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Jeffrey Goldsworthy

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Challenging parliamentary sovereignty: Past, present and future

I Introduction

Some critics portray the doctrine of parliamentary sovereignty as a myth that conceals the true nature of constitutionalism in Britain and other common law jurisdictions.[1] In reality, they say, Parliament and the courts are engaged in a 'collaborative enterprise', with sovereignty divided between them;[2] or the constitution is ultimately based on a common law 'principle of legality' which the courts, rather than Parliament, have ultimate authority to interpret and enforce.[3]

Sometimes the critics really seem to be suggesting that the constitution is evolving inexorably in this direction. In fact, there are at least four different claims they might be making, which are not all mutually compatible. The first is that Parliament was never sovereign: that the doctrine of parliamentary sovereignty was always mistaken as a matter of law. The second is that, even if Parliament is accepted as sovereign today, this is a relatively recent deviation from a venerable constitutional tradition that should now be restored. The third is that even if Parliament was once sovereign, recent developments mean that it no longer is. The fourth is that even if Parliament was and still is sovereign, times are rapidly changing, and it is unlikely to retain sovereignty for much longer. Those who make the second, third or fourth claim often argue that parliamentary sovereignty is a doctrine of judge-made common law, which the courts may therefore unilaterally curtail. That argument has already been refuted.[4]

In this chapter, the critics' claims about the past, present and future of parliamentary sovereignty will be examined.

[1] E.g. Philip A. Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' *King's College Law Journal* 15 (2004) 321 at 333.

[2] *Ibid*., 334; A. Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), p. 414.

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

[4] See Chapter 2, above.

II The past

A Doctor Bonham's *case and the common law tradition*

In a recent book defending 'common law constitutionalism', Douglas Edlin seems to make the second claim (despite rhetoric that is often more sweeping): that although Parliament is generally regarded as sovereign today, this is a relatively recent deviation from a constitutional tradition that should now be restored.[5]

Edlin frankly concedes that parliamentary sovereignty 'dominates English legal minds today'[6] and might seem to have 'become irretrievably imbedded in the collective psyche of the English legal community';[7] that an 'attenuated role of common law courts [is] assumed by current English legal practice';[8] and that the English judiciary is 'wholly captivated and captured by the dogma of absolute parliamentary supremacy'.[9] Almost the only support in current English judicial thinking that he cites for his strong version of common law constitutionalism is the courts' treatment of privative clauses, exemplified in the *Anisminic* case,[10] and Lord Steyn's reasoning in *Simms*, which Edlin discusses at length.[11] He says that these cases 'show that the burgeoning of parliamentary sovereignty has not swept from the English legal landscape' older common law principles.[12] Yet Edlin concedes that Lord Steyn's reasoning is 'exceptional' and 'extraordinary'; that he did not claim any judicial power to overrule statutes; and that 'most English judges' would still agree with Lord Hoffman's more restrained approach.[13] Surprisingly, Edlin does not cite the unprecedented obiter dicta questioning parliamentary sovereignty of Lords Hope and Steyn in *Jackson* v. *Attorney-General*,[14] which would have provided him with better ammunition.

Edlin therefore concedes that he must demonstrate that what he calls 'common law review' of the legality of statutes can be 'introduced' into and 'adapt even to the English legal environment',[15] which will

[5] Douglas E. Edlin, *Judges and Unjust Laws, Common Law Constitutionalism and the Foundations of Judicial Review* (Ann Arbor: University of Michigan Press, 2008).
[6] *Ibid*., p. 174. [7] *Ibid*., p. 178; see also p. 173. [8] *Ibid*., p. 175. [9] *Ibid*., p. 183.
[10] *Anisminic* v. *Foreign Compensation Commission* v. *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, discussed in Section III, Part B, below.
[11] Edlin, *Judges and Unjust Laws*, pp. 159–61, 178 and 186 (on *Anisminic*), and 178–87 (on *Simms*).
[12] *Ibid*., p. 194. [13] *Ibid*., pp. 182, 183 and 186–7.
[14] *R (Jackson)* v. *Attorney-General* [2006] 1 AC 262.
[15] Edlin, *Judges and Unjust Laws*, pp. 10 and 169.

require 'overcoming the doctrine of … legislative supremacy as … currently understood by English lawyers and judges' through a 'process of reconceptualization'.[16] Changes in judicial attitudes are necessary, and also sufficient, since 'legislative supremacy is based finally on the attitudes of judges rather than on the pronouncements of Parliament'.[17]

His argument for change is that English lawyers should recover 'their birthright', 'England's authentic common law heritage', and 'accept the mantle of [their] common law ancestry', which supposedly recognised that judges are capable of reviewing the compatibility of legislation with the rule of law.[18] The changes he calls for are 'not revolutionary … [o]r if they are, then they represent a reactionary revolution … [which] would return England's legal system to its roots'.[19] Yet the only historical support he provides for this claim is his 'strong' interpretation of Sir Edward Coke's famous dictum in *Dr Bonham's* case, whose 'progeny' supposedly include Lord Steyn's judgment in *Simms*.[20] Edlin describes his reading of Coke's dictum in *Bonham* as '*the* historical and theoretical basis for judicial review of legislation according to common law principles …'[21] He later states that this was '*the first* judicial pronouncement of the authority of common law courts to review legislative … acts to ensure compliance with common law principles',[22] although he is able to supplement it only with American cases.[23]

Edlin's interpretation of Coke is contradicted by the most careful and thorough recent examinations of Coke's language, which have confirmed (albeit for different reasons) that he did not intend to assert a judicial power to invalidate statutes.[24] Moreover, Edlin admits that even on his

[16] *Ibid*., pp. 170 and 177. [17] *Ibid*., p. 187. [18] *Ibid*., pp. 176, 183 and 187. [19] *Ibid*., p. 177.

[20] *Ibid*., p. 184. At pp. 74–9, Edlin also discusses a dictum of Lord Mansfield in *Omychund* v. *Barker* (1744) 1 Atk 22; 26 Eng Rep 15. But that dictum provides no support for judicial review of legislation.

[21] Edlin, *Judges and Unjust Laws*, p. 7 (emphasis added).

[22] *Ibid*., p. 27 (emphasis added).

[23] Notably, Edlin fails to respond to the evidence and arguments in Chapter 2 of this book, although an earlier version of it was previously published in a book edited by him: J. Goldsworthy, 'The Myth of the Common Law Constitution', in D. Edlin (ed.), *Common Law Theory* (Cambridge: Cambridge University Press, 2007), ch. 8.

[24] I. Williams, '*Dr Bonham's Case* and "Void" Statutes' *Journal of 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' (2009) *J. of Legal Analysis* 325. Hamburger disagrees with Williams at *ibid*., p. 625, n. 7. Edlin (*Judges and Unjust Laws*, ch. 5) presents arguments to the contrary, but fails to refer to Williams (Hamburger's book was not available to him), or to undertake anything like their detailed comparative analysis of the contemporaneous use of words

reading of Coke's judgment, (a) the precedents there cited provided only 'tenuous support' for Coke's views;[25] and (b) Coke's supposed attempt to establish judicial review of statutes was 'defeated' by subsequent events in England.[26] Even if Edlin's now discredited interpretation of Coke were correct, it is very difficult to see how the failed attempt of a single judge to promote judicial review of statutes, which had only tenuous support in precedent, could characterise 'England's authentic common law heritage'.[27]

B The Parliament of Scotland before the Union

I previously disputed the well-known dictum of Lord Cooper in *MacCormick* v. *Lord Advocate*, that the doctrine of parliamentary sovereignty 'is a distinctively English principle which has no counterpart in Scottish constitutional law', and that there was no good reason to think that the new Parliament of Great Britain, created by the Act of Union 1707, 'must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament'.[28] This dictum is still occasionally cited on the assumption that Lord Cooper's dictum was soundly based. Iain McLean and Alistair McMillan, for example, have recently asserted that the dictum 'seems unanswerable. At least in relation to Scotland, [Dicey's theory] is neither descriptively correct nor normatively defensible.'[29] In *Jackson* v. *Attorney General*, Lord Hope referred to 'the English principle of the absolute legislative sovereignty of Parliament', mentioned the dicta of Lord Cooper and other Scottish judges discussing this and the effect of the Act of Union, and concluded that 'here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with reality'.[30]

such as 'void' or of the precedents cited by Coke. Some of Edlin's arguments are refuted by Williams, e.g. concerning the views of contemporaneous critics of Coke: compare Edlin at p. 73 with Williams at pp. 126–7.

[25] Edlin, *Judges and Unjust Laws*, pp. 67 and 71.

[26] *Ibid*., p. 58.

[27] See n. 18, above. Admittedly, Edlin also cites two other judicial dicta often taken to support the 'strong' reading of Coke in *Dr Bonham's* case: *ibid*., 237, n. 111.

[28] *MacCormick* v. *Lord Advocate* [1953] SC 396 at 411; discussed in J. Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford: Clarendon Press, 1999), pp. 165–73.

[29] I. McLean and A. McMillan, 'Professor Dicey's Contradictions' *Public Law* (2007) 435 at 441.

[30] *Jackson* v. *Attorney General* [2005] UKHL 56; [2006] AC 262 at [104]; see also [159] per Baroness Hale.

McLean and McMillan ignore my own previous effort to show that the Diceyan theory is descriptively accurate and normatively defensible, even in relation to the pre-1707 Scottish Parliament and the constitutional effect of the Act of Union.[31] They might be more interested in the conclusions of a Scottish historian, Julian Goodare, who has written extensively on the nature of the authority of the Scottish Parliament before 1707. Here is his conclusion:

> Parliament in its full sense – that is, estates and crown – was very much a sovereign body. It had not always been one, but it became one in the course of the sixteenth century. Traditional accounts of the Scottish Parliament have often said that it was not sovereign, but this is wrong. What I mean by sovereignty is the exercise of untrammelled power by a government.[32]

This conclusion is restated, and the extensive evidence and argument for it set out in full, in *The Government of Scotland 1560–1625*, where Goodare asserts that in Scotland before 1707 'parliamentary sovereignty was well understood and rigorously adhered to'.[33]

On the other hand, J.D. Ford regards Goodare's thesis as 'impressive but ultimately unpersuasive'.[34] Ford cites cases in which Scottish judges decided: (a) that statutory provisions had fallen into desuetude due to contrary popular usage, although this appears to have been occasionally controversial and sometimes difficult to distinguish from statutory interpretation;[35] or (b) that a statute had not come into force because it had not been accepted by the people, although the judges could also declare that, in the public interest, the statute would be enforced in future.[36] The significance of these cases is difficult to evaluate. They do not suggest that Parliament's authority was limited by fundamental laws, but rather that its statutes had to have some influence on public behaviour in order to be recognised as legally efficacious. It is not clear whether, when statutes were held not to have such an influence, this was

[31] Goldsworthy, *The Sovereignty of Parliament*, pp. 165–73.

[32] J. Goodare, 'Scotland's Parliament in its British context 1603–1707', in H.T. Dickinson and M. Lynch (eds.), *The Challenge to Westminster; Sovereignty, Devolution and Independence* (East Lothian: Tuckwell Press, 2000), 22 at p. 24.

[33] J. Goodare, *The Government of Scotland 1560–1625* (Oxford: Oxford University Press, 2004), p. 86.

[34] J.D. Ford, 'The Legal Provisions in the Acts of Union' *Cambridge Law Journal* 66 (2007) 106 at 136, n. 137.

[35] J.D. Ford, *Law and Opinion in Scotland During the Seventeenth Century* (Oxford: Hart Publishing, 2007), pp. 322–4, 326 and 428.

[36] *Ibid*., pp. 326–7.

due merely to public ignorance, or in some cases, also to public resistance. Hopefully, further research will clarify these matters. Ford also cites the opinion of the eminent seventeenth-century lawyer Sir George MacKenzie, that Parliament was bound by fundamental laws, but adds that whether MacKenzie thought that judges could review the validity of statutes is much less clear.[37] Ford quotes a report of a decision in 1622, in which the Lords of Session are said to have held that 'acts of Parliament cannot be annulled or reduced but in subsequent parliaments and by no inferior judges . . .'[38]

C The philosophical origins of parliamentary sovereignty

Many critics of the doctrine of parliamentary sovereignty claim that it derives from a Hobbesian or Austinian theory of law that is now known to be erroneous.[39] By implication, Parliament could not have been sovereign before these theories held sway. These theories portray law as a body of commands, backed by threats, issued by a sovereign with sufficient power to enforce compliance if necessary. According to both, a sovereign's power cannot be conferred, or limited, by human law (as distinct from the higher law of God or nature), because that power is the source of, and therefore is necessarily superior to, human law. They regard this as a necessary truth about human law, wherever it exists. But there are differences between the two theories: for example, Austin acknowledged that subjects might have a moral obligation to disobey the sovereign's commands if they violate the laws of God, whereas Hobbes, regarding social order as imperative, insisted on obedience except in extreme cases where this would imperil a subject's own life.

The legal theories of Hobbes and Austin have indeed long been discredited. Most legal positivists now follow H.L.A. Hart, and think of legal systems as being based on fundamental rules of recognition, rather than on the extra-legal power of a sovereign. In my earlier book, I showed that the doctrine of parliamentary sovereignty can easily be understood accordingly. It is not a matter of eternal truth, compelled by logic. Whether any particular legal system includes a doctrine of

[37] *Ibid*., p.478. [38] Quoted in *ibid*., 479, n. 29.

[39] Edlin, *Judges and Unjust Laws*, pp. 173–4 and 177–8; The Hon. E.W. Thomas, 'The Relationship of Parliament and the Courts' *Victoria University of Wellington Law Review* 5 (2000) 9; Joseph, 'Parliament, the Courts and the Collaborative Enterprise', 321, 333 and 345; Rt Hon. Dame Sian Elias, 'Sovereignty in the 21st Century: Another Spin on the Merry-go-round' *Public Law Review* 14 (2003) 148, 150 and 151.

legislative sovereignty depends on its own distinctive rule (or rules) of recognition.[40] It is simply wrong to say that '[f]or sovereignty theorists, the constitution must be founded on supremacy of one sort or another'.[41]

But it follows from this that some other doubts about the doctrine are misconceived. It has been suggested that the doctrine is incompatible with the modern realisation that whoever the law-makers may be, rules are required to specify the manner and form by which they legislate, to enable the community to distinguish between real and pretended laws.[42] It is true that Austin's theory has difficulty accommodating manner and form requirements. But there is no such difficulty if parliamentary sovereignty is regarded as grounded in rules of recognition.[43] It is true that the courts must identify and uphold these rules, but this does not entail that they may also hold Parliament to be subject to deeper, substantive principles, such as that of democracy.[44] This simply does not follow.[45] It is possible for rules of recognition to consist entirely of purely formal and procedural rules, law-making in accordance with them being unlimited by any rules or principles of substance.[46]

Historically, parliamentary sovereignty has stronger roots in Lockean than in Hobbesian political theory. In the late seventeenth and eighteenth centuries, Hobbes's theory was not very popular even among Tories, who thought it bordered on atheism, let alone among Whigs. Yet the Whigs, inspired by Locke and like-minded writers, were initially more strongly committed to parliamentary sovereignty than the Tories, many of whom preferred to think that the royal succession, and certain 'absolute' royal prerogatives, were not subject to parliamentary authority.

This may seem surprising, since Locke is famous for arguing that there are limits to what a legislature may legitimately do, implicit in the trust that the people have committed to it. But in Locke's theory, those limits

[40] As Elias suggests, the foundation of a legal system does not necessarily consist of one master rule of recognition. There might be a number of rules that 'interact and cross-refer': Elias, 'Sovereignty in the 21st Century', 151, quoting Neil MacCormick.

[41] P. Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn) (Wellington: Thomson/Brookers, 2007), p. 544.

[42] Elias, 'Sovereignty in the 21st Century', 150.

[43] Goldsworthy, *The Sovereignty of Parliament*, pp. 13–16.

[44] Elias, 'Sovereignty in the 21st Century', 151; see also 156 ('explicit analysis of constitutional principle') and 162 (on protecting the essential democratic process).

[45] See Goldsworthy, *The Sovereignty of Parliament*, pp. 253–9. Also, the judicial decisions in Australia, Canada and India that Elias refers to are all of doubtful correctness.

[46] See Chapter 7 above.

are moral rather than legal, and they are enforced not by legal remedies dispensed by courts, but by popular rebellion that dissolves the constitution. He regarded the legislature as the supreme power within the constitution, subject only to a higher power outside the constitution – the community as a whole – which, if the legislature abused its trust, could dissolve the constitution and establish a new one, in which some new legislature would be legally supreme.[47]

The truth in the widespread belief that the doctrine of parliamentary sovereignty was firmly established by the Revolution of 1688 is that the Whig theory of the constitution prevailed over that of the Tories. Within a short period, most Tories had accepted that Parliament could control the royal succession and all of the Crown's prerogatives.[48] But throughout the eighteenth century, the consensus that Parliament had legally unlimited authority was not based on the Hobbesian thesis that the supreme power within any state has a right to virtually absolute obedience. Constitutional thought was much more sophisticated than that. The Whig theory – that in the face of tyranny, popular rebellion might be justified – was generally accepted. But it was also believed, not unreasonably, that the law itself should not recognise any limits to Parliament's authority (even though moral limits were acknowledged), or countenance rebellion in any circumstances, because of the risk that such limits would be construed too broadly, and rebellion incited too easily by demagogues.[49] It was also often observed that the moral limits to legislative authority were too vague and controversial to be legally serviceable.[50] No doubt the Whigs, when they acquired power, deliberately downplayed the right of resistance, but the Lockean theory remained intact. And this is the constitutional theory that was propounded by Blackstone.[51]

It is true that in the nineteenth century, legal philosophy in Britain came to be dominated by Austin's theory. But Austin explicitly rejected Hobbes's demand of almost absolute obedience to the established sovereign, and acknowledged that resistance to tyranny might be justified in extreme cases.[52] Dicey agreed with this,[53] but also distanced himself from Austin's general philosophy of law. Dicey astutely suggested that, rather than the doctrine of parliamentary sovereignty being derived from Austin's theory, that theory was a generalisation drawn from English law, and owed its rapid acceptance to the familiarity of English jurists with the

[47] See Goldsworthy, *The Sovereignty of Parliament*, pp. 151–3.
[48] *Ibid*., pp. 159–64. [49] *Ibid*., pp. 173–81. [50] *Ibid*. [51] *Ibid*., pp. 19 and 181–3.
[52] *Ibid*., p. 19. [53] *Ibid*.

already well established doctrine of parliamentary sovereignty.[54] I suspect that Dicey was right on both counts.

In claiming that the doctrine of parliamentary sovereignty owes much more to Locke than Hobbes, I am not suggesting that it was established by Locke. As I have previously argued, the doctrine has much deeper roots than late seventeenth- and eighteenth-century political theory. These roots include: the sovereignty of the medieval King; Parliament's role as the King's highest seat of judgment, in which his powers were most absolute; its standing as the highest court in the realm from which there could be no appeal; its claim to represent the collective wisdom of the entire community; distrust of the ability of the King's judges to withstand improper royal influence; the perceived need for a decision-maker able to take extraordinary measures to protect the community in an emergency; the presumed equal right of every generation to change its laws; and confidence in the capacity of Parliament's three component elements to check and balance one another.[55]

D The 'collaborative model'

Philip Joseph claims that the doctrine of parliamentary sovereignty is a 'latter day myth' resulting from 'sleight of hand' and 'lazy thinking'.[56] 'Parliament has never been sovereign', he says. 'Sovereignty implies autocracy … [but] [l]egislative power has never been of this nature.'[57] Parliamentary sovereignty has always been a 'perverse legal theory', which conveyed a 'skewed conception of legislative power' and misrepresented the true 'constitutional balance' between the political and judicial branches of government.[58]

But the evidence provided for this claim is very thin. Joseph is reluctant to assert that the courts currently have power to invalidate legislation. At one point, he expressly denies that the courts 'claim judicial power to strike down or disapply Parliament's legislation'.[59] He also concedes that 'the Glorious Revolution settled Parliament's right to override or qualify

[54] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn) (London: Macmillan, 1959), p. 72.

[55] Summarised in Goldsworthy, *The Sovereignty of Parliament*, ch. 9.

[56] *Ibid*., p. 321.

[57] Joseph, 'Parliament, the Courts, and the Collaborative Enterprise', 321. This claim is repeated in the latest edition of Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn), p. 543.

[58] Joseph, 'Parliament, the Courts, and the Collaborative Enterprise', 345.

[59] *Ibid*., p. 328.

judge-made principles of common law',[60] and that the courts 'defer to the political decisions of the legislature [and] avoid making judgments about legislative policy'.[61] On the other hand, he states that 'the judicial branch asserts its autonomy to uphold the rule of law',[62] and that whether Parliament can effectively abrogate fundamental rights is an 'imponderable' that 'leaves room for conjecture'. This is because the courts, while paying 'lip-service' to its power to do so, may refuse to acknowledge that it has spoken with sufficient clarity.[63] But this implies that the courts would be (nobly) lying, which is not at all the same as claiming that they have legal authority to refuse to enforce legislation that abrogates rights.

One of Joseph's major claims is that:

> Throughout English constitutional history, Parliament and the courts have exercised co-ordinate, constitutive authority … Theirs is a symbiotic relationship founded in political realities: Parliament and the political executive must look to the Courts for judicial recognition of legislative power, and the Courts must look to Parliament and the political executive for recognition of judicial independence.[64]

If by 'co-ordinate authority' he means authority that is equal in rank,[65] my previous book demonstrates that this historical claim is false. The courts of Westminster were not traditionally regarded as Parliament's equals: they were 'inferior courts', whose judgments were subject to appeal to the 'High Court of Parliament', the King's highest seat of judgment, in which his authority was most ample and absolute.[66] That book cites countless statements to this effect from the reign of Edward II onwards.[67] Parliament's status as the supreme power in the realm was accepted by John Locke, and was at the core of the constitutional theory of the Whigs, which triumphed in 1688.[68] Indeed, Parliament's superiority to 'inferior' courts such as King's Bench was one (but only one) of the principal reasons why its statutes were regarded as legally unchallengeable. Joseph's claim is philosophically as well as historically dubious. From the undoubted fact that parliamentary sovereignty depends (partly) on judicial recognition, it simply does not follow that Parliament and the courts possess

[60] *Ibid*., p. 335. [61] *Ibid*., p. 334. [62] *Ibid*., p. 336. [63] *Ibid*., p. 342.

[64] *Ibid*., p. 322. See also Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn), pp. 543–5.

[65] *Concise Oxford Dictionary of Current English* (6th edn) (Oxford: Clarendon Press, 1976), p. 224.

[66] Goldsworthy, *The Sovereignty of Parliament*, pp. 58 and 89–90.

[67] See *ibid*., Index, p. 318, under 'Parliament, as highest court, not subject to appeal'.

[68] *Ibid*., pp. 151 and 160.

'co-ordinate authority'. Indeed, judicial recognition of parliamentary sovereignty suggests the opposite.[69]

Joseph asserts that '[s]overeignty theorists discount any historical, constitutional role of the Courts, such as upholding the rule of law, securing the constitutional balance, or standing between the individual and the State', and also discount 'the constitutive authority of the Courts to develop the law'.[70] But there is no reason why sovereignty theorists should discount any of these things, because none of them is incompatible with parliamentary sovereignty. It should be borne in mind, however, that the notion that it is the unique or distinctive role of the courts to uphold the rule of law, secure the constitutional balance and protect the individual, is a modern one. For most of English constitutional history, Parliament was believed to play the pivotal role in all three respects.[71] But sovereignty theorists have no reason whatsoever to deny that Parliament and the courts collaborate in their endeavours to achieve good government in conformity with the rule of law.

Joseph argues that classical sovereignty theory is inconsistent with 'the constitutive law-making/law-partnership role of the Courts when they construe and apply legislation'.[72] According to him, the courts:

> … are more actively engaged in law-creation than sovereignty theorists concede. It is a misrepresentation that the Courts receive Parliament's words, interpret them according to what Parliament is presumed (but did not *really*) intend, and apply them, without regard to the constitutional, legal or social framework. This formalist depiction reserves to the Courts a servile, patronising role.[73]

Since Joseph cites one of my own essays on statutory interpretation, I need do little more than refer readers to it.[74] The careful reader will discover that I acknowledge both the frequently creative, law-making role of the courts in interpreting statutes, and the way that judges often interpret statutes in the light of fundamental – 'constitutional', if you will – common law rights

[69] R. Ekins, 'The Myth of Constitutional Dialogue: Final Legal Authority, Parliament and the Courts' (2004) *Bell Gully Public Lecture*, 5 (unpublished, on file with author).

[70] Joseph, 'Parliament, the Courts, and the Collaborative Enterprise', 332 and 335.

[71] Goldsworthy, *The Sovereignty of Parliament*, Index, p. 318, under 'Parliament as incorporating checks and balances', and 'Parliament as principal guardian of liberty'.

[72] Joseph, 'Parliament, the Courts, and the Collaborative Enterprise', 322.

[73] *Ibid*., 337.

[74] Jeffrey Goldsworthy, 'Parliamentary Sovereignty and Statutory Interpretation', in R. Bigwood (ed.), *The Statute: Making and Meaning* (Wellington: LexisNexis, 2004), p. 187. See Chapter 9, above.

and principles.[75] Joseph is right that on my account, resort to these common law rights and principles is justified only insofar as there is genuine uncertainty about Parliament's intentions, but I also accept the modern position that where basic rights and principles are at stake, it is reasonable to conclude that there is such uncertainty absent express words or necessary implication.[76] I argue that British and Commonwealth courts have always justified the common law presumptions in this way.[77] In leading cases, over many hundreds of years, 'it is almost universally asserted that the most fundamental principle of interpretation is that statutes should be interpreted according to the intention they convey, either expressly or by implication given the context [including the "constitutional" context] in which they were enacted'.[78] There is nothing 'servile' and 'patronising' in judges being guided by this principle, unless one thinks that it is servile and patronising for judges to respect the law-making authority of democratically elected legislatures, and to obey the laws they make. But in any event, the courts themselves have long embraced the principle.

Joseph seems to believe that the courts have a much more independent and creative role in interpreting statutes by virtue of their 'co-ordinate authority' as the final arbiters of what the law is. He states: 'No-one can dispute that the judiciary has final authority to determine what is or is not law';[79] '[t]he judiciary … *is* the final authority by virtue of the judicial function'.[80] This line of thought leads him to the rather extreme conclusion that '[i]n the final analysis, Parliament's statutes … mean what the Courts say they mean, even if judges choose to adopt self-constraining interpretations that are entirely sympathetic to the parliamentary purpose'.[81]

I do not believe, and doubt that many judges believe, that statutes mean whatever the courts say they mean. (I am also confident that Joseph does not really believe this.) Statutes are not empty shells with no meaningful content until the courts breathe life into them. They are necessarily assumed to have meaningful content that is binding on the courts as well as other legal officials and citizens. If they did not, they would not be laws. The courts' authority to 'determine what the law is', amounts to authority to ascertain that content, to clarify it when it is obscure and to supplement it when it is indeterminate. They have no authority to change that content,

[75] Goldsworthy, 'Parliamentary Sovereignty and Statutory Interpretation', pp. 189–93 and 206–8.
[76] *Ibid*., p. 209. [77] Goldsworthy, *The Sovereignty of Parliament*, pp. 250–2.
[78] Goldsworthy, 'Parliamentary Sovereignty and Statutory Interpretation', 191.
[79] Joseph, 'Parliament, the Courts, and the Collaborative Enterprise', 324.
[80] *Ibid*., 330. [81] *Ibid*.

except perhaps in very limited circumstances, to correct some deficiency in Parliament's expression of its obvious purpose.[82] Such authority is certainly not entailed by the fact that the interpretation adopted by an ultimate appellate court is final, in the sense of not being subject to appeal. That an institution has the final word in this sense does not mean that it is either unconstrained or infallible.[83] It may be genuinely bound by laws, including statutes, and constitutional doctrines such as parliamentary sovereignty, even if its compliance with them is not enforceable by appeal to some other institution. If Joseph believes that the courts do have authority to change the content of a statute as enacted by Parliament, regardless of Parliament's own purposes, he needs to spell out the extent of that authority, and argue for its existence, in more detail.

Joseph's sweeping claims that Parliament was never sovereign, and that the doctrine of parliamentary sovereignty is a latter-day myth, are hard to reconcile with his earlier writings. In the first edition of his book *Constitutional and Administrative Law in New Zealand*, published in 1993, he expressed the opposite opinion in no uncertain terms.[84] He asserted there that the United Kingdom and New Zealand Parliaments both possessed sovereign law-making power.[85] Moreover, he disapproved of statements to the contrary made by Sir Robin Cooke (as he then was).[86] In a sophisticated but compressed analysis of the foundations of legal authority, Joseph exploded the conceit that parliamentary sovereignty is a judicial construction, and explained that it cannot be changed either by Parliament, or by the courts, alone. '[A] broader accommodation through a Bill of Rights or some other national settlement for controlling or redefining legislative power' was required.[87] Even in the second edition of his book, published as recently as 2001, Joseph repeated most of these points.[88]

Of course, it is possible that Joseph is right in 2004, but was wrong in 1993 and 2001, about whether the United Kingdom and New Zealand

[82] On these limited circumstances, see Chapter 9, Section II, Part B, above. In Hart's terminology, the courts' authority is conferred by a 'rule of adjudication' rather than a 'rule of change': H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 93–4.

[83] Goldsworthy, *The Sovereignty of Parliament*, pp. 272–4.

[84] Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (Sydney: Law Book Co., 1993).

[85] *Ibid*., pp. 2, 8, 12, 396, 418 and 429–31.

[86] *Ibid*., pp. 445 and 454–6.

[87] *Ibid*., 455–6. This is repeated in Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn), pp. 536–8.

[88] Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd edn) (Wellington: Brookers, 2001), pp. 3, 16, 461, 472, 475 and 507–9.

Parliaments were ever truly sovereign. People are entitled to change their minds. Yet Joseph's earlier certainty, based on impressive research and lucid analysis, surely raises doubts about his current claim that parliamentary sovereignty is a 'latter-day myth' resulting from 'sleight of hand' and 'lazy thinking'.[89] There is considerable evidence even in his new critique that the doctrine of parliamentary sovereignty is not a 'myth'. Much of this article concerns very recent developments, which in his opinion show that Parliament, today, is not sovereign. These developments include the enactment of the Human Rights Act 1998 (UK) and the way its application is challenging orthodox understandings of statutory interpretation; the relatively recent expansion of judicial review in administrative law, and its supposed incompatibility with parliamentary sovereignty; the influence of proportionality analysis; and so on. But evidence of this kind does not show that Parliament was not sovereign in the past. Quite the contrary, insofar as Joseph acknowledges that these are recent developments, it suggests the opposite. He argues that these developments require 'new' constitutional theorising, which a conservative judiciary has not yet embraced.[90] At most, all this strongly suggests incipient change, not long-standing practice. Recent judicial innovations may require new theories, and may constitute a challenge to the doctrine of parliamentary sovereignty. But they cast very little light on the nature of parliamentary authority in the past.

III The present and future

Defenders of parliamentary sovereignty cannot ignore constitutional change. Constitutional arrangements and understandings today are in many respects very different from those of the past. But the doctrine of parliamentary sovereignty has survived centuries of change, and has the capacity to survive many more. I will argue that the recent constitutional developments discussed by its critics are compatible with the doctrine.

If I am wrong, and one or more recent developments have undermined parliamentary sovereignty, it is crucial to identify them in order to achieve a clear understanding of the new constitutional order. For example, if legislation such as the European Communities Act 1972 (UK) or the Human Rights Act 1998 (UK) has made parliamentary sovereignty redundant, that is presumably because Parliament has somehow succeeded in binding

[89] Joseph, 'Parliament, the Courts, and the Collaborative Enterprise', 321.
[90] *Ibid*., 322 including n. 4, 321–3, 327, 340, 342–5.

itself, which does not vindicate the theory of common law constitutionalism. Moreover, this would not affect parliamentary sovereignty in New Zealand, or in other Commonwealth jurisdictions where the doctrine exists in attenuated form. But other grounds for challenging parliamentary sovereignty might entail some version of common law constitutionalism, and potentially affect every common law jurisdiction.

A Judicial review of administrative action

One of Joseph's central arguments is that judicial review of administrative action has for centuries been based on the courts' inherent jurisdiction as a matter of common law.[91] Joseph is here taking aim at the 'ultra vires' theory of judicial review, one of the protagonists in recent British debates over the nature and foundations of judicial review of administrative action.[92]

The ultra vires theory, championed by Christopher Forsyth and Mark Elliott, holds that judicial review of administrative action taken under statute enforces legal limits imposed by the statute itself, implicitly if not explicitly. This is supposedly because, when administrative power is conferred, and not relevantly limited, by statute, the imposition by judges of limits to that power would be tantamount to overriding the statute, in defiance of Parliament's sovereignty. This claim appears to depend on the proposition that whatever the statute itself does not prohibit, it permits, so that any limits imposed by judges on the exercise of statutory powers would necessarily be inconsistent with that permission.[93] Forsyth and Elliott now advocate a 'modified' ultra vires theory, which attributes to Parliament a tacit or implied general authorisation of the courts' creative development of the grounds of judicial review.[94]

Sir John Laws, writing extra-judicially, described the ultra vires theory as 'a "fig-leaf" serving to provide a façade of constitutional decency, with lip-service to the sovereign Parliament, while being out of touch with reality'.[95] The rival 'common law' theory, advanced by Paul Craig,

[91] *Ibid*., 328–33.

[92] The debate started with C. Forsyth, 'Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review' *Cambridge Law Journal* 55 (1996) 122. Many of the responses this article provoked are collected in C. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000).

[93] C. Forsyth and M. Elliott, 'The Legitimacy of Judicial Review' *Public Law* (2003) 286 at 289.

[94] See Forsyth's and Elliott's contributions in Forsyth (ed.), *Judicial Review and the Constitution*.

[95] Qutoed by H.W.R. Wade and C.F. Forsyth, *Administrative Law* (9th edn) (Oxford: Oxford University Press, 2004), p. 39.

maintains that judicial review enforces legal limits to administrative power that have largely been laid down, and continue to be creatively developed, as a matter of common law, without any need for Parliament's imprimatur. He urges us to frankly acknowledge that the principles enforced by the courts through judicial review are creatures of the common law, rather than genuine implications of statutes.[96] He argues that subjecting administrative powers to common law principles of good administration is no more controversial than subjecting such powers to common law principles of tort.[97] In neither case is it necessary to attribute to Parliament an intention to authorise or consent to the imposition, and as long as Parliament is free to override any limits imposed by common law, it remains sovereign.[98] Craig's position follows from the basic 'rule of law' principle, that the Crown is subject to the ordinary law of the land, including the common law, unless it is granted an exemption by statute.

Trevor Allan occupies an intermediate position. He agrees with Forsyth and Elliott that 'constitutional logic' requires the grounds of judicial review of administrative action under statute to be found within the statute itself, yet he regards legislative intent as largely an artefact of judicial 'construction' (rather than an object of judicial discovery) in accordance with common law principles.[99] He also disagrees with Forsyth, Elliott and Craig by holding that Parliament's authority is limited by fundamental common law principles.[100]

The ultra vires theorists are wrong to suggest that whatever Parliament does not forbid, it permits. There are many matters with respect to which Parliament may not have formed, or communicated, any intention one way or the other, leaving the common law free to regulate them. To use terminology familiar in the jurisprudence of federal systems, concerned with the relationship between national and state laws, if the legislation of one parliament is not intended to 'cover the field', another parliament

[96] See the contributions of Paul Craig in Forsyth (ed.), *Judicial Review and the Constitution*.

[97] P. Craig, 'Competing Models of Judicial Review' *Public Law* 428 (1999) 433–5.

[98] P. Craig, 'Constitutional Foundations, the Rule of Law and Supremacy' *Public Law* 92 (2003) esp. at 107–10; P. Craig, 'The Common Law, Shared Power and Judicial Review' *Oxford Journal of Legal Studies* 24 (2004) 237, esp. at 249–56; P. Craig and N. Bamforth, 'Constitutional Analysis, Constitutional Principle and Judicial Review' *Public Law* 763 (2001) esp. at 768–71.

[99] T.R.S. Allan, 'Legislative Supremacy and Legislative Intent: A Reply to Professor Craig' *Oxford Journal of Legal Studies* 24 (2004) 563, and 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority' *Cambridge Law Journal* 63 (2004) 685. See the discussion in Chapter 9, Section IV, Part B, above.

[100] Allan, 'Legislative Supremacy and Legislative Intent: A Reply to Professor Craig', 582.

may legislate with respect to the same subject-matter.[101] If so, it is hard to see why judges may not develop the common law in relation to that subject-matter. The ultra vires theorists have yet to respond effectively to this criticism, but they do insist that even principles of tort can justifiably be imposed on statutory authorities only if Parliament's tacit authorisation or consent can be presumed.[102]

On the other hand, it seems unlikely that the grounds of judicial review can all be justified in the same way. The ultra vires theory is undoubtedly well suited to what used to be called 'simple' ultra vires: the absence of the statutory power that was purportedly exercised. It may also be able to explain some of the other grounds. As we have seen, judicial interpretations of statutory provisions that supplement or qualify their literal meanings are sometimes justified by the idea of implicit or background assumptions.[103] When Parliament confers power on an administrator, does it really need to spell out that the power is to be exercised without bias, in good faith, for the purposes for which it has been conferred, on the basis of at least a scintilla of evidence, and within the bounds of rationality? Surely the courts are justified in treating such limits to the exercise of administrative power as presuppositions that are taken for granted.

Admittedly, this justification might not fit all the grounds of review, or at least, not completely. An alternative possible justification relies on the idea that judges may sometimes 'embroider' a statute, by filling in details, and supplementing or qualifying its provisions, to ensure that it achieves its purposes without damaging other important objectives or principles to which the legislature is committed.[104] Aronson, Dyer and Groves have proposed something like this understanding of the case law.[105] The intimate, almost inextricable relationship, in a particular case, between the grounds of review and the provisions and purposes of the statute in question, suggest that this may be a better account of judicial creativity than the idea that the courts have developed independent, common law

[101] T. Endicott, 'Constitutional Logic' *University of Toronto Law Journal* 53 (2003) 201; A. Halpin, 'The Theoretical Controversy Concerning Judicial Review' *Modern Law Review* 64 (2001) 500, esp. at 501–6.

[102] M. Elliott, 'Legislative Intention Versus Judicial Creativity? Administrative Law as a Co-operative Enterprise', in Forsyth (ed.) *Judicial Review and the Constitution*, pp. 347–8, above.

[103] See Chapter 9, Section II, Part A(2).

[104] *Ibid*., Section II, Part B, above.

[105] M. Aronson, B. Dyer and M. Groves, *Judicial Review of Administrative Action* (3rd edn) (Sydney: Lawbook Co., 2004), pp. 101–2.

grounds of review. Yet Craig's common law theory might be the most plausible explanation of some other grounds of review.

We have, then, many possible explanations of the grounds of review to choose from, and they may not all be justifiable on the same basis. But judicial review is not unique in raising these difficult theoretical questions. Consider, again, the decision in *Riggs* v. *Palmer*, concerning the murderer who claimed the right to an inheritance under his victim's will.[106] Although the New York statute dealing with wills did not expressly exclude murderers from inheriting, the state's Court of Appeals held that it did exclude them, by interpreting it in the light of the common law principle that no-one may profit from his own wrong. This decision has been explained in terms similar to each of the various theories of judicial review that have been mentioned:

(1) Although the legislators had no conscious intention concerning murderers inheriting, it was reasonable to understand the statute in the light of tacit, background assumptions that can be taken for granted.[107] This is equivalent to Forsyth's and Elliott's 'modified' ultra vires theory.
(2) The judges engaged in 'equitable' interpretation along Aristotelian lines, adding to it a qualification needed to prevent damage to an important principle that the legislature itself would probably have chosen to avoid had it addressed the question.[108] This is related to Aronson's, Dyer's and Groves' theory.
(3) The legislature had no relevant intention one way or another; but precisely for that reason, it did not purport to 'cover the field', and left room for the operation of independent, common law principles.[109] This is similar to Craig's theory.
(4) The judges attributed to the legislature an artificial, 'constructive' intention, based on common law principles, that helped to make the statute 'the best that it can be' (to use one of Dworkin's expressions).[110] This is equivalent to one aspect of Allan's theory.[111]

[106] (1889) 115 NY 506, 22 NE 188.
[107] R. Dworkin, 'Reflections on Fidelity' *Fordham Law Review* 65 (1997) 1799 at 1816. See also Chapter 9, Section IV, end of Part C, above.
[108] See, for example, Jim Evans's theory of equitable exceptions: J. Evans, 'Reading Down Statutes', in R. Bigwood (ed.), *The Statute; Making and Meaning* (Wellington: LexisNexis, 2004), p. 123.
[109] D. Farber, 'Courts, Statutes, and Public Policy: the Case of the Murderous Heir' *Southern Methodist University Law Review* 53 (2000) 37.
[110] R. Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986), pp. 351–2.
[111] See Trevor Allan's discussion of Riggs in Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority', 696–703.

(5) In effect, the decision subordinated the statute, and the will of the legislature, to common law principles (contrary to the American doctrine that the legislature is supreme as long as it does not violate limits imposed by the state or national Constitution).[112] This is equivalent to another aspect of Allan's theory.[113]

The most important point is that in the case of judicial review, there is no good reason to accept (5). I would also reject (4), on the ground that it reduces to (5). This is because, if legislative intentions are not real, but artificial 'constructs' that are essentially fictions, then we must pierce through the fiction to ascertain the underlying reality – which must be (5) (since all the other alternatives depend to some extent on legislative intentions being real).

As for (1), (2) and (3), the right choice will probably vary, depending on the particular ground of review in question. Although the choice is of analytical interest, it may be of little practical importance. What is of great practical importance is whether, by interpreting a statute as subject to some unexpressed qualification, a court is being faithful to Parliament's purposes, insofar as these have been clearly communicated, or whether it is really overriding them, and the statute, to give effect to its own policy preferences. There appears to be no good reason to think that this is generally true of the judicial review of administrative decision-making. One exception may be the courts' treatment of some privative clauses that purport to oust their jurisdiction to review administrative action.

B The Anisminic *case*

Many critics have claimed that the *Anisminic* case[114] is flatly inconsistent with parliamentary sovereignty, because the House of Lords, in effect, refused to obey Parliament's command that decisions of the statutory authority in question were not to be judicially reviewed.[115] Two responses

[112] A. Marmor, *Interpretation and Legal Theory* (Oxford: Clarendon Press, 1992), pp. 136–7; F. Schauer, *Playing By the Rules: a Philosophical Examination of Rule-Based Decision Making in Law and Life* (Oxford: Clarendon Press, 1991), pp. 209–10; both critically discussed in Chapter 9, Section IV, Part A, above.

[113] T.R.S. Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority', 699, quoted in Chapter 9, Section IV, end of Part B, above.

[114] *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 AC 147, [1969] 2 WLR 163.

[115] For example, H.W.R. Wade and C.F. Forsyth, *Administrative Law* (7th edn) (Oxford: Oxford University Press, 1994), p. 737; Thomas, 'The Relationship of Parliament and the Courts', 27.

can be made. The first is that even Trevor Allan, no friend of parliamentary sovereignty, has justified the decision in that case on the orthodox ground of presumed legislative intention. He said that '[i]t is quite as reasonable to suppose that Parliament intended the courts to superintend the Foreign Compensation Commission, as regards the extent of its jurisdiction, as to suppose the contrary. Far more reasonable – it would seem almost absurd to think that Parliament intended the Commission's activities to be free from all legal control.'[116] Allan has not subsequently changed his mind.[117] And as I have previously observed, judges who presume that Parliament did not intend to violate some important common law principle 'do not deliberately flout the doctrine of parliamentary sovereignty unless they know that there is clear, admissible evidence that it did intend to do so'.[118]

Many scholars believe that judges routinely evade privative clauses by lying about Parliament's likely intention in enacting them.[119] Aronson, Dyer and Groves use the term 'disingenuous disobedience'.[120] Sir William Wade referred to 'the logical contortions and evasions' to which judges were 'driven' by privative clauses, although he added that their stance should be condoned rather than criticised.[121] Justice E.W. Thomas recommends that we candidly admit what the judges have been doing: 'I know of no rule of law or logic which would make judicial disobedience more palatable simply because it is done covertly.'[122]

Let us assume that the Court did knowingly disobey Parliament. The second possible response was outlined in my earlier book:

> It must also be admitted that in some … cases, the judges' claim to be faithful to Parliament's implicit intention has been a 'noble lie', used to conceal judicial disobedience. But such cases are relatively rare, and the fact that the lie is felt to be required indicates that the judges themselves realise that their disobedience is, legally speaking, illicit. The lie also preserves Parliament's freedom, after reconsidering its position, to

[116] T.R.S. Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' *Cambridge Law Journal* 44 (1995) 111 at 127.

[117] T.R.S. Allan, *Constitutional Justice; a Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), pp. 211–12.

[118] Goldsworthy, *The Sovereignty of Parliament,* p. 252.

[119] See, e.g., C. Saunders, 'Plaintiff S157: A case-study in common law constitutionalism' *Australian Journal of Administrative Law* 12 (2005) 115 at 117 and 125.

[120] Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd edn), p. 830.

[121] Sir William Wade, *Constitutional Fundamentals* (rev'd edn) (London: Stevens & Sons, 1989), p. 86.

[122] Thomas, 'The Relationship of Parliament and the Courts', 27.

override the judges by enacting new legislation expressing its intention more clearly.[123]

C *Britain and the European Community*

An important challenge to parliamentary sovereignty is posed by the decision of the House of Lords in *R* v. *Secretary of State for Transport, ex parte Factortame Ltd (No 2)* ('*Factortame*').[124] Some provisions of the Merchant Shipping Act 1988 (UK) ('the MS Act') were 'disapplied' by the House of Lords, because the European Court of Justice had held that they were inconsistent with laws of the European Community that were operative within the United Kingdom by virtue of s. 2(1) of the European Communities Act 1972 (UK) ('the EC Act'). Section 2(4) of the EC Act states that any other enactment, past or future, 'shall be construed and have effect subject to the foregoing provisions of this section'. The practical consequence of the decision is that British legislation inconsistent with applicable EC laws will be 'disapplied' unless Parliament either: (a) makes it quite clear, by express words or necessary implication, that it specifically intends the legislation to be applied notwithstanding the inconsistency; or if this is held to be insufficient to make the legislation applicable, (b) enacts legislation formally withdrawing Britain from the European Community.

Paul Craig suggests that (a) would be insufficient to save British legislation from disapplication, because the courts are likely to rule that as long as Britain remains in the Community it 'cannot simply pick and choose which [of the Community's] norms to accept'.[125] But I will assume that (a) would be sufficient. It is the business of the government and Parliament, not the courts, to decide whether or not Britain should abide by its treaty commitments. The duty of the courts is to accept their decision, even if they regard it as undesirable on policy grounds. As we will see, (a) is arguably consistent with parliamentary sovereignty, for reasons to do with either statutory interpretation or 'pure procedure or form'.[126] But if (b) were necessary, then the EC Act would have subjected Parliament's law-making power to a limitation of substance: although Parliament would

[123] Goldsworthy, *The Sovereignty of Parliament*, p. 252.

[124] [1991] 1 AC 603 (HL).

[125] See P. Craig, 'Report on the United Kingdom', in A.M. Slaughter, A.S. Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts; Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1998), 195 at p. 204.

[126] See Chapter 7, above.

still have power to withdraw Britain from the European Community, it would no longer have power to override applicable Community laws without withdrawing Britain from the Community. That could not be explained in terms of a mere requirement as to the form of British legislation. Parliament would, indeed, have abdicated part of its sovereignty, even if it retains the power to recover it.

It is easy for a proponent of parliamentary sovereignty to justify the decision in *Factortame* on policy grounds. The inconsistency of the MS Act with EC law was inadvertent: while preparing the draft legislation, the government was advised that it was consistent with EC law, and gave an assurance to that effect when the question was raised in Parliament.[127] Parliament unknowingly had two inconsistent intentions: an intention to enact the MS Act, and an intention not to legislate inconsistently with Community laws. As explained in Chapter 7, there are good reasons why Parliament might want to authorise the courts to correct this kind of mistake, by 'disapplying' legislation that inadvertently overrides or interferes with some important existing law or principle to which Parliament is committed.[128] The decision in *Factortame* is therefore perfectly consistent with parliamentary sovereignty as a theoretical principle. But whether and if so how the decision can be reconciled with the orthodox legal understanding of parliamentary sovereignty remains subject to debate.

The decision in *Factortame* to 'disapply' statutory provisions might be inconsistent with Dicey's understanding of parliamentary sovereignty, which is still frequently quoted and relied on.[129] Dicey defined Parliament's sovereignty in terms of two criteria, one positive and the other negative. The positive criterion is that Parliament has 'the right to make or unmake any law whatever'; the negative one is that 'no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[130] If the second criterion is essential to parliamentary sovereignty, then the decision in *Factortame* probably spells the

[127] G. Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance From the United Kingdom?' *Public Law Review* 17 (2006) 188 at 195; D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: Oxford University Press, 2001), p. 182.

[128] See Chapter 7, Section III, above.

[129] E.g., A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2008), ch. 1; A. Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), ch. 11.

[130] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn), E.C.S. Wade, (ed.) (London: Macmillan, 1959), p. 40.

end of the doctrine, since it apparently involved the court overriding or setting aside, at least partially, some provisions of the MS Act.

Dicey also adhered to the doctrine of implied repeal, which is often regarded as an essential concomitant of parliamentary sovereignty.[131] The doctrine of implied repeal maintains that, since a sovereign Parliament can no more be bound by its own previous laws than by any other legal constraint, it must be at liberty to ignore those laws whenever it passes a new one. Any earlier law that is inconsistent with a new law is necessarily repealed by implication (although 'disapplied' would be a better term than 'repealed'.[132]) The decision in *Factortame* is arguably inconsistent with this doctrine, given that provisions of the later MS Act were overridden or set aside ultimately due to the authority of the earlier EC Act.

It can be argued, on the other hand, that the decision in *Factortame* is not inconsistent with either Dicey's second criterion, or the doctrine of implied repeal. One possible argument is that the decision involved the interpretation of the MS Act in the light of the EC Act, rather than disapplication of the MS Act due to inconsistency with the EC Act. That interpretive argument will be considered shortly. But it is important to bear in mind that an alternative defence of the compatibility of the decision with parliamentary sovereignty is available. This is to deny that either Dicey's second criterion, or the doctrine of implied repeal, is truly essential to parliamentary sovereignty, when it is understood conceptually or theoretically. Reasons for this denial are provided in Chapter 7, which argues that a sovereign Parliament should have power to bind itself to comply with requirements as to pure procedure or form which, by definition, do

[131] As for implied repeal, see Kavanagh, *Constitutional Review*, pp. 315 and 297; Craig, 'Report on the United Kingdom', 210.

[132] This is for two reasons. First, the earlier statute is 'repealed' only insofar as it is inconsistent with the later one. Therefore, if inconsistency arises only in particular circumstances, the operation of the earlier law should be unaffected – and able to be applied 'distributively' – in all other circumstances. '[I]f the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act': *Goodwin* v. *Phillips* (1908) 7 CLR 1 at 7 (emphasis added) (Griffith C.J.). Secondly, the inconsistent provisions of the earlier statute are not, as it were, expunged from the statute book: if the later statute were to be formally repealed, the earlier one should be fully revived. For useful discussion, see E.A. Driedger, *Construction of Statutes* (2nd edn) (Toronto: Butterworths, 1983), pp. 231–5. Implied repeal due to inconsistency of statutes therefore seems identical to the invalidity of state laws, when inconsistent with Commonwealth laws, under s. 109 of the Australian Constitution.

not destroy or diminish Parliament's substantive law-making power.[133] If this view is taken, then it can be conceded that the MS Act was disapplied due to inconsistency with the earlier EC Act, the latter being interpreted as imposing a requirement as to the form of future legislation – namely, that any breach of applicable EC law must be authorised by express words clearly communicating Parliament's intention to do so – rather than as imposing a limitation of substance. This could serve as a fall-back position if the interpretive argument, which will now be explored in depth, should fail.[134] But it should be recalled that the difference between a 'procedure or form' and an 'interpretive' reading of a statutory directive is sometimes hard to draw.[135]

(1) Implied repeal and different subject-matters

Adam Tomkins has offered two arguments to show that the decision in *Factortame* is consistent with orthodox understandings of parliamentary sovereignty and implied repeal.[136] His first argument is that in disapplying provisions of the MS Act, the court was enforcing EC law, not English law, and therefore the doctrine of parliamentary sovereignty – which is part of English law, not EC law – was unaffected. But given that Tomkins also rightly insists that the court had jurisdiction to apply EC law only because the ECA required it to do so, it was ultimately English law that the court was enforcing. Tomkins claims that even after *Factortame*, it remains the case that 'under English law [in contrast to EC law] nobody may override or set aside a statute'.[137] Yet in one sense of 'under' this is wrong, because the court was enforcing EC law 'under' the EC Act.

Tomkins's second argument is, in part, that the principle of implied repeal was unaffected by the decision because there can only be an implied repeal if two Acts deal with the same subject-matter, and the EC Act and MS Act did not do so. He cites Maugham L.J. in *Ellen Street Estates* v. *Minister of Health*, who said that 'it is impossible for Parliament to enact that in a subsequent statute *dealing with the same subject-matter* there can be no implied repeal'.[138] A similar argument has been made by

[133] See Chapter 7, Section VII, above.
[134] I here disagree with the position I previously took in J. Goldsworthy, 'Parliamentary Sovereignty and Statutory Interpretation', in R. Bigwood (ed.), *The Statute; Making and Meaning*, 187 at p. 201.
[135] Chapter 7, Section IV, above.
[136] A. Tomkins, *Public Law* (Oxford: Clarendon Press, 2003), pp. 117–19.
[137] *Ibid*., p. 118.
[138] [1934] 1 KB 590 at 597 (emphasis added), cited by Tomkins, *Public Law*, p. 107.

Nick Barber and Alison Young, who distinguish between two different 'models' of implied repeal: the 'conflict of norms model' and the 'conflict of subject-matter model'.[139] According to the former, implied repeal is triggered by any conflict between two statutory norms; according to the latter, which Barber and Young endorse, implied repeal is triggered only when the two norms 'stand upon the same subject-matter'.[140] Tomkins, applying the second model, concludes:

> The Merchant Shipping Act and the European Communities Act did not deal with the same subject-matter. The one concerned fishing and the other concerned the legal relationship between the United Kingdom and the European Community. It is frankly preposterous to suggest that there could have been an issue of implied repeal here: what provision of the Merchant Shipping Act could be said to have impliedly repealed what provision of the European Communities Act?[141]

Advocates of the first model of implied repeal would reply that the EC Act, together with relevant EC law, in effect required the court not to apply the relevant provisions of the MS Act, whereas the MS Act – simply by virtue of being an Act of Parliament – required the court to apply them. The MS Act's inconsistency with EC law would have been of no legal consequence had it not also amounted to inconsistency with the legal force conferred on EC law by the EC Act. The answer to Tomkins' question is therefore: 'the provisions of the MS Act that are inconsistent with applicable EC laws, are also inconsistent with – and therefore impliedly repeal – the provisions of the EC Act that confer binding force on those EC laws.' Can this conclusion be evaded by adopting the 'conflict of subject-matters model'?

Many objections can be made to that model. One is that it is novel. The leading texts on statutory interpretation do not mention it, and appear instead to regard any unavoidable inconsistency between statutes as sufficient to trigger implied repeal.[142] In *Ellen Street Estates*, Maugham L.J. was the only judge to treat the subject-matter of the laws as a significant consideration, although he did not assert that implied repeal can occur only when inconsistent laws deal with the same subject-matter.

[139] N.W. Barber and A.L. Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] *Public Law* 112 at 115.

[140] *Ibid*. For their endorsement, see 116 and 126–7.

[141] Tomkins, *Public Law*, p. 119. See also E. Ellis, 'Supremacy of Parliament and the European Law' *Law Quarterly Review* 96 (1980) 511 at 513.

[142] See, e.g., F. Bennion, *Statutory Interpretation* (4th edn) (London: Butterworths, 2002), pp. 254–5.

Secondly, there does not seem to be any good reason why, if two statutes are inconsistent, the fact that they deal with different subject-matters should prevent implied repeal. Surely it is inconsistency between two laws that gives rise to the need for implied repeal, regardless of the subject-matters they are dealing with. If one provides that *a* must do *x*, and the other that *a* must not do *x*, the fact that they do so while dealing with different subject-matters cannot help. As the inconsistency makes it impossible for a court to fully apply both laws; one must therefore prevail, and Parliament's continuing sovereignty requires that it be the later one. Why should the earlier law prevail over the later law just because they deal with different subject-matters?

Thirdly, this suggests that, if a difference in their subject-matters is significant, this must be because it indicates that the two laws are not, despite appearances, inconsistent.[143] It is clear that although two laws dealing with quite different subject-matters can conflict, a difference in their subject-matters may suggest that the laws should be interpreted so that both can operate, side by side, confined to their respective subject-matters. It is well established that a later, general law can be interpreted as impliedly qualified, so that it does not interfere with an earlier, more specific law. If Parliament in the earlier statute carefully settled a specific matter, and in the later statute provided for more general matters without any clear indication (other than arguably careless language) of having intended to disturb the earlier settlement, the later statute can be 'read down' by finding it subject to an implied qualification making it inapplicable to the specific matter. The maxim *generalia specialibus non derogant* ('general things do not derogate from special things') is generally invoked in such cases.

By much the same reasoning, a later law dealing with one subject-matter might be interpreted as impliedly qualified, so that it does not interfere with an earlier law dealing with a different subject-matter, even if the two laws would be inconsistent if construed literally. Indeed, Maugham L.J. may have mentioned subject-matters because he had in mind cases involving general and specific laws.[144] In a similar observation, Griffith C.J. of the Australian High Court clearly intended to distinguish such cases: '… where the provisions of a *particular* Act of Parliament *dealing with a particular subject matter* are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is

[143] See also the full discussion in Young, *Parliamentary Sovereignty and the Human Rights Act*, pp. 45–9.

[144] Barber and Young acknowledge this in 'The Rise of Prospective Henry VIII Clauses', 116.

repealed by implication'.[145] This observation does not imply that no inconsistency between two laws dealing with different subject-matters can ever trigger implied repeal; it implies merely that an apparent inconsistency between a later law dealing with a general subject-matter and an earlier law dealing with a particular subject-matter may not trigger an implied repeal. If this is right, then the distinction between the 'conflict of norm model' and the 'conflict of subject-matters model' of implied repeal is fallacious. Implied repeal is triggered by inconsistency between norms, but if two norms deal with quite different subject-matters, it *may* be possible to interpret them so as to dispel a *prima facie* inconsistency. Australian cases dealing with alleged inconsistencies between state and federal laws provide many examples.[146] On the other hand, if one law provides that *a* must do *x*, and the other that *a* must not do *x*, the fact that they do so while dealing with different subject-matters cannot help. This is a consequence of the fact that laws dealing with different subject-matters can contradict one another, whether or not Parliament intended or even adverted to the contradiction.

(2) Statutory interpretation, legislative intention, and legislative mistakes

The usual way to avoid implied repeal is to remove the appearance of inconsistency between two statutes through interpretation. The question then becomes: is it possible in a case such as *Factortame* to interpret the two statutes so that they can be confined to their respective subject-matters, thereby avoiding inconsistency? One difficulty is that, when a later, general statute is 'read down' to accommodate an earlier, special law, the operation of the later, general law is otherwise unaffected. As Lord Selborne put it, implied repeal can be avoided 'where there are general words in a later Act *capable of reasonable and sensible application* without extending them to subjects specially dealt with by earlier legislation . . . '[147] This is relatively easy if any impact on the earlier legislation would be, at most, collateral damage, because the principal, intended operation of the later legislation lies elsewhere. But what if exempting an earlier law from the scope of the later law would render the latter incapable of a reasonable and sensible application – in other words, if the exemption cannot be made without in effect nullifying the later law? The courts seem to have

[145] *Goodwin* v. *Phillips* (1908) 7 CLR 1 at 7 (emphasis added).

[146] See S. Joseph and M. Castan, *Federal Constitutional Law, A Contemporary View* (2nd edn) (Sydney: Lawbook Co., 2006), pp. 226–41.

[147] *Seward* v. *The Vera Cruz* (1884) 10 App Cas 59 at 68.

assumed that a later law can be qualified, without impugning the sovereignty of Parliament. But can a later law be nullified?

One of the questions raised by *Factortame* is whether complete disapplication of a statutory provision, or even the statute as a whole, could in some cases follow from interpretation of that very statute. A lucid argument to this effect has been made by Geoffrey Lindell. He points out that Parliament might intend that a particular statute should come into operation only if a certain condition is satisfied (such as that the statute does not conflict with EC law); that a requirement to that effect would be effective if included in the statute itself; and that it should also be effective if enacted in a previous statute, of general and ambulatory effect, purporting to govern the operation of future legislation. Such a general and ambulatory requirement would operate as a 'standing or continuing expression of the notional will and intent of Parliament', obviating the need to include the requirement in every subsequent statute.[148] Parliament should then be deemed to adhere to that standing intention unless and until it is clearly repudiated.

Lindell's argument seems plausible to this point. But does it follow that the disapplication of a statute for non-compliance with a precondition laid down in a previous statute can plausibly be attributed to the interpretation of the disapplied statute itself? Lindell cites Lord Bridge's statement that the relevant provisions of s. 2 of the ECA had 'precisely the same effect as if a section were incorporated' in the MS Act.[149] But even if preconditions imposed by an earlier statute have much the same effect 'as if' they were expressly incorporated in the later, disapplied statute, the fact remains that they were not so incorporated. It could just as plausibly be said that a declaration in an earlier statute that all later statutes inconsistent with it are invalid, has the same effect 'as if' it were incorporated in every later statute.[150] Disapplication – which is a kind of invalidation – cannot be converted into interpretation by means of a fiction.

[148] Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty', esp. at 194–5 (for an earlier version, see G. Lindell, 'Invalidity, Disapplication and the Construction of Acts of Parliament: Their Relationship With Parliamentary Sovereignty in the Light of the European Communities Act and the Human Rights Act' (1999) 2 *Cambridge Yearbook of European Legal Studies* 399, esp. at 405–7). For a similar argument, see T.C. Hartley, *Constitutional Problems of the European Union* (Oxford: Hart Publishing, 1999), pp. 172–3.

[149] Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty', quoting *R* v. *Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85 at 140.

[150] Sir William Wade, 'Sovereignty – Revolution or Evolution?' *Law Quarterly Review* 112 (1996) 568 at 570.

Lindell also draws an analogy with the interpretation of a later statute according to the provisions of an Interpretation Act, which Lord Dunedin once said are 'so to speak, written into every statute'.[151] But interpreting statutory provisions according to guidelines in an Interpretation Act seems qualitatively different from refusing to apply them due to non-compliance with preconditions imposed by an earlier Act. Parliamentary counsel are presumed to be familiar with an Interpretation Act, and to craft statutory language with its guidelines in mind. Since counsel act as Parliament's assistants in drafting legislation, it is plausible to attribute to Parliament itself an expectation that its legislation be interpreted accordingly. An Interpretation Act is a bit like a code-book, which the intended recipient of a coded message uses to de-code the message only because the sender of the message is known to have used it in coding the message. It is less plausible to attribute to Parliament, when it enacts a statute, an intention that the statute be disapplied. In the case of the MS Act that was partially disapplied in *Factortame*, the government had apparently been advised that it was consistent with EC law.[152] That advice was conveyed to Parliament, when the government was asked whether there was a risk of the draft legislation being challenged in the European Court.[153] Parliament presumably acted on the mistaken assumption that there was no obstacle to the legislation coming into effective operation. It did not intend to enact legislation inconsistent with EC law. But it does not follow just from this that Parliament, when it enacted the MS Act, intended that it should be disapplied if it were found to be inconsistent with EC law. It appears that Parliament failed to entertain that possibility, or to contemplate its consequences.

One way of understanding, or reinforcing, Lindell's argument is to rely on the notion of implicit, background assumptions, which was discussed in Chapter 9.[154] Even if Parliament lacked a positive intention that its Act should be disapplied if shown to be inconsistent with EC law, it might be reasonable to attribute to it an implicit, background assumption to that effect, amounting to a standing commitment. Since (we are assuming at present) the question remains one of interpretation, rather than validity, courts must always remain open to the possibility that, in enacting a later statute, Parliament has overridden that standing

[151] Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty', 195, quoting Lord Dunedin in *Re Silver Brothers Ltd* [1932] AC 514 at 523.
[152] Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty', 195.
[153] Nicol, *EC Membership and the Judicialization of British Politics*, p. 182.
[154] Chapter 9, Section II, Part A(2), above.

commitment, at least to the extent necessary to enact the statute. In the absence of an express statement to that effect, it may be reasonable to conclude that it has not done so but, instead, has made a mistake. It is certainly reasonable where matters of such fundamental importance as Britain's membership of the European Community is concerned. Since violation of Community law by a member state could have extremely serious consequences, there are weighty reasons why Parliament might want British courts not to apply legislation that is inadvertently inconsistent with Community law – weighty reasons, in other words, why Parliament might want to authorise the courts to correct its mistakes in that regard.[155] In principle, there is no diminution of legislative sovereignty if they do so.

The court is required to decide whether or not the later Act evinces an intention to override what an earlier Act declared to be a standing commitment, concerning a matter whose fundamental importance suggests that it is very unlikely to be overridden. This is a matter of interpreting the later Act. Does it or does it not evince the unlikely intention that is required for its provisions to be operative? If not, it may embody or presuppose two incompatible intentions: an intention to enact provisions that the legislature did not understand to be inconsistent with European law, and an ongoing, implicit, standing commitment that provisions inconsistent with European law not be applied. One of these intentions must give way to the other, and a court should give priority to that which Parliament itself would most likely regard as paramount.

On the other hand, the situation in *Factortame* arguably should be distinguished from the usual 'background assumption' cases. In those cases, it can reasonably be concluded that the legislation enacted, and Parliament's intention in enacting it, should be understood in the light of background assumptions that did not need to be spelled out. Parliament did not make a mistake, because it did not need to spell out obvious background assumptions. The legislation is subject to a genuinely implied or presupposed qualification. By contrast, in enacting the legislation considered in *Factortame*, Parliament did, in effect, make a mistake.

[155] Admittedly, this may not have been Parliament's intention when it enacted the European Communities Act. A recent book that has investigated Parliament's original intention concludes that most members of Parliament were ignorant or confused about the nature and effect of the Act: see Nicol, *EC Membership and the Judicialization of British Politics*. If so, Parliament may not have had any coherent intention concerning the meaning of s. 2(4) of that Act. But that possibility is an inescapable hazard of the interpretive enterprise.

To return to another theme in Chapter 7, there is an alternative way of explaining an implied qualification when Parliament has made a mistake in the design of a statute. We might have to concede that there was no implicit assumption; that the legislature erred by failing to anticipate and expressly provide for some circumstance or subsequent development; and that creative interpretation is needed to avoid a result that would be inconsistent with the purpose of the statute, or with other important objectives or principles that it is reasonable to presume that the legislature would not have wanted to damage. In some cases, the court must repair or rectify the statute, by undertaking some 'embroidery' to supplement or qualify its express provisions, in order to correct a legislative oversight. As previously observed, that may be why lawyers use the peculiar terminology of qualifications being 'implied into' or 'read into' legal instruments.[156] Alison Young appears to suggest that *Factortame* is best understood in this way, as involving the Court in effect 'reading into' every future Act, including the MS Act, words that require its provisions to take effect subject to applicable EC laws.[157] (Although it is not clear whether she regards this exercise as giving effect to an implicit assumption of the MS Act, or as rectifying it.)

In many cases of rectification, Parliament either overlooked the existence of an earlier law or legal principle, or erroneously believed that the later law was consistent with it. The implied qualification gives effect to what Parliament presumably would have intended had the inconsistency with the earlier law or principle been brought to its attention. The 'implied' qualification that is 'read into' the later law really involves partial disapplication of it, to avoid a result that Parliament presumably would not have wanted.[158] This is a well established judicial technique, although it has not been used to completely disapply statutory provisions. The truly innovative consequence of the decision in *Factortame* may be the extension of this technique to complete disapplication.

Is the decision in *Factortame* best justified by the first, the second, or neither of these two explanations? According to Danny Nicol's study of the origins of the EC Act in 1972, members of Parliament (and therefore presumably Parliament itself) at that time had no clear intention as to

[156] Chapter 9, Section II, Part B, above.

[157] Young, *Parliamentary Sovereignty and the Human Rights Act*, pp. 44, 51, 55 and 62. On the other hand, a passage towards the bottom of p. 56 is more difficult to reconcile with continuing parliamentary sovereignty.

[158] See Chapter 9, Section II, Part B, above.

the constitutional consequences of that Act.[159] Yet we know that by the time the MS Act was passed, the government and Parliament were aware of the importance of ensuring that statutory provisions did not breach relevant EC laws. The government assured Parliament that the MS Act did not do so.[160] The government's legal advice, on which that assurance was based, turned out to be wrong. Does it follow that Parliament made a mistake, which had to be corrected by the judges 'reading into' the MS Act a qualification that was not (really) already there, although one that was consistent with Parliament's standing commitments? Or is the better interpretation of the MS Act that Parliament acted on the basis of a genuine presupposition or background assumption that EC law should not be breached, which qualified the operation of that Act?

To adopt either the first or the second explanations assumes that it can make sense to think of Parliament as having standing commitments that may not be consciously adverted to when a law is passed. For those who would dismiss that assumption as a 'fairy tale' used to preserve 'the formal veneer of legal sovereignty',[161] there is, as I previously foreshadowed, a third explanation that is also consistent with parliamentary sovereignty. This is that Parliament in the EC Act in effect subjected itself to a mild requirement as to the form of future legislation, requiring that express words be used to override applicable EC laws. This requirement does not prevent Parliament from exercising at any time its substantive power to override EC laws, but does entail that Parliament must use express words to do so, or else provisions inconsistent with those laws will be inoperative.[162]

The key difference between the third explanation, and both the first and second ones, is this: when Parliament is bound by a requirement as to form, it is bound by an earlier law regardless of whatever its later intentions may have been; on the other hand, genuine interpretation of a later law depends on a bona fide attempt to determine Parliament's intentions and standing commitments at the time it was enacted, which prevail regardless of the procedure or form that Parliament adopted.[163]

[159] Nicol, *EC Membership and the Judicialisation of British Politics*.

[160] Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty', 195; Nicol, *EC Membership and the Judicialization of British Politics*, p. 182.

[161] P. Craig, 'Britain in the European Union', in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (6th edn) (Oxford: Oxford University Press, 2007), 84 at p. 97.

[162] See text to n. 133, above, and Chapter 7, above.

[163] See Chapter 7, Section IV, above.

D Judicial review under the Human Rights Act

Some critics of parliamentary sovereignty assert that it cannot be reconciled with the expanded judicial role under the Human Rights Act 1998 ('the HRA').[164] Several judges in *Jackson* v. *Attorney-General* expressed similar, although rather cryptic, opinions.[165] Like most commentators, I fail to see the difficulty. Parliament has enacted the HRA, and has the power to repeal it at any time. The Act gives the courts considerable latitude in interpreting statutes, but no power to disapply or invalidate them. Aileen Kavanagh provides the most sustained and powerful response to my view, which she concedes is 'widely believed, amongst both judiciary and academic commentators'. She argues that the HRA, as judicially interpreted and applied, has rendered the doctrine of parliamentary sovereignty redundant.[166]

Some of Kavanagh's arguments depend on treating Dicey's definition of parliamentary sovereignty as axiomatic.[167] For example, she holds that the HRA is a 'constitutional statute' that is partially 'entrenched' because the rights it protects are immune from the doctrine of implied repeal.[168] Alison Young has forcefully argued, to the contrary, that s. 3(1) of the HRA is not immune from implied repeal. A later Act that is inconsistent with rights protected by the HRA is not inconsistent with the courts' interpretive duty under s. 3(1), and so the question of implied repeal simply does not arise; however, a later Act that imposed a contradictory interpretive duty would impliedly repeal s. 3(1).[169] I think Young is right, but the question is of less importance if, as I have argued, parliamentary sovereignty is best regarded as not entailing the doctrine of implied repeal.[170]

Kavanagh also relies partly on Parliament being subject to 'legal limits' that arise from Britain's membership of the European Union.[171] But as she acknowledges, these international legal obligations are not part of

[164] Joseph, 'Parliament, the Courts, and the Collaborative Enterprise', 322; Elias, 'Sovereignty in the 21st Century', 157.

[165] *Jackson* v. *Attorney-General* [2005] UKHL 56 at [102] per Lord Steyn, [104]–[107] per Lord Hope, and [159] per Baroness Hale. See the comments of Tom Mullen, 'Reflections on *Jackson* v. *Attorney-General*: questioning sovereignty' *Legal Studies* 27 (2007) 1 at 12–13.

[166] Kavanagh, *Constitutional Review*, esp. ch. 11.

[167] *Ibid*., p. 315.

[168] *Ibid*., pp. 315 and 317.

[169] Young, *Parliamentary Sovereignty and the Human Rights Act*, p. 53.

[170] See Chapter 7, Section III, above.

[171] Kavanagh, *Constitutional Review*, pp. 317 and 321.

Britain's domestic legal system.[172] They are therefore irrelevant to the scope of Parliament's law-making authority as defined within that system.

In addition, she emphasises the HRA's 'legal pervasiveness and its interpretive robustness', especially the practical equivalence of the very strong methods of 'interpretation' authorised by s. 3 of the Act, and partial disapplication or invalidation.[173] She claims that the courts have construed s. 3 as authorising them to 'rectify' legislation by re-writing it, if its operation would otherwise sometimes violate protected rights. This, she suggests, is tantamount to partial disapplication of the legislation: disapplication to the extent that its operation would otherwise violate those rights. I argued in the preceding section that disapplication, when it is authorised by and (as far as legal constraints are concerned) can easily be avoided by Parliament itself, is not inconsistent with parliamentary sovereignty, even if it is inconsistent with the second of Dicey's definitional criteria.[174]

Kavanagh places more emphasis on the power in s. 4 to issue declarations of incompatibility between a statute and protected rights. She maintains that, in practice, this power is (or is becoming) 'similar to a judicial strike-down power', and therefore imposes substantial limits on Parliament's law-making functions.[175] As she sees it, a practice or convention is developing that legislation will always be changed in response to such declarations, and for a good reason: if the elected branches of government were to ignore a declaration, they would threaten the comity between them and the judiciary, and 'challenge the judges' constitutional role as the body empowered to pronounce authoritatively on the requirements of the law, including rights provisions'.[176] Therefore, a declaration is and should be 'effectively final in almost all cases'.[177]

This robustly 'constitutionalist' understanding of the moral and political obligations of the elected branches of government when handed a declaration of incompatibility is highly debatable. One might wonder why, if they should always feel obligated to accept and act on such declarations, which are therefore 'similar' to formal invalidation, the HRA did not take the more straight-forward route of giving the judges the power to invalidate. Parliament's very deliberate decision not to do so surely

[172] *Ibid*., p. 321. [173] *Ibid*., p. 318–19. [174] See also Chapter 7, Section III, above.

[175] Kavanagh, *Constitutional Review*, p. 287; see also pp. 285 and 289. Kavanagh says that the 'salient difference' between these powers concerns the plight of the individual litigant: *ibid*., pp. 287 and 290.

[176] *Ibid*., pp. 286–7. [177] *Ibid*., p. 288.

implies that it anticipated that it might, in some cases, be legitimate and even desirable for the elected branches to act on their own opinions, rather than those of the judiciary, as to the content of contested rights or the balance between them and other competing, weighty considerations. In a healthy democratic society, cases of clear injustice are rare; in the vast majority of cases, whether or not the law violates some basic right is open to reasonable arguments on both sides. The whole point of having a democracy is that in these debatable cases, the opinion of the majority rather than of an unelected elite should ultimately prevail. As Jeremy Waldron has argued:

> It is puzzling that some philosophers and jurists treat rights as though they were somehow beyond disagreement, as though they could be dealt with on a different plane – on the solemn plane of constitutional principle far above the hurly-burly of legislatures and political controversy and disreputable procedures like voting.[178]

Rights should not be treated as truths that are objectively knowable only to the supposedly apolitical legal mind, by which democratic decision-making can be dispassionately judged. Of course the majority is not always right – but then again, it is not always wrong, and the nub of the problem is that there is no impartial, objective method capable of authoritatively determining when it is right or wrong. This does not mean that judges have no role to play. As argued in Chapter 8, allowing aggrieved litigants to seek non-binding judicial opinions about the impact of legislation on their rights can add a further check or balance to the political system, without diminishing its fundamentally democratic character. It permits an appeal from the rough-and-tumble of politics to a 'forum of principle', subject to a right of final appeal back to a consequently more informed and conscientious legislature. But,

> … [i]n a healthy democracy, responsible legislators would feel free to override actual or anticipated judicial interpretations of constitutional rights that, after careful and conscientious reflection, they do not agree with. That, after all, is a power exercised by the judges themselves, when they overrule previous judicial decisions that they have come to regard as erroneous. They do not treat their predecessors, or expect their successors to treat them, as infallible oracles.[179]

[178] J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), p. 12.

[179] Chapter 8, at p. 219–20, above. For a more extended defence of this idea, see D. Nicol, 'The Human Rights Act and the Politicians' *Legal Studies* 24 (2004) 451, esp. at 454–5.

This view is implicit in the popular 'dialogue' model of the relationship between the courts and the elected branches of government in decision-making about rights, which Kavanagh opposes.[180]

None of this diminishes Kavanagh's main point, which is that in practice declarations of incompatibility may come to have similar consequences to judicial invalidation. She also relies on the likelihood that the HRA is already, or will soon become, politically impossible for Parliament to repeal.[181] All of this leads her to conclude that from a practical (as opposed to a 'formal') perspective, Parliament has abandoned its sovereignty. 'Parliament has the last word only in the most formal sense.'[182] She shares Mark Elliott's concern that a 'gap' has opened up between what he calls the 'theory' of Parliament's sovereign authority to legislate, and the 'reality' of its more limited political power to do so.[183] Elliott urges that this gap be closed.[184]

But it is far from clear that any such gap exists. It has always been part of the justification of sovereign power, whether monarchical or parliamentary, that the repository of the power is subject to powerful extra-legal constraints, both 'internal' (moral) and 'external' (political), which make many theoretically possible abuses of the power virtually impossible in reality. There have always been many logically possible laws that, for moral and political reasons, Parliament would never enact, the hypothetical 'blue-eyed babies' statute being one of them. Yet it has seldom been thought to follow that Parliament lacked legal authority to enact such laws. Far from being a problem for the theory of sovereignty, this 'gap' between the absence of legal constraints, and the presence of moral and political ones, is essential to its acceptability. We would not want an institution to possess sovereign power if there were no such gap – if there were no effective moral or political constraints on its exercise of power. If the gap is expanded by additional, self-imposed constraints, such as the HRA, then (many would think) so much the better.

[180] Kavanagh, *Constitutional Review*, pp. 128–32 and 408–11. For a defence of the dialogue model see Young, *Parliamentary Sovereignty and the Human Rights Act*, pp. 118–30.

[181] *Ibid*., pp. 315–16. [182] *Ibid*., p. 324.

[183] *Ibid*., pp. 316 and 325. See also Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn), p. 543: 'Here, theory and reality disconnect: Parliament has absolute power but some laws it cannot enact.'

[184] M. Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality, and Convention' *Legal Studies* 22 (2002) 340; M. Elliott, 'United Kingdom: Parliamentary Sovereignty Under Pressure' *International Journal of Constitutional Law* 2 (2004) 545, *passim*.

There is no inconsistency here between 'theory' and 'reality'.[185] Parliament is legally sovereign both in theory and reality, and it is subject to moral and political constraints both in theory and reality. When Elliott complains that 'the doctrine of parliamentary sovereignty misstates the scope of the authority which, in practical political terms, Parliament possesses', he misunderstands the doctrine's purpose.[186] Its purpose is merely to make it clear that no other official or institution has legal authority to invalidate or override statutes. It does not purport to describe the scope of Parliament's likely desire and ability to enact statutes as a matter of practical politics. It makes perfectly good sense to say both: (1) that there are many things that a majority in Parliament either would never want to do, or for political reasons could never do, and (2) that it is not the courts' business to attempt to list these things, or to add the threat of judicial invalidation to the moral and political imperatives that prevent Parliament from doing them. There are good reasons for leaving the enforcement of moral and political constraints to political actors, rather than transforming them into legal constraints; for a start, this leaves room open for negotiation, compromise, and the continuing evolution of political practice and constitutional convention. If the 'gap' between Parliament's moral and political authority, and its legal authority, were closed, the courts would be authorised to decide which moral and political constraints should be judicially enforceable: in effect, this would be a blank cheque to rewrite the constitution. We would then lose a genuine and crucial 'gap', between Parliament submitting itself to political fetters, and its being subject to legal fetters imposed by judges in the name of a mythical 'common law constitution'. Tellingly, after mentioning Britain's membership of the EU, Kavanagh observes that 'there are now signs that, post-HRA, the courts are prepared openly to announce *their* ability to limit parliamentary sovereignty'.[187] Since any limits to Parliament's law-making authority imposed by the ECA and the HRA are self-imposed, it hardly follows that the courts are entitled to add further limits. The danger of arguments such as Elliot's and Kavanagh's is that they might suggest otherwise.

It is true that the practical significance of the doctrine of parliamentary sovereignty diminishes as Parliament's practical (moral and political) ability to exercise its sovereignty is reduced. As Parliament is increasingly hemmed in by practical constraints, whether or not they are self-imposed,

[185] Elliot, 'Parliamentary Sovereignty and the New Constitutional Order', 353.
[186] *Ibid*., 342. [187] Kavanagh, *Constitutional Review*, pp. 326–7 (emphasis added).

the area in which it has a practically unfettered law-making discretion shrinks. But even if it is true that the practical significance of the legal doctrine of parliamentary sovereignty has substantially diminished, and is likely to continue to diminish, this does not expose any gap between 'theory' and 'reality'.

Kavanagh's case against parliamentary sovereignty appears to rest ultimately on a version of common law constitutionalism. There is a tension in her analysis between claims that the HRA renders parliamentary sovereignty redundant, and claims that it does not give the courts distinctively new methods of interpretation, but merely 'expands' or 'enhances', 'in significant but subtle ways', methods they have traditionally used.[188] For example, she says that judges 'have always possessed (and exercised) the power to rectify statutory language, if to do so would remove an injustice or violate a fundamental constitutional principle'; therefore, 'if there are legitimacy problems about interpretation under the HRA, they apply *with equal force* to pre-HRA adjudication'.[189] She frequently claims that the traditional presumptions of statutory interpretation amount in reality to the imposition by the common law of a form of 'constitutional entrenchment' that protects fundamental rights.[190] '[T]he courts possess an inherent common law jurisdiction to protect and enforce constitutional rights, including the ability to ensure that legislation enacted by Parliament conforms to them.'[191] Admittedly, the HRA adds to the pre-existing judicial armoury the power to issue declarations of incompatibility. But Kavanagh says that 'the most profound influence of the HRA may well be in the impetus it gives the judiciary to be more explicit and more assertive about the nature of their constitutional role'.[192]

On this view, it is the court's traditional common law jurisdiction that makes parliamentary sovereignty redundant. The HRA merely reduces the courts' previous tendency 'to underplay the substantive nature' of that jurisdiction by 'maintaining fairytales'.[193] This claim warrants more careful examination.

E The common law protection of rights

For centuries, the courts have been guided by a presumption that Parliament does not intend to interfere with generally accepted principles

[188] For statements of the former kind, see *ibid*., ch. 11; for claims of the latter kind, see pp. 114–16, 275–6, 280 and 309.
[189] *Ibid*., p. 115 (emphasis added). See also p. 275.
[190] E.g., *ibid*., pp. 306, 328 and 280. [191] *Ibid*., p. 336. [192] *Ibid*., p. 415. [193] *Ibid*.

of morality, or with fundamental common law rights and freedoms, a presumption defeasible by express words or necessary implication. The traditional justification for these presumptions was entirely consistent with parliamentary sovereignty. Dicey himself acknowledged that the courts, when interpreting statutes, 'presume that Parliament did not intend to violate the ordinary rules of morality, or the principles of international law'.[194] As the High Court of Australia explained: 'The rationale for all such rules lies in the assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear.'[195] Even Kavanagh, who is no friend of parliamentary sovereignty, concedes that:

> the orthodox justification for applying the statutory presumptions is the fact that, in general, legislators know, or can be taken to know, that their legislation will be interpreted and understood in light of them. They are part of the known background against which Parliament legislates and of which it should be aware.[196]

This can be put in terms of giving effect to Parliament's 'standing commitments': it is deemed to have a standing commitment to preserve basic common law rights and freedoms, which it should not be taken to have repudiated absent very clear evidence such as express words or necessary implication.[197]

Parliament's standing commitments need not be confined to those implicit in past practice; it can make them explicit, and even subscribe to new ones. The British Parliament did so when it enacted the HRA, which requires courts to interpret legislation, whenever possible, as compatible with enumerated rights. That Act could have been interpreted as going no further, apart from protecting a larger number of rights, than orthodox presumptions or canons of interpretation that protect common law rights from anything less than express or necessarily implied alteration or interference. In fact, it has been interpreted as giving British courts much greater power to rewrite legislation in order to ensure compliance with the protected rights.

Apart from this, the most obvious difference between common law and statutory presumptions is that the latter are created by Parliament

[194] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn), pp. 62–3.
[195] *Bropho* v. *Western Australia* (1990) 93 ALR 207 at 215.
[196] Kavanagh, *Constitutional Review*, p. 99.
[197] See Chapter 7, Section III, above.

itself, and amount to self-avowed standing commitments. A common law presumption amounts to an attribution by the courts of a standing commitment to Parliament, and whether the attribution is accurate may be questionable. Traditional, well-established presumptions, well known to parliamentary counsel, are no longer questionable. If I know that others attribute standing commitments to me, and do nothing to disavow them, I confirm the attribution and dispel any previous doubts. But new presumptions might also be recognised by the courts. As the Australian High Court explained, if what was previously accepted as a fundamental principle or right ceases to be so regarded, the presumption that the legislature would not have intended to infringe it is necessarily undermined.[198] If so, the opposite process must also be possible. According to Sir Anthony Mason, a recent Australian case 'indicates that the courts will protect rights and interests other than those hitherto protected by the common law'.[199] The presumptions of statutory construction protect whatever rights are 'generally accepted' today as fundamental, even if they were not previously recognised by the common law.[200] It should be added, however, that if the orthodox justification of the presumptions is taken seriously, the relevant question is what rights were generally accepted as fundamental when the statute in question was enacted.

There is a widespread modern tendency to dismiss the traditional justification of the presumptions as an artificial rationalisation or polite fiction. Sir Anthony Mason has referred to the 'evident fictional character' of strong presumptive rules, fictional because 'they do not reflect actual legislative intent'.[201] It has been claimed that the common law presumptions 'no longer have anything to do with the intent of the Legislature; they are a means of controlling that intent'.[202] Kavanagh asserts that '[t]he law reports are full of (pre-HRA) cases where the courts … refused

[198] *Bropho* v. *Western Australia* (1990) 93 ALR 207 at 215 per Mason C.J., Deane, Dawson, Toohey, Gaudron and McHugh J.J.

[199] Sir Anthony Mason, 'Courts, Constitutions and Fundamental Rights' in R. Rawlings (ed.), *Law, Society and Economy* (Oxford: Clarendon Press, 1997), 273 at p. 281.

[200] *Ibid*., 281–2.

[201] Sir Anthony Mason, 'Commentary' *Australian Journal of Legal Philosophy* 27 (2002) 172 at 175. Not all judges agree, of course. Former Chief Justice Murray Gleeson stated that the presumption that Parliament does not intend to overturn fundamental freedoms 'is not based upon a fiction': The Hon Murray Gleeson, 'Legality – Spirit and Principle', *The Second Magna Carta Lecture*, NSW Parliament House, Sydney, 20 November 2003, at p. 11 (www.highcourt.gov.au/speeches/cj/cj_20nov.html).

[202] L. Tremblay, 'Section 7 of the Charter: Substantive Due Process' (1984) 18 *UBC Law Review* 201 at 242. See also Kavangh, *Constitutional Review*, p. 335.

to follow the clear implications of statutory terms where it would deny a fundamental right or cause clear injustice';[203] the 'presumed intentions' to which judges appeal are often independent of or even contrary to the legislators' actual historical intentions;[204] and in cases such as *Anisminic*, 'even clearly expressed enacted intention has been insufficient to rebut the application of certain presumptions'.[205] In reality, it is said, the courts have stubbornly protected the fundamental values of the common law from legislative interference, while acknowledging political constraints on their ability to do so.[206] John Finnis puts it this way:

> Constitutional principles and rights prevail over ordinary norms of statutory interpretation; the presumption that statutes do not overturn these rights and principles qualifies the ordinary subordination of our common law to parliamentary authority.[207]

This line of thinking leads to the conclusion that the presumptions 'can be viewed as the courts' efforts to provide, in effect, a common law bill of rights – a protection for the civil liberties of the individual against invasion by the state'.[208] As Sir Rupert Cross put it, the presumptions operate 'at a higher level as expressions of fundamental principles governing civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles …'[209] In the United States, presumptions used in statutory interpretation have been called 'clear statement rules', and their creation described as 'quasi-constitutional lawmaking'.[210] In Britain, an analogy has been drawn between the effect of interpretive presumptions, and that of 'manner and form' provisions that require express words or even a particular verbal formula in order to amend or repeal legislation of a certain kind.[211] Sir John Laws

[203] Kavanagh, *Constitutional Review*, p. 115.
[204] *Ibid*., p. 98.
[205] *Ibid*., pp. 98, n. 39 and 105.
[206] J. Burrows, 'The Changing Approach to the Interpretation of Statutes' *Victoria University of Wellington Law Review* 33 (2002) 981 at 982–3, 990–5 and 997–8.
[207] J. Finnis, 'Nationality, Alienage and Constitutional Principle' *Law Quarterly Review* 123 (2007) 417 at 417.
[208] D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (5th edn) (Sydney: Butterworths, 2001), p. 131. Kavanagh cites many other expressions of this view: Kavanagh, *Constitutional Review*, pp. 97–9.
[209] J. Bell and G. Engle, *Statutory Interpretation* (3rd edn) (London: Butterworths, 1995), 166.
[210] See W. Eskridge and P. Frickey, 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' *Vanderbilt Law Review* 45 (1992) 593.
[211] For example, T.R.S. Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' *Cambridge Law Journal* 44 (1985) 111.

is typically forthright in claiming that 'we *already have* constitutional guarantees: guarantees given by the common law, entrenched by a rule that they may only be overridden by statutory measures leaving no room for doubt as to the legislative intention to effect that result'.[212] He defines 'constitutional guarantee' as 'a legal measure which … protects basic or fundamental rights against intrusion or subversion by the State', and 'that is in some sense entrenched – that is, it is proof against being changed, or abrogated, by those legal mechanisms which are deployed to change ordinary laws'.[213] He relishes 'a great irony. The common law does what on conventional doctrine Parliament cannot do: provide for an entrenched constitutional measure.'[214]

Some of these ideas found expression in the famous passage in *Ex parte Simms*, in which Lord Hoffmann said:

> Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[215]

Lord Bingham, writing extra-judicially, said that the presumptions are important because

> … if, as sometimes happens, the executive as the proponent of legislation wants to introduce a provision that would strike ordinary people as unfair or disproportionate or immoral, the need to spell out that intention explicitly on the face of the bill must operate as a discouragement, not last because of the increased risk of media criticism and parliamentary and popular resistance.[216]

These statements suggest that the presumptions are not really motivated by genuine uncertainty about Parliament's intentions; instead,

[212] Sir John Laws, 'Constitutional Guarantees' *Statute Law Review* 29 (2008) 1 at 8.
[213] *Ibid*., 1–2. [214] *Ibid*., 8.
[215] *R* v. *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131.
[216] Lord Bingham of Cornhill, 'Dicey Revisited' [2002] *Public Law* 39 at 48.

they amount to quasi-constitutional 'manner and form' requirements, imposed by the judiciary, to enhance Parliament's accountability to the electorate. On the other hand, the statements are consistent with the more modest view that enhancing Parliament's accountability is an additional advantage of presumptions that must still be justified primarily on more orthodox grounds.

It is undoubtedly true that judges have used common law presumptions to interpret legislation more narrowly than Parliament apparently intended, thereby frustrating its objectives. Dicey noted with apparent approval that

> from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself … to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.[217]

Historically, this is notorious in the case of a good deal of legislation dealing with taxation and industrial relations, and attempting to restrict judicial review of administrative decisions. The use of the presumptions by conservative judges to curtail or thwart progressive legislation is not something that judges today should be proud of. It tarnishes the image of a fearless judiciary shielding the individual from the tyranny of the state. In many cases the judges misapplied the presumptions, by using them as a polite fiction or smokescreen to conceal judicial disobedience of Parliament.[218] Should these cases now be used to support the proposition that the presumptions were really, all along, creatures of the common law, independent of and applicable contrary to Parliament's known intentions? That would be inconsistent with the doctrine of parliamentary sovereignty.

As previously argued, if the express meaning of a provision is incompatible with some right, the only way consistent with parliamentary sovereignty that it can be 'read down' to remove the incompatibility is to presume that Parliament did not intend to interfere with the right. If it clearly did intend to do so, then to read the legislation down is to rewrite or partially disapply it. If in doing that the judges are not correcting a mistake, by giving effect to one of Parliament's own standing commitments,

[217] Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn), 413–14.
[218] Kavangh, *Constitutional Review*, pp. 334–5.

then they are engaging in judicial legislation rather than interpretation.[219] That is something that judges are not constitutionally permitted to do. It is also to assume a power that is difficult to confine. If judges can legitimately rewrite statutes to make them consistent with a 'common law bill of rights', why should they not be able to use the same power to improve statutes in other ways? To repeat a question posed earlier: what principled limit to a power of judicial amendment could provide a substitute for rebuttable presumptions of legislative intention?[220]

We must choose between three options. First, we can continue to accept that application of the common law presumptions must be justified primarily by genuine uncertainty about legislative intentions, even if as a by-product they also enhance Parliament's political accountability to the electorate. If we choose this option, we must reject as wrongly decided those cases in which the presumptions have been used as a smokescreen to conceal judicial disobedience of Parliament. On the other hand, if we choose the second or third options, we can accept most if not all of these cases as correctly decided.

The second option is to accept Kavanagh's claim that, in reality, the courts have always possessed an 'inherent jurisdiction' to protect fundamental rights from legislative infringement or subversion. A major difficulty is that, if so, why have the courts not said so? Why have they felt the need to engage in a pretence, by hiding behind spurious 'presumptions' of legislative intention? According to Kavanagh, the 'politics of judicial lawmaking in the UK' required the courts to do this: 'given the fact that respecting the will of Parliament is thought to be one of the most fundamental principles of statutory interpretation … we should not be surprised if judges routinely say that their judgments give effect to the will of Parliament'.[221] The judges appeal to 'legislative intentions' that in reality are 'constructed' by them and used as 'a rhetorical device' to give them 'a 'cloak of respectability'.[222] 'Judicial assurances that they are loyally giving effect to Parliament's intention' have a 'beguiling effect' that obscures the reality of judicial creativity.[223] But surely this deeply felt need for concealment suggests that the courts were aware that they would have been flouting constitutional orthodoxy to openly proclaim that they were partially disapplying legislation to give effect to 'constitutional values' of their own choosing.

[219] See Chapter 9, Section II, Part B, above.
[220] *Ibid*., Section II, end of Part A.
[221] Kavanagh, *Constitutional Review*, pp. 335 and 81.
[222] *Ibid*., pp. 98, n. 38, 82 and 115. [223] *Ibid*., p. 115.

This leads to the third option, which is that the courts have waged a stealthy, and ultimately successful, campaign to acquire – or usurp – authority to protect 'constitutional' values of their choice, by imposing a kind of manner and form requirement on Parliament.[224] As Jeffrey Jowell more charitably puts it, '*consciously or unconsciously*, [the judges] were chipping away at the rock of parliamentary supremacy by making it increasingly difficult for Parliament to authorise the infringement of the rule of law and … fundamental rights'.[225] When we are strongly attracted to a particular conclusion, we are sorely tempted to assess evidence selectively, and bend or stretch logic. Even if we try to resist the temptation, we may fail at the subconscious level. In other words, even if we do not lie, we may delude ourselves. This is a universal human trait, which judges share with the rest of us. If they believe that a statute would otherwise infringe rights, they may be strongly motivated to prevent the infringement through interpretation. If it is not possible to do so through orthodox methods that are consistent with parliamentary sovereignty, they may be tempted to adopt a 'spurious interpretation'.[226] This amounts to 'put[ting] a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery'.[227]

To adopt either the second or third options is to lend support to the claim that, rather than being subordinate to Parliament, the judiciary now shares sovereign power with it. It might then seem legitimate for the judiciary to enlarge its share of sovereignty by adding to the constitutional values that it protects, or strengthening the method by which it protects them. For example, in a jurisdiction lacking a statutory Bill of Rights, the courts might introduce one 'through the back door', by developing a common law bill of rights that protects the same rights as a statutory bill and provides the same level of protection. Or the courts might ramp up the strength of the 'presumptions', by advancing from strict interpretation to invalidation of legislation. If the former is tantamount to partial disapplication, why not – in a sufficiently extreme case – assume the power of full disapplication? After all, that is precisely what common

[224] See the comments of J. Evans, 'Controlling the Use of Parliamentary History' *New Zealand Universities Law Review* 18 (1998) 1 at 44.

[225] J. Jowell, 'Parliamentary Sovereignty Under the New Constitutional Hypothesis' *Public Law* 562 (2006) 575 (emphasis added).

[226] R. Pound, 'Spurious Interpretation' *Columbia Law Review* 6 (1907) 379.

[227] *Ibid*., 382.

law constitutionalists such as Trevor Allan claim that the courts, in some cases, already do.[228]

F Constitutional statutes

Lord Justice Laws (with the agreement of Crane J.) has recently proposed a novel explanation of the effect of the European Communities Act 1972 (UK) ('the EC Act'), in authorising the judicial 'disapplication' of statutes that are inconsistent with European Community laws that it makes binding. He suggests that the EC Act is just one of a number of 'constitutional statutes' that can now be amended or repealed only by express words, and not mere implication.[229] This suggestion could be endorsed on relatively orthodox grounds: it is plausible to think that some statutes are of such constitutional importance that Parliament is very unlikely to intend to interfere with them, and should therefore be presumed not to intend to do so in the absence of clear, express words to the contrary. This is especially plausible when, as in the case of the EC Act itself, the statute expressly provides that future legislation inconsistent with it should not be applied. What is remarkable about Laws L.J.'s judgment is his repeated and emphatic claim that the basis of his suggestion is not legislative intent, but 'the common law'. Parliament, he insists, cannot bind its successors by stipulating as to the manner and form of future legislation.[230] The doctrine of implied repeal, 'which was always the common law's own creature', can only be changed 'by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided'.[231]

> The courts may say – have said – that there are certain circumstances in which the legislature may only enact what it desires to enact if it does so by express, or at any rate specific, provision.[232]

This amounts to a judicial power to impose upon Parliament a modest 'manner and form' requirement, a power which Laws L.J. denies that Parliament itself possesses. He asserts that the common law has imposed the requirement both to protect 'rights which should properly be classified as constitutional or fundamental', and – now – 'constitutional statutes'.[233] 'The ECA is, *by force of the common law*, a constitutional statute.'[234] This amounts to the adoption of a strong version of 'common

[228] See Chapter 9, Section IV, Part B, above.
[229] *Thoburn* v. *Sunderland City Council* [2003] QB 151 at [60].
[230] *Ibid*., [59]. [231] *Ibid*., [60]. [232] *Ibid*., [60]. [233] *Ibid*., [62]. [234] *Ibid*. (emphasis added).

law constitutionalism', the term now widely used to denote a variety of theories that attribute some kind of constitutional status to the common law.[235]

As in the case of the presumptions of statutory interpretation, there are alternative ways of justifying the idea that there are constitutional statutes that cannot be repealed by implication. One is the orthodox idea that some statutes are of such constitutional importance that Parliament is very unlikely to intend to meddle with them indirectly, as a side-effect of provisions dealing primarily with other matters. We already accept that there are fundamental common law rights that Parliament is very unlikely to intend to override, and it is just as plausible to think that there are very important statutes that it is equally unlikely to intend to override.[236] Not doubt the HRA, as Kavanagh argues, is one of them.[237] This is no doubt why Lord Wilberforce said in 1967 that he felt 'some reluctance to holding that an Act of such constitutional significance as the Union with Ireland Act is subject to the doctrine of implied repeal'.[238]

Another way of justifying the same result is Laws L.J.'s suggestion that 'the common law' – which really means the judges – has conferred this elevated status and concomitant protection upon these statutes. Kavanagh agrees with Laws, asserting that the HRA is a 'constitutional statute' that, along with fundamental common law rights, is 'constitutionally entrenched in the common law'.[239]

Alison Young has argued at length that, despite Laws L.J.'s apparent adoption of the second justification, his discussion as a whole is best interpreted as adopting the first one.[240] She concedes, however, that his actual words provide strong support for the second justification.[241] Moreover, in a recent journal article he unequivocally adopts the second one, and acknowledges that the adoption of his recommendation would involve a change in the rule of recognition of statutes as valid laws.[242]

But, as demonstrated in Chapter 2, it is simply untrue that 'the scope and nature of Parliamentary sovereignty are ultimately confided' to the

[235] See Chapter 2, above.
[236] See Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty', 197–8.
[237] Kavanagh, *Constitutional Review*, pp. 293–306.
[238] *Earl of Antrim's Petition (House of Lords)* [1967] 1 AC 691, quoted in Bennion, *Statutory Interpretation* (4th edn), p. 255 s. 87, and by Kavanagh, *Constitutional Review*, p. 301.
[239] Kavanagh, *Constitutional Review*, p. 306.
[240] Young, *Parliamentary Sovereignty and the Human Rights Act*, pp. 13 and 40–5.
[241] *Ibid*., p. 41.
[242] Sir John Laws, 'Constitutional Guarantees', esp. at 8–9.

courts.[243] It cannot truly follow from this false premise either that the doctrine of implied repeal was 'the common law's own creature', or that the courts have authority to modify the doctrine by holding that sometimes the legislature may only legislate if it does so 'by express, or at any rate specific, provision'.[244] If, as Laws L.J. insists, Parliament itself lacks authority to impose requirements as to manner or form upon its legislative power,[245] it would be very surprising if the courts had authority to do so. The first, orthodox justification of 'constitutional statutes' should be preferred.

G Constitutional principles

It is often observed that the courts' attitude towards parliamentary authority is changing, for various reasons that include statutory innovations such as the EC Act, the HRA and devolution, and increased judicial interest in the protection of rights.[246] Paul Craig, for example, believes that the new judicial power to disapply legislation inconsistent with EC law makes the prospect of the judges assuming a similar power to disapply legislation inconsistent with rights 'less novel or revolutionary'.[247] Kavanagh, whose focus is on the HRA, agrees:

> Once we begin to refine the doctrine of parliamentary sovereignty by admitting the legitimacy of legal limits on Parliament's power, then this begs the question of what value remains in articulating these issues in terms of sovereignty at all … [T]he immensely important obiter dicta contained in *Jackson* … are important signposts to a subtle change in constitutional culture … They are a signal that the judiciary no longer wishes to play a part in maintaining fairytales … The HRA is, albeit slowly and incrementally, contributing to a change in how we understand constitutional law … and has begun to unleash the constitutional imagination in order to reassess the theoretical foundations of UK constitutional law.[248]

The most serious challenge likely to confront the doctrine of parliamentary sovereignty in the near future is likely to arise from further development of the tendency to describe important common law principles, and now statutes, as having a 'constitutional' status that entitles them to special judicial protection.[249] Describing important principles

[243] *Thoburn* v. *Sunderland City Council* [2003] QB 151 at [60].
[244] *Ibid*. [245] *Ibid*., [59]. [246] E.g., Craig, 'Report on the United Kingdom', at 215.
[247] *Ibid*., 218. [248] Kavanagh, *Constitutional Review*, pp. 413–15.
[249] Joseph and Elias both advert to this phenomenon: Joseph, 'Parliament, the Courts, and the Collaborative Enterprise'; Elias, 'Sovereignty in the 21st Century', 161.

as 'constitutional' is, of course, a familiar feature of British constitutional discourse, and in itself entirely consistent with parliamentary sovereignty. Sir Robert Chambers, Blackstone's successor to the Vinerian Chair at Oxford, embraced parliamentary sovereignty whole-heartedly, but said that a particular statute 'though not illegal, for the enaction of the supreme power is the definition of legality, was yet unconstitutional', because it was 'contrary to the principles of the English government'.[250] In 1830, Henry Brougham criticised the Benthamites for denying that any sensible distinction could be drawn between the concepts of illegality and unconstitutionality: 'Cannot they comprehend how a thing may be wrong, as inconsistent with the spirit of our political system, which yet the law has not prohibited?' Statutes committing such wrongs could sensibly be condemned as 'contrary to the spirit, and dangerous to the existence, of the constitution – in one word, as *unconstitutional*. Yet … they would be legal: for the legislature itself would have sanctioned them.'[251] This distinction, perpetuated by Austin and Dicey, survives today in the language of constitutional convention.[252] That is why Lord Wilberforce once rejected a possible interpretation of a statute on the ground that it would produce a result 'which is arbitrary, unjust, and in my opinion unconstitutional'.[253]

The problem is that the subtle distinctions encoded in this traditional terminology are increasingly liable to be misunderstood or obfuscated. The campaign to confer 'constitutional' status on a growing number of principles or rights ultimately aims at arming the judiciary to protect them from legislative interference. Sir John Laws is the leading judicial proponent of further developments in this direction.[254]

[250] R. Chambers, *A Course of Lectures on the English Law Delivered at the University of Oxford 1767–1773*, T.M. Curley (ed.) (Madison: University of Wisconsin Press, 1986), vol. I, p. 141.

[251] H. Brougham, 'Review of *Inquiry into the Rise and Growth of the Royal Prerogative in England*, by James Allan' *Edinburgh Review* 52 (1830) 139 and 142.

[252] J. Austin, *The Province of Jurisprudence Determined*, H.L.A. Hart (ed.) (London: Weidenfeld & Nicholson, 1954), pp. 257–8; Dicey, *Introduction to the Study of the Law of the Constitution*, pp. 24–7 and Part III. See also Goldsworthy, *The Sovereignty of Parliament*, pp. 190–2.

[253] *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1148 at 1174.

[254] *Thoburn* v. *Sunderland City Council* [2003] QB 151 at [63]-[64] per Laws L.J. See *R* v. *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann; Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' *Public Law* 671 (2000) 675, 682 and 683; D.L. Keir and F.H. Lawson, *Cases in Constitutional Law* (4th edn rev.) (Oxford: Clarendon Press, 1959), p. 10; Lord Devlin, 'Judges as Lawmakers' *Modern Law Review* 39 (1976) 1 at 14.

> In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy … Parliament remains the sovereign legislature … But at the same time, the common law has come to recognise and endorse the notion of constitutional, or fundamental, rights.[255]

He foresees 'in the tranquil development of the common law … a gradual re-ordering of our constitutional priorities to bring alive the nascent idea that a democratic legislature cannot be above the law'.[256] As Lord Irvine has observed, this is 'a prediction that we are only half-way on a constitutional journey and that, in the fullness of time, we will leave parliamentary supremacy behind altogether'.[257]

Laws L.J. and some other judges seem intent on building up a body of dicta, announcing the constitutional status of an uncertain number of common law principles, dicta that might, at some future time, be regarded as authority for the proposition that these principles lie beyond the reach of statute. At present, fundamental principles are protected mainly through presumptions of legislative intent, and the grounds of judicial review of administrative action. But if the concept of legislative intention is eventually discarded as a fiction, the way in which statutory language is sometimes bent or stretched to accommodate these principles might have to be explained in terms of their inherent constitutional status, thereby elevating them above statute law. We would then have a 'common law constitution' with a vengeance.

It is impossible to predict with any confidence whether or not the judiciary will try to push this far, or if it does, whether Parliament will allow it to succeed. That is no doubt why many recent critics have been reluctant to make any stronger claim than that it is 'possible' that the courts might hold that Parliament cannot abrogate fundamental rights.[258] Their reticence is presumably due partly to their realising that it is not yet clear that the courts could get away with it. But one further point should be made.

[255] *International Transport Roth GmbH* v. *Secretary of State for the Home Department* [2002] EWCA Civ 158; [2002] 3 WLR 344 at [71].

[256] Sir John Laws, 'Illegality and the Problem of Jurisdiction', in M. Supperstone and J. Goldie (eds.), *Judicial Review* (2nd edn) (London: Butterworths, 1997), 4.17.

[257] Lord Irvine of Lairg, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' *Public Law* (2003) 308 at 310.

[258] Elias, 'Sovereignty in the 21st Century', 160; Thomas, 'The Relationship of Parliament and the Courts', 8; Joseph, 'Parliament, the Courts, and the Collaborative Enterprise', 342.

Judges are often keen to dispel any impression that *they* are engaged in attempting to change the constitution. Laws L.J., for example, speaks of 'the common law' coming to recognise the existence of constitutional rights.[259] In *Thoburn's* case, he observes that the traditional doctrine of sovereignty has been modified 'by the common law': 'the common law has in recent years allowed, or rather created, exceptions to the doctrine of implied repeal: a doctrine which was always the common law's own creature'.[260] This apparent attribution of change to 'the common law' as an autonomous and (even more mysteriously) active agent is intriguing. The declaratory theory of judging, which modern judges often disparage as a 'fairy tale', apparently on some occasions still has some merit or utility.

There are two possible explanations of this style of rhetoric. The cynical explanation is that judges such as Laws L.J. are ducking for cover, seeking to avoid political flak by pretending that in constitutional matters the common law somehow evolves by itself, rather than being changed by them. When judges speak as if the common law is an autonomous and active agent, and they are merely its dutiful spokesmen, they are using the common law like a ventriloquist's dummy.

But I would prefer to accept a non-cynical explanation. Earlier, I pointed out that rules of recognition, and other unwritten constitutional rules, are constituted by a consensus among senior legal officials. I also suggested that this is what people might mean, when they describe such rules as common law rules: in other words, that the rules and principles of the 'common law constitution' are customs of legal officialdom, which the judges did not create, and cannot change, unilaterally.[261] Mark Elliott has developed a similar theory, according to which Laws L.J.'s common law constitution is best understood in terms of constitutional conventions crystallising into law.[262] The existence of constitutional conventions requires consensus among legal officials, including members of the elected branches of government. If Elliott is right, the common law constitution also depends on such a consensus, and can change only if that consensus changes. If this is an accurate account of what Laws L.J. means by 'the common law', in constitutional matters, then he is not being disingenuous when he speaks as if it is at least partly independent of judicial

[259] See text to n. 256, above.
[260] [2002] EWHC 195 (Admin); [2002] 1 CMLR 50 at [59]-[60].
[261] See end of Chapter 2, above.
[262] Elliot, 'Parliamentary Sovereignty and the New Constitutional Order', 362–76.

opinion, and potentially subject to changes that the judiciary neither initiates nor controls. The evolution of custom is beyond any one institution's deliberate control. If so, then Laws L.J. is not a legal revolutionary at all: he is merely predicting evolutionary, consensual, and therefore uncontroversial, change.

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