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Jeffrey Goldsworthy

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The myth of the common law constitution

I Introduction

The relationship between the common law and statute law is a subject of debate. The controversy goes deeper than questions of interpretation, such as – given the doctrine of legislative supremacy over the common law – why, how and to what extent the meaning of a statute can legitimately be governed by common law principles.[1] The answers to those questions depend partly on more basic issues concerning the legal foundations of the two bodies of law, and their respective status. The orthodox view is that because Parliament can enact statutes that override any part of the common law, statute law is superior to common law. But according to an increasingly popular theory, Britain's 'unwritten' constitution consists of common law principles, and therefore Parliament's authority to enact statutes derives from the common law. Sir William Holdsworth once expressed the view that 'our constitutional law is simply a part of the common law'.[2] For Trevor Allan, it follows that 'the common law is prior to legislative supremacy, which it defines and regulates'.[3] This theory has become so popular that even the British government has endorsed it. When the Attorney-General, Lord Goldsmith, was asked in Parliament what was the government's understanding of 'the legal sources from which the legislative powers of Parliament are

[1] See Chapter 9, Section II A(2) and Chapter 10, Section III, Part E, below.

[2] W. Holdsworth, *A History of English Law* (2nd edn) (London: Methuen and Sweet & Maxwell, 1937), vol. 6, p. 263.

[3] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), p. 271; see also *ibid*. at pp. 139, 225, 229, 240 and 243; T.R.S. Allan, 'Text, Context, and Constitution: The Common Law as Public Reason' in D. Edlin (ed.), *Common Law Theory* (Cambridge: Cambridge University Press, 2007), p. 185; T.R.S. Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed.), *Courts of Final Jurisdiction: The Mason Court in Australia* (Sydney: Federation Press, 1996), p. 146.

derived', he replied, 'The source of the legislative powers is the common law.'[4]

This theory threatens to invert the relationship between statute law and common law as traditionally understood. In this context, the common law is usually characterised either in positivist terms, as a body of rules that the judges have made, and can therefore change, or in Dworkinian terms, as a body of norms that rests on abstract principles of political morality, which the judges have ultimate authority to enunciate and expound.[5] On either view, instead of the judges being clearly subordinate to Parliament, and obligated to obey its laws, they are elevated to a position of superiority over it. On the first view, they have only a self-imposed legal obligation to obey its laws – a 'self-denying judicial ordinance' – that they have legal authority to repudiate.[6] On the second view, the scope of any obligation derives from abstract principles of political morality, and is ultimately for them to authoritatively determine. Since even on the first view, judges in deciding whether they should continue to obey statutes are guided by their assessment of political morality, the two views are in this respect similar.[7] Both views amount to a takeover bid: they threaten – or promise – to replace legislative supremacy with judicial supremacy.[8] Instead of Parliament being the master of the constitution, with the ability to change any part of it (except, perhaps, for the doctrine of legislative supremacy itself), the judges turn out to be in charge. The direction in which some of them would like to develop the constitution is apparent in recent statements of Laws, L.J. In administrative law, 'the common law has come to recognise and endorse the notion of constitutional, or fundamental, rights'.[9] Parliament retains its sovereignty for now, but may lose it 'in the tranquil development of the common law, with a gradual reordering of our constitutional priorities to bring alive the nascent idea that a

[4] *Hansard* (HL), col. WA 160, 31 March 2004, quoted in Lord Anthony Lester, 'Beyond the Powers of Parliament', *Judicial Review* 95 (2004) at 96.

[5] See, e.g., section III below. I am using the term 'Dworkinian' in a loose, generic sense. I am concerned with constitutional theorists who are influenced by Ronald Dworkin, rather than with Dworkin himself.

[6] Justice E.W. Thomas, 'The Relationship of Parliament and the Courts' *Victoria University of Wellington Law Review* 31 (2000) 5 at 26.

[7] They differ as to whether those principles should be classified as legal as well as moral/political principles.

[8] It is welcomed as a promise in M.D.J. Conaglen, 'Judicial Supremacy: An Alternative Constitutional Theory' *Auckland University Law Review* 7 (1994) 665.

[9] *International Transport Roth GmbH* v. *Secretary of State for the Home Department* [2003] QB 728 at 759.

democratic legislature cannot be above the law'.[10] In *Jackson* v. *Attorney-General*, Lord Steyn picked up the baton, stating that the doctrine of the supremacy of Parliament

> … is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.[11]

Sometimes, the basic argument is extended to the authority of written constitutions, which is also held to derive from the common law. Dixon C.J., reputedly Australia's greatest judge, maintained that the common law was the 'ultimate constitutional foundation' that underpinned the authority of the Australian Constitution.[12] This was because that Constitution was enacted in a statute by the British Parliament: its authority depended on Parliament's, and therefore derived ultimately from Britain's unwritten, supposedly common law, constitution.[13] Recently, Australian proponents of unwritten constitutional principles have attempted to push Dixon C.J.'s suggestion much further than he would have approved of.[14] A similar idea is being promoted in Canada. According to Mark Walters, in several recent decisions of the Canadian Supreme Court 'the legal authority for the operative constitutional principles is said to derive from Canada's unwritten, or common law, constitution'.[15] Walters' own writings assume that there is such a 'common law constitution', whose 'structural principles' include the rule of law, the separation of powers and individual rights.[16] Trevor Allan maintains that this is true of all the constitutions in former

[10] Sir John Laws, 'Illegality and the Problem of Jurisdiction' in Michael Supperstone and James Goudie (eds.), *Judicial Review* (2nd edn) (London: Butterworths Law, 1997), para. 4.17.

[11] *Jackson* v. *Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 at [102]; see also Lord Hope at [126], and Laws L. J. in *Thorburn* v. *Sunderland City Council* [2003] QB 151 at [60].

[12] Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in O. Dixon, *Jesting Pilate, And Other Papers and Addresses* (Woinarski, ed.) (Melbourne: Law Book Co., 1965), p. 203.

[13] *Ibid.*, esp. pp. 203 and 206.

[14] Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' *Federal Law Review* 29 (2001) 58.

[15] Mark D. Walters, 'The Common Law Constitution in Canada: Return of the *Lex Non Scripta* as Fundamental Law' *University of Toronto Law Journal* 51 (2001) 91 at 92.

[16] See, e.g., Mark D. Walters, 'The Common Law Constitution and Legal Cosmopolitanism' in David Dyzenhaus (ed.), *The Unity of Public Law* (Oxford: Hart Publishing, 2004), p. 431.

Commonwealth countries, both written and unwritten: all are based on unwritten principles of constitutionalism and the rule of law, which lie at the heart of the common law tradition:[17] '[T]hese (common law) jurisdictions should, to that extent, be understood to *share* a common constitution,' whose common features 'are … ultimately more important than such differences as the presence or absence of a "written" constitution, with formally entrenched provisions, whose practical significance may easily be overestimated'.[18] Douglas Edlin has now extended this claim to the United States Constitution: 'the written American Constitution and the unwritten English constitution are both derived directly from the common law', and 'it is a mistake to think that the Constitution is more fundamental than its common law underpinnings'.[19]

This understanding of the authority of written constitutions might have drastic consequences. Limits that the written constitution imposes on the exercise of legislative or executive powers might be supplemented by unwritten, 'common law' limits. Edlin is forthright on this point: 'wherever one finds the common law, one finds legal principles that act to constrain the abuses of state power. Wherever one finds the common law, one finds common law constitutionalism.'[20] It follows that even the power to amend the constitution might be held to be limited by deeper common law principles, which can be changed (or authoritatively declared to have changed) only by judicial decision.[21]

The term 'common law constitutionalism' is now widely used to denote the theory that the most fundamental constitutional norms of a particular country or countries (whether or not they have a written constitution) are matters of common law.[22] As previously noted, there are different versions of common law constitutionalism – including legal positivist and Dworkinian versions – built around different conceptions of the common law. Common law constitutionalism is defended on historical, as well

[17] See Allan, *Constitutional Justice*.

[18] Allan, *Constitutional Justice*, pp. 4–5; see also *ibid*. at p. 243. For critical discussion, see Jeffrey Goldsworthy, 'Homogenising Constitutions' *Oxford Journal of Legal Studies* 23 (2003) 483.

[19] D. Edlin, *Judges and Unjust Laws; Common Law Constitutionalism and the Foundations of Judicial Review* (Ann Arbor: Michigan University Press, 2008), pp. 188–9.

[20] *Ibid*., 189.

[21] Allan, 'The Common Law as Constitution' in Saunders (ed.), *Courts of Final Jurisdiction*, 158 at 159 and 164.

[22] See, e.g., Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' *Oxford Journal of Legal Studies* 23 (2003) 435; Thomas Poole, 'Questioning Common Law Constitutionalism' *Legal Studies* 25 (2005) 142.

as philosophical, grounds.[23] The historical argument is that England's unwritten constitution was always a matter of common law. The philosophical argument is that its present unwritten constitution is best analysed as a matter of common law. I will first discuss the historical evidence, and then turn to philosophical analysis.

II The historical record

The historical defence of common law constitutionalism has distinguished antecedents. According to John Phillip Reid, common law constitutionalism was orthodoxy in Britain until the late eighteenth century, when it was supplanted by the relatively new theory of parliamentary sovereignty.[24] J.G.A. Pocock famously argued that in the seventeenth century, the common law was regarded by its practitioners – most notably Sir Edward Coke – as embodying an immutable 'ancient constitution' that conferred and limited governmental powers.[25] Much earlier, C.H. McIlwain claimed that in the medieval period, the common law constituted a fundamental law that bound both the King and the 'High Court of Parliament', which could enunciate, but not change, that law.[26]

McIlwain's claims have been discredited, Pocock's thesis heavily qualified, and Reid's views shown to be dubious.[27] Yet it is still widely assumed

[23] For historical argument, see Walters, 'The Common Law Constitution in Canada', 105–36.

[24] John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Legislate* (Wisconsin: University of Wisconsin Press, 1991), pp. 4, 6, 24, 63, 78 and 81.

[25] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957). Pocock modified his position in the 1987 reissue of this book, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century, A Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987).

[26] Charles H. McIlwain, *The High Court of Parliament and Its Supremacy* (New Haven: Yale University Press, 1910), ch. 2; Charles H. McIlwain, 'Magna Carta and Common Law' in *Constitutionalism and the Changing World* (New York: Macmillan, 1939), 132 at p. 143.

[27] See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999), pp. 38–45, 60 and 62 (discussing McIlwain); J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore: Johns Hopkins University Press, 2000), p. 206, n. 34 (discussing McIlwain); Goldsworthy, *The Sovereignty of Parliament*, pp. 188–92 (discussing Reid); Tubbs, *The Common Law Mind*, p. 130 (discussing Pocock); Johann P. Sommerville, 'The Ancient Constitution Reassessed: The Common Law, the Court and the Languages of Politics in Early Modern England' in R. Malcolm Smuts (ed.), *The Stuart Court and Europe: Essays in Politics and Political Culture* (Cambridge: Cambridge University Press, 1996), pp. 39–64; Johann P. Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603–1640* (2nd edn) (London: Longman, 1999), pp. 103–4 and 261–2.

that England has long had a common law constitution. Brian Tamanaha, for example, writes that:

> England has had an *unwritten* constitution for centuries … This constitution served as the functional equivalent of the written US Constitution in the sense of a law that set limits on the law-makers. Coke's decision in *Doctor Bonham's* case testified to this understanding … The basic idea was that the common law, a body of private law reflecting legal principles, established the fundamental legal framework.[28]

Unfortunately, all these propositions except the first are wrong. England has never had a constitution that served as the functional equivalent of the American Constitution. It has been conclusively established that the common law never subjected Parliament's legislative authority to limits whose violation could warrant the judicial invalidation of a statute.[29] As I have argued at some length elsewhere, Coke's famous dictum in *Doctor Bonham's* case might be understood to suggest that he thought otherwise, although even that is very doubtful; but if he did, he was in a tiny minority, and later changed his mind.[30] The most careful and thorough subsequent analyses of Coke's language have confirmed (although for different reasons) the majority scholarly opinion that in *Doctor Bonham's* case he did not intend to assert a judicial power to invalidate statutes.[31] It is odd that his famous dictum is still regularly cited in constitutional textbooks as evidence that Parliament's law-making authority was, in an earlier era, subordinate to a controlling common law.[32] This chapter will challenge Tamanaha's final, more modest proposition that the common law 'established the fundamental legal framework' of English government.

[28] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), p. 57.

[29] Goldsworthy, *The Sovereignty of Parliament*; Tubbs, *The Common Law Mind*, pp. 21, 27, 30, 34–5, 46, 55, 57, 77, 183 and 186.

[30] See generally Goldsworthy, *The Sovereignty of Parliament*; see also *ibid*. at 111–17 (discussing Coke).

[31] I. Williams, '*Dr Bonham's Case* and "Void" Statutes' *J Legal History* 27 (2006) 111; P. Hamburger, *Law and Judicial Duty* (Cambridge, Mass: Harvard University Press, 2008), ch. 8 and Appendix I; R. Helmholz, 'Bonham's Case, Judicial Review and the Law of Nature' *J of Legal Analysis* (2009) 325. Hamburger disagrees with Williams at *ibid*., 625 n. 7. Edlin (*Judges and Unjust Laws*, ch. 5) presents arguments to the contrary, which are discussed in Chapter 10, Section II, Part A. For another recent account of Dr Bonham's case that offers Edlin no support, see J. Allison, *The Historical English Constitution* (Cambridge: Cambridge University Press, 2007), pp. 131–48.

[32] See, e.g., P. Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn) (Wellington: Brookers, 2007), pp. 488–9; I. Loveland, *Constitutional Law, Administrative Law, and Human Rights; a Critical Introduction* (4th edn) (Oxford: Oxford University Press, 2006), p. 22.

There is no doubt that many common law principles, such as those relating to the Crown's prerogatives, have long been part of the unwritten constitution. At issue here is the broader claim that the unwritten constitution as a whole, including its most basic doctrines such as parliamentary sovereignty, is a matter of common law.[33] I will argue that the extent to which it should be regarded as being, or at any time having been, a matter of common law depends on the answers to at least three different, but interrelated, questions. Over the centuries, these questions have been answered in many different ways, some of which are as follows.

1. What is the nature of the common law?

Does the common law consist of: (1) the customs of the community, regarded either as immemorial and unchanging, or as gradually evolving; (2) the 'common erudition,' or learned tradition, of the common law bench and bar; (3) a body of norms resting on fundamental 'maxims' or 'principles' whose identification, exposition and application involves an essentially moral 'reason' and judgment; (4) a body of judge-made rules laid down ('posited') by courts in past cases; or (5) some combination of two or more of these alternatives (e.g., the customs of the community, insofar as they are consistent with 'reason,' or insofar as they are recognised and applied by the common law courts)?

2. What is the scope of the common law?

How is the scope of the common law best understood: (1) does it confer and impose powers, rights, obligations and liabilities only with respect to particular subject-matters, mainly in areas of private law such as land law and contract law, but including some matters of public law such as the 'ordinary' prerogatives of the Crown? On this view, powers, rights and so on with respect to other subject-matters – such as the royal succession, the 'absolute' prerogatives of the Crown, and the powers and privileges of Parliament – subsist independently of the common law (even if the common law necessarily recognises and defers to them). (2) Or is the common law omnicompetent and comprehensive, in the sense that

[33] For present purposes, nonjusticiable constitutional conventions, which are not regarded as 'law' at all, can be disregarded. The claim in question concerns constitutional norms that are recognised and applied by the courts.

all non-statutory legal powers, rights and so on – including the power to make statutes – are its creatures, and subject to its control?

3. *Who has ultimate authority to expound the common law?*

Is the authority to expound the common law possessed by: (1) the Crown, (2) Parliament (meaning the Crown-in-Parliament), or (3) the regular common law courts?

A few observations concerning these questions may be helpful. First, they have frequently been subjects of obscurity and disagreement. In his study of common law thought in the medieval and early modern periods, James Tubbs emphasises that lawyers and judges were concerned much more with technicalities of pleading and procedure than with theoretical questions, and consequently there is little systematic discussion of general jurisprudence in the common law literature until the sixteenth century.[34] Even then, '[t]he impression one gets from reading a wide range of … reports … is of a profession with very little interest in legal philosophy, one that does not go to the trouble of attempting to formulate a coherent jurisprudence'.[35] Tubbs denies that any single conception of the nature of the common law was ever generally accepted.[36] Obscurity and disagreement continued even into the seventeenth century, when some eminent lawyers stressed the antiquity of the common law and identified it with custom, while others showed little interest in its age and emphasised its inherent 'reason'.[37] Moreover, agreement as to one of our three questions was often accompanied by disagreement about another. Sir Edward Coke and Sir John Davies, for example, held similar conceptions of the nature of the common law, but radically different opinions about its scope, especially as to whether it governed the royal prerogative.[38] Disagreement about the first and second questions continues today.

Secondly, the weight of opinion with respect to each question has shifted over time: some answers that were popular in past centuries were rejected in later ones. In the seventeenth century, it was generally accepted that Parliament had ultimate authority to enunciate and interpret the common law, but until 2009 that view could aspire to plausibility only in the tenuous

[34] Tubbs, *The Common Law Mind*, pp. 23 and 1, respectively.
[35] *Ibid*., pp. 115 and 188.
[36] *Ibid*., pp. 48, 65, 69, 70, 115, 162 and 190–2.
[37] *Ibid*., pp. 194–5 and chs. 6–8.
[38] See text accompanying n. 98 below (discussing Coke), text accompanying nn. 116–118 below (discussing Davies).

sense that the highest court was formally the House of Lords; in reality it is, of course, a separate court and only nominally a 'committee' of that House.

Thirdly, the questions are interrelated, in that a particular answer to one may be difficult to reconcile with a particular answer to another. For example, for reasons given in the next section, if the common law is merely a body of judge-made rules, it cannot be the source or basis of Parliament's law-making authority.[39] On the other hand, if it consists of the customs of the community, this becomes more plausible, as does the broader claim that the unwritten constitution as a whole is a matter of common law.

Fourthly, apparent agreement that the unwritten constitution is a matter of common law may obscure disagreement over important details. Even if some seventeenth century lawyers believed that the most fundamental laws of the constitution were part of the common law, they may have meant something very different from superficially similar beliefs held today. They may have conceived of the common law as the custom of the realm, which the High Court of Parliament – rather than the 'inferior courts' of Westminster – had supreme authority to enunciate and expound. That view provides little support for modern theories in which the common law is conceived, on Dworkinian lines, as an evolving body of principles of political morality, which the ordinary courts have ultimate authority to identify and develop.

It is not possible, in this chapter, to provide a comprehensive account of how these three questions have been answered in each of the many centuries over which the British constitution evolved. That would require a book. All that is possible is a brief account of the main issues.

We start with the period up to the sixteenth century, which is clouded by a lack of both clear theoretical thinking about constitutional fundamentals, and written records of what thinking there was. According to Pollock and Maitland, medieval English lawyers had no definite theory of the relationship between enacted and unenacted law, or between law and custom.[40] Chrimes reports that 'the half-expressed concepts and ideas behind the machinery of government are often elusive and hard to

[39] See text accompanying nn. 200–204 below.

[40] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2nd edn) (vol. 1) (London: Cambridge University Press, 1968), p. 176.

interpret, because of the meagreness with which fifteenth-century people recorded what to them were assumptions that called for no statement'.[41]

Nevertheless, it is surely significant that in books such as Tubbs's *The Common Law Mind*, Doe's *Fundamental Authority in Late Medieval England*, and Chrimes's *English Constitutional Ideas in the Fifteenth Century*, one searches in vain for any reference to a political theorist or lawyer asserting that the major institutions of government owed their existence and authority to the common law.[42] Could this have been one of those 'assumptions that called for no comment' mentioned by Chrimes? After all, many writers starting with 'Bracton' spoke of kings being 'under the law'.[43] If they meant customary law, and if all customary law was common law, then perhaps the theory of common law constitutionalism was implicit in medieval legal thought. But these are two big 'ifs'.

It is tempting to assume that medieval and early modern lawyers regarded both the source and limits of the King's basic rights and powers as essentially customary. But in fact this is dubious. Some of those rights, powers and limits were no doubt believed to derive from divine or natural law. Others were regarded as having been laid down in the *Leges Edwardi* and *Leges Henrici*: the Laws of Edward the Confessor, and the Laws of Henry I. William the Conqueror claimed to be the lawful successor of Edward the Confessor, and Henry I in his coronation charter 'confirmed' Edward's putative laws as amended by William with the consent of his barons.[44] When the texts that supposedly recorded these 'laws' were revised in the twelfth century, apocryphal additions inserted constitutional ideas derived from scholastic political principles and the English coronation oath.[45] The baronial rebellion that led to Magna Carta was preceded by a demand for the confirmation of Henry I's charter, and was strongly influenced by the *Leges Edwardi*. The *Leges*, along with two other documents of equally dubious origin, the *Mirror of Justices* and *Modus*

[41] S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (New York: American Scholar Publications, 1966), p. xvi.

[42] Tubbs, *The Common Law Mind*; Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge: Cambridge University Press, 1990); Chrimes, *English Constitutional Ideas*.

[43] It is now known that William Raleigh wrote *De Legibus Consuetudinibus*, which Bracton later edited. See Paul Brand, 'The Age of Bracton' in John Hudson (ed.), *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, Proceedings of the British Academy (Oxford: Oxford University Press, 1996), 78 at pp. 78–9.

[44] J.C. Holt, 'The Origins of the Constitutional Tradition in England' in Holt, *Magna Carta and Medieval Government* (London: Hambledon Press, 1985), 1 at p. 13.

[45] *Ibid*.

tenendi Parliamentum, became the core of the so-called 'ancient constitution', which in later centuries was widely thought to serve both as a shield against tyranny, and a justification for rebellion.[46]

Tubbs maintains that when Glanvil and 'Bracton' discussed the 'unwritten laws' of England, they were referring not to customary laws, but to decisions and enactments of kings, acting with the advice of their magnates, that had not been recorded in writing.[47] The most thorough recent study of 'Bracton' concludes that:

> What he meant by the idea of a king under God and the law was, in the first place, that the king ought to proceed by the judgment of the barons and, secondly, that a king ought to practice the Christian virtues. But neither notion carries with it any connotation of a body of substantive, much less constitutional, law that the king ought not to contravene.[48]

In the abbreviated version of 'Bracton', known as *Britton*, all English law was depicted as the product of royal authority.[49] The substantive common law was, as Charles Oligvie has observed, 'the child of prerogative', based on the writs of the Angevin and Plantagenet kings that were later supplemented by statute.[50] It is clear that the King's clerks and judges had no mandate to deal with the most fundamental laws governing his right to the throne (if there were any), or to question the scope of his powers. Their own jurisdiction and authority were derived from him, and 'Bracton' denied that they could hold him to account.[51] In the many disputes between kings and barons, the latter never appealed to the common law or its courts: they complained that it was the King's law, and the judges were his servants.[52] Moreover, 'there was so little substantive law that the question of legality at the level of high politics hardly arose. The answer of

[46] Janelle Greenberg, *The Radical Face of the Ancient Constitution: St. Edward's 'Laws' in Early Modern Political Thought* (Cambridge: Cambridge University Press, 2001). For the actual origins of these documents, see *ibid*. at pp. 9, 57–61, 71 and 77–8. Note that the term 'ancient constitution' is of modern coinage, an attempt to translate old ideas into a modern idiom.

[47] Tubbs, *The Common Law Mind*, pp. 3, 7, 12, 15–17 and 189.

[48] Donald Hanson, *From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought* (Cambridge, Mass: Harvard University Press, 1970), p. 131.

[49] Tubbs, *The Common Law Mind*, p. 187.

[50] Sir Charles Ogilvie, *The King's Government and the Common Law 1471–1641* (Oxford: Blackwell, 1958), p. 10.

[51] Goldsworthy, *The Sovereignty of Parliament*, pp. 22–3.

[52] Hanson, *From Kingdom to Commonwealth*, pp. 159, 188–90 and 214.

the great twelfth and thirteenth century law books to fundamental political questions was that such matters lay with the king and magnates of the realm.'[53]

In the fourteenth and fifteenth centuries, it is unlikely that the most basic laws on which royal government rested would have been classified as part of the common law, even if they were by then customary. Tubbs challenges the received view that the common law was, at that time, generally identified with the customs of the realm.[54] He argues that it was more frequently treated as the 'common erudition' (or in his words, the 'learned tradition') of the bench and bar of the common law courts.[55] Despite reading five thousand Year Book cases, he uncovered very little evidence that medieval common lawyers primarily understood their law to be custom,[56] and even in the sixteenth century, when it was often described as 'common usage' or 'common custom', lawyers 'nearly always mean only the usage or custom of the bench and bar'.[57] Only in the early seventeenth century did an important common lawyer, Sir John Davies, unequivocally describe the common law as the custom of the English people, and even then, his opinion was unorthodox.[58] Tubbs's conclusions corroborate Norman Doe's, who reports that 'forensic and judicial usage and learning'– and judicial rather than popular consent – were treated in the Year Books as the basis of the common law:[59] 'Indeed, the idea that the common law was in the keeping of, or within the control of, the judges was implicit in several stock phrases … Sometimes, the judges overtly employ the idea that a rule exists or a result is reached because they "assent" to it.'[60] This quasi-positivist conception of the nature of the common law surely had implications for its scope. It is unlikely that those who conceived of it as the 'common erudition' of the bench and bar would have thought that it

[53] *Ibid*., pp. 131–2. [54] Tubbs, *The Common Law Mind*, pp. 1–2.

[55] *Ibid*., pp. 2, 24–5, 45–52, 56–7, 65–6, 111, 114, 130 and 193–4. The common law as 'common erudition' is a principal theme in J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001), Lecture Three, esp. at pp. 67–70 and 74–9.

[56] Tubbs, *The Common Law Mind*, pp. 24, 29, 45–6 and 50.

[57] *Ibid*., pp. 191–2. See also Doe, *Fundamental Authority*, p. 26; Alan Cromartie, *Sir Matthew Hale 1609–1676: Law, Religion and Natural Philosophy* (Cambridge: Cambridge University Press, 1995), pp. 14–15.

[58] Tubbs, *The Common Law Mind*, p. 192; see also *ibid*. at pp. 130–2.

[59] Doe, *Fundamental Authority*, p. 22; see also *ibid*. at p. 32 (noting that occasionally the fiction was expressed, notably by St. German, that the community had consented to the common law).

[60] Doe, *Fundamental Authority*, pp. 23–4.

governed such fundamental matters as the royal succession, or the privileges and powers of Parliament.

The royal succession was not governed by clear, well-established rules – customary or otherwise – until the eighteenth century. The Crown was at different times claimed by hereditary right, right of conquest, and/or election affirmed by statute.[61] There was no consensus as to which of these claims had priority, or as to their ultimate basis: a claim to hereditary right, for example, could be based on either custom or the law of God. Chrimes denies that the fifteenth century had any 'accepted public law' dealing with the succession.[62] In Sir John Fortescue's lengthy defence of the Lancastrian claim to the throne, he relied on natural law, not custom.[63] In later recanting that defence, he said that in 'the laws of this land … the students learn full little of the right of succession of kingdoms'.[64] In 1460, the judges declined to express an opinion concerning a dispute over the matter, because as 'the King's justices' they were unfit to decide it; moreover,

> the matter was so high and touched the King's estate and regality, which is above the law and passed their learning, wherefore they dared not enter into any communication thereof, for it pertained to the Lords of the King's blood, and the peerage of this his land, to have communication and meddle in such matters.[65]

It is equally unlikely that the powers and privileges of the 'High Court of Parliament' – the highest court in the realm – would have been regarded as subject to the 'common erudition' of 'inferior courts'. In 1388, the Lords who prepared charges of treason against some of Richard II's associates, including a number of judges, declared 'that in so high a crime as is alleged in this appeal, which touches the person of the King … and the state of his realm … the process will not be taken anywhere except to Parliament, nor judged by any other law except the law and court of parliament'; 'the great matters moved in this Parliament and to be moved in parliaments

[61] Howard Nenner, *The Right to be King: The Succession to the Crown of England 1603–1714* (North Carolina: University of North Carolina Press, 1995), pp. 1–12.

[62] Chrimes, *English Constitutional Ideas*, pp. 22 and 34.

[63] Sir John Fortescue, *De Natura Legis Naturae* (New York: Garland Publishing, 1980), referred to in Tubbs, *The Common Law Mind*, p. 53.

[64] Sir John Fortescue, 'The Declaracion of Certayn Wrytyngs' in *The Works of Sir John Fortescue*, p. 532, quoted in Chrimes, *English Constitutional Ideas*, p. 22.

[65] *Rotuli Parliamentorum* (London, s.n., 1767–1777), V, pp. 375–6, quoted in W.H. Dunham and C.T. Wood, 'The Right to Rule in England: Depositions and the Kingdom's Authority, 1327–1485' *American Historical Review* 81 (1976) 738 at 750.

in the future, touching peers of the land, should be introduced, judged and discussed by the course of Parliament and not by civil law nor by the common law of the land, used in other and lower courts of the land'. This followed advice given by judges and sergeants at law that the proceedings were 'not made nor affirmed according to the order which either one or the other of these laws [common or civil] requires'.[66] In 1454, the judges acknowledged that 'the determination and knowledge of that privilege (of the high court of Parliament) belongs to the Lords of Parliament, and not to the justices'.[67] We will later encounter similar views expressed by the House of Commons in 1604, Sir Edward Coke in his *Fourth Institute*, and Sir Matthew Hale.[68] As Donald Hanson concludes:

> Obviously, the estates of the realm in parliament were quite clear that these matters of high politics were not governed by the common law. In short, the men of the Middle Ages were unwilling to attribute to the common law the constitutional bearing which modern enthusiasts have been so ready to see there.[69]

As a body of law administered by particular courts, the common law was sometimes regarded as just one branch of the *lex terrae* or 'law of the land'.[70] On this view, other bodies of law, administered by other courts, were equal in status. The issue was raised during jurisdictional disputes between the common law courts and civil law courts, that broke out in the late sixteenth century. The common law judges began to issue prohibitions against suits pending in civil law courts, which resented the loss of business that this threatened to cause.[71] The civilians could not hope for assistance from Parliament, which was dominated by common lawyers, so they appealed to the King. They argued that as he had delegated his jurisdiction as the 'fountain of justice' to all his various courts, he retained supreme authority to determine the boundaries between their jurisdictions. The argument assumed that all his courts, common law, civil law, ecclesiastical and prerogative – and the bodies of law they

[66] Bertie Wilkinson, *Studies in the Constitutional History of Medieval England 1216–1399* (vol. 2) (London: Longmans, 1952), pp. 280 and 282; see also S.B. Chrimes and A.L. Brown (eds.), *Select Documents of English Constitutional History 1307–1485* (London: Adam & Charles Black, 1961), pp. 146–9.

[67] *Rotuli Parliamentorum*, V, 240, quoted in Chrimes, *English Constitutional Ideas*, p. 152.

[68] See text accompanying nn. 106–108 and 162 below.

[69] Hanson, *From Kingdom to Commonwealth*, p. 215.

[70] Brian P. Levack, *The Civil Lawyers in England 1603–1641: A Political Study* (Oxford: Oxford University Press, 1973), p. 143.

[71] *Ibid*., pp. 72–81.

administered – were constitutionally parallel and equal, all subordinate to the King, but none to any other.[72] Lord Chancellor Ellesmere complained that Sir Edward Coke desired 'to weaken the power of the Ecclesiastical Court, as if they were not absolute in themselves in jurisdictions naturally belonging to them, but subordinate [to] the judges of the common law to be controlled in things that fall not within the level of the common law'.[73] But some writers had begun to equate the 'law of the land' with the common law alone.[74] The common lawyers regarded their courts and their law as superior to the civil law and its courts. The common law alone constituted the law of England and the supreme guardian of the people's liberties, and it demarcated the jurisdiction within which civil and other laws could legitimately operate.[75] The civil law was equivalent to a special body of customary law that was accorded legal recognition for particular purposes by the common law.[76]

The civil lawyers lost this battle, partly because the Tudor monarchs needed the support of the common lawyers to impose royal supremacy over ecclesiastical courts and canon law.[77] But the common law did not achieve a similar victory in its jurisdictional struggles with courts of equity early in the next century. The Court of Chancery, unlike the civil law courts, could plausibly claim to be as ancient as the common law courts.[78] Furthermore, since Chancellors outranked common law judges, it could also plausibly claim to be the highest of the King's courts (apart from Parliament itself).[79] In addition, several writers depicted equity as a moral law deduced directly from the law of God, and therefore as inherently superior to all positive laws, including the common law.[80] These claims did not, of course, go unchallenged. Common lawyers such as Sir Edward Coke ranked courts according to the law they administered, and

[72] *Ibid*., pp. 81–3.

[73] 'Observations on Ye Lord Cookes Reportes', in Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press, 1977), p. 297.

[74] Knafla, *Law and Politics in Jacobean England*, p. 166.

[75] Levack, *The Civil Lawyers in England*, pp. 144–5 and 122–3.

[76] *Ibid*., pp. 145–6.

[77] *Ibid*., pp. 125–6; John Guy, 'The "Imperial Crown" and the Liberty of the Subject: The English Constitution from Magna Carta to the Bill of Rights' in Bonnelyn Young Kunze and Dwight D. Brautigam (eds.), *Court, Country and Culture: Essays on Early Modern British History in Honor of Perez Zagorin* (Rochester: University of Rochester Press, 1992), 65 at pp. 72–3.

[78] Levack, *The Civil Lawyers in England*, p. 147.

[79] Knafla, *Law and Politics in Jacobean England*, pp. 160–1.

[80] *Ibid*., p. 161.

since the common law was in his opinion superior to equity, its courts were 'above' the Court of Chancery.[81] Leading common lawyers denied that equity was derived directly from divine law; it was, instead, concerned with the reasons underlying positive laws, and aimed merely to prevent strict adherence to legal rules from defeating those reasons.[82] Lord Chancellor Ellesmere denied both claims of superiority: he regarded Chancery and Star Chamber as equal to the common law courts, and the laws they administered as equally part of the 'law of the land'.[83] James I accepted the view that civil lawyers had urged in the previous century, insisting that he would settle jurisdictional disputes among his courts: it 'is a thing regal, and proper to a King, to keep every court within its own bounds'.[84] He said that the Court of Chancery was 'independent of any other Court, and is only under the King … from that Court there is no appeal'; if it exceeded its jurisdiction, 'the King only is to correct it, and none else'. He explicitly forbad the common law courts from bringing charges of *praemunire* against Chancery for allegedly exceeding its powers.[85]

The common law came to be regarded as superintending all other bodies of law administered by English judges, except for equity, which it never subordinated.[86] This development appears to have been part, and a partial cause, of broader changes in conceptions of the nature and scope of the common law. Instead of being merely the 'common erudition' of particular courts, it was increasingly portrayed as the repository of immemorial customs of the realm, including those dealing with the rights and powers of the King and Parliament. This led to what has been called the 'classic age of common-law political thought, of ancient constitutionalism' described by writers such as J.G.A. Pocock and Glenn Burgess.[87] Janelle

[81] *Ibid*., p. 160. [82] Tubbs, *The Common Law Mind*, pp. 102–3.

[83] Knafla, *Law and Politics in Jacobean England*, pp. 161 and 166.

[84] King James VI and I, 'Speech in Star Chamber 1616' in Johann P. Sommerville (ed.), *King James VI and I: Political Writings* (Cambridge: Cambridge University Press, 1995), 212 at p. 213. See also 'Speech of 21 March 1610' in Sommerville (ed.), *King James VI and I*, p. 188.

[85] King James VI and I, 'Speech in Star Chamber 1616' in Sommerville (ed.), *King James VI and I*, pp. 214–15.

[86] On other bodies of law, see, e.g., Sir Matthew Hale, *The History of the Common Law of England* (Charles M. Gray, ed.) (Chicago: University of Chicago Press, 1971), p. 4; Sir William Blackstone, *Commentaries on the Laws of England* (vol. 1) (Oxford: Oxford University Press, 1765), p. 15.

[87] Pocock, *The Ancient Constitution and the Feudal Law*; Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought 1600–1642* (Hampshire: Palgrave Macmillan, 1992).

Greenberg has shown that constitutional claims based on supposedly 'ancient laws', such as the *Leges Edwardi*, were commonly made long before the seventeenth century.[88] But it may have been only in the late sixteenth century that it became widely believed that the substance of these ancient laws survived only through having been absorbed by the common law, which had thereby inherited their role as the fundamental law of the land.[89]

Alan Cromartie suggests that assuming the mantle of national custom served the common law's ambitious claim to be able to resolve disputed questions of high politics: 'they needed to offer some kind of explanation why the customs observed by the bench should bind upon the nation as a whole'.[90] Many lawyers thought that the customs of the realm had, in effect, been consented to by the King and the community.[91] Coke's theory may have been slightly different, but the result was the same. As Charles Gray explains that theory:

> [t]he lawyer working exclusively through the law discovered something more than the law – the native fund of preferences and values, national character in effect … [W]ith the faith that legal thinking at its best disclosed 'the common custom of the realm', the lawyer stepped out of his 'art' while refusing to budge from it. He turned political oracle.[92]

Cromartie argues that between 1528 and 1628, there was a 'constitutionalist revolution' in English political culture that originated within the legal profession.[93] Coke, who stated that the '[common] laws do limit, bound and determine of all other human laws, arts and sciences', was

[88] Greenberg, *The Radical Face of the Ancient Constitution*.

[89] The thesis that the common law originated in these laws is found in the writings of Polydore, Vergil, Holinshed, Sir John Dodderidge, John Speed, Peter Heylyn, John Cowell and William Whiteway, quoted in Greenberg, *The Radical Face of the Ancient Constitution*, pp. 88, 99, 108, 135, 136, 152–3 and 156, respectively. See also the views of Hale and Vaughan, below at n. 145.

[90] Cromartie, *Sir Matthew Hale*, p. 16.

[91] *Ibid*., pp. 12–13.

[92] Charles M. Gray, 'Parliament, Liberty, and the Law' in J.H. Hexter (ed.), *Parliament and Liberty: From the Reign of Elizabeth to the English Civil War* (Stanford: Stanford University Press, 1992), 155 at pp. 162–3. Cromartie's account of Coke's thought is somewhat different. See Cromartie, *Sir Matthew Hale*, pp. 13 and 32.

[93] Alan Cromartie, 'The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England', (1999) 163 *Past and Present* 76, esp. at 82 (for the 1528 date) and 111 (for the 1628 date). These themes are developed in his book, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (Cambridge: Cambridge University Press, 2006).

particularly influential.[94] The common lawyers came to think of their law as 'the legal master science', based on natural law, which determined the respective rights of the King and his subjects with such perfect reasonableness that no resort to extraneous principles was necessary.[95] The common law allowed the King's servants to administer other bodies of law only on the condition that they remained accountable to it.[96] This principle applied not only to rival courts, but to statutory bodies such as Commissioners of Sewers that exercised discretionary powers. But it did not go unchallenged. One lawyer, Robert Callis, rejected Coke's view that all discretions were subject to the rule of common law, arguing that some statutes conferred authority 'to order business there arising in course of equity': in other words, discretion guided only by the statutory body's understanding of the law of nature.[97]

Most importantly, Coke's principle applied to the prerogatives of the King himself, which many common lawyers insisted were conferred and limited by the common law.[98] Sir Henry Finch expressed this view when he said that the King's prerogative 'grows wholly from the reason of the common law . . . [o]nly the common law is the *primum mobile* which draws all the planets in their contrary course'.[99] (This Latin term – meaning 'first moveable' or 'prime mover' – had been used by Aristotle, and later Ptolemy, to denote the outermost sphere of the universe believed to cause all the other spheres to revolve around the earth. This analogy was often used in describing the ultimate source of political and legal authority.) In some quarters, the common law had come to be accepted as governing even the royal succession. In 1571, the Treasons Act declared that it was treason to maintain 'that the common law of this realm not altered by Parliament ought not to direct the right of the crown of England'.[100] And in 1610, Thomas Hedley stated that 'the common law doth bind, and lead

[94] Cromartie, 'The Constitutionalist Revolution', 88 (quoting Part Three of Coke's Reports in John Farquhar Fraser (ed.), *The Reports of Sir Edward Coke* (Joseph Butterworth and Son, 1826), pp. xxxviii.

[95] Cromartie, 'The Constitutionalist Revolution', 81–2. [96] *Ibid*., p. 88.

[97] *Ibid*., pp. 91–2, quoting Robert Callis, *The Reading of that Famous and Learned Gentleman Robert Callis; Sergeant at Law, upon the Statute of 23 Henry VIII, cap. 5 of Sewers* (London: William Leak, 1647), pp. 85–6.

[98] Cromartie, 'The Constitutionalist Revolution', 96.

[99] Sir Henry Finch, *Law, or A Discourse Thereof* (London: Society of Stationers, 1627), p. 85.

[100] Carl Stephenson and Frederick George Marcham (eds.), *Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Interregnum* (revised edn) (vol. 1) (Harper & Row, 1972), p. 352.

or direct the descent and right of the crown'.[101] He also asserted that 'the Parliament has his power and authority from the common law, and not the common law from the parliament. And therefore the common law is of more force and strength than the Parliament'.[102] If the common law was the source of the King's title to the throne, his prerogatives, and the authority of Parliament, it was indeed the constitution of the realm.

But not all common lawyers, let alone other members of the ruling elite, agreed with these views. As for the succession, Lord Chancellor Ellesmere said in 1605 that 'the King's majesty, as it were inheritable and descended from God, has absolutely monarchical power annexed inseparably to his crown and diadem, not by common law nor statute law, but more ancient than either of them'.[103] Even Coke agreed that 'the King's majesty, in his lawful, just and lineal title to the Crown of England, comes not by succession only, or by election, but from God only … by reason of his lineal descent'.[104]

Although Coke insisted that the King's prerogatives were conferred and regulated by the common law, he does not seem to have held the same view of Parliament's privileges. In his *First Institute*, in a list of fifteen 'diverse laws within the realm of England', he included – in addition to the common law itself – the *lex et consuetudo Parliamenti* (the law and custom of Parliament).[105] Later still, in his *Fourth Institute*, he discussed the relationship between the common law and the *lex and consuetudo Parliamenti*:

> And as every court of justice has laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, so the High Court of Parliament *suis propriis legibus & consuetudinibus subsistit* [subsists according to its own laws and customs]. It is *lex & consuetudo Parliamenti,* that all weighty matters in any Parliament moved concerning the Peers of the Realm, or Commons in

[101] 'Speech on Impositions, 28 June 1610' in Elizabeth Read Foster (ed.), *Proceedings in Parliament 1610* (vol. 2) (New Haven: Yale University Press, 1966), p. 174.

[102] *Ibid*. But see the discussion of his views in Goldsworthy, *The Sovereignty of Parliament*, pp. 117–19.

[103] John Hawarde in William Paley Baildon (ed.), *Les Reportes del Cases in Camera Stellata 1593–1609* (London, 1894), 188, quoted in Conrad Russell, 'Divine Rights in the Early Seventeenth Century' in John Morrill, Paul Slack and Daniel Woolf (eds.), *Public Duty and Private Conscience in Seventeenth-Century England* (Oxford: Oxford University Press, 1993), 101 at p. 117.

[104] Hawarde, quoted in Russell, 'Divine Rights in the Early Seventeenth Century', p. 118.

[105] Edward Coke, *The First Part of the Institutes of the Laws of England* (2nd corrected edn) (Moore, 1629), ch. 1, sec. 3, p. 12.

> Parliament assembled, ought to be determined, adjudged, and discussed by the course of the Parliament, and not by the civil law, nor yet by the common laws of this realm used in more inferior courts … And this is the reason that judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but *secundum legem ad consuetudinem Parliamenti* [according to the laws and customs of Parliament]: and so the judges in divers Parliaments have confessed. And some hold, that every offence committed in any court punishable by that court, must be punished (proceeding criminally) in the same court, or in some higher, and not in any inferior court, and the Court of Parliament has no higher.[106]

Coke clearly did not regard the 'law and custom of Parliament' as an example of the local or particular customs whose application the common law sometimes authorised. He listed it separately. Moreover, local or particular customs were not authorised by the common law unless they satisfied the test of reasonableness, and it is hardly likely that judges would have dared to dispute a privilege asserted by Parliament itself, as part of its 'law and custom', on the ground that it was contrary to reason. Parliament was, as Coke acknowledged, the highest court in the realm. Cromartie suspects that Coke's discussion of the *lex et consuetudo Parliamenti* was motivated by a desire to criticise James I's conduct in the 1620s, in attempting to prevent discussion of certain matters in Parliament, and ordering the arrest of leading members of the Commons who had forcibly prevented the Speaker from adjourning debate. Coke was also warning the judges of inferior courts not to interfere with Parliament in such matters.[107] But political motivations no doubt lay behind many of his views, including his expansion of the scope of the common law in other respects. Moreover, there were good precedents for his views about the 'law and custom of Parliament'. In 1604, the House of Commons complained that James I had accepted an opinion of his judges, concerning a disputed election return, rather than a contrary determination of the House itself: 'the judges' opinion … being delivered what the common law was, which extends only to inferior and standing courts, ought [not] to bring any prejudice to this High Court of Parliament, whose power being above the law is not founded on the common law but have their rights and privileges peculiar to themselves'.[108]

[106] Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (4th edn) (Crooke, 1669), ch. 1, pp. 14–15.

[107] E-mail from Alan Cromartie to author, 18 March 2005.

[108] 'The Form of Apology and Satisfaction, 20 June 1604' in J.R. Tanner (ed.), *Constitutional Documents of the Reign of James I 1603–1625* (Cambridge: Cambridge University Press,

So not even Coke, the prime exemplar of the 'common law mind', consistently held that the common law was the supreme and overarching body of law, which provided the ultimate source of all legal authority and governed the scope and application of all other laws. As for other lawyers, statesmen, and political theorists, many located the ultimate source of political authority not in the common law, but in either the King, or the community represented in Parliament. Even in the fourteenth and fifteenth centuries, those who sought to account for the authority of legislation had looked not to custom or common law, but to the will of the King or the 'common consent' of the whole realm.[109] By the sixteenth century, these strands of thought had evolved into competing theories, one based on the King's divine right to rule, and the other on the consent and combined wisdom of the community.[110] Henry VIII's self-proclaimed 'imperial' kingship – deployed to justify his supremacy over the Church – entailed that he was 'under God but not the law, because the king makes the law'.[111] On this view, the King was the human source of law and political authority, and the foundation of all jurisdictions.[112] The other theory was expounded by Richard Hooker, who argued that '[t]he whole body politic makes laws, which laws give power unto the king'.[113] For many, the two theories could be happily combined to sustain the authority of the King in Parliament, but in the 1640s they were split apart with tragic consequences.

Sir John Davies is often cited as one of the two best examples – the other being Coke – of the 'classical' seventeenth century 'common law mind' that placed the common law at the core of the 'ancient constitution'.[114] The preface to Davies's *Le Primer Report des Cases [etc.]* has been described as 'the classic exposition of the common lawyer's viewpoint'.[115] He depicted the common law as the custom of the realm, refined by the accumulated

1930), 221 at 224. See also the earlier incident discussed in the text accompanying n. 67 above.

[109] Doe, *Fundamental Authority*, p. 31.

[110] Goldsworthy, *The Sovereignty of Parliament*, pp. 63–75.

[111] Quoted in Guy, 'The "Imperial Crown" and the Liberty of the Subject' in Kunze and Brautigam (eds.), *Court, Country and Culture*, pp. 67–8.

[112] Corinne Comstock Weston and Janelle R. Greenberg, *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge: Cambridge University Press, 1981), p. 87; Goldsworthy, *The Sovereignty of Parliament*, pp. 65–7.

[113] Richard Hooker, 'Of the Laws of Ecclesiastical Polity' in J. Keble (ed.), *The Works of Mr. Richard Hooker* (7th edn) (vol. 3) (Georg Olms Verlag, 1977), p. 443.

[114] See, e.g., Pocock, *The Ancient Constitution and the Feudal Law*.

[115] David Wootton, (ed.), *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Penguin, 1986), p. 129.

experience and wisdom of countless generations, and warned that whenever it was changed by statute, inconveniences invariably followed.[116] Yet Davies was also a royalist, who maintained that originally, the King had possessed 'absolute and unlimited power in all matters whatsoever'; that he subsequently agreed to subject his power to the positive law in 'common and ordinary cases'; but that he retained 'absolute and unlimited' power in other cases. The latter power was not conferred on him by the people or the common law: it was 'reserved by himself to himself, when the positive law was first established', his prerogative being 'more ancient than the customary law of the realm', and remaining 'above the common law'.[117] Davies compared the King 'to a *primum mobile*, which carries about all the inferior spheres in his superior course … [A]s the King does suffer the customary law of England to have her course on one side, so does the same law yield, submit, and give way to the King's prerogative over the other'.[118] He was by no means the only lawyer who held royalist views. Sir Francis Bacon said that 'the king holds not his prerogatives of this kind mediately from the law, but immediately from God, as he holds his crown'.[119] Others who agreed included Attorney-General and future Chief Justice Sir John Hobart, Chief Baron Fleming, the great antiquary William Lambarde, Lord Keeper Coventry and Serjeant Ashley.[120] James I was not alone in holding that his 'absolute' prerogative was 'no subject for the tongue of a lawyer'.[121]

The early seventeenth century was riven by constitutional disputes partly because the law of the constitution was inherently uncertain: every attempt to state it became 'tendentious as soon as it got beyond easy cases … Englishmen did not and could not know sufficiently the rules of the game in which they were players.'[122] Proponents of rival ideologies were drawn into debate over which institution was the most ancient: the monarchy, assemblies representing the community, or the common law. The

[116] Sir John Davies, *Le Primer Report des Cases* (Flesher, Steater, and Twyford, 1674) in Wootton (ed.), *Divine Right and Democracy*, pp. 131–2.

[117] Sir John Davies, *The Question Concerning Impositions* (Twyford, 1656), pp. 29–33. For discussion, see Tubbs, *The Common Law Mind*, pp. 133–9.

[118] Davies, *The Question Concerning Impositions*, p. 26.

[119] James S. Spedding, R.L. Ellis and D.D. Heath (eds.), *The Works of Francis Bacon* (vol. 10) (London: Longman, 1858–1874), p. 371. But see *ibid*. (vol. 14), 118, quoted in Tubbs, *The Common Law Mind*, p. 138.

[120] See Goldsworthy, *The Sovereignty of Parliament*, pp. 82–4, esp. p. 83, n. 40.

[121] Charles H. McIlwain, *The Political Works of James I* (Cambridge, Mass: Harvard University Press, 1918), p. 333.

[122] Gray, 'Parliament, Liberty, and the Law' in Hexter (ed.), *Parliament and Liberty*, pp. 191–2.

question was regarded as important because, as Corinne Weston explains, 'a derived authority was considered inferior to an original one'. William Prynne, for example, observed that 'every creator is of greater power and authority than its creature and every cause than its effect'.[123] The question was: what was the nature of England's original constitution?

Leading royalist writers found it incomprehensible that the common law could have come first, or that it could be more fundamental than the authority of the King. In his famous *Patriarcha*, Sir Robert Filmer discussed at length the necessary 'dependency and subjection of the common law to the sovereign prince':[124]

> The common law (as the Lord Chancellor Egerton teaches us) is the common custom of the realm. Now concerning customs, this must be considered, that for every custom there was a time when it was no custom … [w]hen every custom began, there was something else than custom that made it lawful, or else the beginning of all customs were unlawful. Customs at first became lawful only by some superior power, which did either command or consent to their beginning. And the first power which we find (as it is confessed by all men) is the kingly power, which was both in this and in all other nations of the world, long before any laws, or any other kind of government was thought of; from whence we must necessarily infer, that the common law itself, or common customs of this land, were originally the laws and commands of kings at first unwritten.[125]

Not only had kings created the common law, they retained 'absolute authority' to supplement or correct it.[126] For this reason, Filmer said elsewhere, the common law 'follows in time after government, but cannot go before it and be the rule to government by any original or radical constitution'.[127] Later in the century another prominent royalist, Dr Robert Brady, criticised Coke for giving the impression that the

[123] Corinne Comstock Weston, 'England: Ancient Constitution and Common Law' in J.H. Burns (ed.), *The Cambridge History of Political Thought 1450–1700* (Cambridge: Cambridge University Press, 1991), 374 at p. 377, quoting William Prynne, *The Treachery and Disloyalty of Papists to their Sovereigns in Doctrine & Practice* (Cambridge University Press, 1643), pp. 35–6. But not everyone thought that the origins of government were important. See Johann P. Sommerville, *Politics and Ideology in England 1603–1640* (London: Longman, 1986), pp. 105–6.

[124] Robert Filmer, *Patriarcha, or the Natural Power of Kings* (Richard Chiswell, 1680), p. 11, quoted in Johann P. Sommerville (ed.), *Patriarcha and Other Writings* (Cambridge: Cambridge University Press, 1991), p. 54.

[125] Filmer, *Patriarcha*, p. 9, quoted in Sommerville (ed.), *Patriarcha and Other Writings*, p. 45.

[126] Filmer, *Patriarcha*, p. 11, quoted in Sommerville (ed.), *Patriarcha and Other Writings*, p. 54.

[127] Robert Filmer, 'The Anarchy of a Limited or Mixed Monarchy', in Sommerville (ed.), *Patriarcha and Other Writings*, 131 at p. 153.

common law had grown up with the first trees and grass, 'abstracting it from any dependence upon, or creation by the government'.[128] For royalists, it was obvious that kings came first, armed with divine authority, and laws followed. The common law was sometimes explained as an innovation of the Norman kings.[129] Some royalists concluded that, since all law was originally made by kings, it could be unmade or overridden by them.[130]

The royalist theory was widely regarded as a threat to the traditional rights and liberties of the people, including the powers and privileges of the Houses of Parliament. But there were different ways of resisting that threat. Johann Sommerville shows that anti-absolutists relied either on a contractual theory, according to which the powers of the King were granted and limited by a pact between him and his subjects, or on Coke's theory of an immemorial common law that stood above both king and people. He denies that everyone who regarded the King's power as limited subscribed to Coke's theory: '[T]he vocabulary of contract was almost as common as that of immemorial law.'[131]

Contractualists argued that, whenever the word 'parliament' was first used, representative assemblies had existed from time immemorial. John Selden, for example, claimed that kings, nobles and freemen had shared the power to make law from the inception of civil government in England.[132] He regarded all law and government as the product of contracts between the King and the people.[133] His views influenced his younger friends, Sir Matthew Hale and Sir John Vaughan.[134] Others argued for the same conclusion on theoretical rather than historical grounds: there must have been an original contract, whereby the community established the kingship subject to stringent conditions designed to control regal power.[135] Charles Herle stated that 'what is meant by those fundamental laws of this kingdom … is that original frame of this

[128] Quoted by Weston, 'England: Ancient Constitution and Common Law' in Burns (ed.), *The Cambridge History of Political Thought*, p. 407.

[129] Greenberg, *The Radical Face of the Ancient Constitution*, quoting Samuel Daniel, *The Collection of the History of England* (Simon Waterson, 1626).

[130] Goldsworthy, *The Sovereignty of Parliament*, p. 83.

[131] Sommerville, *Politics and Ideology in England*, p. 79.

[132] *Ibid*., pp. 62–4; Paul Christianson, 'Royal and Parliamentary Voices on the Ancient Constitution c. 1604–1621' in Linda Levy Peck (ed.), *The Mental World of the Jacobean Court* (Cambridge: Cambridge University Press, 1991), 71 at pp. 83–5.

[133] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), pp. 96 and 99–100; Cromartie, *Sir Matthew Hale*, pp. 32, 37 and 39.

[134] Tuck, *Natural Rights Theories*, pp. 84, 113 and 134.

[135] Sommerville, *Politics and Ideology in England*, pp. 64–6 and 106–8.

co-ordinate government of the three Estates in Parliament, consented to and contrived by the people in its first constitution'.[136] It followed that the law owed its existence to the King, Lords and Commons acting together, and not to the King alone. In the 1640s, Henry Parker denied that the law was the mother of Parliament; on the contrary, Parliament was 'that court which gave life and birth to all laws'.[137] As the Earl of Shaftesbury put it much later, Parliament, rather than the King or the common law, was 'the great spring, the *primum mobile* of affairs'.[138] Many concluded that Parliament was therefore 'above the law'.[139]

Glenn Burgess argues that the doctrine of the ancient constitution broke down partly because of the impact of contractualist ideas.[140] He also describes Sir Matthew Hale as one of the few who continued the tradition of thinkers such as Coke.[141] But Hale was a contractualist. He said that 'all human laws have their binding power by reason of the consent of the parties bound'.[142] Like Selden, he regarded statute as the paradigm of law, and custom as tantamount to statute:[143] '[T]he laws of England … are institutions introduced by … will and consent … implicitly by custom and usage or explicitly by written laws or Acts of Parliament.'[144] Hale surmised that 'doubtless, many of those things that now obtain as common law, had their original by Parliamentary Acts or Constitutions, made in writing by the King, Lords and Commons'.[145]

[136] Charles Herle, *A Fuller Answer to a Treatise Written by Doctor Ferne etc.* (John Bartlet, 1642), p. 6.

[137] Henry Parker, *Observations Upon Some of His Majesties Late Answers and Expresses* (London, s.n., 1642), p. 42, reprinted in William Haller, *Tracts on Liberty in the Puritan Revolution 1638–1647* (vol. 2) (Octagon Books, 1979). See also similar statements quoted in Goldsworthy, *The Sovereignty of Parliament*, p. 106.

[138] Earl of Shaftesbury, *Some Observations concerning the Regulation of Elections for Parliament* (Randall Taylor, 1669), p. 5, quoted in Goldsworthy, *The Sovereignty of Parliament*, p. 150.

[139] Goldsworthy, *The Sovereignty of Parliament*, p. 130; see also *ibid*. at p. 106.

[140] Burgess, *The Politics of the Ancient Constitution*, pp. 99 and 231.

[141] *Ibid*., p. 231.

[142] D.E.C. Yale (ed.), *Sir Matthew Hale's The Prerogatives of the King* (Selden Society, 1976), p. 169; Cromartie, *Sir Matthew Hale*, pp. 23, 46, 49, 57, 67, 77 and 88.

[143] Cromartie, *Sir Matthew Hale*, p. 52.

[144] Matthew Hale, 'Reflections on Hobbes' *Dialogue*' in Sir William Holdsworth (ed.), *History of English Law* (vol. 5) (London: Sweet & Maxwell, 1945), 500 at p. 505; Yale, *Sir Matthew Hale's The Prerogatives of the King*, p. 169.

[145] Hale, *The History of the Common Law of England*, pp. 4, 6 and 44–5. Note that by 'constitutions' Hale meant particular written laws – like the so-called 'constitutions of Clarendon' – and not a constitution in our sense of the term. Elsewhere he said that 'positive constitutions … with us are called statutes or ordinances'. See Yale (ed.), *Sir Matthew Hale's The Prerogatives of the King*, p. 169.

Because authentic records of these ancient statutes (such as parliament rolls) had presumably been lost or destroyed, their substance survived only through having been absorbed into the common law: for legal purposes, they existed 'before time of memory'.[146] Hale's friend Sir John Vaughan agreed that this was why 'many laws made in the time of the Saxon Kings, of William the First, and Henry the First … are now received as common law'.[147] But he went further than Hale, asserting that 'most' of the common law must have originated in Acts of Parliament or their equivalent.[148]

Hale recognised that the common law could change, but also thought, in Charles Gray's words, that 'one essential thing has remained unchanged throughout: the basic political frame, or the constitutional rules by which other rules [could] be authoritatively recognised as binding'.[149] What was this 'political frame'? Hale said that the common law was:

> the common rule for the administration of common justice in this great kingdom … it is not only a very just and excellent law in itself, but it is singularly accommodated to the frame of the English government, and to the disposition of the English nation, and such as by a long experience and use is as it were incorporated into their very temperament, and, in a manner, become the complection [complexion] and constitution of the English commonwealth.[150]

Here, Hale was using the word 'constitution' in a medical sense, to mean the commonwealth's natural state of health.[151] It is significant that he described the common law as 'singularly accommodated to' the frame of government, and not as *forming* or *embodying* the frame of government. By 'the frame of the English government,' he meant law-making by the

[146] Hale, *The History of the Common Law of England*, p. 4. Hale and Vaughan both understood 'time of memory' to have been fixed for legal purposes as the period after 1189, the beginning of the reign of Richard I. See Alan Wharan, 'The 1189 Rule: Fact, Fiction or Fraud?' *Anglo-American Law Review* 1 (1972) 262. Plucknett has argued that Hale was quite right to suspect that the common law often originated in legislation of one kind or another. Theodore Frank Thomas Plucknett, *Legislation of Edward I* (Oxford: Oxford University Press, 1962), pp. 8–9.

[147] *Thomas* v. *Sorrell*, (1677) Vaugh 330, 358, 124 Eng. Rep. 1098, 1112. In the full passage, Vaughan clearly uses the word 'constitution' in the same sense as Hale. See n. 145, above.

[148] *Sheppard* v. *Gosnold*, (1672) Vaugh 159, 163, 124 Eng. Rep. 1018, 1020.

[149] See Gray's introduction to Hale, *The History of the Common Law of England*, p. xxiii.

[150] Hale, *The History of the Common Law of England*, p. 30.

[151] Cromartie, *Sir Matthew Hale*, p. 63.

King, with the assent of whatever assembly from time to time represented the people.[152]

In his *Prerogatives of the King*, Hale discussed how the 'nature and extent of any government in any kingdom or place' could be ascertained. He explained that in the absence of actual records of 'the original of government' – 'the original of that pact or constitution of our government':

> we must have recourse to the common custom and usage of the kingdom … I mean such customs as have been allowed by the known laws of the kingdom. And therefore under the word custom I take in the traditions and monuments of the municipal laws, law-books, records of judgments and resolutions of judges, treaties and resolutions and capitulations of regular and orderly conventions, authentical histories, concessions of privileges and liberties …[153]

For example, 'by the laws of this kingdom the regal government is hereditary and transmitted by descent. This appears not only by the recognition of 1 Jac. and 1 Eliz., but by the constant usage.'[154] Evidence of the pact that established the government of England was therefore not confined to the records of common law, but included statute law as well. According to Cromartie, Hale regarded Parliament as the only place where the fundamental compact could be deliberately altered, the only place in which the 'consent of the people [and es]states of the kingdom' could be voiced.[155] That is why, when Henry VIII wished to dispose of the Crown by his last will, 'he could not make such disposal without an act of parliament enabling him'.[156] But the compact could also be altered by changes in custom and usage, which were evidence of mutual consent.[157] In that sense, Hale attributed to the common law the capacity to change the constitution, although Cromartie adds that in this respect the common law 'was conceptually equivalent to an enormous statute, on which the king and people had tacitly agreed'.[158] Hale did not think of the common law as something that could be altered by judges. He said that when the common law failed to provide a remedy for injustice, only Parliament could provide what was

[152] In his *Prerogatives of the King*, Hale distinguished the 'frame of government' – whether monarchical, aristocratic, democratic, or mixed – from 'the particulars of government,' which include the rights of the King and the people. See Yale (ed.), *Sir Matthew Hale's The Prerogatives of the King*, p. 6.

[153] Yale (ed.), *Sir Matthew Hale's The Prerogatives of the King*, pp. 7–8.

[154] *Ibid*. p. 13.

[155] Cromartie, *Sir Matthew Hale*, p. 50; Yale (ed.), *Sir Matthew Hale's The Prerogatives of the King*, p. 15.

[156] Yale (ed.), *Sir Matthew Hale's The Prerogatives of the King*, p. 18.

[157] Cromartie, *Sir Matthew Hale*, pp. 49 and 102.

[158] *Ibid*., p. 49.

needed by making a new law. Not even the House of Lords, the highest ordinary court of appeal, could grant a remedy if no established law provided for one: 'for that were to give up the whole legislative power unto the House of Lords. For it is all one to make a law, and to have an authoritative power to judge according to that, which the judge thinks fit should be law, although in truth there be no law extant for it.'[159]

Hale acknowledged that the common law dealt with matters of a fundamental nature, such as 'the safety of the king's royal person, his crown and dignity, and all his just rights, revenues, powers, prerogatives and government … and this law is also, that which declares and asserts the rights and liberties, and the properties of the subject'.[160] On the other hand, he insisted that Parliament as a whole (and not the House of Lords alone) was the 'dernier resort' – the supreme and final court of appeal – with respect to all questions of law.[161] These included questions that were too high for inferior courts, raised by cases that were:

> so momentous, that they are not fit for the determination of judges, as in questions touching the right of succession to the crown … or the privileges of parliament … or the great cases which concern the liberties and rights of the subject, as in the case of Ship Money, and some others of like universal nature.[162]

Hale subscribed to the belief that a representative assembly of some kind had always existed in England.[163] This became central to the ideology of the Whigs, but was strenuously denied by most Tories. As J.G.A. Pocock describes that ideology:

> it was now parliament, rather than the law as a whole, which was being presented as immemorial; and the claim to be immemorial had been virtually identified with the claim to be sovereign … The whole concept of ancient custom had been narrowed down to this one assertion, that parliament was immemorial … The medieval concept of universal unmade law, which the notion of ancient custom had sought to express, had collapsed.[164]

[159] *Ibid*., p. 117, quoting Matthew Hale in F. Hargrave (ed.), *The Jurisdiction of the Lords House, or Parliament, Considered According to Ancient Records* (T. Cadell and W. Davies, 1796), pp. 108–9.

[160] Hale, *The History of the Common Law of England*, pp. 30–1.

[161] Hale in Hargrave (ed.), *The Jurisdiction of the Lords House*. See Goldsworthy, *The Sovereignty of Parliament*, p. 121.

[162] Hale in Hargrave (ed.), *The Jurisdiction of the Lords House,* p. 159.

[163] Cromartie, *Sir Matthew Hale*, p. 50.

[164] Pocock, *The Ancient Constitution and the Feudal Law*, p. 234; see also *ibid*. at p. 239. Corinne Comstock Weston asserts that this happened in the 1640s. See Weston,

According to Burgess, the 'classic age' of common law political thought and ancient constitutionalism came to an end in the 1640s, when loss of faith in the common law's ability to control the Crown prompted a shift to other modes of political and legal thought, relying on necessity, *salus populi*, or social contract, rather than custom.[165] Janelle Greenberg disagrees, pointing out that ancient constitutionalism and contract theory were perfectly compatible since the original constitution was widely regarded as having been established by contract. She argues that in the 1640s ancient constitutionalism took on 'a new and even more vigorous life'.[166] But Burgess may be partly right, insofar as the 'common law' version of ancient constitutionalism was thrust aside by the contractualist version.

Further developments can only be briefly sketched here. The eighteenth and nineteenth centuries were dominated by the political theory of sovereignty. Writers such as Blackstone did not derive the authority of Parliament from the common law. In discussing the application of civil and canon law by special courts, he denied that 'their force and efficacy depend upon their own instrinsic authority; which is the case of our written laws, or acts of parliament'. Instead, all their 'strength' within the realm was due either to having been 'admitted and received by immemorial usage and custom in some particular cases, and some particular courts, and then they form a branch of the *leges non scripta*, or customary law; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scripta*, or statute law'.[167] This assumes that the authority of Acts of Parliament was not itself derived from customary law: indeed, he asserted that it is 'intrinsic'. Elsewhere, he referred to 'the natural, inherent right that belongs to the sovereignty of a state … of making and enforcing laws'.[168] In his view, the existence of a legislature with sovereign law-making authority was not a contingent feature of a legal system that depended on local customs. It was, instead, 'requisite to the very essence of a law': sovereignty 'must in all governments reside somewhere'.[169] It might be objected that, even if the existence of a sovereign legislature of some kind is a necessity, its

'England: Ancient Constitution and Common Law' in Burns (ed.), *The Cambridge History of Political Thought*, pp. 397–8.

[165] Burgess, *The Politics of the Ancient Constitution*, pp. 99 and 221–31.

[166] Greenberg, *The Radical Face of the Ancient Constitution*, pp. 21–2 and 157. See also the many references in her index to 'contract theory of government'.

[167] Blackstone, *Commentaries on the Laws of England*, pp. 79–80.

[168] *Ibid*. p. 47. [169] *Ibid*., pp. 46 and 156.

identity and composition in a particular society must be contingent, and could be determined by custom. But for Blackstone, England's legislature was established by 'an original contract, either express or implied,' entered into by 'the general consent and fundamental act of the society'.[170] Moreover, Parliament's moral authority flowed partly from the security provided by the checks and balances among the monarchical, aristocratic and democratic principles embodied in its three component elements.[171] Blackstone had no need to rely on the authority of custom.

Common law constitutionalism was alien to the classical legal positivism that came to dominate the nineteenth century. According to John Austin's influential theory,

> all judge-made law is the creature of the sovereign or state … A subordinate or subject judge is merely a minister. The portion of sovereign power which lies at his disposition is merely delegated … [W]hen customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature.[172]

This theory has, of course, been shown to be flawed – most notably by H.L.A. Hart.[173] But it does not follow that common law constitutionalism was therefore the correct theory all along. As will be shown in the next section, it is not vindicated by Hart's theory of the nature of fundamental constitutional rules.[174] A.V. Dicey once wrote rather loosely that,

> the English constitution … far from being the result of legislation, in the ordinary sense of that term, [is] the fruit of contests carried on in the courts on behalf of the rights of individuals. Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law.[175]

But Dicey was at this point discussing what he called 'the general principles of the constitution', and as the editor of his tenth edition, E.C.S. Wade, explained in a footnote, 'it is clear from [Dicey's] examples that he is dealing with the means of protecting private rights. The origin of the sovereignty of Parliament cannot be traced to a judicial decision

[170] *Ibid*., p. 52. [171] *Ibid*., pp. 50–1.

[172] J. Austin, *The Province of Jurisprudence Determined etc.* (H.L.A. Hart, ed.) (London: Weidenfeld and Nicolson, 1954), pp. 31–2.

[173] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 46–7.

[174] See Section III.

[175] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn) (London: Macmillan, 1959), p. 196.

and the independence of the judges has rested on statute since the Act of Settlement, 1701.'[176]

There is ample evidence that Dicey did not believe that Parliament owed its authority to judge-made law. First, having stated that English constitutional law was 'a cross between history and custom', he argued that Parliament's sovereignty could be 'shown historically' by describing a number of extraordinary statutes that had been efficacious.[177] For example, he described the Septennial Act as 'standing proof', Acts of Indemnity as 'crowning proof', and repeals of statutes purporting to prohibit their future repeal as 'the strongest proof', of Parliament's sovereign power.[178] Secondly, Dicey endorsed Austin's thesis that '[j]udicial legislation is . . . subordinate legislation, carried on with the assent and subject to the supervision of Parliament'.[179] Thirdly, his statement that '[t]here is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament' is inconsistent with the idea that Parliament's sovereignty derives from, and therefore could be limited by, the exercise of judicial power.[180] Finally, it is doubtful that Dicey regarded even the common law as entirely judge-made: he described it as a 'mass of custom, tradition, or judge-made maxims'.[181]

Dicey seems to have regarded Parliament's sovereignty as a matter of long-standing, fundamental custom, which has the status of 'law' because the courts are obliged to accept and enforce it. He did not accept Austin's theory that there must be a sovereign power in every legal system.[182] Dicey surmised that, rather than Parliament's sovereignty being 'a deduction from abstract theories of jurisprudence', Austin's conception of sovereignty was 'a generalisation drawn in the main from English law', and 'the ease with which the theory of absolute sovereignty has been accepted by English jurists is due to the peculiar history of English constitutional law'.[183]

The notion that the common law is the source of Parliament's authority was later revived by constitutional writers such as W. Ivor Jennings in the twentieth century. But Jennings was too subtle a thinker to suggest that, in this regard, the common law was judge-made law:

[176] *Ibid*., p. 195 n. 3. Jennings had previously made the same point: W.I. Jennings, *The Law and the Constitution* (2nd edn) (London: University of London Press, 1938), pp. 38–40.

[177] Dicey, *Introduction*, pp. 24 and 43.

[178] *Ibid*., pp. 48, 50 and 65 respectively. [179] *Ibid*., pp. 60–1.

[180] *Ibid*., p. 70. Hence, his assertion that 'no English judge ever conceded, *or, under the present constitution, can concede*, that Parliament is in any legal sense a "trustee" for the electors'.: *Ibid*., p. 75, emphasis added.

[181] *Ibid*., p. 24. [182] *Ibid*., p. 61. [183] *Ibid*., p. 72.

> The most important principle [of the constitution], that of the supremacy of Parliament, is no doubt a rule of the common law. It was not established by judicial decisions, however; it was settled by armed conflict and the Bill of Rights and the Act of Settlement. The judges did no more than acquiesce in a simple fact of political authority, though they have never been called upon precisely to say so.[184]

This passage from the second edition in 1938 was repeated in the fifth in 1959.[185] But by that time, Jennings had come to question whether Parliament enjoyed complete supremacy over the common law. Emphasising that recognition of Parliament's supremacy was a practical *modus vivendi* between institutions that had once competed – sometimes violently – for power, he added that it had never been necessary to settle the precise relationship between Parliament and the common law. Therefore, whether there were some common law principles that Parliament could not repeal had not been conclusively determined, and if Parliament passed an extreme law (such as one introducing slavery) 'a judge would do what a judge should do'.[186] Some scattered passages suggest that, since this is a question of common law, the judges' decision would be authoritative.[187] But that suggestion would be incompatible with Jennings' acknowledgement that such matters are effectively settled only by the practical outcome of institutional conflict, and not by judicial law-making.[188]

In a justly famous article, William Wade wobbled on this point. He rightly said that the doctrine of parliamentary sovereignty is a common law rule only 'in one sense', because it is also an 'ultimate political fact'.[189] But he also said that the doctrine 'lies in the keeping of the courts', and cannot be 'altered by any authority outside the courts'.[190] This implies that the courts have an exclusive authority unilaterally to alter the doctrine. But that puts the cart before the horse, because the courts' authority, no

[184] W.I. Jennings, *The Law and the Constitution* (2nd edn) (London: University of London Press, 1938), pp. 38–9.

[185] W.I. Jennings, *The Law and the Constitution* (5th edn) (London: University of London Press, 1959), p. 39.

[186] *Ibid*., pp. 160 and 157–60 for the whole argument.

[187] E.g., *ibid*., p. 160 ('a lawyer ought to be able to say what the answer of the courts would be, and happily we cannot do so because there are no precedents'); p. 164 ('Since this is a matter of common law, this must be proved by decisions of the courts'); p. 169 ('At best they [some statutes] show what Parliament thought of its own powers, and not what the courts thought those powers were').

[188] *Ibid*., pp. 39 and 157–8.

[189] H.W.R. Wade, 'The Basis of Legal Sovereignty' *Cambridge Law Journal* (1955) 172, 188–9.

[190] *Ibid*., 189.

less than Parliament's, depends on 'ultimate political facts'. There is no good reason to assume that the courts, but not Parliament, can unilaterally alter the source of their own authority. Many later commentators seem simply to have assumed that, because the source of Parliament's authority cannot be statute (since that would be boot-strapping), it must be the common law, understood as judge-made law. That simplistic assumption has become very influential, but as the next section will demonstrate, it is either false or dangerously misleading.

What conclusions can be drawn from this brief historical survey? First, there is no evidence of significant, if any, support for common law constitutionalism before the seventeenth century. On the contrary, there is solid evidence that it was widely rejected. For much of the pre-modern period, the common law was regarded as the 'common erudition' of the bench and bar.[191] The idea that the authority of the judges' superiors – the King who appointed and could dismiss them, and the High Court of Parliament that could overturn their decisions – was the product of their decisions, or of their 'erudition', would have been dismissed out of hand as an absurdity. That is partly why, on several occasions, it was expressly and authoritatively denied that either the royal succession, or the privileges of Parliament, were governed by the common law.

Secondly, even in the seventeenth century, arguably the 'classical age' of common law constitutionalism, that theory was fully embraced only by a few lawyers such as Thomas Hedley.[192] Sir Edward Coke denied, at least on some occasions, that the royal succession and the privileges of Parliament were governed by the common law. He famously held that the King's prerogatives were so governed. But Sir John Davies, who shared Coke's conception of the nature of the common law, was a royalist who believed that as the human source of all legal authority, the King had retained prerogative powers that were 'above' the common law. Many lawyers, and other members of the ruling elite, agreed with him. Many others were contractualists, who believed that legal authority derived from the community as a whole, which had entered into a pact with the King that conferred and limited his powers. After the seventeenth century, the political theory of sovereignty, which maintained that there must be a sovereign legislator in every state that by definition stands above the law, became ascendant.

[191] See text accompanying nn. 55–61 above.

[192] The title of Chapter 6 of John Allison's *The Historical English Constitution* (Cambridge: Cambridge University Press, 2007), 'The Brief Rule of a Controlling Common Law', therefore seems inapt.

Thirdly, for most of the period surveyed here, almost everyone accepted that the High Court of Parliament was the highest court in the realm, with ultimate authority to declare and interpret the common law itself.[193] Even lawyers such as Thomas Hedley therefore accepted a version of common law constitutionalism that is very different from modern versions of the theory, which attribute ultimate authority to expound and develop the unwritten constitution to judges.

It must be conceded that, over the centuries, the ambit of the common law has steadily expanded. For example, the theory that the King possessed 'absolute' prerogatives that were above the common law eventually lost credibility. All the powers of the Crown are now creatures of either statutory or common law, and today the unwritten constitution is largely a matter of common law. Parliamentary sovereignty may be the final bastion that still resists the common law's imperial ambitions. But the common law's subjugation of other sites of legal authority does not entail that, by some kind of immanent logic, it is entitled and destined to sweep the field.

III Philosophical analysis

I have shown that common law constitutionalism has much weaker historical credentials than is often assumed. But many lawyers accept the theory for philosophical rather than historical reasons. In the limited space that remains, these philosophical reasons will be briefly examined.

Common law constitutionalism is sometimes the conclusion of an enquiry into the source or basis of the authority of the doctrine of parliamentary sovereignty. Adam Tomkins, for example, asks:

> What then is the legal authority for the rule [of parliamentary sovereignty]? What is its source? There are two alternatives: authority might be found either in statute or in common law. The first of these options may relatively quickly be dismissed. Parliament has never legislated so as to confer legislative supremacy on itself … The doctrine of legislative supremacy is a doctrine of the common law.[194]

Tomkins is concerned with the source or basis of the doctrine's *legal* authority, whereas other writers seem more concerned with its *moral* authority. Let us assume, for the moment, that there is a difference.

[193] Goldsworthy, *The Sovereignty of Parliament*, pp. 110, 118–19, 153–4 and 156–7.
[194] Adam Tomkins, *Public Law* (Oxford: Oxford University Press, 2003), p. 103.

If we are concerned with legal authority, then it is not clear that there is any need to resort to deeper principles. There cannot be an infinite regress of legal institutions or norms, each owing its authority to the next in line. There must be a basic norm or set of basic norms that is authoritative for legal purposes. These basic norms might simply be that the institutions in question possess the legal authority that is generally attributed to them. Consider written constitutions, for example. In Australia, it has become common for people to ask what the current legal foundation of the Australian Constitution is. Since the British Parliament, which originally enacted the Constitution, lost its authority to change Australian law, the answers usually given are either the common law, or the sovereignty of the people. But no good reason has been given for assuming that, for legal purposes, the Constitution must rest on some deeper legal foundation. Why cannot the Constitution itself be the ultimate foundation of the legal system, with no need for the support of deeper legal norms? And if it can, then presumably the generally accepted norms of an unwritten constitution can play the same role. In other words, constitutional doctrines such as that of parliamentary sovereignty can be legally fundamental, requiring no deeper legal support.

If, on the other hand, we are concerned with moral rather than legal authority – either for its own sake, or because positivists are wrong to think that the two are distinct – another question arises. Why would an enquiry into the ultimate source or basis of the *moral* authority of a legal institution or norm be satisfied by an appeal to a deeper *law,* such as the common law? Even if it did look to the common law, would it not insist on digging even deeper, and enquiring into the moral authority of that body of law? It is, after all, a moral rather than a legal source that is required here, and many candidates are available: necessity, prudence, justice, equality, fraternity, duty to others, fair play, consent, and so on. This is why political and legal thinkers in past centuries, when reflecting on the law's moral authority, appealed to a variety of competing principles such as divine right, natural law, ancient custom, social contract, the checks and balances of 'mixed government', the collective wisdom of the community, and the practical necessity of sovereign power.

The nature of fundamental legal norms is admittedly a subject of philosophical puzzlement. That is why we turn to thinkers such as Kelsen and Hart for enlightenment. Perhaps what writers such as Tomkins really seek, when they ask about the ultimate source or basis of the authority of constitutional doctrines, is a philosophical *explanation* of legal authority and of ultimate legal norms. But that is quite different from what they

expressly ask for. Hart's theory of law, for example, helps us understand the nature and mode of existence of fundamental legal norms, and what it means to say that they are legally authoritative, but it does not provide a source or basis for their legal authority.

Common law constitutionalists might reply that, even if constitutional norms such as the doctrine of parliamentary sovereignty are legally fundamental, and do not derive their authority from deeper legal principles, it is still useful to classify them. Even if they do not rest on deeper common law principles, it may still be the case that they themselves are part of the common law.

It should be noted at this point that the common law constitutionalists' interest in classifying such norms as 'common law' is not merely taxonomical. They believe that it has an important practical consequence: namely, that such norms are 'in the keeping of the courts', which have authority either to change them, or at least authoritatively to declare that they have changed. Thus, having decided that parliamentary sovereignty is a common law rule, Tomkins infers that '[l]ike any other rule of the common law it may be developed, refined, re-interpreted, or even changed by the judges'.[195] But there is a chicken/egg problem here: is the existence of authority to change legal norms a consequence of their correct classification, or is their correct classification partly dependent on the nature and location of authority to change them? Whether we should classify unwritten constitutional norms as 'common law' surely depends partly on whether they share the distinctive characteristics of the large body of norms that uncontroversially bear that label – those of contract, property, tort, and so on. These are the characteristics that distinguish the common law from statute law. Among them is that common law norms have been developed by judicial decisions over many centuries, and that the courts have acknowledged authority to continue to develop them. But there are still major theoretical disagreements about the precise nature of these norms, and the way in which they are properly developed by judicial decisions. At least four conceptions of the nature of the common law currently compete for acceptance.

First, there is a legal positivist conception of the common law as a body of judge-made rules, which Brian Simpson in 1973 described as the 'predominant conception'.[196] Secondly, there is the conception that Simpson

[195] Tomkins, *Public Law*, p. 103.

[196] A.W.B. Simpson, 'The Common Law and Legal Theory' in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Oxford University Press, 1973),

himself advocated, of the common law as professional custom: 'a body of practices observed and ideas received by a caste of lawyers … [and] used by them as providing guidance in what is conceived to be the rational determination of disputes …'[197] This resembles the conception of the common law as the 'common erudition' of the bench and bar, which historians have found in the fourteenth and fifteenth century Year Books.[198] Thirdly, there is Dworkin's conception of the common law as a presumptively coherent body of norms, resting on fundamental principles of political morality, which the judiciary has authority to identify and expound. This is in several respects similar to the conception held by Sir Edward Coke in the early seventeenth century.[199] Fourthly, the common law in constitutional matters can be conceptualised as customs or conventions either of the community in general, or of government officialdom. In addition, other conceptions are possible, including various 'hybrids' that combine elements of two or more of these four.

Whether unwritten constitutional norms are matters of common law depends on two questions: which of these conceptions of the common law is the most plausible, and whether those constitutional norms fit within that conception. I will attempt to answer only the second question.

Versions of common law constitutionalism based on the first and second conceptions of the common law, as judge-made law, or as the custom or 'common erudition' of the legal profession, are all implausible. As a matter of history, it is plainly false that the authority of either the King or Parliament was established either by judicial decisions or the 'common erudition' of the legal profession.[200] And philosophically, there is an incongruity between the legal doctrine that the courts are obligated to obey statutes, because Parliament is sovereign, and the theory that the courts can at any time release themselves from the obligation, because Parliament's sovereignty is their creation, and subject to their control.[201]

reprinted in A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon, 1987), 359 at p. 361.

197 Simpson, 'The Common Law and Legal Theory' in Simpson, *Legal Theory and Legal History*, p. 376.

198 See text accompanying nn. 55–61, above.

199 The similarities clearly emerge in Gray, 'Parliament, Liberty, and the Law' in Hexter (ed.), *Parliament and Liberty*.

200 For Parliament, see the historical study in Goldsworthy, *The Sovereignty of Parliament*, chs. 1–8, which is summarised in ch. 9 of that book.

201 See Thomas, 'The Relationship of Parliament and the Courts' at 26 ('The conferral of that recognition [of Parliament's sovereignty] is in the nature of a self-denying judicial ordinance.').

We would not normally agree that x is obligated to obey y, if the suggested obligation is self-imposed, and can be repudiated whenever x thinks it appropriate to do so. Such an 'obligation' would be illusory.

There is, in addition, a deeper philosophical problem. Tomkins' implicit assumption that there are only two kinds of law in Britain, statute law and common law, is demonstrably false if the common law is judge-made law. It is true that the basis of the doctrine of parliamentary sovereignty cannot be statute. No legislature can confer authority on itself by statute, because absent pre-existing authority, the statute would have to confer authority on itself, which would beg the question.[202] As Lord Lester points out, 'Parliament cannot pull itself up by its own bootstraps'.[203] But it is a mistake to jump to the conclusion that the doctrine must therefore be a matter of judge-made common law. After all, it could then be asked where the judges got *their* authority from. If it is true, as Lord Steyn insists, that Parliament's authority 'must come from somewhere',[204] it must be equally true of the judges' authority. But they, too, cannot 'pull themselves up by their own bootstraps', by conferring authority on themselves. It follows that their authority cannot come from the common law, if this is judge-made law. If it were true that all British law is either common law or statute law, their authority would then have to come from statute law – giving rise to a vicious circle in which Parliament's authority to enact statutes is conferred by judge-made common law, and the judges' authority to make common law is conferred by statute. To break the circle, someone's legal authority – Parliament's, the judges', or both – must be grounded in a kind of law that was not made either by Parliament or by the judges.

Common law constitutionalists must therefore subscribe either to the third or to the fourth conception of the common law. According to the third one, the common law is a body of norms based on fundamental principles of political morality, which the judges enunciate and expound, but have no authority to change. The identity of these principles is an objective matter: they are whatever principles provide the best moral justification of the common law as a whole. This is the conception favoured

[202] Note, however, that the Treasons Act of 1571 declared that it was treason to deny that Parliament had authority to regulate the royal succession.

[203] Lester, 'Beyond the Powers of Parliament' at 96. It follows that, in New Zealand, Parliament's authority cannot derive exclusively from § 15(1) of the Constitution Act of 1986 (NZ), or § 3(2) of the Supreme Court Act of 2004 (NZ), which refer, respectively, to Parliament's 'full power to make laws' and to its 'sovereignty'.

[204] 'Lord Steyn's Comments from the Lester and Pannick Book Launch' *Judicial Review* 107 (2004) at 107.

by most modern common law constitutionalists, who often depict the common law as resting ultimately on a principle of 'legality'.[205] On this view, the unwritten constitution consists of whatever fundamental principles of political morality provide the strongest moral justification of the entire legal system. These principles may therefore change if other parts of the system change. Judges do not have authority to change them, but do have authority to declare either that they have changed, or that previous understandings of them were mistaken.

Dworkin's conception of the common law seems plausible because it is consistent with the way judges develop that law. Judges do seem to believe that a constantly evolving body of fundamental principles guides them in deciding novel questions, and in overruling past doctrines that they have come to regard as erroneous. Moreover, their authority not only passively to identify and apply, but also actively to develop, these principles is acknowledged by other legal officials. Dworkin's conception can therefore form part of a plausible interpretation of the practices and understandings of legal officialdom. The problem with extending his conception of the common law to encompass the doctrine of parliamentary sovereignty is that this would not be equally consonant with official practices and understandings. There is no settled official understanding that the doctrine is merely one of a number of principles of political morality, which the judges have ultimate authority to identify and creatively develop. Common law constitutionalists assert that judges possess authority to decide whether parliamentary sovereignty has come to be inconsistent with other fundamental common law principles, and if they think it has, to modify or repudiate it. But unless this interpretation can be shown to fit general official practices and understandings, it remains a bare assertion. I have argued, elsewhere, that official practices do not justify such an interpretation.[206]

In this regard, an interpretation of the practices and understandings of legal officialdom must extend further than those of the judiciary. Let us imagine that the highest court endorses a Dworkinian interpretation of the unwritten constitution, holding it to rest on fundamental principles of political morality that confer and limit the authority of all governmental institutions including Parliament. In the absence of a broader official

[205] See generally the references to Trevor Allan's work in n. 3 above, and Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty' *Oxford Journal of Legal Studies* 28 (2008) 709.

[206] Goldsworthy, *The Sovereignty of Parliament*; Goldsworthy, 'Homogenizing Constitutions'.

consensus either as to the nature of the unwritten constitution, or as to the judges' authority to interpret it in that way, their interpretation could claim no better authority than their own say-so. That would be just as question-begging and boot-strapping as the theory that the unwritten constitution is a matter of judge-made law. If the judges' claim to possess authority to interpret the unwritten constitution were itself dependent on their interpretation of it, and derived from whatever principles of political morality they regarded as morally justifying the legal system as a whole, then the theory of common law constitutionalism would ultimately rest on nothing more solid than their claim that it is morally compelling. This would hardly be likely to persuade other theorists or legal officials – in the executive government or in Parliament, for example – who have a very different understanding of the nature of the unwritten constitution and its moral justification.

Dworkin's conception of the common law, when extended to the unwritten constitution, is distinctive in that it almost merges legal and moral authority. The deepest principles of the common law confer moral as well as legal authority on all other legal norms because, by definition, they just are whatever principles of political morality provide the best moral justification of the legal system as a whole. They must therefore consist of some selection, appropriately weighted, from the principles of political morality previously listed: necessity, prudence, justice, equality, fraternity, duty to others, fair play, consent, and so on.[207] But no proposed moral justification of the law as a whole can realistically hope to secure widespread agreement. Many justifications, drawing on these diverse moral principles, have been proposed by political philosophers, and all of them remain deeply controversial. Judges are not recognised as having authority to settle this controversy. And it would be question-begging and boot-strapping if their claim to possess authority to settle it were itself dependent on their proposed settlement of it – that is, on their assessment of the deepest principles of political morality. Any other institution, such as Parliament, could with equal plausibility claim the very same authority.

As I have argued at length elsewhere, self-proclaimed moral authority – even if it is justified – is incapable by itself of sustaining law. That is why legal authority depends on general consensus, at least among the senior officials of all branches of government.[208] This leads to the fourth

[207] See p. 48, above.

[208] Goldsworthy, *The Sovereignty of Parliament*, pp. 254–6. Overlooking this point is the major flaw in Lakin, 'Debunking the Idea of Parliamentary Sovereignty'.

conception of the common law as judicially enforceable customs of legal officialdom, or of the community in general, which the judges did not create, and cannot change, unilaterally.[209] Mark Elliott has developed a conception of this kind, according to which the common law constitution consists of constitutional conventions that have crystallised into laws.[210] The existence of constitutional conventions requires consensus among legal officials, including politicians. If Elliott is right, the common law constitution also depends on such a consensus, and can change only if that consensus changes.

Understanding the unwritten constitution in terms of official consensus is supported by H.L.A. Hart's theory that the fundamental rules of recognition in any legal system are constituted by the practices of legal officials.[211] Such rules simply *are* whatever rules legal officials do in fact accept and follow when they make, recognise, interpret or apply law. For this purpose, 'legal officials' cannot mean judges alone, and that was certainly not what Hart meant.[212] Otherwise, his theory could not account for the authority exercised by the judges themselves. The fundamental rules of a legal system are necessarily established and maintained by a consensus among the senior officials of all branches of government. Only such a general consensus can provide both the coherence and stability that a legal system needs to survive and function effectively, and a satisfactory explanation of the authority exercised by each branch of government individually.[213]

On this view, parliamentary sovereignty, like other unwritten constitutional rules, does depend on judicial acceptance.[214] Judicial acceptance is a necessary condition for the existence of such rules, and that acceptance depends on judicial value-judgments. The judges do not passively acknowledge the existence of 'political facts', because their willingness to accept the rules – which depends on evaluative judgments – is itself a crucial ingredient of the relevant political facts.[215] But judicial acceptance

[209] See p. 5, above.

[210] Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' *Legal Studies* 22 (2002) 340 at 362–76.

[211] See H.L.A. Hart, *The Concept of Law* (2nd edn) (Oxford: Oxford University Press, 1994), ch. 6.

[212] Goldsworthy, *The Sovereignty of Parliament*, pp. 240–2.

[213] *Ibid*., pp. 6 and 240–6. [214] *Ibid*., p. 26.

[215] This point is seized on by Stuart Lakin, in 'Debunking the Idea of Parliamentary Sovereignty', but he overlooks the subtleties explained here, and in Goldsworthy, *The Sovereignty of Parliament*, pp. 254–9. For example, he ignores my explanation of how judicial value-judgments play a legitimate role in the settlement of 'hard cases'

is not a sufficient condition for the existence of such rules, because the acceptance of the other branches of government is also necessary. And the judges' judicial authority is equally dependent on acceptance by the political branches. This means that any attempt by the judiciary unilaterally to change the fundamental rules of a legal system is fraught with danger. Other officials might be persuaded, inveigled, bamboozled, or bluffed into acquiescing in the change. But, on the other hand, they might not. They might resent and resist the judicial attempt to change the rules that had previously been generally accepted, and take strong action to defeat it, possibly including the impeachment of 'over-mighty judges'. That might be regrettable, but the point is that if the judges tear up the consensus that constitutes the fundamental rules of the system, they are hardly well placed to complain if it is replaced by a power struggle they are ill-equipped to win. In the absence of consensus, their own authority as well as Parliament's would be up for grabs. Rules of recognition can and do change, but fundamental change in an unwritten constitution requires a change in official consensus. Judges can attempt to initiate such a change, but are well advised to make sure that the other branches of government are likely to acquiesce. If that cannot be confidently expected, they would be wise to wait for the legislature to initiate change.

This conception of the common law constitution is consistent with the nature of fundamental unwritten constitutional rules, and the process by which they are changed. But it is still problematic. The problem is that describing the unwritten constitution as a matter of common law, even in this sense, is likely to breed confusion. The vast bulk of the common law consists of substantive rules and principles, governing property, contracts, torts and so on, that are not constituted by a consensus of legal officialdom in general, and are therefore able to be changed without such a consensus having to change. Judges are now recognised as having authority unilaterally to change these rules and principles, or to declare that they have changed. They are best conceptualised as judicially posited rules, judicial customs, or Dworkinian principles.[216] To apply the same label, 'common law', to the most fundamental norms of the unwritten constitution, is likely to produce confusion, erroneous assumptions about the authority of judges to change them, and conflict between the branches of government. They are best regarded as '*sui generis*, a unique hybrid of law

(*ibid*., p. 259), and also my fall-back argument that, even if a Dworkinian theory were adopted, parliamentary sovereignty should still be vindicated (*ibid*., pp. 254 and 271).

[216] We do not need to choose between these alternatives here.

and political fact deriving [their] authority from acceptance by the people and by the principal institutions of the state, especially Parliament and the judiciary'.[217] As one critic of the doctrine rightly put it, parliamentary sovereignty 'is at one and the same time a political fact … a convention of the constitution and a fundamental principle of the common law'; 'the legal distribution of power consists ultimately in a dynamic settlement, acceptable to the people, between the different arms of government'.[218]

[217] George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds.), *Interpreting Constitutions: Theories, Principles and Institutions* (Sydney: Federation Press, 1996), 121 at p. 136.

[218] Justice E.W. Thomas, 'The Relationship of Parliament and the Courts' *Victoria University of Wellington Law Review* 5 (2000) 31 at 14 and 19 respectively.