary legislation is concerned, the court can make a declaration of incompatibility when it is satisfied that a provision is incompatible with Convention rights, and in the interpretation process, the court must take into account what has been described as “the entire corpus of the jurisprudence of the European Court of Human Rights.” In response to a declaration of incompatibility, the appropriate minister may at his discretion proceed through subordinate legislation (which must normally be approved by both Houses of Parliament) to amend the offending statute—another dramatic example of a Henry VIII clause.

13. Id. at 206 (quoting LEWIS CARROLL, ALICE THROUGH THE LOOKING GLASS (1872)).
Judges in the United Kingdom are acutely aware of the new demands that incorporation of the Convention creates, and, in response, a training program has been developed for the judiciary. Sir John Laws of the Court of Appeal reminded us that “the principles of freedom and fairness which the Convention enshrines are the very principles respected by the common law,” and that statement is itself a reminder that the jurisprudence of the Supreme Court of the United States may well feature prominently in the new realm of human rights and statutory interpretation. Indeed, doubtless aware of what may lay ahead, the Lord Chief Justice has extra-judicially stressed that it is “very important that the judges, particularly the most senior and conspicuous judges, should resist any temptation to cultivate reputations as liberals, or strict constructionists or anything else.” An American legal commentator, in looking at the Supreme Court, might say much the same.

The Human Rights Act, then, has sanctioned a form of judicial review of parliamentary legislation that confers on the executive and the legislature the ability to strike down legislation following a fast-track procedure. Some might view this as a vindication of the separation of powers by rejecting judicial power to annul legislation. Others might view it as a characteristically British violation of the separation of powers that entrusts to a minister of the Crown the initiative to amend legislation. Nevertheless, although the new scheme, in theory, confines the courts to their familiar statutory interpretation role, the Human Rights Act represents a highly significant step towards constitutional adjudication.

The significance of this is all the greater when one considers the other steps that have been taken towards constitutional adjudication. As a member of the European Union, the United Kingdom—by virtue of the European Communities Act of 1972 (the Act of 1972)—must defer to European law, and the courts must in appropriate circumstances “disapply” parliamentary legislation. It could, of course, be argued that disapplication is permitted under the Act of 1972 and that parliamentary supremacy remains intact. Even Dicey, however, would have conceded that the time may be ripe for rethinking and restating the fundamentals of the Constitution. Judicial review of legislation can be assumed by a more drawn-out series of developments that allows time for the readjustment of ideas, rather than by the single stroke of Chief Justice Marshall’s pen as in the early years of the United States.

16. *Id.* at xiii (“An Overview”).
17. *Id.* at xii (“Keynote Speech”).
Consider also the impact of devolution. As a result of legislation that was passed in 1998, Scotland and Wales, and perhaps eventually Ireland, will enjoy considerably more prominence in the legislative process. Scotland now has its own Parliament with extensive powers of quasi-primary legislation, although those powers are subject to review by the Judicial Committee of the Privy Council (a strange judicial entity that once exercised considerable power on this side of the Atlantic, both north and south of the 49th Parallel). While the Welsh National Assembly has no powers of quasi-primary legislation, it does have a complex and heavy-handed arbitral system that involves the Judicial Committee in other areas of government. And Northern Ireland is hovering on the brink of either having an assembly designed to acquire quasi-primary legislative authority subject to judicial review or, as we appreciate all too well, a constitutional abyss. Until 1972, Northern Ireland appeared, under the Government of Ireland Act of 1920 (which was originally designed to provide parallel assemblies in Dublin and Belfast but from which what is now the Republic, especially through the efforts of the doomed Michael Collins, had extricated itself by 1922), to have secured the trappings of a state within a federation. The province had its own legislature, its own executive, and its own judicial system that were subject only to the authority of the House of Lords or the Judicial Committee. Against the yardstick of the relevant parliamentary legislation of 1998, both Scotland and Northern Ireland are poised to become quasi-states within a quasi-federation and it is important to note the quality of the judicial review once enjoyed by Northern Ireland under the 1920 Act. In a case before the House of Lords some forty years ago, Viscount Simonds commented that,

in the interpretation of constitutional instruments guidance should be sought from those courts whose constant duty it has been to construe similar instruments, if only because, as it appears to me, a flexibility of construction is admissible in regard to such instruments which might be rejected in construing ordinary statutes or inter partes documents. The courts of Northern Ireland have not hesitated to adopt this course and have found assistance in their task of construing their own constitution from the manner in which great judges
among the English-speaking people overseas have dealt with kindred problems.\(^{18}\)

Those words concerned the validity of legislation enacted by a subordinate legislature that eventually collapsed in 1972 following endless violence and terrorism in Northern Ireland. Their significance in a wider constitutional context, however, is considerable because they demonstrate the readiness of the courts to adopt a different approach in interpreting parliamentary legislation with constitutional significance. The Human Rights Act of 1998 and, more obliquely, the Act of 1972 overtly recognize and demand such a change, and the devolution statutes implicitly recognize and demand it. Yet it would be premature to speak of the demise of parliamentary sovereignty and of the arrival of judicial review of parliamentary legislation. At least two reasons for this highlight the contrasts between British and American approaches to parliamentary or congressional legislation.

First, the courts continue to accept the doctrine of parliamentary sovereignty. In February of this year, Lord Rodger of Earlsferry, the Lord President of the Court of Session in Scotland, explicitly stated that the courts respect the Westminster Parliament as sovereign, adding that, in the devolution of power to Scotland, the courts had been aware that they were not dealing with a sovereign parliament in Edinburgh.\(^{19}\) True enough, there have in the past been alleged assertions of a judicial review power over parliamentary legislation. Most American lawyers are aware of Chief Justice Coke’s dictum in Dr. Bonham’s Case,\(^{20}\) though William Popkin shares Sam Thorne’s more limited reading of Coke's words\(^{21}\) and it is interesting that royalist judges in Hampden’s Case\(^{22}\) (which, like Dred Scott,\(^ {23}\) seemed to identify critical areas of dispute just before a civil war) claimed that some prerogative powers were immune from parliamentary interference. In this century, there have also been both judicial and extra-judicial assertions of judicial review, but normally on the assumption of a power of last resort. This approach, of course, differs significantly from the regular acceptance and application of judicial review in the United States.

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20. 8 Co. Rep. 118a (1610).
22. 3 St. Tr. 825 (1637).
23. 60 U.S. 393 (1856).
Underlying judicial deference towards Parliament is the conviction that aggressive judicial review comes at a considerable price. Judicial independence would need to be reassessed in several ways, bearing in mind that the recent upsurge in the United Kingdom of judicial review of administrative action has already stimulated vigorous debate about what has been called "a basic tension between judicial engagement in political controversy and public confidence in the judges' political impartiality in deciding disputes according to law."\(^{24}\) In a recent article in the *Modern Law Review*,\(^{25}\) John Griffith of the London School of Economics emphatically wrote of the dangers to the democratic process that arise when the judiciary is entrusted with too much power. A move toward constitutional review would unquestionably ignite the arguments on judicial restraint and judicial activism that have been familiar in the United States for many years.

More specifically, concern over judicial independence would concentrate on the role the Lord Chancellor plays in our legal system; on the position of the Lords of Appeal in Ordinary (the Law Lords) as members of the House of Lords in its judicial capacity as the effective Supreme Court and also as members of the House of Lords in its legislative and general parliamentary capacity; on the methods of appointing judges, particularly to the High Court and above; on the perceived impartiality of judges as they adjudicate; and on the extensive use of judges for extra-judicial functions on behalf of the executive.

The last two items—perceived impartiality and extra-judicial activities—have been the source of recent case law in England, suggesting an increasing sensitivity in the wake of constitutional change. In the well-known *Pinochet* case, a decision by the House of Lords was set aside because of the disqualification for bias of Lord Hoffmann on the ground of his links with Amnesty International which had been a party to the proceedings.\(^{26}\) The wider implications of that unusual ruling were considered at length last autumn in a decision by the Court of Appeal. That decision, which was rendered by the Lord Chief Justice (Lord (Tom) Bingham), the Master of the Rolls (Lord (Harry) Woolf) and the Vice-Chancellor (Sir Richard Scott), and inevitably became known as the "Tom, Dick and Harry" case, involved five separate applications for permission to appeal which raised common questions about

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the disqualification of judges on grounds of bias.27 In the course of a fascinating and exhaustive judgment, however, the Court of Appeal at one point said that it could not

conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge’s social or educational or service or employment background or history, nor that of any member of the judge’s family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society, or chambers.28

The increasing sensitivity toward extra-judicial activities was highlighted in another Court of Appeal decision, R v. Lord Saville of Newdigate and others, ex parte A and others.29 This case involved a challenge by judicial review to Lord Saville, a serving Law Lord, Sir Edward Somers (formerly of the Court of Appeal of New Zealand) and William L. Hoyt (former Chief Justice of New Brunswick), the three members of a tribunal that was established to reinvestigate the events of “Bloody Sunday” (January 30, 1972) when twenty-six people were shot during a demonstration in Londonderry. The tribunal had declined to allow anonymity to military witnesses scheduled to appear before it, and seventeen of the soldiers who had fired shots on Bloody Sunday sought judicial review. In another exhaustive judgment, the Court of Appeal affirmed the court below and held against the tribunal, emphasizing the safety of the former soldiers and their families and endorsing the claims for anonymity.30 At a time when the members of the House of

28. 1 All E.R. at 77 (2000).
29. 4 All E.R. 860 (1999).
30. 4 All E.R. at 879-82 (1999).
Lords face unprecedented constitutional challenges, we are in the United Kingdom increasingly willing to accept the wisdom of Charles Evans Hughes who, when an Associate Justice of the Supreme Court, said that it is best for the Court and the country that the Justices strictly limit themselves to their judicial work, and that the dignity, esteem, and indeed aloofness, which attach to them by virtue of their high office as the final interpreters of legislation and constitutional provisions, should be jealously safeguarded.\textsuperscript{31}

A second reason why it would be premature to speak of the demise of parliamentary supremacy is the nature of the legislative process itself, which vividly underscores Anglo-American differences. It is misleading to speak of legislative interpretation and of the need to accommodate democratic concerns without considering the meaning of legislation and the extent to which it reflects democratic values. Parliament, for example, has been busily enacting legislation for many centuries, but absent universal suffrage—which was achieved with painful slowness over the past two centuries—its mandate would scarcely meet the demands of what we nowadays term democracy. Today, minority party votes in the United Kingdom are often lost in the “first past the post” election system, and there are strong calls for some form of proportional representation in parliamentary elections. Proportional representation has already been injected into the electoral systems for the devolved assemblies, but the national government is unsurprisingly more reluctant to inject it into the national electoral system for the House of Commons.

The House of Commons, of course, is presently the only elected chamber of Parliament. It is dominated by the majority party, which itself is controlled by the Prime Minister and his Cabinet, which, in turn, consists entirely of members of the Commons and the House of Lords. Members of the House of Commons are elected for a maximum of five years, but the Prime Minister can call a general election at any time during that period, a fact that explains the tight discipline observed by party members. The government takes the initiative in virtually all legislation, and it controls the legislative timetable almost completely. Ever and anon some troublesome backbench members may rebel and the House of Lords can delay and protest (as it recently did over

\textsuperscript{31} \textit{Merlo J. Pusey, I Charles Evans Hughes} 296-97 (1951).
legislative proposals to restrict trial by jury in criminal cases), but the government remains in charge and royal assent to a measure which has gone through both Houses has not been refused for nearly 300 years.

There is ample room for manipulation. The pre-legislative stage of consultation, even when it has been initiated by a government-issued White Paper, can be extended and delayed as the government has second thoughts. In December 1997, for instance, a White Paper entitled “Your Right to Know”\(^\text{32}\) was issued with proposals for a Freedom of Information Act. Views were sought, then came a consultation paper\(^\text{33}\) and draft bill in May 1999, followed by pre-legislative scrutiny by committees in both Houses and yet more public consultation. Responses were analyzed in part over the Internet. A bill with watered-down provisions was finally produced last November; that bill, however, is still winding its way through Parliament. By contrast, devolution for Scotland and Wales was heralded by White Papers in the early summer of 1997—the Welsh White Paper was particularly rushed—and referendums were held a week apart in Scotland and Wales later that summer. The referendum in Wales was supported by only twenty-five percent of the total electorate, with some fifty percent abstaining. Even so, the financial backing for the “yes” vote was later criticized by the Committee for Standards in Public Life. A bill of remarkable particularity appeared for Welsh devolution, and it was duly enacted by 1998. Scottish devolution, which was more carefully considered and had a more decisive referendum, occurred when the Scotland Act also emerged in 1998.

Executive power over legislation violates any realistic application of the separation of powers, and Americans accustomed, for instance, to the lessons of the Steel Seizure\(^\text{34}\) and Chadha\(^\text{35}\) cases, would appreciate the contrasts. These contrasts are all the more stark against the background of, say, Bowsher \(v.\) Synar\(^\text{36}\) when one adds to executive control over primary legislation the extent of executive control over subordinate legislation or rulemaking, with the unnerving revival of Henry VIII clauses during the past decade in areas such as deregulation and human rights. This combination is an outstanding illustration of the almost limitless range of executive initiative. Where the Constitution of the United States is concerned, the Framers of 1787 provided,

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32. Cm. 3818 (1997).
34. Youngstown Sheet and Tube Co. \(v.\) Sawyer, 343 U.S. 579 (1952).
in the words of Chief Justice Burger, "a vigorous legislative branch and a separate and wholly independent executive branch, with each branch responsible ultimately to the people."\textsuperscript{37} The Chief Justice added that, unlike "parliamentary systems such as that of Great Britain, no person who is an officer of the United States may serve as a Member of the Congress."\textsuperscript{38}

A British lawyer or political theorist might qualify this account of executive power by emphasizing that the government is constitutionally accountable to Parliament, and it is true that all ministers, including the Prime Minister (though one of Tony Blair's first actions was to limit his appearances in the Commons), must face questions and debates in one of the Houses. The Prime Minister's question time loosely resembles a presidential press conference. Ministerial responsibility, however, rarely imperils the government as a whole—save in circumstances where the government's majority in the House of Commons is small or virtually nonexistent. It is true that parliamentary questions to Ministers offer some democratic advantages—Justice Robert H. Jackson was an admirer of the system—but even here there is potential for manipulation through government control of information and through "friendly" questions from back-bench members of the majority party.

What, then, of the House of Lords? Does the second chamber offer something more reassuring, especially at a time when reform of the House of Lords enjoys political visibility unseen since 1911 when Churchill and Lloyd George took a lead in curbing its old-style powers, leaving it only with the authority to amend and delay legislation? The House of Lords stands in sharp contrast to the United States Senate, and its composition has consistently underscored the contrast. At the beginning of November 1999, the House of Lords consisted of 758 hereditary peers, 542 life peers, and 26 Archbishops and Bishops. The House of Lords Act of 1999, enacted last November, provided that no future member of the House of Lords be admitted by virtue of hereditary peerage, save that ninety of the members might be elected to continue. This measure was followed last January by the Report of the Royal Commission on the House of Lords\textsuperscript{39} which produced 132 recommendations designed to round off the wholesale changes under consideration. It will be some time before legislation follows, not least because the last thing the government and the House of Commons want is the establishment of a more

\textsuperscript{37} Id. at 722.
\textsuperscript{38} Id.
\textsuperscript{39} REPORT OF THE ROYAL COMMISSION ON THE HOUSE OF LORDS, Cm. 4534 (2000).
powerful legislative second chamber. Hence the Royal Commission itself accepts that the Commons should remain the principal political forum, even though the Lords would retain its suspensory veto. Other recommendations include the proposal that the reformed second chamber act as a “constitutional long-stop” to ensure that changes are not made to the Constitution without full and open debate and an awareness of the consequences, and that there should be an authoritative House Constitutional Committee. The Royal Commission envisages a House of some 550 members who are mainly appointed as life peers but with an express recognition that its composition include representatives from the various regions and nations in the United Kingdom—a far cry from the overtly federal composition of the U.S. Senate.

Given the breadth of the current program of constitutional change in the United Kingdom, it is perhaps surprising that the Royal Commission sees no reason why the second chamber should not continue to exercise the judicial functions of the House of Lords. In other words, the British supreme court should continue to consist of legislators. The Commission urged the Law Lords to prepare a statement for the future “of the principles which they intend to observe when participating in debates and votes in the second chamber and when considering their eligibility to sit on related cases.” Yet, a distinguished working group of Justice—the British branch of the International Commission of Jurists—had already recommended to the Royal Commission that both the Judicial Committee of the House of Lords and the Privy Council be replaced by a Supreme Court of Appeal, that serving Law Lords should no longer sit and vote in the House of Lords, that the Lord Chancellor should no longer sit as a judge during his term of office or be head of the judiciary, and (for good measure) that there should be an independent Commission to advise on judicial appointments. Given the pressures that will likely be felt by judges in the United Kingdom’s new constitutional scheme, and given the frequent judicial assertions of the importance of the separation of powers, the proposals of Justice must surely be correct. The readiness to accommodate the Law Lords, as demonstrated by the Royal Commission, is but one of many reasons why our legislative process serves as much as anything to confuse.

When we speak of the possibility of judicial review and of the demise of parliamentary sovereignty, we do so in a constitutional maze where the Prime Minister calls the tune in legislative matters, where the House of Commons

40. Id. at ¶ 9, 10.
41. See JUSTICE (British Section of the International Commission of Jurists (ICJ)), ANN. REP. (1999).
totally overshadows the House of Lords, and where the most senior judges (especially the Lord Chancellor) participate in legislative proceedings. Parliamentary sovereignty means, in essence, the supremacy of the executive under our government system, and the confusion of legislative and executive functions (especially when the senior judges are compromised) makes it all the more difficult for the courts to assert judicial review. Chief Justice Marshall, by contrast, could expound his ideas of judicial review on the basis of a brief, structured settlement based on the separation of powers, with the legislative and executive roles well-defined, albeit with exceptions. The ultimate claim of judicial review in the United Kingdom would require the formulation of a written constitution, which need not be identical to that of the United States but which should at least be open and clear. The existing Constitution is a moving target, and the courts are ill-equipped to fire at it.

At the same time, we must recognize how difficult it is to devise a written constitution, especially at a time when the United Kingdom's structure is dictated by variable concessions to the Celtic fringe while England, where most of the population live, has at best been allowed a weak gesture towards regional government. There may be quasi-federal elements in the country's structure, but we are far removed from the contentions of state sovereignty associated with, say, the Tenth Amendment, the Commerce Clause, or the manner in which Massachusetts seeks to express its disapproval of the government of Myanmar. Where human rights are raised, we must await the implementation of the Human Rights Act of 1998; but it may be here that the English courts, bolstered by reference to the jurisprudence of the European Court of Human Rights and doubtless by recourse to the jurisprudence of common law countries including the United States, will make their mark. There is always the danger of extravagant expectations, but at this stage the judiciary seems to be measured in its pronouncements. The experience of European Community law should discourage those who expect the walls of Jericho to come tumbling down as the trumpets sound.

Another recent Court of Appeal decision recalls the complexities of constitutional progress and, at the same time, underlines the cross-border, or globalizing, nature of much constitutional adjudication arising from the European connection. In 1998, a directive came from Europe requiring the banning of advertising and sponsorship of tobacco products. Legislation in each country was required by mid-2001, but the British government

42. R v. Secretary of State for Health, ex parte Imperial Tobacco Ltd., 1 All E.R. 572 (2000).
announced that it proposed immediately to implement the obligation through regulations made within the European Communities Act of 1972. Several tobacco companies sought judicial review—in terms of administrative law—both to challenge the validity of the directive, a matter which the judge referred to the European Court of Justice, and to seek an injunction to restrain the government from implementing the directive until the European Court had ruled. Mr. Justice Turner took into account several factors and concluded that an injunction was justified. By a majority, however, the Court of Appeal overruled his judgment. Lord Woolf M.R., for the majority, stated that the lower court had been sensitive to the "constitutional implications" of the case, that national courts may, in appropriate cases, grant interim relief against European community legislation that is allegedly void, that the courts nevertheless "must be circumspect about interfering with the legislative activities of the government," that it was not for the courts to second-guess the government’s decision on public health priorities, that it was difficult to inject primary legislation on tobacco advertising and sponsorship into its current legislative program, and that the impact of the regulations on freedom of expression was "of marginal relevance."43

The spirit of Lord Woolf’s judgment reflects, in a different constitutional context, the dissenting comment by Justice Brennan in National League of Cities v. Usery44 recalling Chief Justice Marshall’s postulate that “the Constitution contemplates that restraints upon [the] exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process.” In a concurring judgment in the Court of Appeal, Lord Justice Ward emphasized (though not “without anxiety and personal reservations") that “the factor which has to be given weight is the right of the government to make its political judgment.”45

Sir John Laws, the third member of the Court of Appeal, strongly dissented. He expressed a personal view that the directive was “plainly unlawful,” emphasizing that the European Union “possesses no general legal competence to legislate, however benignly, for the conduct of public or private affairs in the member states.”46 While he also did not wish to second-guess the government’s concern about tobacco advertising, he felt that primary legislation should have been sought. In supporting the decision below, Lord Justice Laws eloquently spoke of the rule of law, on one occasion speaking of

43. Id. at 588.
44. 426 U.S. 833, 857 (1976).
45. Imperial Tobacco Ltd., 1 All E.R. at 594.
46. Id. at 606.
“one of the regions in the case where the rule of law steps on very thin ice”
and on another asserting that it “is all too easy, but all too dangerous, to lose
the inconveniences of the rule of law in the thickets of a good cause.”
7 His arguments will doubtless be considered on appeal, for the House of Lords
gave leave to appeal on February 7, 2000.

That case, where the tobacco companies were once again at bay, perhaps
suggests that increasingly more constitutional controversy will cross borders.
In his concurring opinion in Equal Employment Opportunity Commission v.
Wyoming, 48 Justice Stevens said, with regard to the Commerce Clause, that the
“development of judicial doctrine has accommodated the transition from a
purely local, to a regional, and ultimately to a national economy. Today, of
course, our economy is merely a part of an international mechanism no single
nation could possibly regulate.”

More recently, such sentiments have been
echoed in response to the “rigid concept of state sovereignty” that Dean Aman
sees emerging from recent Supreme Court opinions on the Commerce Clause
and the Tenth Amendment. 50 He was referring 51 to such cases as Printz v.
personally respond to the globalization arguments advanced by Dean Aman
in a surprising way because of the very different constitutional demands on the
United Kingdom’s courts as global jurisprudence continues to evolve.
Adherence to parliamentary sovereignty, the rejection of judicial review and
federalism, the breaches of the separation of powers, and the absence of a
written constitution may well be less important, or at least be seen from a
different perspective, if we accept the development of a constitutional law that
transcends national boundaries. In their approach to legislation, the United
Kingdom’s courts and those of their European partners may have something
valuable to offer in the opening years of the new millennium.

47. Id. at 598, 606.
49. Id. at 247.
50. Alfred C. Aman, Jr., The Globalizing State: A Future-Oriented Perspective on the Public/Private
51. Id. at 856.