PARLIAMENTARY SOVEREIGNTY

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

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

The aim of this series is to produce leading monographs in constitutional law. All areas of constitutional law and public law fall within the ambit of the series, including human rights and civil liberties law, administrative law, as well as constitutional theory and the history of constitutional law. A wide variety of scholarly approaches is encouraged, with the governing criterion being simply that the work is of interest to an international audience. Thus, works concerned with only one jurisdiction will be included in the series as appropriate, while, at the same time, the series will include works which are explicitly comparative or theoretical – or both. The series editors likewise welcome proposals that work at the intersection of constitutional and international law, or that seek to bridge the gaps between civil law systems, the US, and the common law jurisdictions of the Commonwealth.

Series Editors
David Dyzenhaus, Professor of Law and Philosophy,
University of Toronto, Canada
Adam Tomkins, John Millar Professor of Public Law,
University of Glasgow, UK

Editorial Advisory Board
T.R.S. Allan, Cambridge, UK
Damian Chalmers, LSE, UK
Sujit Choudhry, Toronto, Canada
Monica Claes, Tilburg, Netherlands
David Cole, Georgetown, USA
K.D. Ewing, King's College London, UK
David Feldman, Cambridge, UK
Cora Hoexter, Witwatersrand, South Africa
Christoph Moellers, Goettingen, Germany
Adrienne Stone, Melbourne, Australia
Adrian Vermeule, Harvard, USA
PARLIAMENTARY SOVEREIGNTY

Contemporary Debates

JEFFREY GOLDSWORTHY

Monash University
## CONTENTS

*Detailed table of contents* vii  
*Acknowledgments* xi  

1. Introduction 1  
2. The myth of the common law constitution 14  
3. Legislative sovereignty and the rule of law 57  
4. Homogenising constitutions 79  
5. Abdicating and limiting Parliament’s sovereignty 106  
6. *Trethowan’s case* 141  
7. Requirements as to procedure or form for legislating 174  
8. Judicial review, legislative override, and democracy 202  
9. Parliamentary sovereignty and statutory interpretation 225  
10. Challenging parliamentary sovereignty: Past, present and future 267  

*Index* 319
# DETAILED TABLE OF CONTENTS

1 Introduction 1

2 The myth of the common law constitution 14
   I Introduction 14
   II The historical record 18
   III Philosophical analysis 47

3 Legislative sovereignty and the rule of law 57
   I Introduction 57
   II Legal principle or political ideal? 58
   III The content of the rule of law 61
   IV ‘Thin’ conceptions of the rule of law 63
   V ‘Thicker’ conceptions of the rule of law 66
   VI Conclusion 78

4 Homogenising constitutions 79
   I Introduction 79
   II The rule of law in liberal democracies 82
   III Institutional authority 84
   IV The concept of law 87
   V The rule of law as law 95
   VI The interpretation of written constitutions 101
   VIII Conclusions 104
5 Abdicating and limiting Parliament’s sovereignty 106
   I Introduction 106
   II Some clarifications 109
   III Competing theories 113
      A Limitations imposed by the judiciary: common law constitutionalism 113
      B Limitations imposed by Parliament 114
         (1) The procedurally self-embracing theory 114
         (2) The full self-embracing theory 115
         (3) The constituent power theory 116
         (4) The abdication theory 118
      C Limitations imposed by a change in official consensus 122
         (1) The hard cases theory 122
         (2) The legal revolution theory 123
         (3) The consensual change theory 125
   IV Oliver’s theory scrutinised 126
   V Conclusion 137

6 Trethowan’s case 141
   I Introduction 141
   II Background 141
   III Parliamentary privilege 150
   IV The validity and bindingness of s. 7A 151
      A Reconstitution 156
      B Manner and form 160
      C Political principle and legal logic 166
   V Aftermath and consequences 169

7 Requirements as to procedure or form for legislating 174
   I Introduction 174
   II Alternative and restrictive requirements: Jackson’s case 176
   III Policy considerations 179
   IV Distinguishing requirements as to procedure or form
# Table of Contents

## V

### Beyond the stereotypes: the variety of requirements as to procedure or form

- Validity, enforceability and bindingness
- Sources and limits of the validity and enforceability of requirements as to procedure and form
- Is the ‘manner and form’ provision in s. 6 of the Australia Act redundant?

## IX

### Reconstitution

## X

### Conclusion

## 8 Judicial review, legislative override, and democracy

### I

#### The ‘notwithstanding clause’

### II

#### The rights-based objection to constitutional rights

### III

#### Goal-based objections to constitutional rights

### IV

#### The desuetude of s. 33

### V

#### Conclusion

## 9 Parliamentary sovereignty and statutory interpretation

### I

#### Introduction

### II

#### The indispensability of legislative intentions

#### A Clarifying interpretation

##### (1) Ambiguity and ellipsis

##### (2) Presuppositions

#### B Creative interpretation

### III

#### Evidence of legislative intention

### IV

#### Alternatives to intentionalism

#### A Judicial override

#### B Constructivism

#### C Criticism of constructivism

### V

#### Conclusion
10  Challenging parliamentary sovereignty: Past, present and future  267

I  Introduction  267

II  The past  268
   A  Doctor Bonham's case and the common law tradition  268
   B  The Parliament of Scotland before the Union  270
   C  The philosophical origins of parliamentary sovereignty  272
   D  The 'collaborative model'  275

III  The present and future  280
   A  Judicial review of administrative action  281
   B  The Anisminic case  285
   C  Britain and the European Community  287
      (1)  Implied repeal and different subject-matters  290
      (2)  Statutory interpretation, legislative intention, and legislative mistakes  293
   D  Judicial review under the Human Rights Act  299
   E  The common law protection of rights  304
   F  Constitutional statutes  312
   G  Constitutional principles  314
ACKNOWLEDGMENTS

Six of the chapters in this book are revised and updated versions of essays published previously. Chapters 3, 4, 6 and 8 have been only lightly revised, while Chapters 2 and 5 have had significant new material added to them. The other chapters are new, but include some material that appeared in previously published essays. I thank the following for permission to republish the following essays, or material that appeared in them:


Acknowledgments

xii


The original versions of these essays record my indebtedness to many colleagues and friends who provided helpful comments while they were being written. I will not repeat my thanks to them here. But I do thank Richard Ekins for very helpful comments on a draft of Chapter 8. I also thank my daughter Kate Goldsworthy for her meticulous proofreading, and Juliet Smith and Emma Wildsmith for their assistance in preparing the manuscript for publication.

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