CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

Jeffrey Goldsworthy

PARLIAMENTARY SOVEREIGNTY

CONTEMPORARY DEBATES

CAMBRIDGE

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This book has four main themes: (1) a criticism of 'common law constitutionalism', the theory that Parliament's authority is conferred by, and therefore is or can be made subordinate to, judge-made common law; (2) an analysis of Parliament's ability to abdicate, limit or regulate the exercise of its own authority, including a revision of Dicey's conception of sovereignty, a repudiation of the doctrine of implied repeal and the proposal of a novel theory of 'manner and form' requirements for law-making; (3) an examination of the relationship between parliamentary sovereignty and statutory interpretation, defending the reality of legislative intentions and their indispensability to sensible interpretation and respect for parliamentary sovereignty; and (4) an assessment of the compatibility of parliamentary sovereignty with recent constitutional developments, including the expansion of judicial review of administrative action, the Human Rights and European Communities Acts and the growing recognition of 'constitutional principles' and 'constitutional statutes'.

JEFFREY GOLDSWORTHY holds a Personal Chair in the Faculty of Law at Monash University in Melbourne, Australia, where his major interests are legal philosophy and constitutional law, theory and history.

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Contemporary Debates

JEFFREY GOLDSWORTHY
Monash University

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I dedicate the book to my wife Helen, with gratitude for all her love and support.

1

Introduction

I

This book is a collection of essays with four main themes. The first is criticism of the theory known as 'common law constitutionalism', which holds either that Parliament is not sovereign because its authority is subordinate to fundamental common law principles such as 'the Rule of Law', or that its sovereignty is a creature of judge-made common law, which the judges have authority to modify or repudiate (Chapters 2, 3, 4 and 10). The second theme is analysis of how, and to what extent, Parliament may abdicate, limit or regulate the exercise of its own legislative authority, which includes the proposal of a novel theory of 'manner and form' requirements for law-making (Chapters 5, 6 and 7). This theory, which involves a major revision of Dicey's conception of sovereignty, and a repudiation of the doctrine of implied repeal, would enable Parliament to provide even stronger protection of human rights than is currently afforded by the Human Rights Act 1998 (UK) ('the HRA'), without contradicting either its sovereignty or the principle of majoritarian democracy (Chapters 7 and 8). The third theme is a detailed account of the relationship between parliamentary sovereignty and statutory interpretation, which strongly defends the reality of legislative intentions, and argues that sensible interpretation and parliamentary sovereignty both depend on judges taking them into account (Chapters 9 and 10). The fourth is a demonstration of the compatibility of parliamentary sovereignty with recent constitutional developments, including the expansion of judicial review of administrative action under statute, the operation of the HRA and the European Communities Act 1972 (UK), and the growing recognition of 'constitutional principles' and perhaps even 'constitutional statutes' (Chapter 10). This demonstration draws on the novel theory of 'manner and form', and the account of statutory interpretation, developed in Chapters 7 and 9.

II

The English-speaking peoples are reluctant revolutionaries. When they do mount a revolution, they are loath to acknowledge – even to themselves – what they are doing. They manage to convince themselves, and try desperately to convince others, that they are protecting the 'true' constitution, properly understood, from unlawful subversion, and that their opponents, who wear the mantle of orthodoxy, are the real revolutionaries.[1] They appear certain that their cause is not only morally righteous, but also legally conservative, in that they are merely upholding traditional legal rights and liberties.

Today, a number of judges and legal academics in Britain and New Zealand are attempting a peaceful revolution, by incremental steps aimed at dismantling the doctrine of parliamentary sovereignty, and replacing it with a new constitutional framework in which Parliament shares ultimate authority with the courts. They describe this as 'common law constitutionalism', 'dual' or 'bi-polar' sovereignty, or as a 'collaborative enterprise' in which the courts are in no sense subordinate to Parliament.[2] Or they claim that the true normative foundation of the constitution is a principle of 'legality', which (of course) it is ultimately the province of the courts, rather than Parliament, to interpret and enforce.[3] But they deny that there is anything revolutionary, or even unorthodox, in their attempts to establish this new framework. They claim to be defending the 'true' or 'original' constitution, 'properly understood', from misrepresentation and distortion.[4] And they sometimes accuse their adversaries, the defenders of parliamentary sovereignty, of being the true revolutionaries.[5]

[1] This happened during the civil war of the 1640s, the Glorious Revolution of 1688, the American Revolution of 1776, and the secession of the southern States of the US in the 1860s. See for example R. Kay, 'Legal Rhetoric and Revolutionary Change' *Caribbean Law Review* 7 (1997) 161; R. Kay, 'William III and the Legalist Revolution' *Connecticut Law Review* 32 (2000) 1645.

[2] Philip A. Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' *King's College Law Journal* 15 (2004) 333 at 334, discussed in Chapter 10, Section II, Part D, below.

[3] S. Lakin, 'Debunking the Idea of Parliamentary Sovereignty: the Controlling Factor of Legality in the British Constitution' *Oxford Journal of Legal Studies* 28 (2008) 709.

[4] D. Edlin, *Judges and Unjust Laws, Common Law Constitutionalism and the Foundations of Judicial Review* (Ann Arbor: University of Michigan Press, 2008), p. 177.

[5] Judicial repudiation of parliamentary sovereignty 'would not be at all revolutionary. What is revolutionary is talk of the omnipotence of Parliament': R.A. Edwards, 'Bonham's Case: The Ghost in the Constitutional Machine' *Denning Law Journal* 63 (1996) 76.

Claims like these are familiar ones in the development of the unwritten British constitution over many centuries. How, for example, did the common law subordinate what were once called the 'absolute prerogatives' of the Crown? By strenuously asserting that those prerogatives had, all along, been creatures of and therefore controlled by the common law. When we read the constitutional debates of earlier centuries, we see on all sides the pervasive tendentiousness of legal thinking pursued by those who care so passionately about practical outcomes that objectivity has become impossible. This was noted by A.V. Dicey:

> The fictions of the courts have in the hands of lawyers such as Coke served the cause both of justice and of freedom, and served it when it could have been defended by no other weapons … Nothing can be more pedantic, nothing more artificial, nothing more unhistorical, than the reasoning by which Coke induced or compelled James to forego the attempt to withdraw cases from the courts for his Majesty's personal determination. But no achievement of sound argument, or stroke of enlightened statesmanship, ever established a rule more essential to the very existence of the constitution than the principle enforced by the obstinacy and the fallacies of the great Chief Justice … The idea of retrogressive progress is merely one form of the appeal to precedent. This appeal has made its appearance at every crisis in the history of England and … the peculiarity of all English efforts to extend the liberties of the country … [is] that these attempts at innovation have always assumed the form of an appeal to pre-existing rights. But the appeal to precedent is in the law courts merely a useful fiction by which judicial decision conceals its transformation into judicial legislation.[6]

Today, the sovereignty of Parliament is the target of attempted innovation disguised as an appeal to pre-existing rights. Whether 'the cause both of justice and of freedom' would be advanced by clipping Parliament's wings is debatable. But even if it would be, it cannot plausibly be maintained that there are 'no other weapons' to achieve this than artificial, unhistorical fictions. 'Sound argument' candidly aimed at formal legislative or even constitutional reform is surely preferable to surreptitious judicial law-making.

In an earlier book, I set out to refute various philosophical errors and dispel several historical myths concerning the doctrine of parliamentary sovereignty.[7] Prominent among these errors and myths are the beliefs that

[6] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn), E.C.S. Wade (ed.) (London: MacMillan, 1959), pp. 18–19.

[7] J. Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford: Clarendon Press, 1999).

the doctrine of parliamentary sovereignty: (a) is a relatively recent development, no older than the eighteenth century; (b) supplanted an ancient 'common law constitution' that had previously limited Parliament's authority; (c) is a creature of the common law that was made by the judges and can therefore be modified or even repudiated by them. But it is possible, as Ian Ward has observed, that even if I was right, 'truth matters little in a politics of competing mythologies'.[8] I take him to mean that lawyers and judges who find the doctrine of parliamentary sovereignty morally objectionable, and are committed to bringing about its demise, are unlikely to be either able or willing to assess objectively the historical evidence and jurisprudential analysis that I presented – or perhaps even to acknowledge their existence. The mythology of common law constitutionalism is indeed very difficult to dispel. Scholarly works continue to perpetuate it while ignoring the weighty arguments and evidence to the contrary.[9]

The desire to clothe legal revolution in the trappings of legal orthodoxy is not, of course, peculiarly British. Constitutional debates reminiscent of those in Britain today took place in France between 1890 and the 1930s. Before 1890, the French legal system was firmly based on the principle of legislative sovereignty, which had been established during the French Revolution and the rule of Napoleon. But after 1890, leading public law scholars began to revive natural law ideas, arguing that the legislature was bound by an unwritten higher law, which the judges were capable of discerning and ought to enforce. According to a recent account, these neo-natural law ideas were 'functionally equivalent to rule of law notions in Anglo-American legal theory'.[10] These scholars waged a persistent campaign to convince judges, first, 'that they were juridically required to exercise … substantive judicial review', and secondly, 'that the judges had

[8] Ian Ward, *The English Constitution, Myths and Realities* (Oxford and Portland Oregon: Hart Publishing, 2004), p. 185.

[9] E.g., E. Wicks, *The Evolution of the Constitution, Eight Key Moments in British Constitutional History* (Oxford and Portland: Hart Publishing, 2006). Although some footnotes show that Wicks knew of my book, she completely ignores the evidence it contains. She makes many unsupported claims such as that 'there was no suggestion' around the time of the 1688 Revolution 'that Parliament should be unlimited in its legislative powers', and that 'fundamental principles of the common law constitution … remained to bind the King-in-Parliament': *ibid.*, 20. To the contrary, there were many explicit statements by eminent lawyers not only around that time, but much earlier, that Parliament's powers were unlimited: see, e.g., J. Goldsworthy, *The Sovereignty of Parliament*, pp. 124–34, 149–65 and 173–81.

[10] A. Stone Sweet, 'Why Europe Rejected American Judicial Review, and Why It May Not Matter' *Michigan Law Review* 101 (2003) 2744, 2755.

already begun doing so, but apparently did not yet know it'.[11] The basis of the second claim was that a number of judicial decisions supposedly made complete sense only if higher, unwritten constitutional principles were assumed to exist. As one of these scholars argued in 1923, the judges 'without expressly admitting it, and perhaps without even admitting it to themselves, have opened the way to judicial review'.[12] This campaign was making headway until the publication of a book that explained how the American Supreme Court had stymied democratic social reform by reading laissez faire principles into its Constitution, and warned that French judges might follow suit. This book had an enormous impact, and routed the campaign in favour of judicially imposed, higher law principles.[13]

Law is an unusual discipline, in that the truth of legal propositions is not independent of people's beliefs about them: indeed, it depends on whether enough of the right people believe them. According to H.L.A. Hart, the most fundamental norms of a legal system owe their existence partly to their being accepted as binding by the most senior officials of the legal system, legislative, executive and judicial.[14] Norms that are accepted today might no longer be accepted tomorrow – so that propositions of law that are false today might be true tomorrow – if the beliefs of enough of the right people can be changed. The process by which the common law gradually evolves can be of great assistance in bringing about such changes. Obiter dicta or dissenting opinions that are false can, through sheer repetition, come to appear true; indeed, sufficient repetition can eventually clothe them with authority. For example, it can be confidently predicted that dicta in *Jackson* v. *Attorney-General*[15] challenging the doctrine of parliamentary sovereignty will be cited in this way regardless of their inaccuracies. Judges know this, which is no doubt why, as Lord Cooke of Thorndon observed, some of them have been 'inching forwards with ever stronger expressions when treating some common law rights as constitutional'.[16] As Tom Mullan says, of the obiter dicta in *Jackson*:

> The most obvious reading is that certain judges are staking out their position for future battles. They do fear that Parliament and governments cannot be trusted in all circumstances to refrain from passing legislation inconsistent with fundamental rights, the rule of law or democracy. When a case involving such 'unconstitutional legislation' arises they want to be

[11] *Ibid*., p. 2757. [12] Quoted in *ibid*., p. 2758. [13] *Ibid*., pp. 2758–60.
[14] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), ch. 6.
[15] [2005] UKHL 56.
[16] Robin Cooke, 'The road Ahead for the Common Law' *International and Comparative Law Quarterly* 53 (2004) 273 at 277.

> in a position to strike it down without appearing to invent new doctrine on the spot. They want to be able to say that they are applying settled constitutional doctrine. *Jackson* may then be a useful precedent … *Jackson* may [also] be viewed as a shot across the government's bows.[17]

The central claims of 'common law constitutionalism' are false, or so I argue in what follows. Most senior legal officials, including judges, still accept the doctrine of parliamentary sovereignty. Stuart Lakin has recently claimed that 'there is simply no widely accepted "core" of acceptance about the relative powers of Parliament and the courts'.[18] But this is hard to square with his admission that only 'a distinguished minority' of judges and academics currently support the idea that there are limits to Parliament's authority.[19] Among the senior judiciary, dissent from the core principle of parliamentary sovereignty is a relatively recent, minority view, inspired by the false claims of the common law constitutionalists. Recently, that dissenting view was firmly repudiated by Britain's then most senior judge, Lord Bingham of Cornhill.[20] If a majority of British judges were converted to the dissenting view, the rule of recognition that currently underpins the constitution might be undermined. But, as I will argue shortly, this would be very risky because the judges could not replace it with a new rule of recognition without the agreement of the elected branches of government.[21]

The claims of the dissenters could prove self-fulfilling if they are repeated so often that enough senior officials are persuaded to believe them. And this could happen even if these officials are persuaded for reasons that are erroneous (such as that common law constitutionalism was true all along). If that happens, original doubts about their correctness will be brushed aside as irrelevant, and the law books will be retrospectively rewritten. After revolution, as after war, history is written by the victors. If the legal revolution succeeds, it will not be acknowledged to have been a revolution. It will be depicted either as a judicial rediscovery of 'hitherto latent' restrictions on Parliament's powers that the law always

[17] T. Mullen, 'Reflections on *Jackson* v. *Attorney General*: questioning sovereignty' *Legal Studies* 27 (2007) 1 at 15–16.

[18] S. Lakin, 'Debunking the Idea of Parliamentary Sovereignty' at p. 727.

[19] *Ibid.*, p. 730.

[20] The Rt Hon Lord Bingham of Cornhill, 'The Rule of Law and the Sovereignty of Parliament', King's Law Journal 19 (2008) 223.

[21] See Chapter 2, below.

included,[22] or as the exercise of authority that the judges always had to continue the development of the 'common law constitution'.

III

This book includes further efforts to resist the legal revolution sought by the common law constitutionalists. Chapter 2 presents historical and philosophical objections, and Chapters 3 and 4 respond to arguments based on the political ideal known as 'the rule of law'. The first section of Chapter 10 is also relevant to this theme. I attempt to show that Parliament has been for centuries, and still is, sovereign in a legal sense; that this is not incompatible with the rule of law; and that its sovereignty is not a gift of the common law understood in the modern sense of judge-made law. It is a product of long-standing consensual practices that emerged from centuries-old political struggles, and it can only be modified if the consensus among senior legal officials changes. Furthermore, it ought not to be modified without the support of a broader consensus within the electorate. The recent Green Paper titled *The Governance of Britain* ends on the right note: constitutional change in Britain as significant as the adoption of an entrenched Bill of Rights or written Constitution requires 'an inclusive process of national debate', involving 'extensive and wide consultation' leading to 'a broad consensus'.[23] Such changes should not, and indeed cannot, be brought about by the judiciary alone.

If radical change is to be brought about by consensus, legislation will be required. Chapters 5, 6 and 7 discuss problems relating to Parliament's ability to abdicate or limit its sovereignty, or to regulate its exercise through the enactment of requirements as to the procedure or form of legislation. Chapter 5 reviews all the current theories of abdication and limitation, and advocates an alternative based on consensual change to the rules of recognition underlying legal systems. The theories of A.V. Dicey, W. Ivor Jennings, R.T.E. Latham, H.W.R. Wade and Peter Oliver are all subjected to criticism. Chapter 6 is a detailed account of the influential decision in *Trethowan* v. *Attorney-General (NSW)*,[24] which is often misunderstood and misapplied in discussions of 'manner and form'. This account reveals the difference between the 'manner and form' and 'reconstitution' lines of

[22] M. Elliott, 'United Kingdom Bicameralism, Sovereignty, and the Unwritten Constitution' *International Journal of Constitutional Law* 5 (2007) 370 at 379.

[23] *The Governance of Britain* (CM 7170, July 2007), paras 198 and 213.

[24] (1931) 44 CLR 97 (High Court).

reasoning that were first propounded in that case, and shows that much of the majority judges' reasoning was dubious. Chapter 7 draws on the previous two chapters to propose a novel theory of Parliament's power to regulate its own decision-making processes, by enacting mandatory requirements governing law-making procedures or the form of legislation. In passing, it discusses the somewhat different issues raised in *Jackson* v. *Attorney-General*,[25] which involved what is called in Australia an 'alternative' rather than a 'restrictive' legislative procedure. The novel theory of restrictive procedures that is proposed differs from the 'new theory' propounded by Jennings, Latham and R.F.V. Heuston, and from the neo-Diceyan theory of H.W.R. Wade. It rejects a key element of Dicey's conception of legislative sovereignty, and the popular notion that the doctrine of implied repeal is essential to parliamentary sovereignty. Chapter 7 concludes with the possibly surprising suggestion that a judicially enforceable Bill of Rights could be made consistent with parliamentary sovereignty by including a broader version of the 'override' or 'notwithstanding' clause (s. 33) in the Canadian Charter of Rights, which enables Canadian parliaments to override most Charter rights. Chapter 8 examines this topic in more detail, analysing the relationship between the judicial protection of rights, legislative override, legislative supremacy and majoritarian democracy.

Chapter 9 is a detailed account of the relationship between parliamentary sovereignty and statutory interpretation, which argues that legislative intentions are both real and crucial to avoiding the absurd consequences of literalism. It also describes and criticises the alternative 'constructivist' theories of interpretation defended by Ronald Dworkin, Michael Moore and Trevor Allan. It acknowledges the frequent need for judicial creativity in interpretation, including the repair or rectification of statutes by 'reading into' them qualifications they need to achieve their purposes without damaging background principles that Parliament is committed to. The intentionalist account is further developed in Chapter 10, where it is shown to be crucial to the traditional justification of presumptions of statutory interpretation, such as that Parliament is presumed not to intend to infringe fundamental common law rights, and also crucial to the defence of parliamentary sovereignty against other criticisms.

Chapter 10 is a lengthy defence of parliamentary sovereignty against recent criticisms that it was never truly part of the British constitution, or

[25] [2005] UKHL 56.

is no longer part of it, or will soon be expunged from it. The Chapter begins with some historical discussion, and then considers at length the consequences of recent constitutional developments, including the expansion of judicial review of administrative action under statute, the operation of the *European Communities Act* 1972 (UK) and the HRA, and the growing recognition of 'constitutional principles' and possibly even 'constitutional statutes'. It argues that none of these developments is, so far, incompatible with parliamentary sovereignty.

IV

The once popular idea of legislative sovereignty has been in decline throughout the world for some time. 'From France to South Africa to Israel, parliamentary sovereignty has faded away.'[26] A dwindling number of political and constitutional theorists continue to resist the 'rights revolution' that is sweeping the globe, by refusing to accept that judicial enforcement of a constitutionally entrenched Bill of Rights is necessarily desirable. To be one of them can feel like King Cnut trying to hold back the tide.

This book does not directly address the policy questions raised by calls for constitutionally entrenched rights. For what it is worth, my opinion is that constitutional entrenchment might be highly desirable, or even essential, for the preservation of democracy, the rule of law and human rights in some countries, but not in others. In much of the world, a culture of entrenched corruption, populism, authoritarianism, or bitter religious, ethnic or class conflicts, may make judicially enforceable bills of rights desirable. Much depends on culture, social structure and political organisation.

I will not say much about this here, because the arguments are so well known. I regret the contemporary loss of faith in the old democratic ideal of government by ordinary people, elected to represent the opinions and interests of ordinary people.[27] According to this ideal, ordinary people have a right to participate on equal terms in the political decision-making that affects their lives as much as anyone else's, and should be presumed to possess the intelligence, knowledge and virtue needed to do

[26] T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), p. 3.

[27] I hope the term 'ordinary people' does not seem patronising. I cannot think of an alternative, and I regard myself as an 'ordinary person'.

so.[28] Proponents of this ideal do not naively believe that such a method of government will never violate the rights of individuals or minority groups. But they do trust that, in appropriate political, social and cultural conditions, clear injustices will be relatively rare, and that in most cases, whether or not the law violates someone's rights will be open to reasonable disagreement. They also trust that over time, the proportion of clear rights violations will diminish, and 'that a people, in acting autonomously, will learn how to act rightly'.[29] Strong democrats hold that where the requirements of justice and human rights are the subject of reasonable disagreement, the opinion of a majority of the people or those elected to represent them, rather than that of a majority of some unelected elite, should prevail. On this view, the price that must be paid for giving judges power to correct the occasional clear injustice by overriding enacted laws, is that they must also be given power to overrule the democratic process in the much greater number of cases where there is reasonable disagreement and healthy debate. For strong democrats, this is too high a price.

What explains the loss of faith in the old democratic ideal? I am aware of possible 'agency problems': failures of elected representatives faithfully to represent the interests of their constituents. In many countries this is a major problem. But I suspect that in countries such as Britain, Canada, Australia and New Zealand, the real reason for this loss of faith lies elsewhere. There, a substantial number of influential members of the highly educated, professional, upper-middle class have lost faith in the ability of their fellow citizens to form opinions about important matters of public policy in a sufficiently intelligent, well-informed, dispassionate, impartial and carefully reasoned manner. Even though the upper-middle class dominates the political process in any event, the force of public opinion still makes itself felt through the ballot box, and cannot be ignored by elected politicians no matter how enlightened and progressive they might be. Hence the desire to further diminish the influence of 'public opinion'.

If I am right, the main attraction of judicial enforcement of constitutional rights in these countries is that it shifts power to people (judges) who are representative members of the highly educated, professional,

[28] This position is most ably defended by J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), Part III, and 'The Core of the Case Against Judicial Review' *Yale Law Journal* 115 (2006) 1346.

[29] R. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), p. 192.

upper-middle class, and whose superior education, intelligence, habits of thought, and professional ethos are thought more likely to produce enlightened decisions. I think it is reasonable to describe this as a return to the ancient principle of 'mixed government', by re-inserting an 'aristocratic' element into the political process to check the ignorance, prejudice and passion of the 'mob'. By 'aristocratic', I mean an element supposedly distinguished by superior education, intellectual refinement, thoughtfulness and responsibility, rather than by heredity or inherited wealth.

The obvious rejoinder is that the attraction of judicially enforceable rights has more to do with the procedures that judges follow – procedures that promote more impartial and carefully reasoned decision-making – than the personal qualities of the judges. Of course there is something to this, but I do not find it completely convincing. If the main problem were deficiencies in the deliberative procedures of elected legislatures, then the most obvious remedy would be to improve those procedures to promote more careful, well-informed and dispassionate reasoning. The theory propounded in Chapter 7 could prove very useful in that regard. Judicial enforcement of rights would be a fall-back position, to be resorted to only if such reforms were unsuccessful. Few advocates of constitutional entrenchment approach the issue in that way, although improving the deliberative procedures of the elected branches of government is a primary aim of the unentrenched, statutory bills of rights in New Zealand and Britain.

The American model of entrenched constitutional rights is no longer the only alternative to a system of untrammelled legislative sovereignty. New 'hybrid' models pioneered in Canada, New Zealand and Britain allocate much greater responsibility for protecting rights to courts, without completely abandoning the principle of legislative supremacy based on the old democratic ideal. Judges there have not been given ultimate authority on questions of rights. Indeed, s. 33 of Canada's Charter of Rights, which enables legislatures to override Charter rights, 'was included in the *Charter* for the very purpose of preserving parliamentary sovereignty on rights issues'.[30] Parliaments in New Zealand and Britain were deliberately left with discretion as to whether or not to defer to judicial views of the compatibility of their statutes with rights. If an 'aristocratic' element has

[30] P.W. Hogg, A.A.B. Thornton and W.K. Wright, 'A Reply on "*Charter* Dialogue Revisited"' *Osgoode Hall Law Journal* 45 (2007) 193, 201.

been added to the political process, its primary function is to improve the quality of the debate over human rights, not to impose its will on the legislature by force of law.[31]

These models offer the possibility of a compromise that combines the best features of both the traditional British model of legislative sovereignty, and the American model of judicial supremacy, by authorising courts to pronounce on the compatibility of legislation with protected rights, while preserving the legislature's authority to have the final word.[32] They are experiments that may or may not work. It has been suggested that in practice, they will probably collapse (if they have not already collapsed) into something like the American model of judicial supremacy.[33] The compromise they attempt to strike between legislative and judicial authority is heartily disapproved of by advocates of constitutional entrenchment, who actively seek to bring about such a collapse. For example, common law constitutionalists are not satisfied with the enhanced protection of rights provided by the HRA, which was deliberately designed to leave Parliament with the final word. They continue to incite the courts to find fundamental common law rights entrenched within Britain's unwritten constitution, to insist that whatever Parliament may have intended the HRA establishes a strong form of 'constitutional' judicial review, and to condemn as constitutionally illegitimate any parliamentary response to judicial declarations of incompatibility other than meek acquiescence. Their views are criticised in later chapters.[34]

If enhanced judicial protection of rights is needed, I prefer the statutory bill of rights model to the Canadian one. My somewhat tentative assessment of the latter and its relationship to the old democratic ideal is outlined in Chapter 8. Although I regard it as defective – in particular, in the way that s. 33 is framed – I am not implacably opposed to possible improved versions of its basic architecture. In general, I regard the new hybrid models as important experiments in constitutionalism. Universal adoption of the American model of constitutionally entrenched rights would, in my opinion, be premature and dangerously complacent, ruling

[31] See Chapter 8, below.

[32] See Chapter 8, below.

[33] M. Tushnet, 'New forms of judicial review and the persistence of rights- and democracy-based worries' *Wake Forest Law Review* 38 (2003) 813; M. Tushnet, 'Weak-form Judicial Review: Its Implications for Legislatures' *New Zealand Journal of Public & International Law* 7 (2004).

[34] See the discussion of Trevor Allan in Chapter 4, and Aileen Kavanagh in Chapter 10, Section II, Part D, below.

out possibly superior alternatives. It may turn out that the old democratic ideal does not need to be abandoned in order to maintain a level of human rights protection at least as good as that achieved in the United States and other countries that have adopted the American model. In fact, I believe that the evidence already shows that this is possible.