2002

The Republican Monarchy Revisited. Book Review Of: The English Constitution. by Walter Bagehot. Edited by Paul Smith

Adam Tomkins

THE REPUBLICAN MONARCHY REVISITED

THE ENGLISH CONSTITUTION. By Walter Bagehot.[1] Edited by Paul Smith.[2] Cambridge University Press. 2001. Pp. xxxii, 253. $21.00

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Of all the works of nineteenth-century British constitutional scholarship that have come down to us, two stand out. Among lawyers it is Dicey[4] that continues to be revered above all others. But among communities of political scientists and journalists it is Bagehot who has that honor.

The centenary of Bagehot's *English Constitution* was marked in 1967 with the publication of a new edition, edited by Richard Crossman. Crossman was a leading minister in the government of Harold Wilson, who was Prime Minister from 1964-1970 and again from 1974-1976. Crossman's famous introduction to his edition of Bagehot was a masterpiece of reading the political concerns and preoccupations of 1960s government into the work that Bagehot had written a century earlier, and as a result his introduction now looks very dated—indeed, it has withstood the test of time rather less impressively than have the far older words it introduced.[5] Now the brilliant Cambridge University Press series of *Texts in the History of Political Thought*[6] has added a new edition of Bagehot to its formidable list, this new edition edited and introduced by historian Paul Smith.[7] To have the new scholarly edition alongside Crossman's more familiar one is welcome. A professional and historical (as opposed to popular and political) appraisal of Bagehot has been long coming. It has been worth the wait.

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1. 1826-1877; English essayist, economist and journalist; editor of *The Economist*, 1860-1877.
2. Formerly Professor of History at the University of Southampton, England.
3. Fellow and Tutor in Law, St Catherine's College, University of Oxford.
4. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1885).
5. The Crossman edition was most recently republished in London, in 1993, by Fontana.
6. The series is edited by Raymond Geuss and Quentin Skinner, both of the University of Cambridge.
7. See note 2 above.

Smith has provided a reasonably short, but sharp, editorial introduction, which seeks to place Bagehot in historical context, and to explain what Bagehot aimed to achieve in writing *The English Constitution*. Whereas Crossman strained to insist that Bagehot could be read as an authority on the 1960s as much as he was on the 1860s, Smith is much more relaxed about letting Bagehot speak for himself, and about allowing readers to draw their own conclusions as to the relevance (or otherwise) of Bagehot's interpretations for today. Helpful yet unobtrusive, Smith's is an ideal introduction for those seeking to locate Bagehot in the context of his time or for those looking for an informed summary of his argument, motivation, and general purpose. In addition to his new introduction, Smith's edition appears with all the usual scholarly apparatus associated with the Cambridge series. He has included a list of the major personal and political events in Bagehot's lifetime; biographical notes of persons mentioned in the text; and a helpful if somewhat brief bibliographical note. Printed on high-quality paper, and priced reasonably, Smith's is surely set to be the principal edition of reference for the twenty-first century.

I. BAGEHOT AND CONSTITUTIONAL HISTORY

Bagehot matters, even now. His work is of great importance to contemporary constitutional scholarship, both in Britain and to some extent also in the United States. His analysis of monarchy as a form of government, and of the constitutional roles of Parliament, remain leading statements, which should be studied by all serious students of comparative constitutional law. Comparative analysis has come relatively late to constitutional law, and one central element of good comparative scholarship that is still too frequently overlooked in the constitutional sphere is that of the history and development of political ideas. Constitutions are not drawn up out of the ether, and neither are they based on universal principles of justice. Rather, they are the products of the specific political climates in which they were forged. It is all too easy to forget that such climates change—it is in the nature of constitutions that they are so general in character that they are able to transcend the particular politics of the moment and appeal afresh to each new political generation. This is true at least of successful constitutions. There are more brittle constitutions, that simply snap when the political wind changes, but they necessarily last only a short time, as France among others would surely testify. However, notwithstanding their political transcen-

dentalism, all constitutions are constructs based on particular choices, priorities, and compromises, and all are informed by the mood—or political philosophy—prevalent at the time of their construction.

Part of Bagehot's modern value, part of the reason why he continues to matter, is that he reminds us of the political mood at a time that was critical to the formation of the British constitutional order—the mid-nineteenth century. It was Bagehot's self-appointed and self-conscious task to paint a thumbnail sketch of the dominant political values of British constitutional life in the 1860s. Nearly a century and a half on, it is perhaps easier for lawyers to recall the raw events of Bagehot's time than it is for us to evoke the perceptions of those events that were current at the time, yet it is the elusive perceptions as much as it is the events themselves that go to forge constitutional identities. Reading Bagehot brings back to life not only the events of his time, but also the context in which those events were then understood and given meaning. As we comprehend better the constitution of yesteryear, so in turn are we able to see more clearly just where it is that we have now got to.

Taking constitutional history seriously—and by constitutional history I mean not only the history of constitutional law, but also the historical development of the political ideas on which constitutional law is based—is perhaps nowhere more important for constitutional lawyers than in Britain. The history of British constitutional law is, as is well known, peculiar. Its peculiarity lies in the fact that no one historical moment trumps any other in offering authoritative constitutional meaning. Most of the world's constitutional orders now contain formal written documents that enjoy a privileged position above all other sources in determining what the constitution is. The United States Constitution is, of course, a paradigmatic example. Written constitutional texts such as that of the United States are visible (and legally enforceable) manifestations of the fact that in the political history of the nation, one historical moment—or series of historical moments[8]—was more important than all others in the formation of that nation's political and constitutional identity. Such nations have not experienced smooth, even constitutional development: rather, their history has been marked by

8. In the context of the United States it could be argued that it is not only the founding which is of unusual constitutional consequence, but also reconstruction: see, e.g., Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale U. Press, 1998).

revolution, civil war, and perhaps invasion or other military defeat. Written constitutions are never drawn up in moments of political tranquility or prolonged stability—think not only of the United States, but more recently of post-war Germany, of post-apartheid South Africa, or of post-communist Russia. For nations such as these, it is clear, indeed banal, that some periods of history are more critical to state-building and to the forging of new constitutional identities than others. One might expect therefore, constitutional scholars to focus on some periods more than on others.

Britain's constitutional order, however, owes its authority not to any one moment, or even series of moments, but to the much more amorphous accumulation of time. This is not because the British political experience has been smooth: after all there was military defeat at the hands of both the Romans (55BC) and the Normans (1066), there was civil war in the 1640s, and there was revolution in the 1680s. Rather, the unusual nature of the unwritten or uncodified British constitution is due to the timing of these events: they all occurred too early. Written constitutions are neither natural nor inevitable. They are convenient inventions of the political Enlightenment of the eighteenth century. Had Britain experienced invasion, civil war, or revolution during or since the eighteenth century, it is highly likely that its constitution would now look much more like the American, the French, or the German constitutions. In the period since the invention of the modern written constitution, Britain's political experience has been rough, but never so rough as to merit a fresh start. Never since 1689 has there been a moment so potent as to be able unambiguously to tower over all subsequent moments. England's union with Scotland (in 1707) to form Britain; Britain's union with Ireland (in 1800) to form the United Kingdom; and the United Kingdom's belated accession to the European Economic Community (in 1973) each might have constituted such moments had political hands been played differently. But while all of these events have led to constitutional changes, none of them led to such wholesale reform as would require a new constitutional code.

Instead of enjoying particular moments of constitutional formation, Britain's ancient constitutional order has simply emerged out of over eight centuries of almost entirely unbroken government. Each new development is woven into the rich fabric of the constitution, usually apparently seamlessly, but on occasion with rough edges on which later problems can find them-

selves snagged. Sometimes the fabric tears and is repaired, but in over eight hundred years it has been discarded only once, and even then only temporarily.[9] Thus, contemporary constitutional law includes authoritative and binding sources from Magna Carta (1215) to the Representation of the People Act (1983) via the Bill of Rights (1689) and the Act of Settlement (1701).

This creates something of a problem for the British constitutional law scholar who is serious about seeking to understand the historical development of her subject. How can one learn and remember eight centuries of history? It is simply too much—the fabric is so rich it suffocates. Thus, while nowhere is it more pressing to be aware of the historical dimension of the subject, nowhere is it more impossible. To cope, we make things up. We make believe that, for all the historical continuity we know to be such a feature of the British constitution, some periods can be seen as more pressing than others. For the past one hundred years and more, a common perception among British constitutional scholars has been that it was the period during which and about which Bagehot wrote that is one of the most pressing of all. In this respect constitutional scholarship echoes a theme found throughout twentieth century British studies: namely, the privileging of the years 1865-1895 as if the last third of the nineteenth century constituted the founding the modern British state, of its manners, mores, and methods.[10]

Even if this is an unjustified perception—even if on a proper analysis the mid-nineteenth century turned out not to have been so central to the British constitutional story—it would remain an important perception. Even if people are wrong to believe what they believe, their very believing it gives it weight. It does not make it right, of course, but it does make it important. And the fact that throughout the twentieth century it was orthodox to believe that the mid-nineteenth century was a formative moment makes it imperative that we understand what Bagehot's period represented—even if what it represented was more mythical than real.[11]

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9. I am referring to the interregnum, or commonwealth: that is, to the Cromwellian period that separated the execution of King Charles I in 1649 from the coronation of King Charles II in 1660. The latter event is known as the "Restoration," and for good reason.

10. For an authoritative excavation and interrogation of this theme, see E. Hobsbawm and T. Ranger, eds., *The Invention of Tradition* (Cambridge U. Press, 1983).

11. For an account of the British constitutional order that locates the mid-seventeenth century, rather than the mid-nineteenth century, at its center, see Adam Tomkins, *Public Law* chs. 1-2 (Oxford U. Press, 2003).

II. DICEY, BAGEHOT, LAW, AND CONVENTION

Dicey and Bagehot complement each other. They do not repeat one another, but neither do they contradict each other. Dicey was a lawyer—he was Vinerian Professor of English Law at All Souls College in Oxford. Bagehot on the other hand was a political journalist—he spent much of his career at the *Economist*. Dicey taught us two lessons. The first was that the constitutional order was made up of two components, which he labeled the legal and the conventional; and the second was that the law of the constitution contained within it two ground-rules, which he labeled the "sovereignty of Parliament" and the "rule of law".[12] It is worth taking a little care to outline what Dicey meant by these terms before we turn to the substance of Bagehot's account.

The first stage of Dicey's argument was to identify that in the British constitutional order there were two sources of constitutional authority: constitutional *law* and constitutional *convention*. To this day, this remains the first lesson we teach our constitutional law students, and we owe it to Dicey. The importance of the lesson, for Dicey's generation as well as for ours, is that it instructs us that if we aim to understand the constitution, we are going to have to look beyond the court-room. If we confine our attention to the constitution in the courts, there will be much that we will miss. For sure the courts play their role, but their role is but one among many roles that we will need to investigate. With Dicey we may argue that there are two ways in Britain in which something may be unconstitutional: it may be unconstitutional because it is illegal, because it violates some rule of constitutional law; or it may be unconstitutional because it is unconventional, because it breaches some norm of constitutional propriety. Constitutional laws are distinguished from constitutional conventions by virtue of the fact that the former are enforceable in courts whereas the latter are not. This is not to say that constitutional conventions are unenforceable, but that their enforcers are constitutional actors other than judges.[13]

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12. See Dicey, *Introduction to the Study of the Law of the Constitution* at xii-xv (cited in note 4).

13. Most constitutional conventions are enforced by Parliament. It is, for example, a constitutional convention that all Ministers are accountable to Parliament (this is the constitutional rule that explains Prime Minister's Question Time, among other things). If a Minister fails to account to Parliament for the actions, decisions, and policies of his department, he will be required by Parliament to resign from office. This is a rule that cannot be judicially enforced, but is nonetheless constitutionally enforced—enforced by Parliament.

It would be difficult to exaggerate the importance to the British constitution of conventions. Conventions are not add-ons, appended as an afterthought to the legal bulk of the constitution. If anything, the reverse would be more accurate: the law has come relatively late to British constitutionalism. The core of the British constitution is not legal, but political—or, in Diceyan terms, conventional. The existence of the Prime Minister, for example, is a creature of convention, not of law. There is no law that provides for the office of Prime Minister. Thus, it would not be unlawful for there to be no Prime Minister, although it would be both unconventional and unconstitutional. Neither is there any law that answers the question of who should be the Prime Minister. The office is in the gift of the Queen, although constitutional convention now requires that the Queen must offer the position to the person who is the leader of the political party that after a general election commands an overall majority of seats in the House of Commons. Thus, it would not be unlawful for the Queen to appoint me as her Prime Minister, although it would be both unconventional and unconstitutional (unless of course I happened to be the leader of the political party with an overall majority of seats in the Commons).

What is perhaps unusual about this situation is not that the law of the constitution does not provide for the Prime Minister, but that despite this legal silence, British constitutionalists would nonetheless argue that it would be unconstitutional for there to be no Prime Minister. Compare for example the way in which the United States Constitution regulates the executive branch. While the President is catered for by Article II of the Constitution, there is no mention of either his Cabinet or of his thousands of civil servants, aides and advisors. In the United States, it would not be contrary to constitutional law for the President to fail to appoint a Cabinet. It would be unusual, but it would not be unconstitutional in the same sense as the Queen's failure to appoint a Prime Minister would be unconstitutional. The United States Constitution shares with the British a number of gaps, omissions, or silences—thus it is not the omission of the Prime Minister and his Cabinet from the law of the constitution that is particularly odd. What is remarkable is the way in which the British have plugged the gaps of their constitutional law with binding non-legal rules of constitutional behavior—that is to say, with constitutional conventions. Conventions are prescriptive, not descriptive. They are binding rules that lay down what ought to happen: they are not merely descriptive of what does happen.

The existence of the Prime Minister is but one example of constitutional convention. There are many others. A good number of them relate to the powers of the Queen. It is a popular misconception of the British constitution that the Queen is a mere figurehead, a ceremonial head of state with little real power. Such a portrayal may be popular, but it is seriously misguided. The undemocratic truth is that the Queen remains a person of extraordinary legal power. In law, she may appoint whomsoever she wishes to be her Prime Minister. She may dismiss the Prime Minister from office at any time, for any reason, or for none. There is no remedy in judicial review to act as a check on the exercise of these powers. Parliament still meets at the behest of the Queen. There is an Act of Parliament (that is to say a statute) which provides that the Queen must call a Parliament at least every third year,[14] but the calling and dissolution of Parliament remains a matter of royal prerogative, and again these are prerogative powers the exercise of which are beyond the reach of modern judicial review law. In law the Queen may refuse her assent to any Bill passed by the Houses of Parliament, giving her a unique veto over all legislation. Once again, no court would entertain an application for judicial review of the exercise of this power. These examples serve to demonstrate the extraordinary legal powers of the Queen.

But to outline only the law of the constitution is to see less than half the picture. For in all of these areas conventions operate so as significantly to limit the availability of these legal powers. We have already seen that convention provides that the Queen will appoint as her Prime Minister only the person who is the leader of the political party with an overall majority of seats in the House of Commons. Convention further provides that the Queen will dissolve Parliament only on the advice of her Prime Minister, and that she will not exercise her power to veto legislation. At least, convention would *appear* so to provide. No-one can be sure, however. The uncertainty arises directly out of the nature of conventions. Conventions are habits, or traditions. If something is repeatedly done, and there is a good constitutional reason for its being done, it can over time be said to be a constitutional convention. There is no authoritative list of conventions, and neither is there a sure-fire test that can be adopted to identify whether a habit is a mere political custom or a binding constitutional convention.

14. Meeting of Parliament Act 1694.

The conventions mentioned in the previous paragraph, however, are all uncontroversial. All British constitutional commentators would accept that they are constitutional conventions. But even in these uncontroversial instances, difficulty lurks. Conventions are based on habits, or traditions. This makes them a useful tool to analyze the propriety of normal behavior, and also of behavior that is clearly abnormal. If for example the Queen were to appoint me as Prime Minister, or were to dissolve Parliament tomorrow without Tony Blair having requested her to do so, we would have no difficulty in describing the Queen's behavior as unconventional (and therefore as unconstitutional). But what if the situation is neither clearly normal nor clearly abnormal? In these circumstances, conventions can relatively easily break down and lose their normative force. Consider for example the rule that the Queen must appoint as her Prime Minister the person who is the leader of the political party with an overall majority of seats in the House of Commons. What if there is no such person, or no such party? The former situation might occur if a party leader dies or resigns and there is no obvious successor: whom should the Queen appoint as her Prime Minister then? The latter situation might occur if after a general election a hung Parliament is returned: that is to say, a House of Commons in which no one party enjoys an overall majority.

These are not unrealistic hypotheticals. Both of these situations have occurred during the present Queen's reign: the former in 1957 and again in 1963, and the latter in 1974.[15] The point here is that in these out of the ordinary situations conventions are useless. Being based as they are on things which routinely happen, when the routine is interrupted, there is no rule to instruct the constitutional actor how to behave. In instances concerning the appointment of the Prime Minister, once convention disappears all the Queen has is the law, and all the law provides is that as Queen she may appoint whomsoever she wishes to be her Prime Minister. This is why her power remains vast: conventions will act as effective constraints on the exercise of the Queen's constitutional powers only when normal constitutional circumstances prevail, and not when the unusual occurs—as, in politics, it inevitably will, from time to time.[16]

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15. For a full discussion of these events, see Tomkins, *Public Law* ch. 3 (cited in note 11).

16. Another constitutional convention insists that the Queen acts only, and always, on Prime Ministerial advice. What if a Prime Minister advised the Queen to refuse her assent to a Bill that had been passed by both Houses of Parliament: would she be acting

In the century that has passed since Dicey published *The Law of the Constitution* lawyers have expended a great deal more energy on the second stage of Dicey's argument than they have on the first. It will be recalled that Dicey's second argument was that, having distinguished the legal from the conventional, he then proceeded to identify what he considered to be the two cardinal rules of the law of the constitution. The "sovereignty of Parliament" was the rule that governed the relationship between the courts and the legislature, and the "rule of law" was the rule that governed the relationship between the courts and the executive. Dicey argued that the sovereignty of Parliament meant that Parliament could make or unmake any law whatsoever, and that nobody (the courts included) could override or set aside an Act of Parliament. The practical operation of the sovereignty of Parliament has now been significantly altered by Britain's membership of the European Union, and also by the incorporation in 1998 of a domestic Bill of Rights, and there has been an inordinate amount of scholarly ink spilt on attempting to reconcile these developments with Dicey's legal arguments. The rule of law has been likewise affected by the late-twentieth century development of British administrative law and its central component, judicial review.[17]

Re-reading Bagehot now, it is something of a puzzle that lawyers have focused so much on the second part of Dicey's argument, and so little on the first. For it is the law/convention distinction, rather than the detailed contents and operation of the principles of parliamentary sovereignty and the rule of law, that speaks so forcefully to the peculiar identity of British constitutional practice. And it is very much on this aspect of constitutionalism, and not on the law, on which Bagehot focused in *The English Constitution*. Indeed, there is no mention either of the sovereignty of Parliament or of the rule of law in Bagehot's text. Having made his all-important law/convention distinction, Dicey left the conventions of the constitution relatively untouched, and concentrated only on the law. Bagehot, by contrast, barely mentions the law at all. There is no consideration in his work of the constitutional roles to be played by courts or by judges acting extra-curially. Rather, Bagehot's enterprise was to seek an understanding of how an essentially monarchic and aristocratic constitution could be made to work in an age where both monarchy

unconstitutionally to accept the advice, or unconstitutionally not to accept the advice?

17. For an account of these developments, see A. Bradley and K. Ewing, *Constitutional and Administrative Law* chs. 4, 6 & 8 (Longman, 13th ed, 2003).

and aristocracy were losing their allure. At the opening of the twenty-first century, it is clear that of the two Bagehot should be the more important writer not only to political scientists and to journalists, but also to lawyers. The reasons why this is so are set out in the following two sections.

III. BAGEHOT'S ARGUMENT

Bagehot's purpose was to set out and to celebrate the various institutions of English[18] government as they were at the time he wrote: that is to say, in 1865-1867. His readership was English, and his celebration was designed to persuade his domestic audience of the superiority of what they had over the claims of alternative forms of government. His principal point of comparative reference was the United States (this contrasts with Dicey's principal point of comparative reference, which was France). Bagehot's argument was less that the English system of government was universally superior over the American, and more to the effect that it simply suited the English better. For a book that hails from a grand imperial time, there is surprisingly little colonial ambition to the work.

Bagehot's account commences with the Cabinet, and then proceeds to discuss the Monarchy, the two Houses of Parliament, and the constitution's "supposed" (p. 149) checks and balances, before concluding with a brief consideration of some aspects of constitutional history. Each of Bagehot's chapters contains profound insight, as revealing of the constitution as it stood in 1865 as it is provocative in evaluating its subsequent development 140 years on. His most famous idea is contained in the opening chapter, on the Cabinet. In this chapter Bagehot introduces a framework of analysis which he employs throughout the book, namely his distinction between the "dignified" and the "efficient" (p. 5). In Bagehot's view, all constitutions that, like the English, grow over many centuries contain dignified parts and efficient parts. The former are "those parts which excite and preserve the reverence of the population" whereas the latter are "those by which [the constitution] in fact works and rules" (p. 5). For Bagehot this distinction was more than a mere rhetorical device, handsome for the writer, but operating at some remove

18. Like many Englishmen, Bagehot used the terms "English" and "British" interchangeably. Nothing infuriates the Scots and the Welsh more, and it has now become the (somewhat tedious) fashion to append the expression "(*sic*)" to the title of Bagehot's book whenever it is cited.

from actual practice. Rather, it went to the very core of the subject, not only on paper, but equally in fact.

Bagehot saw, of course, as all good constitutional commentators must, that constitutions are about power. For Bagehot, however, constitutions (or at least successful constitutions) must both gain power, and must then use it. The dignified is that which performs the former task, by winning "the loyalty and confidence of mankind", and the efficient is that which performs the latter, by employing this "homage in the work of government" (p. 5). Thus, "the dignified parts of government are those which bring it force—which attract its motive power. The efficient parts only employ that power" (p. 5). Applying this distinction to the English constitution, Bagehot saw the Monarchy as constituting the dignified element, and the House of Commons as constituting the efficient. In his own words:

> ". . . the characteristic merit of the English constitution is that its dignified parts are . . . very old and venerable; while its efficient part . . . is decidedly simple and rather modern. We have made, or, rather, stumbled on, a constitution which . . . has two capital merits: it contains a simple efficient part which, on occasion, and when wanted, *can* work more simply and easily, and better than any instrument of government that has yet been tried; and it contains likewise historical, complex, august, theatrical parts, which it has inherited from a long past, which *take* the multitude, which guide by an insensible but an omnipotent influence the associations of its subjects." (p. 8).[19]

There is considerable analytic force in Bagehot's schema here. We saw in the previous section of this review that in the contemporary English constitutional order there is frequently some distance between that which the law provides and that which is constitutional. Thus, to repeat an example discussed above, the law provides that the Queen may appoint whomsoever she wishes to be her Prime Minister, but it would be contrary to constitutional convention for the Queen not to appoint as her Prime Minister the leader of the political party that has an overall majority of seats in the House of Commons. It is just this distance between the formal and the actual that Bagehot is seeking to capture in his distinction between the dignified and the efficient. This distinction overlaps with Dicey's division of law from convention. It is the law that feeds the dignity of the consti-

19. Emphasis in the original.

tution, but convention which allows for efficient government under the cloak of the law.

This is perhaps clearest in the context of the powers of the Crown. Even today the law vests ultimate executive authority in the Crown. In reality however it is the Queen's Ministers, not the Queen herself, who exercise the bulk of that power, even if the law continues to imagine that such Ministers are merely the vehicles of royal will. There are some powers that only the Queen may exercise (appointing the Prime Minister, dissolving Parliament, granting royal assent to legislation, etc), but even most of these are exercised only on Prime Ministerial advice. All remaining prerogative powers—that is, all powers emanating from the Crown rather than from statute—are exercised by Ministers. These include: signing treaties, declaring war, defending the realm, employing civil servants, and issuing passports, as well as many others. All of these activities would in former times have been exercised by the Monarch him- or herself. Over the course of the eighteenth and nineteenth centuries, however, the practical exercise of these powers was gradually handed over to senior Ministers. This process of royal withdrawal from front-line policy-making was already well underway mid-way through the reign of Queen Victoria (1837-1901) when Bagehot was writing. Yet while the personnel of government transformed from royal courtiers to career politicians, and while the locus of power moved from the royal palaces of Whitehall and Windsor to the Parliament at Westminster, the formal constitution altered not one jot. The law and the dignity of the constitution continued to imagine that British government remained the Crown's government long after such a picture had become utter pretence. It was exactly this covert transformation that Bagehot sought to capture and to celebrate in *The English Constitution*.

There was one concept, and one institution, that Bagehot saw as being central to this covert transformation. The institution was the Cabinet. But underpinning the Cabinet was the idea that Bagehot considered to be the real key. This he famously described as the "efficient secret of the English Constitution" (p. 8). Bagehot's "efficient secret" consisted of an outright repudiation of one of the notions of constitutional government that is most sacred to Americans: namely, the separation of powers. Bagehot knew that the constitutional orthodoxy in Enlightenment thinking, brought into focus in the constitutions of both the United States and of France, was that legislative and executive power should be kept apart. Just as the functions of legislating

and of executing the laws should be kept separate, so too should the personnel responsible for legislating and for executing the laws be separate groups of people.

Bagehot suggested that what enabled efficient government under England's dignified constitution was "the close union, the nearly complete fusion of the executive and legislative powers" (pp. 8-9). He identified the Cabinet as the institution in which this central idea was given form. Bagehot wrote that the Cabinet was "a committee of the legislative body selected to be the executive body" (p. 9). This is a rather curious definition. The Cabinet is composed of the most senior Ministers in the government. It is chaired by the Prime Minister, who decides who sits in his Cabinet, and who has which job within it. There may be many political constraints on whom the Prime Minister may select to sit in his Cabinet. The Prime Minister may himself be unpopular within his own party, or he may be relatively inexperienced, and he may feel that he needs a certain very popular, or experienced, colleague to play a prominent role in the government even though the two figures disagree over policy or clash personally. Alternatively, the Prime Minister may enjoy only a small majority in the House of Commons and may feel that his government will be more secure if his Cabinet represents as broad a coalition of interests as possible, incorporating hawks and doves, or hard-liners and moderates, and so forth.

Aside from these ordinary political constraints that some (especially the weaker) Prime Ministers may feel, there is but one constitutional constraint on whom he may call on to serve in his Cabinet. This is the rule—it is a convention, not a rule of law—that all members of the Cabinet must be either members of the House of Commons or of the House of Lords. Indeed, this rule applies not only to Cabinet Ministers, but also to junior Ministers who are in government but not in the Cabinet. Every Minister in every administration must be a member of one of the two Houses of Parliament. This is what Bagehot was referring to when he talked of the "nearly complete fusion" of executive and legislative. In terms of personnel there is no separation between the two. This remains as true now as it was in Bagehot's time. We shall return to this issue in the final section of this review, below, when we will address the question of why it is that all Ministers must simultaneously be members of Parliament. There is a sound constitutional reason for the rule, as we shall see.

After discussing the Cabinet, Bagehot then proceeds to consider both the dignified parts (the Monarchy) and the efficient

parts (Parliament) in more detail. His discussions of both remain acute and valuable. On the Monarchy Bagehot offers first a defense of Monarchic forms of government, and then moves on to analyze the roles that the Monarch plays in English government. His defense of Monarchy is unexceptional, not especially persuasive, and is now somewhat outmoded. His essential argument is that Monarchy should be preferred over other forms of government because it provides the strongest government. He offers three reasons for this view: first that it is "intelligible" government—the "mass of mankind understand it, and they hardly anywhere in the world understand any other" (p. 34). The second is that "English monarchy strengthens our government with the strength of religion" (p. 37). Since the reign of Henry VIII (1509-1547) the Monarch has been head of the Church of England as well as Head of State. Thirdly, "the Queen is head of our society" (p. 41) meaning that it is she, rather than the Prime Minister and his wife, who receives foreign dignitaries and who gives the most prestigious parties, the Queen being able to undertake these responsibilities with considerably more style than a professional politician, or so Bagehot evidently thought.

None of these arguments has stood the test of time. As to the first Monarchy is now less well understood than presidential government—there is considerable popular confusion in today's Britain about exactly what the legal role of the Monarch and her family is. As to the second, religion and government have grown steadily more distant from one another (at least in the West) over the course of the twentieth century, even in Britain. As to the last, this has simply been overtaken by events, with the Prime Minister rather than the Monarch now taking as much of a lead in foreign affairs as he does in domestic politics. Even if it remains true that for the small British Establishment, royal events are still the apogee of the social calendar, such events revolve around horse-racing and garden parties, and have no constitutional relevance. The consequence of this is stark: Bagehot offers nothing that can be adopted by today's Monarchists in defense of Monarchy as a form of contemporary government. Even if his arguments were meaningful in the 1860s—and even this point is at best arguable—they withstand no scrutiny now. This is not a criticism of Bagehot: it was not his purpose to articulate a defense of Monarchy that would continue to apply more than a century after his death.[20] But it is interesting to observe that

20. Bagehot died in 1877, aged 51.

whatever the defense of Monarchy would be today, its terms would have to be substantially different from those of its defense of the mid-nineteenth century. For an institution that above all privileges continuity over change—surely the very essence of heredity is continuity—this is an intriguing observation.

Having defended Monarchy, Bagehot then discusses the roles of the Monarch in English government. Here, in two respects, his analysis is more valuable today than is his defense. If the best known line from his chapter on the Cabinet is the one about the fusion of powers being the "efficient secret" of the constitution, the best known line from his chapter on Monarchy is that the Monarch has three rights: "the right to be consulted, the right to encourage, and the right to warn" (p. 60). This little mantra is frequently incanted by today's students of constitutional law and British politics. It has become a token line of text in the unwritten constitution. This is surprising, since it tells us relatively little. Who is it that the Monarch has the right to be consulted by, to encourage, and to warn? What is it that the Monarch has the right to be consulted, and to warn, about? Once the consultation is received and the encouragement and warnings given, what consequences follow? The answer to the first of these questions must be that it is the Prime Minister. When both the Queen and the Prime Minister are in London, they meet each week for a short conference in Buckingham Palace. The meetings are shrouded in absolute secrecy: what is discussed is strictly confidential between the two. No advisers are present (or so we are led to believe). This is presumably where consultation, encouragement, and warnings are given and taken. Is this, in Bagehot's terms, a dignified diversion from, or an efficient means of, the business of government? Only a handful of people know, and none of them will say. Neither the content nor the consequences of the Queen's regular audiences with her Prime Ministers are permitted to leak into the public realm.

A less well-known, but much more important, line from Bagehot's chapter on the Monarchy is his comment that "a republic has insinuated itself beneath the folds of a monarchy" (p. 44).[21] This is the greatest single insight contained in the entire work, and the final section of this review is dedicated to exploring its many meanings.

21. The sentiment is repeated in Bagehot's final chapter, on constitutional history, in which he writes that "the appendages of a monarchy have been converted into the essence of a republic" (p. 179).

Before we come to that, however, we should pause to add a word on Bagehot's analysis of Parliament. Bagehot starts with the House of Lords. The Lords he places mainly on the dignified, rather than on the efficient, side of the constitution. In this, he was half a century before his time. Bagehot argued that the locus of parliamentary power was the House of Commons, and that the Lords had but two powers: a power to delay legislation, and a power to revise it (p. 78). This was very much how the House of Commons liked to view the House of Lords, but the House of Lords itself was not prepared to come to this view until well into the twentieth century, preferring until then to present itself as if it were at least equal, if not superior, to the Commons. The incompatibility of these views came to its inevitable head in 1909, when the House of Lords vetoed the budget proposals of the Liberal government after they had sailed through the House of Commons. The impasse that ensued was the nearest the British have come to a full scale constitutional crisis since 1689. It contributed to the premature death of one King (Edward VII), embroiled his inexperienced successor (George V) in deep political controversy, necessitated two general elections in quick succession, and culminated in the most significant constitutional reform of the twentieth century, the Parliament Act 1911. This Act formally reduced the powers of the House of Lords to those that Bagehot had ascribed to it fifty years earlier (delay and revision—scrapping the Lords' veto) and in effect ratifying the legislative superiority of the Commons.[22]

Whereas prescience was the hallmark of Bagehot's analysis of the House of Lords, his discussion of the House of Commons was characterized principally by his rare understanding of the multiplicity of roles that the Commons plays. Bagehot appreciated that the Commons was a complex institution that defied easy pigeon-holing. The subtlety and deftness of touch with which Bagehot portrayed the House of Commons stands in stark contrast to the rather simplistic accounts of Parliament that can be found in so much of the constitutional literature of the twentieth century. For most of the past one hundred years Parliament in general and the House of Commons in particular have been portrayed as being mainly a legislature, as being the institution in which national law-making takes place. There is the occasional reference to the notion that Parliament is in addition a

22. For a wonderfully entertaining account of this story, see G. Dangerfield, *The Strange Death of Liberal England* (Stanford U. Press, 1935).

scrutineer, and that the government of the day is accountable to Parliament (and principally to the House of Commons), but on the whole the focus of the treatment that Parliament is given in the standard literature is on Parliament and the House of Commons as a legislature.[23]

Bagehot argued that the House of Commons had five separate functions. Its first and "main" (p. 94) function was to be the "electoral chamber . . . the assembly which chooses our president" (p. 94). Whereas in the United States the electoral college is a temporary being that has no continuing powers or responsibilities once the President is elected, the House of Commons acts as a permanent electoral college, to which the government of the day is permanently accountable, and which may at any time dismiss the government from office. To consider this to be the most important power of the House of Commons may seem odd in an era in which we have become accustomed to seeing the Commons mainly as a legislature, but Bagehot is surely right in his analysis. To say this is neither to underestimate nor to undermine the significance of law-making, but it is to recognize that law is less made *by* Parliament, and more made *through* Parliament. It is, on the whole, the government's law that is made. Parliament is merely the vehicle through which it is made. The right of legislative initiative vests in the government of the day, and while it remains possible for backbench, non-government MPs to promote legislative initiatives, the reality is that the vast bulk of the legislation that Parliament passes is made at the instigation of the government, and not of individual backbenchers. This is even more uniformly the case now than it was in Bagehot's time. And in this sense, again, there is a remarkable prescience about Bagehot's understanding of Parliament.

In addition to this main function of the House of Commons, Bagehot listed four further functions for the Commons. The first of these was its "expressive function" (p. 95), that is to say, its task of expressing the mind of the English people. Secondly, there was its "teaching function" (p. 96)—its task of teaching the nation what it does not know. Thirdly there was its "informing function" (p. 96). In former times, Bagehot observed, "one office of the House of Commons was to inform the sovereign what was wrong. It laid before the Crown the grievances and complaints of

23. See for example E. Barendt, *An Introduction to Constitutional Law* (Oxford U. Press, 1998), and I. Loveland, *Constitutional Law: A Critical Introduction* (Butterworths, 2nd ed, 2000); cf. C. Turpin, *British Government and the Constitution: Text, Cases, and Materials* (Butterworths, 5th ed, 2002).

particular interests. Since the publication of the parliamentary debates a corresponding office of Parliament is to lay these same grievances, these same complaints, before the nation, which is the present sovereign. The nation needs it quite as much as the king ever needed it" (p. 96). The last function was that of "legislation" (p. 97). Bagehot noted that "some persons will perhaps think that I ought to enumerate a [further] function of the House of Commons—a financial function" (p. 97). But Bagehot rejected this as a separate function, and instead considered it to be an aspect of the legislative function. In this he was perhaps, for once, mistaken. The House of Commons does possess powers of peculiar importance in terms of scrutiny of the government's revenue and expenditure, recognized in Bagehot's era by Gladstone, who as Chancellor of the Exchequer established in 1866 the office of Comptroller and Auditor General, an Officer of the House of Commons, whose task it was—and indeed to this day remains—to assist the Commons in its tasks of financial scrutiny.[24]

There is of course a good deal more that could be written about Bagehot's argument in *The English Constitution*, but what has been noted here should be sufficient to give a flavor of his core concerns, at least as far as they relate to the central institutions of English government: Monarchy and Parliament. What remains is to consider how Bagehot conceptualized the relationship between Monarchy and Parliament, using his framework distinction between the dignified and the efficient. This is the topic that is discussed in the final section of this review.

IV. THE REPUBLICAN MONARCHY

Bagehot knew that the constitution vested supreme authority in the Crown: the Queen was both head of state and head of the church; justice was done in her name; and it was she who appointed Prime Ministers and dissolved Parliaments. Yet he also knew that the locus of political power was the House of Commons, not Windsor Castle: no government could survive in office without the support of the House of Commons, and the second that such support was withdrawn was the second that the government would fall. In Bagehot's era such power of the House of Commons was not merely latent, but active: as Smith reminds us

24. The Comptroller and Auditor General is now the head of the National Audit Office, which was established, and is governed, by the National Audit Act 1983.

in his introduction, between 1852 and 1866 the House of Commons brought down no fewer than six administrations (p. xviii). It was one of Bagehot's main purposes to seek to explain this apparent paradox. How could both the Crown and the House of Commons simultaneously be top constitutional dog? As we have seen, his neat explanatory device was to divide the constitution into two—the dignified and the efficient—and to explain that while the Crown ruled over the former, the House of Commons governed the latter. In order to understand the British constitution, you need to know both its dignified and its efficient elements. Without the dignified you would not be able to see, for example, where either the government of the day, or the courts, obtain the bulk of their constitutional authority from. But without seeing also the efficient you would think that neither the government of the day nor the courts were subject to a great degree of constitutional accountability.

The British constitution is in this sense characterized by something of a duopoly, not just between the concepts of the dignified and the efficient, but also and more importantly between the institutions that generate and give authority to the dignified and the efficient: that is to say, between the Crown and the House of Commons. To understand why this is so we have to return to the point about constitutional history that we started with.

Britain's constitutional history is long and virtually unbroken. Practically the whole of its history over the past eight centuries (since Magna Carta) has been taken up with the same question: namely, how to subject the Crown's government to constitutional account? For a few years in the seventeenth century the question seemed to have changed (to "how can the Crown's government be replaced?") but the experiment with republican forms was short-lived, brutal, unpopular, and seemingly unsuccessful. With the single exception of the mid-seventeenth century hiatus, the principal constitutional concern has been not how to remove the Crown or what to replace it with, but on the contrary how to keep it, yet at the same time how to limit it, how to control it, and how to locate it within a modern constitutional setting. Just as there has been remarkable continuity in the principal constitutional question ("how to subject the Crown's government to account?"), so too has there been remarkable continuity in the understanding of who it is that should perform this constitutional task—of who it is that should answer the constitutional question.

It has never been assumed that the courts could perform this role. With the judicial oath of allegiance being sworn to the Queen, the courts being housed in the *Royal* Courts of Justice (the name is no mere coincidence), and the very constitutional authority of the courts being derived directly from the Crown, the courts have never been well-placed to impose limits on the exercise of the Crown's power. While it is true that in very recent times (since the mid-1960s) the courts have made some effort at reform in this regard,[25] the law reports remain littered with precedents ancient and modern that show extraordinary judicial deference to the Crown.[26] It was no doubt for reasons such as these that Bagehot ignored the courts in *The English Constitution.*

Instead of placing its faith in the courts, the British constitution has always seen Parliament as the institution with lead responsibility in the task of holding the Crown to account. Indeed, Parliament as an institution emerged out of the perceived need to hold medieval kings to account. It was the Barons who forced King John to agree to the terms of Magna Carta. Over the course of the century that followed it was the same Barons (and their heirs) that began to meet more regularly and that in time formed what became the House of Lords. The House of Commons followed later in the fourteenth century. Thus Parliament developed in early modern England not out of the need to legislate, but out of the need to subject the Crown's government to some form of account.[27] The people and its Parliament would continue to accept royal government, but only on Parliament's terms. The Crown would be allowed to govern, but Parliament would set out the limits within which the Crown was to rule.

This ancient constitutional balance between the Crown on the one hand and Parliament on the other continued to provide stable government in England from the era of Magna Carta, through the Wars of the Roses and the rise of the Tudors, and began to break down only with the passing of the Tudors after the death of Queen Elizabeth in 1603. It was this year that marked the end of the Tudor period and the beginning of the

25. See, e.g., *M. v. Home Office* [1994] 1 A.C. 377; *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513.

26. The classic ancient authority is *R. v. Hampden* (the Ship-money case) (1637) 3 St. Tr. 825. Among more recent authorities are *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 and *R. v. Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] Q.B. 26.

27. Hence Bagehot's portrayal of the "main" function of the House of Commons being to act as a permanent electoral college.

Stuart. The Stuart kings found that they could not work with Parliament, and after a quarter-century of struggle (1603-1629) sought eventually to rule without it. The experiment of the so-called "personal rule" (1629-1640) failed, however, and within two years of Parliament's recall in 1640, England had collapsed into the anarchy of civil war. It was Oliver Cromwell's parliamentary forces that emerged victorious, and from 1649-1660 it was Parliament's turn to rule without the Crown. This experiment proved almost as disastrous as the Crown's earlier attempts to rule without Parliament had been, and in 1660, two years after Cromwell's death, King Charles II was restored to the throne. Again, however, as with Magna Carta four centuries earlier, the Crown was required to govern on terms laid down by Parliament. These terms are now formally provided for by the Bill of Rights 1689 and the Act of Settlement 1701.

The point here is this. As even a cursory glance at England's constitutional history will reveal, England has a royal government for one reason and for one reason alone: namely, that Parliament has decreed it. Government continues to be carried out in the Crown's name (this is true even today), but it is Parliament that sets out the limits to the Crown's power (and not the courts), and it is to Parliament that those exercising the powers of the Crown (that is to say, Ministers) are constitutionally accountable for their actions.[28] Until the beginning of the nineteenth century this curious expression, "the Crown," still largely meant the King himself, in the company of advisers and courtiers. But over the course of the early nineteenth century, those advisers—known as Ministers—began to play an ever more prominent role, particularly those advisers who were also Members of Parliament. By the beginning of Queen Victoria's reign (1837) government had switched from being largely in the hands of the Monarch him- or herself, to being largely in the hands of the Ministers of the day. The legal powers of government, it is important to note, were unaffected by this change.[29] What did

28. It is to facilitate such accountability that Ministers must be Members of Parliament. Thus, this apparent violation of the classic separation of powers doctrine, far from *encouraging* tyranny (as Madison thought) is the British constitution's principal means of seeking to *combat* tyranny. For a fuller account, see Tomkins, *Public Law* ch. 2 (cited in note 11).

29. Thus, just as two hundred years ago it would have been the King himself who exercised his prerogative to make treaties, to declare war, and to defend the realm, so today it is the Prime Minister and his senior Cabinet colleagues who exercise those same royal prerogative powers to make treaties, to declare war, and to defend the realm. The Prime Minister and his Cabinet are, of course, accountable to Parliament for the way in which they exercise, or fail to exercise, these powers.

change, however, was the nature of the government's accountability to Parliament. While it was the Monarch him- or herself that governed, Parliament could hold the government to account only in the most formal way. But once effective government shifted from the Monarch him- or herself to parliamentary Ministers appointed by the Monarch, the degree of parliamentary oversight, scrutiny, and accountability could be radically enhanced.

Such parliamentary accountability reached its zenith during the middle of Queen Victoria's reign, and it was exactly this spirit that Bagehot sought to capture in *The English Constitution*. At no time of internal peace has Parliament held more power over the Crown's government than in the mid-nineteenth century. Before about 1820 royal government was still too far removed from Parliament for fully effective scrutiny. After about 1870 Parliament became ever more dominated by political party, as mass democracy eventually began to arrive, such that parliamentarians' loyalty was offered and withdrawn strictly along party lines rather than in accordance with whether the government was acting with constitutional propriety or not.[30] But between these dates, when Bagehot was writing, was the heyday of parliamentary power.[31] Hence his wonderful line that a parliamentary republic had "insinuated itself beneath the folds" of the old monarchy.

Today it appears once more that the Crown's government has regained the upper hand, that the parliamentary republic is in retreat, and that the constitutional garb is as majestically monarchic as it ever was. The question of how to stop a Parliament dominated by political party from voting always on party lines, and thereby from undermining the ideal of government accountability to an independent Parliament, is the most pressing one that is faced by the British constitutional order. Most of today's constitutional commentators have given up entirely, and seem to believe that Parliament can no longer be expected to bear such great responsibility, and that any accountability we have now is going to have be found through the courts rather

30. For a detailed examination of the differences between Parliament governed by party, and Parliament governed by constitutional propriety, see A. Tomkins, *The Constitution after Scott: Government Unwrapped* (Oxford U. Press, 1998).

31. It is for this reason that Bagehot's period has throughout the twentieth century been perceived as having been so important in the development of British constitutionalism. It is because parliamentary power has so declined in the 140 years since Bagehot that we should be cautious about constructing general principles about parliamentary government from the particular events of his time.

than in Parliament. Even some senior judges now appear to be thinking broadly along these lines.[32] But anyone placing their faith in the courts will first have to tackle the problem that judicial power as it is presently constructed is neither sufficiently independent of the authority of the Crown, nor sufficiently robust in the face of the government's sometimes rather spurious arguments to the effect that it needs unfettered emergency Crown powers in order to safeguard Britain's national security.[33]

Bagehot would have decried such an attempt to hand over to the judges the constitutional functions that he thought were Parliament's. But Bagehot, like everybody else has done since, would himself have struggled to accommodate his beautiful and brilliant vision of a genuinely parliamentary government to the contemporary reality of a mass democracy. Democracy has its price. It is curious, but the injection of democracy into the republican monarchy that Bagehot knew and loved has revitalized the monarchic in the constitution at the expense of the republican, and not the other way around. We have moved from a republican monarchy to the people's monarchy. How to re-invest in the modern and democratic constitution the values of parliamentary accountability that Bagehot the constitutional monarchist so cherished is the most vital constitutional question of our times. Re-reading Bagehot will not provide us with the answer, but it will remind us of the urgency of the question.

32. See, for example, *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513.

33. See, for example, *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 and *Home Office v. Rehman* [2001] 3 W.L.R. 877. See further on this, Tomkins, *Public Law* chs. 3 & 6 (cited in note 11).