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VICTORIA UNIVERSITY OF WELLINGTON  
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# IS PARLIAMENT SOVEREIGN? RECENT CHALLENGES TO THE DOCTRINE OF PARLIAMENTARY SOVEREIGNTY

Jeffrey Goldsworthy\*

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*The doctrine of parliamentary sovereignty has recently been criticised by three New Zealanders: Dame Sian Elias (the Chief Justice), Justice E W Thomas and Professor Philip Joseph. This paper responds to their criticisms. The paper first dispels some myths about the doctrine: (1) that it is based on the political theories of Hobbes and Austin; (2) that it is a matter of judge-made common law, and can therefore be changed by the judges; and (3) that it rests on the belief that democracy is infallible. The paper then responds to a variety of arguments intended to show either: (4) that Parliament never was sovereign, in that the doctrine of parliamentary sovereignty was always mistaken as a matter of law; (5) that even if Parliament was sovereign, recent legal developments mean that it is no longer sovereign; and (6) that even if Parliament is still sovereign, times are changing, and the judiciary is unlikely to continue to recognise its sovereignty much longer. The paper discusses statutory interpretation, judicial review of administrative action, human rights statutes, the Factortame and Anisminic cases and the recognition by the common law of "constitutional" principles. It concludes that substantial constitutional change should be brought about openly and democratically, not surreptitiously through judicial decision-making.*

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## I INTRODUCTION

The English-speaking peoples are reluctant revolutionaries. When they do mount a revolution, they are loath to acknowledge – even to themselves – what they are doing. They manage to convince themselves, and try desperately to convince others, that they are merely protecting the "true" constitution, properly understood, from unlawful subversion

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\* Professor of Law, Monash University. I am very grateful to Richard Ekins for alerting me to some of the material that is discussed in this paper and for insightful comments on an earlier draft. I also thank Patrick Emerton for insightful comments and Philip Joseph for kindly allowing me to see and refer to his article (below, n 2) before its publication.

and that their opponents, who wear the mantle of orthodoxy, are the real revolutionaries.<sup>1</sup> They appear certain that their cause is not only morally righteous, but also legally conservative, in that they are merely upholding traditional legal rights and liberties.

Today, a number of judges and legal academics in Britain and New Zealand are attempting a peaceful revolution, aimed at toppling the doctrine of parliamentary sovereignty and replacing it with a new constitutional framework in which Parliament shares ultimate authority with the courts. They describe this framework as "common law constitutionalism", "dual" or "bi-polar" sovereignty or as a "collaborative enterprise" in which the courts are in no sense subordinate to Parliament.<sup>2</sup> But they deny that there is anything revolutionary, or even unorthodox, in their attempts to establish this new framework. They claim to be defending the "true" constitution, properly understood, from misrepresentation and distortion. And they sometimes accuse their opponents, the defenders of parliamentary sovereignty, of being the true revolutionaries.<sup>3</sup>

It is rather audacious to portray the doctrine of parliamentary sovereignty, which for hundreds of years has been generally accepted as fundamental to the British constitution, as "a latter-day myth" that "conceals the true locus of political power" in the constitution.<sup>4</sup> It is also disappointing for me, the author of a painstaking book-length study of the subject,<sup>5</sup> in which every argument made by the doctrine's critics is paid the compliment of a detailed rejoinder, to read that this "myth" is a "sleight of hand", "perpetrated by our habits of lazy thought".<sup>6</sup> I will resist the temptation to respond in kind and, once again, give the critics' arguments careful and respectful consideration. Since my book deals comprehensively with arguments that appeared before its publication in 1999, I will on this occasion discuss criticisms that have appeared subsequently.<sup>7</sup> In particular, I will discuss

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- 1 This happened during the civil war of the 1640s, the Glorious Revolution of 1688, the American Revolution of 1776 and the secession of the southern States of the United States in the 1860s. See for example R Kay "Legal Rhetoric and Revolutionary Change" (1997) 7 Caribbean L Rev 161; R Kay "William III and the Legalist Revolution" (2000) 32 Connecticut L Rev 1645.
  - 2 Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321, 333-334.
  - 3 Judicial repudiation of parliamentary sovereignty "would not be at all revolutionary. What is revolutionary is talk of the omnipotence of Parliament": R A Edwards "Bonham's Case: The Ghost in the Constitutional Machine" (1996) Denning LJ 63, 76.
  - 4 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 321.
  - 5 Jeffrey Goldsworthy *The Sovereignty of Parliament, History and Philosophy* (Clarendon Press, Oxford, 1999).
  - 6 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 321.
  - 7 For another response to subsequent criticism, see Jeffrey Goldsworthy "Response to the Commentators" (2002) 27 AJLP 193.

recent articles by three New Zealanders: Dame Sian Elias (the Chief Justice), Justice E W Thomas and Professor Philip Joseph.<sup>8</sup> Since Lord Cooke has endorsed Joseph's article and welcomed Dame Sian to his side of the debate,<sup>9</sup> it is appropriate that their arguments be subject to examination in this session. I will not be able to discuss all of their arguments and, since most of them have been made before, I will often have to repeat rejoinders previously made in my book.

It is sometimes unclear just how radical the revolutionaries' conclusions really are. There are three claims they might be making: first, that Parliament never was sovereign – that the doctrine of parliamentary sovereignty has always been mistaken as a matter of law; secondly, that even if Parliament was sovereign, recent developments mean that it no longer is; and thirdly, that even if Parliament is still sovereign, times are changing and the judiciary is unlikely to recognise its sovereignty much longer. Those who make only the third claim often add that parliamentary sovereignty is a doctrine of judge-made common law, which the courts can, and are very likely to, legitimately curtail. Justice Thomas makes only the third claim. Dame Sian and Joseph make the first claim but, as we will see, their arguments offer more support for either the second or third.

Before examining these claims, it is useful to begin by dispelling some myths about parliamentary sovereignty. Note that I will use the word "Parliament" to mean either that of the United Kingdom, that of New Zealand, or both, depending (when it matters) on the context.

## II SOME MYTHS ABOUT PARLIAMENTARY SOVEREIGNTY

### A *The Doctrine is Based on the Theories of Hobbes and Austin*

One of the modern myths about the doctrine of parliamentary sovereignty is that it is based primarily on an Austinian or Hobbesian theory of law. Both theories depict law as a body of commands, backed by threats, issued by a sovereign with sufficient power to enforce compliance if necessary. According to both theories, 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. Both theories 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

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8 S Elias "Sovereignty in the 21<sup>st</sup> Century: Another Spin on the Merry-go-round" (2003) 14 PLR 148; Hon E W Thomas "The Relationship of Parliament and the Courts" (2000) 31 VUWLR 5; "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 321.

9 Lord Cooke of Thorndon "The Road Ahead for the Common Law" (2004) 53 ICLQ 273, 275, 278 n 20.

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.

Professor Joseph writes that sovereignty "imports the language of [Hobbes's] *Leviathan*" and derives from theories of "autocratic and absolute power ... suggested by Bodin, Hobbes, Austin and Dicey."<sup>10</sup> Justice Thomas observes that "Hobbesian doctrine has long been implicit in British constitutionalism."<sup>11</sup> Dame Sian Elias expresses concern about the strong influence of Austin's theory and suggests that it is time "to consider our constitutional arrangements without distorting them through the lens of command."<sup>12</sup> She also complains about a common preference to found parliamentary supremacy on a political theory that supposedly expresses an eternal truth – a characteristic of Hobbes's and Austin's theories – and insists (rightly) that in fact it is not "compelled by fundamental legal principle or logic."<sup>13</sup>

The legal theories of Hobbes and Austin have 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 book, I showed that the doctrine of parliamentary sovereignty can easily be understood as being constituted by rules of recognition. This is why Dame Sian is right to maintain that it is not a matter of eternal truth, compelled by logic. Whether any particular legal system includes a doctrine of legislative sovereignty depends on its own distinctive rule (or rules) of recognition.<sup>14</sup>

But it follows from this that some of Dame Sian's doubts about the doctrine are misconceived. She suggests 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 make laws, to enable the community to distinguish between real and pretended laws.<sup>15</sup> She is right to suggest that Austin's theory has some difficulty accommodating manner and form requirements. But there is no difficulty if parliamentary sovereignty is regarded as grounded in rules of recognition.<sup>16</sup> Dame Sian is right to insist

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10 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 321, 333.

11 Thomas, above n 8, 9.

12 Elias, above n 8, 150.

13 Elias, above n 8, 149.

14 As Dame Sian 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, above n 8, 151, quoting Neil MacCormick.

15 Elias, above n 8, 150

16 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 13–16.

that it is the responsibility of the courts to identify and uphold these rules.<sup>17</sup> But she is wrong to imply that this necessarily involves or justifies the courts in also recognising and upholding deeper, substantive principles, such as that of democracy.<sup>18</sup> This simply does not follow.<sup>19</sup> It is possible for rules of recognition to include nothing more than purely formal and procedural rules, law-making in accordance with them being unlimited by any rules or principles of substance.

In my book, I showed that historically the doctrine has stronger roots in Lockean than Hobbesian political theory. In the late 17<sup>th</sup> and 18<sup>th</sup> 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 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.<sup>20</sup>

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.<sup>21</sup> But throughout the 18<sup>th</sup> 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 –

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17 Elias, above n 8, 151–152, 160.

18 Elias, above n 8, 151; see also 156 ("explicit analysis of constitutional principle") and 162 (on protecting the essential democratic process).

19 See *The Sovereignty of Parliament, History and Philosophy*, above n 5, 253–259. Also, one can question the correctness of judicial decisions in Australia, Canada and India to which Dame Sian refers.

20 See *The Sovereignty of Parliament, History and Philosophy*, above n 5, 151–153.

21 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 159–164.



continued to be widely accepted. But it was also believed, not unreasonably, that the law itself should not recognise any limits to its own 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 too easily incited by demagogues.<sup>22</sup> It was also often observed that the moral limits to legislative authority were too vague and controversial to be legally serviceable.<sup>23</sup> 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 came to be propounded by Blackstone.<sup>24</sup>

It is true that in the 19<sup>th</sup> century, legal philosophy 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.<sup>25</sup> Dicey agreed with this,<sup>26</sup> 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, the theory was a generalisation drawn from English law and owed its rapid acceptance to the familiarity of English jurists with the already well established doctrine of parliamentary sovereignty.<sup>27</sup> I suspect that Dicey was right on both counts.

In arguing that the doctrine of parliamentary sovereignty owes much more to Locke than Hobbes, I am not suggesting that it was established by Locke. I argue in my book that the doctrine has much deeper roots than late 17<sup>th</sup> and 18<sup>th</sup> century political theory. Its many deeper 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; Parliament's standing as the highest court in the realm from which there could be no appeal; Parliament's 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 to be able to take extraordinary measures to protect the community in an

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22 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 173–181.

23 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 173–181.

24 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 19, 181–183.

25 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 19.

26 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 19.

27 A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, London, 1959) 72.

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.<sup>28</sup>

**B *The Doctrine was Made, and can Therefore be Changed, by the Judges***

Many contemporary judges and scholars argue that parliamentary sovereignty is a common law doctrine and therefore liable to be curtailed or repudiated by judicial decision. Justice Thomas gives this argument particular emphasis.<sup>29</sup> As we will see, it is not always clear what is meant by "common law". But if it means "judge made law", this is a peculiar and dangerous conceit.

As a matter of history, the idea that parliamentary sovereignty is the creation of the judiciary is undoubtedly false. Historically, the judges were always regarded as, and therefore were, subordinate to both King and Parliament. They were appointed by the King to do justice on his behalf and could be dismissed by him, albeit only (after 1701) upon the request of both Houses of Parliament.<sup>30</sup> The judges also belonged to what were called "inferior courts", which were subject to the superior jurisdiction of the High Court of Parliament.<sup>31</sup> Parliament, not the inferior courts, possessed ultimate authority to declare and interpret the common law itself.<sup>32</sup> Until recently, the idea that the judges conferred authority on their legal superiors would have been dismissed out of hand as an absurdity.

The idea is also philosophically unsound. For a start, note the peculiarity of the notion that the courts are currently obligated to obey Parliament's statutes, because it is sovereign, but can release themselves from the obligation, because its sovereignty is their creation and subject to their control.<sup>33</sup> We would not normally agree that x is obligated to obey y, if the suggested "obligation" is self-imposed and can be repudiated whenever x thinks it appropriate to do so. Any "obligation" would be illusory.

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28 Summarised in *The Sovereignty of Parliament, History and Philosophy*, above n 5, ch 9.

29 Thomas, above n 8, 18, 26. See also Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2002] 3 WLR 247, [2002] 1 CMLR 50, paras 59–60; A Lester "Beyond the Powers of Parliament" [2004] JR 95; Lord Steyn "Lord Steyn's Comments From the *Lester and Pannick* Book Launch" [2004] JR 107; and at length in A Tomkins *Public Law* (Clarendon Press, Oxford, 2003) 103–104. Dame Sian perhaps toys with this idea, but does not clearly endorse it, in Elias, above n 8, 156.

30 The Act of Settlement 1701.

31 See text to n 78–79, below.

32 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 110, 118–119, 153–154, 156–157.

33 "The conferral of that recognition [of Parliament's sovereignty] is in the nature of a self-denying judicial ordinance": Thomas, above n 8, 26.

But there are deeper philosophical problems. It is true that the basis of the doctrine of parliamentary sovereignty cannot be statute. No legislature can confer authority on itself by statute, because, absent pre-existing authority, the statute would have to confer authority on itself, which would beg the question. As Lord Lester points out, "Parliament cannot pull itself up by its own bootstraps."<sup>34</sup> But it is a gross error to jump to the conclusion that the doctrine must therefore be a matter of judge-made common law. After all, it could then be asked where the judges got *their* authority from. If it is true, as Lord Steyn says, that Parliament's authority "must come from somewhere",<sup>35</sup> it must be equally true of the judges' authority. But they, too, cannot "pull themselves up by their own bootstraps" by conferring authority on themselves. It follows that their authority cannot come solely from the common law, if this refers to judge-made law. But where else can we look for the ultimate source of legal, including judicial, authority? Unless we resort to some notion of "higher law", like the law of God or nature, it must be found in consensus among senior legal officials. This could be called "common law", in the old-fashioned sense meaning established custom or convention that judges have endorsed, but did not create all by themselves. Common law in that sense amounts to a kind of consensus, which the judges would not have authority unilaterally to change.<sup>36</sup>

Understanding the matter in terms of consensus gains credence from H L A Hart's theory that the fundamental rules of recognition in any legal system are constituted by the practices of legal officials.<sup>37</sup> Such rules simply are whatever rules legal officials do in fact accept and follow in deciding what the law is. For this purpose, "legal officials" cannot mean judges alone, because then the theory could not account for the authority exercised by the judges themselves. That is certainly not what Hart meant.<sup>38</sup> In reality, the fundamental rules of a legal system are necessarily established and maintained by a consensus among senior legal officials, in all branches of government. Only such a general consensus can provide both the coherence and stability that a legal system needs to survive

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34 Lester, above n 29, 96. It follows that in New Zealand, Parliament's authority cannot derive exclusively from section 15(1) of the Constitution Act 1986, or section 3(2) of the Supreme Court Act 2004, which refer, respectively, to Parliament's "full power to make laws" and to its "sovereignty".

35 Steyn, above n 29, 107.

36 Conceiving of common law as a body of judicial doctrine based on deep principles, such as those of justice and equality, which are not judicial creations, is no different in principle from conceiving of it as judge-made law. Judges do not make doctrines for no reason – it reflects their assessment of deep principles of political morality.

37 See H L A Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) ch 6.

38 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 240–242.

and function effectively, and a satisfactory explanation of the authority exercised by each branch individually.<sup>39</sup>

With respect, Justice Thomas gets this right when he says that parliamentary sovereignty "is at one and the same time a political fact ... a convention of the constitution and a fundamental principle of the common law" and that "the legal distribution of power consists ultimately in a dynamic settlement, acceptable to the people, between the different arms of government."<sup>40</sup> At the most fundamental constitutional level, a so-called "common law principle" must really be a convention, established by political consensus among all the branches of government.

It follows that parliamentary sovereignty, like any other fundamental constitutional rule, does depend on judicial acceptance.<sup>41</sup> Judicial acceptance is a necessary condition for the existence of such rules. But it is not a sufficient condition, because acceptance by the other branches of government is also necessary. And it should also be kept in mind that the courts' adjudicative authority is equally dependent on acceptance by the political branches. This means that any unilateral attempt by the judiciary to change the fundamental rules of a legal system is fraught with danger. Other officials might be persuaded, inveigled, bamboozled or bluffed into acquiescing in the change. But, on the other hand, they might not. They might resent and resist the judicial attempt to change the rules that had previously been generally accepted and take strong action to defeat it. Such an attempt would be so regrettable that it would perhaps be irresponsible of me even to suggest what the response might be. But the point needs to be made that if the judges themselves tear up the consensus that constitutes the fundamental rules of the system, they are hardly well placed to complain if it is replaced by a power struggle that they are ill-equipped to win. In the absence of consensus, their own authority as well as Parliament's would be up for grabs.

Rules of recognition can and do change. As Dame Sian puts it, "constitutions live and develop."<sup>42</sup> In the case of unwritten, customary constitutions, fundamental change requires a change in official consensus. Judges can attempt to initiate such a change, but are well advised to make sure that other senior officials are likely to acquiesce. If they cannot be confident of that, they would be wise to wait for the other branches of government to initiate change. That is both for the reasons given in the previous paragraph and for reasons of democratic principle.

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39 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 6, 240–246.

40 Thomas, above n 8, 14, 19.

41 Thomas, above n 8, 26.

42 Elias, above n 8, 151.

### *C Proponents of the Doctrine Believe that Democracy is Perfect and Infallible*

Professor Joseph alleges that proponents of parliamentary sovereignty believe that democracy is perfect and infallible. He kindly explains that majoritarianism can lead to tyranny if it is not "tethered to liberal ideas of tolerance, freedom and respect for human dignity."<sup>43</sup> I know of no parliamentary supremacist who is unaware of this danger. My arguments take full account of it, as the following brief summary, of a complex argument made in my book, demonstrates:<sup>44</sup>

The consequences of the doctrine of parliamentary sovereignty are generally beneficial: democratic decision-making is facilitated, and reasonably just statutes are enacted. Unjust statutes are sometimes enacted, but they are rarely obviously and egregiously unjust. Occasional injustice is a price that must be paid for democracy – as indeed for any decision-making procedure, since none can be guaranteed never to produce unjust laws. It is possible to imagine "hard cases", involving statutes so outrageously unjust that morally they ought not to be obeyed, even by judges. But it does not follow that the doctrine of parliamentary sovereignty ought to be abandoned, and the judges authorised to invalidate outrageously unjust statutes. They might interpret that authority too broadly, and invalidate statutes that are not outrageously unjust.

[J]udges are almost certain to interpret such an authority too broadly. Even in the interpretation of a written constitution, as case after case is decided, a vast coral reef of judicial interpretation gradually accumulates around provisions limiting legislative power. Each decision may extend the judges' authority only slightly, but the eventual cumulative effect is a massive expansion far beyond what was originally intended ... If this a problem when judges enforce a written Bill of Rights, it could be much worse if they were to enforce unwritten common law rights, which they themselves could identify and define, on a case by case basis.

In a healthy democratic society, cases of clear and extreme injustice are rare; in most cases, whether or not a 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 is supposed to prevail. The price that must be paid for giving judges authority to invalidate a few laws that are clearly unjust or undemocratic is that they must also be given authority to overrule the democratic process in a much larger number of cases where the requirements of justice or democracy are debatable. The danger of excessive judicial interference with democratic decision-making might be worse than that of parliamentary tyranny, given the relative probabilities of their actually occurring.

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43 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 329.

44 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 269–271 (the arrangement of paragraphs has been altered, and footnotes omitted).

The full version of my argument is developed in the course of responding to the "argument from extreme cases": the argument that the (admittedly improbable) danger that evil statutes might be enacted is so dreadful that Parliament ought not be regarded as legally sovereign. Justice Thomas relies partly on this argument, agreeing with Sir William Wade that "all writers on sovereignty are bound to deal in improbable examples, and the improbable case will often throw light on the actual."<sup>45</sup> My response draws on the maxim that hard cases make bad law.<sup>46</sup> At the very least, improbable examples from both sides of the question must be taken into account. If it is fair to imagine Parliament enacting evil laws, it is equally fair to imagine judges running amok.

Although my argument may not, in the end, prove persuasive, it surely deserves to be taken seriously. But note also that the argument concerns the moral and political justification of parliamentary sovereignty, rather than its legal justification. The subject of this paper is whether parliamentary sovereignty is still part of the law, which is a separate question from whether it is defensible as a matter of political morality.

### III WAS PARLIAMENT EVER SOVEREIGN?

Professor Joseph asserts that the doctrine of parliamentary sovereignty is a "latter-day myth". "Parliament has never been *sovereign*", he says. "[S]overeignty implies autocracy ... [and] legislative power has never been of this nature."<sup>47</sup> At the end of her article, Dame Sian also concludes that Parliament "never was" sovereign.<sup>48</sup> But closer inspection reveals that they are both considerably more cautious than these sweeping claims suggest.

It is possible that Dame Sian is denying that Parliament was ever sovereign only in the old 19<sup>th</sup> century sense of the term, popularised by Austin.<sup>49</sup> She seems reluctant to assert that New Zealand courts have authority, even today, to invalidate legislation. Earlier in her article, she acknowledges that (a) the case law in New Zealand "does not support judicial review of the substance of legislation";<sup>50</sup> (b) disallowance of legislation is a power that may not have survived the declaration of "full power to make laws" in the New Zealand Constitution Act 1986; (c) it was specifically withheld from the courts by the New Zealand Bill of Rights Act 1990; (d) it is not self-evident that the courts should be given this power; and (e) the requirement of unambiguous words in order to abrogate rights may be

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45 Thomas, above n 8, 15.

46 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 267-270.

47 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 321-322.

48 Elias, above n 8, 162-163.

49 See above Part II A, The Doctrine is Based on the Theories of Hobbes and Austin.

50 Elias, above n 8, 149.

just as effective, as well as more consistent with constitutional tradition.<sup>51</sup> None of this is in itself very radical, although the fourth point could be developed along radical lines. Dame Sian alludes to radicalism only when anticipating possible future developments, such as when she says that "it is possible we will come to recognise substantive limitations upon the competence of [P]arliament to make laws in breach of ... human rights."<sup>52</sup> Even here, it is not clear whether the "we", who are responsible for recognising substantive limitations, are the judges or the community as a whole. It is therefore not clear whether she is anticipating the imposition of substantive limitations by judicial decision or by legislation. Admittedly, though, she probably has judges in mind, when she later says that "[i]t may be that restrictions to protect the essential democratic process are now widely accepted [by judges?] as constitutional limits on parliamentary competence."<sup>53</sup>

Professor Joseph is also 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."<sup>54</sup> He also concedes that "the Glorious Revolution settled Parliament's right to override or qualify judge-made principles of common law"<sup>55</sup> and that the courts "defer to the political decisions of the legislature [and] avoid making judgments about legislative policy".<sup>56</sup> On the other hand, he states that "the judicial branch asserts its autonomy to uphold the rule of law"<sup>57</sup> 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 Parliament's power to do so, may refuse to acknowledge that it has spoken with sufficient clarity.<sup>58</sup> 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.

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. Just eleven years ago, in the first edition of his book *Constitutional and Administrative Law in New Zealand*, he expressed the opposite opinion in no uncertain

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51 Elias, above n 8, 159.

52 Elias, above n 8, 160.

53 Elias, above n 8, 162.

54 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 328.

55 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 335.

56 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 334.

57 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 336.

58 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 341-342.

terms.<sup>59</sup> He asserted there that the United Kingdom and New Zealand Parliaments both possessed sovereign law-making power.<sup>60</sup> Moreover, he disapproved of statements to the contrary made by Sir Robin Cooke (as he then was).<sup>61</sup> 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.<sup>62</sup>

Even in the second edition of his book, published as recently as 2001, Joseph repeated most of these points. He continued to accept that the United Kingdom and New Zealand Parliaments possessed sovereign power<sup>63</sup> and to deny that this position could be unilaterally altered by the courts.<sup>64</sup> Indeed, he referred to the "collaborative enterprise" between the courts and the political branches as a reason why the courts "must move in concert" with the political branches in order to change the foundation of the constitution.<sup>65</sup> On the other hand, he included suggestions that are in tension with this recommendation. He referred to "the possibility that the courts might, if provoked, revisit their loyalty to the legislature and 'disapply' an unconscionable (but valid) statutory provision."<sup>66</sup> These suggestions constitute the main difference between the first and second editions of his book on this topic. But they concern recent, creative judicial decisions that might possibly be developed further in the future, rather than the status of the doctrine of parliamentary sovereignty either in the past or when the second edition was written. Moreover, they do not anticipate an unambiguous challenge to parliamentary sovereignty. Joseph described the method of "disapplying" a valid statute, which he took to have been established in *R v Pora*,<sup>67</sup> as a "middle path" between parliamentary sovereignty and "higher law"

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59 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (1 ed, Law Book Co, Sydney, 1993).

60 *Constitutional and Administrative Law in New Zealand* (1 ed), above n 59, 2, 8, 12, 396, 418, 429–431.

61 *Constitutional and Administrative Law in New Zealand* (1 ed), above n 59, 445, 454–456.

62 *Constitutional and Administrative Law in New Zealand* (1 ed), above n 59, 455–456, cited in *The Sovereignty of Parliament, History and Philosophy*, above n 5, 243 n 30.

63 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 3, 16, 461, 472, 475.

64 *Constitutional and Administrative Law in New Zealand* (2 ed), above n 63, 507–509.

65 *Constitutional and Administrative Law in New Zealand* (2 ed), above n 63, 507, 509.

66 *Constitutional and Administrative Law in New Zealand* (2 ed), above n 63, 507; see also 508.

67 *R v Pora* [2001] 2 NZLR 37.



jurisprudence, which "avoids a confrontation with Parliament".<sup>68</sup> Indeed, he described the method as faithful to Parliament's presumed intent, when it could be shown to have "misfired" by enacting a statute without appreciating its impact on constitutional principles. "This method reduces to a method of statutory interpretation for ascertaining what Parliament *would* (or rather *would not have*) intended had it been fully apprised."<sup>69</sup> "[T]he courts avoid collision with Parliament by acknowledging the latter's constitutional (if theoretical) right to override fundamental rights, where Parliament chooses to enact specific and unambiguous legislation."<sup>70</sup> There is no sign that Joseph regarded this as a specious rationalisation – a "noble lie" – used to camouflage judicial defiance of Parliament.

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

There is considerable evidence even in Joseph's new article 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 is not sovereign today. 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. This is the implication, for example, of his acknowledgement that recent developments have inspired new thinking:

- "[I]ncreasingly" there is a "new 'awareness'" of "the constitutive law-making/law-partnership role of the Courts when they construe and apply legislation", an "early acceptance" of this being an article published in 1972.<sup>71</sup> However, he admits that "[t]he Courts do not typically display such candour but prefer to

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68 *Constitutional and Administrative Law in New Zealand* (2 ed), above n 63, 510.

69 *Constitutional and Administrative Law in New Zealand* (2 ed), above n 63, 510 (emphasis in original).

70 *Constitutional and Administrative Law in New Zealand* (2 ed), above n 63, 510–511. Joseph went on to mention Lord Cooke's proposal to take this much further, and actually limit Parliament's powers, without approving that proposal.

71 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 322 including n 5.

emphasise the values identified with legal conservatism", and that "[c]ommentary has reaffirmed traditional sovereignty doctrine" (which he also refers to as the "classical sovereignty theory" and "dominant tradition");<sup>72</sup>

- Judges have recently been interpreting statutes narrowly, to give effect to what they have begun to call "constitutional values", but he admits that "[t]he courts typically endorse Parliament's sovereignty but emphasise, as a matter of construction, the need for explicit and unambiguous language";<sup>73</sup>
- The *Anisminic* case<sup>74</sup> constituted a "sea change" in administrative law, by introducing the idea of *intra vires* review, which proponents of parliamentary sovereignty have (supposedly) been unable to accommodate;<sup>75</sup>
- "Sovereignty doctrine is too blunt and dogmatic to reconcile the expanded judicial functions under modern human rights legislation". The Human Rights Act 1998 (UK) has introduced "a new constitutionalism" that "negotiates a middle path between parliamentary sovereignty and 'higher law' jurisprudence";<sup>76</sup> and
- These developments are "rapidly supplanting" the presuppositions of "classical sovereignty doctrine", and will "eventually lead to rupture"; sovereignty theorists are "threatened by insurgent ideas", which call for a "new theoretical construct";<sup>77</sup>

At most, all this strongly suggests incipient change, not long-standing practice. I agree that recent judicial innovations may require new theories and may constitute a challenge to the doctrine of parliamentary sovereignty. They will be discussed in the next section. But even if this is true, it casts very little light on the nature of parliamentary authority in the past. What is the evidence that parliamentary sovereignty was *always* 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?<sup>78</sup>

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72 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 340, 322.

73 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 342.

74 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

75 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 327.

76 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 343, 344.

77 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 323, 345.

78 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 345.

### A *Co-ordinate Authority*

One of Joseph's major claims is that:<sup>79</sup>

Throughout English constitutional history, Parliament and the Courts have exercised co-ordinate, constitutive authority ... There 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.

If by "co-ordinate authority" Joseph means authority that is equal in rank,<sup>80</sup> my research 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.<sup>81</sup> My book cites countless statements to this effect from the reign of Edward II onwards.<sup>82</sup> 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.<sup>83</sup> Indeed, Parliament's superiority to "inferior" courts such as the 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 "co-ordinate authority". Indeed, judicial recognition of parliamentary sovereignty suggests the opposite.<sup>84</sup>

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."<sup>85</sup> But there is no reason why sovereignty

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79 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 322.

80 *Concise Oxford Dictionary of Current English* (10 ed, Oxford University Press, Oxford, 1999) 313.

81 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 58, 89–90.

82 See *The Sovereignty of Parliament, History and Philosophy*, above n 5, Index, 318, under "Parliament, as highest court, not subject to appeal".

83 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 151, 160.

84 R Ekins "The Myth of Constitutional Dialogue: Final Legal Authority, Parliament and the Courts" (Bell Gully Public Lecture, 2004) 5.

85 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 332 (emphasis in original), 335.

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.<sup>86</sup> 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.

### ***B Statutory Interpretation***

Professor 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."<sup>87</sup> He argues that the courts:<sup>88</sup>

... 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 to (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.

Since Joseph cites one of my essays on statutory interpretation, I need do little more than refer readers to it.<sup>89</sup> 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 and principles.<sup>90</sup> Joseph is right that I argue that 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.<sup>91</sup> I argue that British and Commonwealth courts

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86 *The Sovereignty of Parliament, History and Philosophy*, above n 5, Index, 318, under "Parliament as incorporating checks and balances" and "Parliament as principal guardian of liberty".

87 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 322.

88 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 337 (emphasis in original).

89 Jeffrey Goldsworthy "Parliamentary Sovereignty and Statutory Interpretation" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 187.

90 "Parliamentary Sovereignty and Statutory Interpretation", above n 89, 189-193, 206-208.

91 "Parliamentary Sovereignty and Statutory Interpretation", above n 89, 209.

have always justified the common law presumptions in this way.<sup>92</sup> 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."<sup>93</sup> I do not believe there is anything "servile" and "patronising" in judges being guided by this principle, but even if there is, the courts themselves have long embraced it.

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";<sup>94</sup> "[t]he judiciary ... is the final authority by virtue of the judicial function."<sup>95</sup> 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."<sup>96</sup>

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 either). Statutes are not empty shells with no meaningful content until the courts breathe life into them. They are assumed to have meaningful content that is binding on the courts as well as other legal officials and citizens. 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, except perhaps in very limited circumstances to correct some deficiency in Parliament's expression of its obvious purpose.<sup>97</sup> Such authority is certainly not inherent in 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.<sup>98</sup> It may be genuinely bound by laws, including

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92 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 250–252.

93 "Parliamentary Sovereignty and Statutory Interpretation", above n 89, 191.

94 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 324.

95 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 330 (emphasis in original).

96 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 330.

97 On these limited circumstances, see "Parliamentary Sovereignty and Statutory Interpretation", above n 89, 190, 193. In Hart's terminology, the courts' authority is conferred by a "rule of adjudication" rather than a "rule of change": Hart, above n 37, 93–94.

98 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 272–274.

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.

These points may have some bearing on claims made by Justice Thomas. He says that "the decision whether or not to review legislation is, and can only be, a decision for the courts to make."<sup>99</sup> This is true, but for a trivial reason. Any person's decision as to how he or she will act is necessarily a decision that can only be made by that person. Justice Thomas also says: "No 'law' can be stated in advance with sufficient impregnability as to deny the courts the capacity to determine at a future date what will or will not be recognised as the law."<sup>100</sup>

This is more problematic. It is true in the sense that no laws can guarantee that courts will not have the de facto capacity to do as they please and ignore any law restricting their de jure capacity. But it is not true that no law can be stated in advance that denies the courts the de jure capacity to make certain decisions, such as to override statutes. As previously explained, such laws may be constituted by official consensus, which the judges have no authority to change unilaterally.<sup>101</sup>

### C *Judicial Review of Administrative Action*

This brief discussion of statutory interpretation is relevant to one of Professor Joseph's central arguments, which is that judicial review of administrative action has for centuries been based on the courts' inherent jurisdiction as a matter of common law.<sup>102</sup> Here, Joseph is taking aim at the ultra vires theory of judicial review, one of the protagonists in recent debates in the United Kingdom over the nature and foundation of judicial review of administrative action.<sup>103</sup> Indeed, he may not regard this argument as, in itself, a challenge

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<sup>99</sup> Thomas, above n 8, 36.

<sup>100</sup> Thomas, above n 8, 26.

<sup>101</sup> See above Part II A, The Doctrine was Made, and can Therefore be Changed, by the Judges.

<sup>102</sup> "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 328-333.

<sup>103</sup> The debate started with C Forsyth "Of Fig Leaves and Fairy Tales: The *Ultra vires* Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 CLJ 122. Many of the responses this article provoked are collected in C Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000).

to parliamentary sovereignty. Justice Thomas also bases his argument partly on uncertainties about the constitutional basis of judicial review.<sup>104</sup>

The ultra vires theory, championed by Christopher Forsyth and Mark Elliott, holds that when administrative action is taken under statute, judicial review enforces legal limits to administrative power the imposition of which is authorised by the statute itself, implicitly if not explicitly. They now advocate a "modified" ultra vires theory, which attributes to Parliament a tacit authorisation of, or consent to, the courts' creative development of the grounds of judicial review.<sup>105</sup> The rival "common law" theory maintains that judicial review enforces legal limits to administrative power that have been laid down, and continue to be creatively developed, as a matter of common law, without any need for Parliament's imprimatur. There are two main versions of the common law theory.

The ultra vires theorists argue that when administrative power is conferred, and not relevantly limited, by statute, the imposition of common law limits to that power would be tantamount to overriding the statute, in defiance of Parliament's sovereignty. This objection depends on the proposition that whatever the statute itself does not prohibit, it permits. Any purely common law limits imposed on the exercise of statutory powers would necessarily be inconsistent with that permission.<sup>106</sup> One version of the common law theory, maintained by Trevor Allan, appears to agree with this. Allan regards the common law theory as a refutation of the doctrine of parliamentary sovereignty.<sup>107</sup> But Paul Craig, who defends the other and more influential version of the common law theory, disagrees. Craig argues that subjecting administrative power to common law principles of good administration is no more controversial than subjecting such power to common law principles of tort.<sup>108</sup> 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.<sup>109</sup> Craig's position, I take it, is

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104 Thomas, above n 8, 13-14.

105 See Forsyth's and Elliott's contributions in *Judicial Review and the Constitution*, above n 103; C Forsyth and M Elliott "The Legitimacy of Judicial Review" [2003] Public Law 286.

106 Forsyth and Elliott, above n 103, 289.

107 T R S Allan "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry" [2002] 61 CLJ 87, 89-90, 94; T R S Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001) 12-13, 233.

108 P Craig "Competing Models of Judicial Review" [1999] Public Law 428, 433-435.

109 P Craig "Constitutional Foundations, the Rule of Law and Supremacy" [2003] Public Law 92, especially 107-110; P Craig "The Common Law, Shared Power and Judicial Review" (2004) 24 OJLS 237, especially 249-256; P Craig and N Bamforth "Constitutional Analysis, Constitutional Principle and Judicial Review" [2001] Public Law 763, especially 768-771.

thought to follow 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. Craig's position is powerfully supported by the argument that it is just not true that whatever Parliament itself 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 federal jurisprudence, concerned with the relationship between national and state law, Parliament may not have "covered the field".<sup>110</sup> To my mind, the ultra vires theorists have yet to respond effectively to these criticisms, 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.<sup>111</sup>

There are therefore three views to choose from, two of which are compatible with parliamentary sovereignty. I see no good reason to prefer Allan's version of the common law theory, which repudiates parliamentary sovereignty. Indeed, I think it is the weakest of the three, and it appears to be the least popular. Moreover, it is not clear that Joseph shares Allan's views. Joseph says that when the courts engage in judicial review, they claim power only to supplement, and not to strike down or disapply, statutes.<sup>112</sup> This sounds more like Craig's position than Allan's. If so, Joseph's target here is only the ultra vires theory, and not parliamentary sovereignty.

Judicial decisions that supplement or qualify the express provisions of a statute are not uncommon and are not confined to administrative law. For example, a celebrated case in legal philosophy is *Riggs v Palmer*, concerning a murderer who claimed the right to an inheritance under his victim's will.<sup>113</sup> The New York statute dealing with the validity of wills did not expressly exclude murderers from inheriting, but the state's Court of Appeals held that it should be interpreted in the light of the common law principle that no-one may profit from his own wrong and therefore as excluding inheritance in the circumstances. Such decisions are not uncommon and are invariably justified (as in this case) by appeal to the legislature's presumed intentions (or lack thereof).

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110 T Endicott "Constitutional Logic" (2003) 53 U Toronto LJ 201; A Halpin "The Theoretical Controversy Concerning Judicial Review" (2001) 64 MLR 500, especially 501-506.

111 M Elliott "Legislative Intention Versus Judicial Creativity? Administrative Law as a Co-operative Enterprise" in *Judicial Review and the Constitution*, above n 103, 347-348.

112 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 328.

113 *Riggs v Palmer* (1889) 115 NY 506, 22 NE 188.



It is perhaps of interest that *Riggs v Palmer* can be explained in terms of each of the three theories I have mentioned:

(1) 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 is not violating limits imposed by the Constitution (this is equivalent to Allan's theory);<sup>114</sup>

(2) In reality, 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 common law to impose further controls (this is equivalent to Craig's theory);<sup>115</sup>

(3) Although the legislators had no conscious intention concerning murderers inheriting, all communications and intentions depend on tacit, background assumptions, which form part of the context that necessarily informs our understanding of their content. Such assumptions need not be consciously adverted to.<sup>116</sup> If I have directed my son to stay at home and finish his homework, I will not think that he has disobeyed me if he has to run from the house to escape a fire. This is equivalent to Forsyth's and Elliott's theory. In Ronald Dworkin's words:<sup>117</sup>

I continue to think that the majority reached the right decision, in *Riggs v Palmer*, in holding that, according to the better interpretive reconstruction, those who created the Statute of Wills did not intend to say something that allowed a murderer to inherit from his victim ... It is a perfectly familiar speech practice not to include, even in quite specific instructions, all the qualifications one would accept or insist on: all the qualifications, as one might put it, that "go without saying".

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114 A Marmor *Interpretation and Legal Theory* (Clarendon Press, Oxford, 1992) 136-137; F Schauer *Playing By the Rules: a Philosophical Examination of Rule-Based Decision Making in Law and Life* (Clarendon Press, Oxford, 1991) 209-210; both critically discussed in Jeffrey Goldsworthy "Legislative Intentions, Legislative Supremacy, and Legal Positivism" in Jeffrey Goldsworthy and T Campbell (eds) *Legal Interpretation in Democratic States* (Ashgate/Dartmouth, Aldershot, 2002) 53-55.

115 D Farber "Courts, Statutes, and Public Policy: the Case of the Murderous Heir" (2000) 53 SMU L Rev 37.

116 See Jeffrey Goldsworthy "Implications in Language, Law and the Constitution" in G Lindell *Future Directions in Australian Constitutional Law* (Federation Press, Annandale, 1993) 150, especially 157-161.

117 R Dworkin "Reflections on Fidelity" (1997) 65 Fordham L Rev 1799, 1816.

Other theoretical explanations are also possible.<sup>118</sup> I see no good reason to accept (1). As for the choice between (2), (3) and other possibilities, I am uncertain, but although it is of analytical interest, it may be of little practical importance. That is one reason why the choice between Forsyth's and Elliott's modified ultra vires theory and Craig's common law theory may not be of great practical importance. If Forsyth and Elliott are merely insisting that statutes granting administrative powers should be understood in the light of a tacit assumption that their exercise is subject to the normal "rule of law" principle, the difference between their position and Craig's is razor thin.<sup>119</sup> What remains of great practical importance is whether a court that interprets a statute as subject to some unexpressed qualification is being faithful to Parliament's purposes, insofar as they have been clearly communicated, or whether it is really overriding them, and the statute, to give effect to its own policy preferences.

#### IV *IS PARLIAMENT STILL SOVEREIGN? IS ITS SOVEREIGNTY IN DECLINE?*

The arguments that Parliament never was sovereign are too weak to be persuasive. But what of arguments that, because of recent changes, Parliament has lost its sovereignty or will soon do so? Dame Sian concentrates on recent developments rather than the past. She claims that parliamentary sovereignty seems "diminished" after thirty years of constitutional change in Australia, the United Kingdom and New Zealand.<sup>120</sup> She discusses "where our constitutions are today and ... the way they might be going."<sup>121</sup> Justice Thomas explicitly accepts that Parliament was sovereign, but argues that perhaps, in view of the inevitable "ongoing development" of the unwritten constitution, it should no longer be accepted as such.<sup>122</sup> As I have suggested, Professor Joseph's strongest arguments also concentrate on recent developments that may be challenging long-standing orthodoxies.

Sovereignty theorists cannot ignore the phenomenon of constitutional change. Constitutional arrangements and understandings today are in many respects plainly very

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118 See, for example, Jim Evans's theory of equitable exceptions: J Evans "Reading Down Statutes" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 123.

119 Forsyth and Elliott insist that we must choose between Parliament having a positive intention that authorises the principles of judicial review (their position) and its not having a positive intention to exclude them (Craig's position): "The Legitimacy of Judicial Review" [2003] Public Law 286, 289 n 14. But if the relevant "intention" is a tacit, and possibly even unconscious, assumption, it is understandable that some people might find that choice difficult.

120 Elias, above n 8, 148.

121 Elias, above n 8, 149.

122 Thomas, above n 8, especially 8, 18-19.

different from those of the past. For example, Parliament is no longer regarded as a "High Court" in any real sense. It may be true today that the courts do enjoy "co-ordinate authority", in the sense that they rank equally (whatever that means) with Parliament in the exercise of their complementary functions. But the doctrine of parliamentary sovereignty has survived centuries of changes and has the capacity to survive many more. I do not believe that the recent developments discussed by Dame Sian and Joseph are inconsistent with the doctrine.

#### ***A Britain and the European Union***

Dame Sian refers to the entry of the United Kingdom into the European Community and devolution within the United Kingdom itself.<sup>123</sup> But these do not in themselves overturn the doctrine of parliamentary sovereignty, although they may threaten it in the long term. As I said in my book:<sup>124</sup>

[A] nation can surrender its independence by merging with a larger political entity. This may be the future in store for Britain, if it ever comes to be generally accepted by British legal officials that Parliament has lost its authority to withdraw Britain from the European Community. That point has not yet been reached, because if Parliament were tomorrow to legislate to terminate Britain's membership of the Community, British courts would almost certainly acquiesce. It follows that Parliament still retains ultimate legal sovereignty, even though the rules governing its exercise of that sovereignty have changed. They have changed because Parliament, by enacting section 2(4) of the European Communities Act 1972, and the courts, by the way they have applied that section, have overturned the former assumption that Parliament cannot control the form in which future legislation must be enacted. This is itself an example of a change in official consensus changing the rule of recognition: in effect, Parliament and the courts have tacitly agreed that as long as Parliament does not repudiate Britain's treaty obligations with Europe in express and unambiguous language, the courts will not apply statutory provisions that violate those obligations. But that former assumption was not entailed by the concept of parliamentary sovereignty: a Parliament that can only effectively legislate if it uses a particular form of words, to ensure that its intentions are unmistakable, is still free to legislate whenever it wishes to do so.

#### ***B Judicial Enforcement of Statutory Rights***

Professor Joseph and Dame Sian both argue that (in Joseph's words) "sovereignty theory struggles to reconcile the judicial role under modern human rights statutes such as

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<sup>123</sup> Elias, above n 8, 152.

<sup>124</sup> *The Sovereignty of Parliament, History and Philosophy*, above n 5, 244–245 (footnotes omitted); see also Thomas, above n 8, 14–15 and, for a fuller analysis, "Parliamentary Sovereignty and Statutory Interpretation", above n 89, 196–201.

the Human Rights Act 1998 [(UK)].<sup>125</sup> I can only report that I do not feel I have had to struggle at all. Parliament has enacted the Act 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. The courts could misuse their power of interpretation to, in effect, disapply them. But Parliament has trusted the judges not to do this and so far its trust does not appear to have been abused.<sup>126</sup>

That it might already be, or in future become, politically impossible for Parliament to repeal the Act is irrelevant. There are those who worry about a "gap" between what they call the "theory" of Parliament's sovereign authority to legislate and the "reality" of its more limited political power to do so. They urge that this gap be closed.<sup>127</sup> I do not understand the problem. 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 conceivable abuses of the power virtually impossible. 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 Human Rights Act 1998 (UK), so much the better.

There is no inconsistency between "theory" and "reality" here.<sup>128</sup> Parliament is legally sovereign both in theory and reality and is subject to moral and political constraints both in theory and reality. When Mark 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.<sup>129</sup> Its purpose is merely to make it clear that no other official or institution has legal authority to invalidate or override statutes. It is not 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)

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125 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 22–23; Elias, above n 8, 157.

126 Lord Irvine of Lairg "The Impact of the Human Rights Act: Parliament, the Courts and the Executive" [2003] Public Law 308, especially 309–310, 314–320.

127 M Elliott "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality, and Convention" (2002) 22 Legal Studies 340; M Elliott "United Kingdom: Parliamentary Sovereignty Under Pressure" (2004) 2 IJCL 545.

128 "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality, and Convention", above n 127, 353.

129 "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality, and Convention", above n 127, 342.

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 pressures that prevent Parliament from doing them. There can be good reasons for leaving the enforcement of moral/political constraints to political actors, rather than transforming them into legal constraints: for a start, this leaves open room for negotiation, compromise and the continued evolution of political practice. If the "gap" between Parliament's moral/political authority and its legal authority were closed, the courts would be given a blank cheque to decide which moral and political constraints should be judicially enforceable – in effect, a blank cheque to rewrite the constitution.

### C *The Anisminic Case*

Professor Joseph says that the *Anisminic* case, decided in 1969, brought about a "sea change" in judicial review, which the ultra vires theory is unable to accommodate.<sup>130</sup> Others have claimed that the case is flatly inconsistent with parliamentary sovereignty, because the Court, in effect, refused to obey Parliament's declaration that decisions of the statutory authority in question were not reviewable.<sup>131</sup> Two comments can be made here. 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:<sup>132</sup>

It 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[.]

Allan has not subsequently changed his mind.<sup>133</sup> And as I said in my book:<sup>134</sup>

Judges who interpret a statute by presuming that Parliament did not intend to violate an important common law principle do not deliberately flout the doctrine of parliamentary

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130 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 327.

131 For example, H W R Wade and C F Forsyth *Administrative Law* (7 ed, Oxford University Press, Oxford, 1994) 737; Thomas, above n 8, 27.

132 T R S Allan "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 CLJ 111, 127.

133 T R S Allan *Constitutional Justice; a Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001) 211–212.

134 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 252.

sovereignty unless they know that there is clear, admissible evidence that it did intend to do so.

But let us assume that the Court did knowingly disobey Parliament. This is the view of Justice Thomas, who recommends that we candidly admit this fact: "I know of no rule of law or logic which would make judicial disobedience more palatable simply because it is done covertly."<sup>135</sup> My second comment, again taken from my book, responds to this point:<sup>136</sup>

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 realize that their disobedience is, legally speaking, illicit. The lie also preserves Parliament's freedom, after reconsidering its position, to override the judges by enacting new legislation expressing its intention more clearly.

Another response to Justice Thomas is suggested by the following remarks of Justice Antonin Scalia, discussing whether or not judges can legitimately change the American Constitution:<sup>137</sup>

The proposition that the text could be disregarded or supplemented ... would have been anathema [until recently] ... This is not to say that American judges did not occasionally "update" the Constitution ... But they did it the good old-fashioned way: they lied about it. Nowadays it is no longer necessary to lie - which is not a good thing if you believe, as I do, that hypocrisy is the beginning of virtue.

#### **D     Increasing Recognition of "Constitutional" Principles**

If the sovereignty of Parliament is faced with a serious challenge in the near future, it is most likely to arise from further development of the tendency to describe important common law principles - and now statutes - as having "constitutional" status, which entitles them to special protection when statutes that might otherwise impinge on them are interpreted.<sup>138</sup> Joseph and Dame Sian both advert to this phenomenon.<sup>139</sup>

135 Thomas, above n 8, 27.

136 *The Sovereignty of Parliament, History and Philosophy*, above n 5, 252.

137 Justice A Scalia "Romancing the Constitution: Interpretation as Invention" in G Huscroft and I Brodie (eds) *Constitutionalism in the Charter Era* (LexisNexis/Butterworths, Canada, 2004) 337.

138 This tendency was extended to statutes by Laws LJ in *Thoburn v Sunderland City Council*, above n 29.

139 "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 341-342; Elias, above n 8, 161.

Jeffrey Jowell, for example, discusses what he calls the "new constitutional litigation", in which:<sup>140</sup>

Without the aid of the Human Rights Act [1998 (UK)] ... our courts have begun to shift the boundaries of administrative law into the constitutional realm by explicitly endorsing a higher order of rights inherent in our constitutional democracy. ... A live question is the extent to which the courts will continue their search for constitutional principle outside of the sometimes limited scope of Convention rights.

The direction in which some judges would like to take this idea is clearly implied in a recent judgment of Laws LJ:<sup>141</sup>

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. These are broadly the rights given expression in the [European Convention on Human Rights], but their recognition in the common law is autonomous.

A few years earlier, he wrote that parliamentary sovereignty:<sup>142</sup>

... remains the plainest constitutional fundamental at the present time; a departure from it will only happen, in the tranquil development of the common law, with a gradual re-ordering of our constitutional priorities to bring alive the nascent idea that a democratic legislature cannot be above the law.

As Lord Irvine has observed, this may be "a prediction that we are only halfway on a constitutional journey and that, in the fullness of time, we will leave parliamentary supremacy behind altogether."<sup>143</sup>

Laws LJ and some other judges do seem intent on building up a body of dicta declaring the constitutional status of an uncertain number of principles, dicta that might, at some future time, be regarded as authority for the proposition that such principles are beyond the reach of statute. At present, fundamental principles are protected mainly through

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140 Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] Public Law 671, 675, 683 (footnote omitted).

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

142 Sir John Laws "Illegality and the Problem of Jurisdiction" in M Supperstone and J Goldie (eds) *Judicial Review* (2 ed, Butterworths, London, 1997) 4.17.

143 Lord Irvine of Lairg, above n 125, 310.

presumptions of legislative intent. But if the concept of legislative intent is held to be a fiction, as some judges argue, the way in which statutes are sometimes bent or stretched to accommodate these principles might have to be explained in terms of the inherent constitutional force of these common law principles, which would then be elevated 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 why, I suggest, neither Dame Sian, Justice Thomas nor Professor Joseph is currently willing to make any stronger claim than that it is "possible" that the courts might hold that Parliament cannot effectively abrogate fundamental rights.<sup>144</sup> I take their uncertainty to be 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.

Judges are often keen to dispel any impression that *they* are engaged in changing the constitution. Laws LJ, for example, speaks of "the common law" coming to recognise the existence of constitutional rights.<sup>145</sup> 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."<sup>146</sup> This attribution of change to "the common law" as a supposedly autonomous and (even more mysteriously) active agent is intriguing. The declaratory theory of judging, which modern judges often disparage as a "fairy tale", apparently still has some merit or, at least, some utility.

There are two possible explanations of this style of rhetoric. The cynical explanation is that judges such as Laws LJ are just ducking for cover: seeking to avoid political flak by pretending that there is a common law constitution that evolves by itself, rather than something invented and revised by them. The cynic regards the common law as a passive product of judicial creativity. When judges speak as if it 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 said 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

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144 Elias, above n 8, 160; Thomas above n 8, 8; "Parliament, the Courts, and the Collaborative Enterprise", above n 2, 342.

145 See *International Transport Roth GmbH v Secretary of State for the Home Department*, above n 141.

146 *Thoburn v Sunderland City Council*, above n 29, paras 59–60.



the "common law constitution" are customs of legal officialdom, which the judges did not create and cannot change unilaterally.<sup>147</sup> Mark Elliott has developed a similar theory, according to which Laws LJ's common law constitution is best understood in terms of constitutional conventions crystallising into law.<sup>148</sup> The existence of constitutional conventions requires consensus among legal officials, including politicians. If Elliott is right, the common law constitution also depends on such a consensus and can change only if that consensus changes. If this is an accurate account of what Laws LJ means by "common law", in the constitutional context, then he is not being disingenuous when he speaks as if it is at least partly independent of judicial opinion and potentially subject to changes that the judges neither initiate nor control. If so, then Laws LJ is not a legal revolutionary at all: he is merely predicting evolutionary, consensual and, therefore, uncontroversial change.

## V CONCLUSION

This debate is not unprecedented. It is in some respects similar to a debate that took place in France between 1890 and the 1930s. Before 1890, the French legal system was firmly based on the principle of legislative sovereignty, which had been established during the French Revolution and the rule of Napoleon. But after 1890, leading public law scholars began to revive natural law ideas, arguing that the legislature was bound by an unwritten higher law, which the judges were capable of discerning and ought to enforce. According to a recent account, these neo-natural law ideas were "functionally equivalent to rule of law notions in Anglo-American legal theory."<sup>149</sup> These scholars waged a persistent campaign to convince judges, first, "that they were juridically required to exercise ... substantive judicial review", and secondly, "that judges had already begun doing so, but apparently did not yet know it."<sup>150</sup> The basis of the second claim was that a number of judicial decisions supposedly made complete sense only if higher, unwritten constitutional principles were assumed to exist. As one of these scholars argued in 1923, the judges "without expressly admitting it, and perhaps without even admitting it to themselves, have opened the way to judicial review."<sup>151</sup> This campaign was making headway until the publication of a book that explained how the American Supreme Court had stymied democratic social reform by reading laissez faire principles into the Constitution, and

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<sup>147</sup> See above n 36.

<sup>148</sup> "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality, and Convention", above n 127, 362-376.

<sup>149</sup> Alec Stone Sweet "Why Europe Rejected American Judicial Review, and Why it May Not Matter" (2003) 101 *Mich L Rev* 2744, 2755.

<sup>150</sup> Sweet, above n 149, 2757.

<sup>151</sup> Quoted in Sweet, above n 149, 2758.

warned that French judges might possibly do the same. This book had an enormous impact and routed the campaign in favour of judicially imposed, higher law principles.<sup>152</sup>

What interests me is the familiar ring to the French story. English-speaking lawyers are clearly not the only ones who manage to convince themselves that legal revolution is legal conservatism. In our case, the ultimate outcome of the debate is as yet unknown. My conclusions are that Parliament was and still is sovereign, but that whether or not it will lose its sovereignty in the near future is impossible to predict. If it does lose its sovereignty, the law books will no doubt be retrospectively rewritten. In cases of revolution, as in cases of war, history is written by the victors. If the legal revolution succeeds, it will not be acknowledged to have been a revolution. It will be depicted either as a judicial discovery, or rediscovery, of what the law had always been or as the exercise of authority, which the judges have always possessed, to develop the "common law constitution".

I agree with the Hon Dr Michael Cullen that constitutional change of this magnitude should be brought about openly and democratically, not surreptitiously through judicial decision-making.<sup>153</sup> Judges who would like more power to protect human rights and the rule of law should encourage the other branches of government to give it to them, through a wider settlement of the kind that Joseph himself used to insist is necessary.<sup>154</sup> This is required by the democratic principle of popular sovereignty. It is also more consistent with the nature of fundamental constitutional rules, which, as I have argued, require consensus among senior legal officials. It also has many practical advantages. Democratic constitutional change can spell out what rights and other principles are to be protected, rather than leaving this to uncertain and open-ended judicial development. It can take the form of Britain's Human Rights Act 1998, which enhances the judges' power to protect rights without allowing them to invalidate statutes. Or it can take the form of Canada's Charter of Rights and Freedoms,<sup>155</sup> which authorises judges to invalidate statutes, but also permits legislatures to insert a "notwithstanding clause" into a statute to prevent its invalidation. A unilateral judicial ruling that an uncertain number of rights and principles cannot be overridden by statute would rule out alternative reforms that might strike a better balance between legislative and judicial power.

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152 Sweet, above n 149, 2758–2760.

153 Hon Dr Michael Cullen "Parliamentary Sovereignty and the Courts" [2004] NZLJ 243.

154 *Constitutional and Administrative Law in New Zealand* (1 ed), above n 59, 455–456, cited in *The Sovereignty of Parliament, History and Philosophy*, above n 5, 243 n 30.

155 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

