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Jeffrey Goldsworthy

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Abdicating and limiting Parliament's sovereignty

I Introduction

The doctrine that Parliament possesses sovereign – legally unlimited – legislative authority has long been part of the foundation, if it is not indeed the foundation, of Britain's largely unwritten constitution.[1] But the doctrine gives rise to a well-known conundrum: can Parliament's authority be used to limit itself? If it cannot, then it is already limited in this one respect; on the other hand, if it can, then while it is unlimited today it might not be tomorrow. According to the former view, Parliament's unlimited, sovereign authority is 'continuing'; on the latter view, it is 'self-embracing'.[2] On the former view, parliamentary sovereignty is a potential obstacle to effective constitutional reform: any statute purporting to limit Parliament's authority can supposedly be repealed, even by implication, which means that it can be simply ignored. In the past, this view made it difficult for constitutional lawyers to conceive of how Britain's dominions could ever achieve full constitutional independence by lawful, rather than revolutionary, means. Even today, some lawyers have difficulty conceiving of how Parliament could effectively subordinate its authority to a constitutionally entrenched Bill of Rights, to a federal constitution transferring part of its authority to other legislatures within Great Britain, or to a new constitution for the European Union.

In an important new book, Peter Oliver deals with the question of colonial independence, although he hopes that his theoretical insights will shed light on other types of constitutional reform.[3] He offers an

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

[2] H.L.A. Hart, *The Concept of Law* (2nd edn) (Oxford: Clarendon Press, 1994), ch. 7, s. 4. But see the penultimate paragraph in Section II, below, on the ambiguity of the label 'continuing'.

[3] P. Oliver, *The Constitution of Independence, The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 2005). This book will be cited henceforth as '*Independence*'.

explanation of how the 'well-behaved' British dominions[4] – Australia, Canada, and New Zealand – achieved genuine constitutional independence by means that were fully lawful rather than revolutionary. It cannot be disputed that they have achieved genuine independence. The question is how they did so, and whether the means used were fully lawful. Arguably, they could not have been fully lawful if Parliament's authority is continuing. On that view, the argument goes, Britain's dominions must either remain permanently subject to Parliament's continuing sovereignty, regardless of any purported abdication of its authority over them, or achieve independence by revolution – although this could be an amicable 'legal' revolution, consisting of a consensual change in the most fundamental norms of the legal system, and in particular, a repudiation by local officials of the doctrine of continuing sovereignty. Oliver rejects that argument, and proffers a theoretical explanation of the lawful acquisition of genuine independence, based partly on the self-embracing theory of parliamentary sovereignty.

Oliver confronts apparent difficulties with the self-embracing theory. He asks how Parliament could abdicate its authority to change a dominion's law without undermining the validity of that law, which had previously derived from its authority.[5] Borrowing Philip Joseph's analogy, the question is how an axeman sitting on a tree branch can sever the tree's trunk without everything toppling down, himself included.[6] What can replace the authority of Parliament, if it is withdrawn, in supporting the validity of the newly independent legal system? This is not a problem on the 'legal revolution' theory, which postulates a change in the underlying rule of recognition, involving the substitution of a local legal foundation for the previous Imperial foundation. That theory has the additional merit that a newly independent constitution can be regarded as deriving its authority or legitimacy from popular acceptance – 'the sovereignty of the people' – rather than from the grace of the former Imperial Parliament. But according to the self-embracing theory, independence is owed to a final exercise of Imperial authority – an authority that is supposedly necessary for this purpose, but expires the moment after it is exercised. If it is genuinely necessary at one moment, how can it cease to be necessary the next? Oliver argues in response that it is possible for us 'to have the constitutional cake and eat it too: to respect the rule of law and thereby maintain constitutional continuity [i.e., to eschew "legal revolution"]

[4] Oliver, *Independence,* p. 1. [5] *Ibid*., pp. 284 and 297. [6] *Ibid*., p. 263.

while achieving constitutional independence, a new beginning and a foundation based on popular acceptance'.[7]

Someone might object that this long book makes a big fuss about very little: why does it matter if undisputed independence was achieved in a lawful rather than revolutionary manner, if the revolutions were technical, 'legal' ones achieved in a wholly amicable fashion? Oliver tackles this 'so what?' objection head-on, and offers various reasons for the importance of his analysis.[8]

One of his major concerns is that even an amicable 'legal' revolution is inconsistent with the Rule of Law, and since officials and citizens of the 'well-behaved dominions' value that ideal, they may benefit from reassurance that their acquisition of independence did not violate it. Unfortunately, Oliver does not attempt to explain why such a revolution should be thought inconsistent with the substantive values protected by the Rule of Law, such as freedom from the arbitrary and unpredictable imposition of punishments or legal disabilities on people who have no opportunity to anticipate and take steps to avoid them. Nothing in the history of the 'well-behaved dominions' suggests that the process by which they acquired independence jeopardised any of these values. If a 'legal' revolution is such only in a formal, technical sense, perhaps any breach of the Rule of Law is purely formal and technical as well, and therefore, of no real concern. In this regard, Oliver may be proposing a complex, and possibly artificial, solution to a non-existent problem.

But there are other, more theoretical, concerns that motivate Oliver's project. He argues that the orderly creation of two separate legal systems out of one can reveal much of theoretical interest about the nature of legal systems and of sovereignty. He hopes that these revelations will illuminate other processes of constitutional change, such as the reverse process by which separate legal systems merge into a single system (as might happen in the case of the European Union).[9] When a legal system, like Britain's, rests ultimately on unwritten, customary norms, and lacks a clear, generally accepted procedure for changing them, illumination is certainly needed.

Oliver's book is thoroughly researched, carefully argued and well written, and his analysis is a thought-provoking contribution to our understanding of the issues. Nevertheless, I have reservations about it, which I will attempt to explain. His analysis is complex, and to explain my reservations I need to introduce even more complexity – hopefully, without

[7] *Ibid*., pp. 7, 11 and 107. [8] *Ibid*., pp. 15–18. [9] *Ibid*., pp. 4–6.

vindicating his warning that '[i]f we are not careful, theoretical explanations can cause yet further confusion'.[10] I realise, however, that further confusion may be unavoidable.

II Some clarifications

One matter that needs to be clarified at the outset is the nature of the legislative authority, with respect to its former dominions, which the 'continuing' theory denies that Parliament can lawfully limit or abdicate, but which it has plainly lost. It is not authority to enact valid legislation with respect to persons or activities within these countries' borders. That is authority to legislate with extra-territorial effect, which Parliament continues to possess with respect to the entire world, enabling it to prohibit people (even the French) from smoking cigarettes in Paris. Even today, Parliament can make it an offence to smoke cigarettes in Sydney, Toronto or Auckland. The point is that in passing such laws, it would be changing British law, but not the law of France, Australia, Canada or New Zealand. By contrast, the authority it has plainly lost with respect to the former dominions is precisely authority to change *their* law. This is a distinction that Oliver appears to overlook, for example, when he says that according to the 'standard' (continuing) theory, Parliament's authority to legislate 'for Australia, Canada and New Zealand' cannot have been terminated, because '[a]s a matter of United Kingdom law … the Westminster Parliament can legislate for [these countries] just as easily as it can legislate for Mexico and France'.[11] This misses the point, because what has been terminated is authority to change the law of Australia, Canada and New Zealand, and an equivalent authority with respect to Mexico and France has never been claimed. The effect of the termination is to put Australia, Canada and New Zealand in the same position as Mexico and France, and all other countries in the world whose legal systems are independent of Britain's.[12]

Oliver discusses a bewildering variety of theories of parliamentary sovereignty and dominion independence. In analysing them, he frequently invokes Kelsen's concept of the *grundnorm*, and Hart's concept

[10] *Ibid*., p. 350. [11] *Ibid*., pp. 286–7; see also p. 289.

[12] It is also worth noting that the Australian and New Zealand Parliaments both possess the same unlimited extra-territorial authority as the British Parliament, and can legislate with respect to persons and activities in Mexico, France, and anywhere else outside their countries' borders. But they do not foolishly claim authority to change the law of any other country.

of the rule of recognition. I will refer only to the latter. For readers who need a reminder, according to Hart, rules of recognition are among the most fundamental norms of a legal system, and govern what other norms should be recognised as members of their system, or, in other words, as valid laws. For example, a rule of recognition might recognise a written constitution as valid law, as well as any statutes enacted by legislatures, and any rules and principles adopted by courts, in accordance with that constitution.[13] Whether there is a single, complex, rule of recognition in every legal system, or a number of such rules, is unimportant for present purposes. Rules of recognition are intimately related to another kind of fundamental norm – which Hart called rules of change – that authorise particular officials or institutions to change the law through specified procedures. If a rule of change authorises some institution to make new laws, then consistency demands that the (or a) rule of recognition recognise as valid the laws made by that institution. The existence of fundamental norms of change and recognition depends, in large part, on their being accepted as binding by the most senior officials of all branches of government. They do not owe their existence to acceptance by the judiciary alone.[14] Hart himself regarded the doctrine of parliamentary sovereignty as a fundamental component of the rule of recognition in Britain, and it is also a rule of change.[15] The crucial question concerns the content of this doctrine, and how it can itself be changed.

Oliver uses the terms 'constituent power' or 'constituent process' to denote the power or process by which the most fundamental norms – which is to say, the constitution – of a legal system can be changed. In a legal system such as that of the United States, one of the most basic components of the rule of recognition is recognition as valid law of the written constitution, and of any amendments made by the procedure prescribed by the constitution for its own amendment. Whatever the original constituent power that enacted or created the constitution – and often it would have been an extra-legal, perhaps revolutionary, power – while that constitution persists, the only constituent power by which it may be lawfully changed is the amendment procedure that it itself prescribes. Crucial to

[13] I use the term 'rule of recognition' to refer only to the most fundamental components of the law governing recognition within a legal system. For an attempt to spell out the rule of recognition in the United States, see K. Greenawalt, 'The Rule of Recognition and the Constitution' (1987) 85 *Michigan Law Review* 621, esp. at 659–60.

[14] For elaboration, see Goldsworthy, *The Sovereignty of Parliament,* pp. 236–43.

[15] Hart, *The Concept of Law*, pp. 144–8.

recognition of the constitution itself as valid law, is the consensus among senior officials that Hart describes, yet it is part of that very consensus that the constitution can only be altered by its own amendment procedure. In other words, the amending procedure is the only legally recognised constituent power, which officials have agreed to be bound by. If the consensus among officials were to change, such that the constitution were replaced or substantially changed without that procedure being followed, the process of change would have to be regarded as extra-legal, and perhaps even revolutionary.[16]

Provisions of written constitutions are often vague and ambiguous, but the content of an unwritten constitution, such as that of the United Kingdom (and that of its former Empire), can be even more obscure. The most fundamental rules of change and of recognition are constituted by a consensus among senior officials, but not having been set down in a written document, their content must often be inferred from orthodox official practice and authoritative interpretations of it. On some important points there may simply be no consensus, and therefore – according to a legal positivist like Hart, at least – no law. The doctrine of parliamentary sovereignty is a case in point. Parliament can be said to have constituent power to change every part of the unwritten constitution except, arguably, that which grants its own law-making authority. Whether Parliament has constituent power to limit or abdicate parts of its own sovereignty is just another way of asking whether its sovereignty is continuing or self-embracing. If Parliament does not have that power, then either its sovereignty is the one element of the unwritten constitution that is legally immutable – like provisions of a written constitution that can never be amended – or it must be subject to some other method of constitutional change. The most likely alternative method is change in the consensus among senior officials that constitutes the fundamental rules of the system. In countries such as the United States, as we have seen, if the consensus among officials changes, so as to replace or change the written constitution without the prescribed amendment procedure being followed, the process of change must be deemed extra-legal, even revolutionary. In Britain, as we will see, it is far less clear that constitutional

[16] This proposition is not uncontroversial, as some theorists argue that the United States Constitution can be lawfully changed by other means. See the discussion in D. Dow, 'The Plain Meaning of Article V', in S. Levinson (ed.), *Responding to Imperfection, The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995), p. 117.

changes resulting from changes in official consensus should be characterised in that way.[17] This is partly because it is less clear that officials have agreed either that some aspects of the unwritten constitution are immutable, or that they can be changed only by some other, specific procedure (such as statute).

The thesis that Parliament's sovereignty is continuing is ambiguous in this respect. It might mean merely that Parliament cannot limit or abdicate its own authority, or it might mean that there is no method at all by which its authority can be lawfully limited or abdicated. I will refer to the first interpretation as the 'weak' version of the thesis of continuing sovereignty, and to the second interpretation as the 'strong' version. The weak version is consistent with Parliament's authority being limited by a change in the official consensus that constitutes the rule of recognition. Oliver seems to assume that we must choose between continuing and self-embracing sovereignty: he does not acknowledge any lawful method of changing the constitution except by statute. 'Either Parliament as presently constituted … is frozen for all time as a legally untouchable and prior rule as in Dicey's version of continuing sovereignty; or Parliament itself has self-embracing power …'[18] It follows that he has in mind only the strong version of continuing sovereignty: if Parliament's sovereignty cannot be limited by statute, then for legal purposes it can never be limited, alienated or extinguished. Indeed, he asserts that 'the dominant approach in the United Kingdom was to assume that Parliament's sovereignty was continuing *and that it must forever be so*'.[19]

I doubt that there is much evidence in favour of the strong version of continuing sovereignty. In any event, it seems bizarre, because it is naïve and futile to purport to forbid constitutional change of this kind in perpetuity. If the rule of continuing sovereignty is constituted by official consensus, then according to the strong version, officials share a consensus that their consensus must never change: that they and their successors must *forever* accept that Parliament is sovereign. But obviously they cannot effectively prevent themselves from changing their own minds, let alone prevent officials in the future from doing so. It might be argued that even if such a change cannot be effectively prevented, it can be deterred,

[17] See Section III, C(2) and (3), below.

[18] Oliver, *Independence*, p. 87; see also p. 297.

[19] *Ibid*., p. 9, emphasis added. See also p. 312: 'the United Kingdom Parliament can be seen *either* (on the continuing version) to remain *perpetually* at the apex of the Australian, Canadian and New Zealand legal systems, or (on the self-embracing version) to provide for its own replacement as the supreme amending procedure' (emphasis added).

by condemning it in advance as illegal and revolutionary. But would it not be foolish as well as arrogant to condemn in advance possible changes that, in the unforeseeable circumstances of the future, might be eminently desirable or even necessary? The strong version of continuing sovereignty should be rejected. But the weak version remains plausible: we will soon see that there are good reasons why Parliament should not be able to limit – at least substantively – its own law-making authority.[20]

III Competing theories

We can now turn to the main alternative theories of how Parliament's authority can be limited, alienated or extinguished. For ease of subsequent reference, I will give each one a label.

A Limitations imposed by the judiciary: common law constitutionalism

The first alternative is that this can be achieved by the courts changing the so-called 'common law constitution'. According to a theory that has become increasingly popular in recent years, the doctrine of parliamentary sovereignty (and, at least to that extent, the rule of recognition) is a matter of judge-made common law.[21] The judges can therefore modify or repudiate the doctrine, so as to limit or extinguish Parliament's authority. This theory could be deployed to argue that even if prior to independence, the common law of the British Empire held that Parliament possessed continuing sovereignty, judges in former dominions are able to change the common law of their newly independent legal systems so that it deems Parliament's sovereignty to have been permanently terminated.

Oliver mentions this theory, and rightly dismisses it, although without adequate discussion.[22] It is worth reflecting on why it is wrong. If Hart is right about the nature of fundamental rules of recognition, the doctrine of parliamentary sovereignty is constituted by a consensus among the senior officials of all branches of government. It was not (as history confirms) made by the judges alone. Its content is fixed by official consensus, and it is unclear insofar as there is no consensus. It cannot be changed unilaterally by any one branch of government, unless it is part of the consensus that

[20] See final paragraph of Section III, Part B(2), below.

[21] The latest expression of this theory is in the judgment of Lord Steyn in *Jackson* v. *Her Majesty's Attorney-General* [2005] UKHL 56 at para. 102.

[22] Oliver, *Independence*, pp. 10, 80, 300 and 304 n. 71.

it can be so changed, and there is little evidence that there is. Of course, any change to a rule of recognition must start somewhere: someone has to initiate the requisite change in consensus. The courts can attempt to initiate change, but they can succeed only if other branches of government are willing to accept it.[23]

B Limitations imposed by Parliament

The second alternative is that Parliament can limit or abdicate its own authority. There are at least four versions of this alternative:

(1) The procedurally self-embracing theory

According to the so-called 'new' theory of parliamentary sovereignty, originating in the work of Ivor Jennings, Parliament can subject itself to manner and form requirements but not substantive limits.[24] On this view, Parliament's authority is procedurally self-embracing but substantively continuing.[25] Oliver argues that the new theory collapses into a full self-embracing theory, because no stable distinction can be drawn between procedural requirements and substantive limits.[26] I disagree, on the ground that courts are capable of sensibly drawing such a distinction, notwithstanding the possibility of difficult borderline cases raising questions of degree.[27] A procedurally self-embracing theory is explained and defended in Chapter 7, below. But in any event, the 'new' theory is irrelevant for Oliver's purposes, because genuine dominion independence involves the termination of Parliament's substantive authority, which cannot be achieved by manner and form requirements. But the new theory remains highly relevant to constitutional reform within the

[23] For more detailed discussion, see Chapter 2, Section III above.

[24] Oliver, *Independence*, pp. 80–1.

[25] G. Winterton, 'The British Grundnorm: Parliamentary Sovereignty Re-examined' *Law Quarterly Review* 92 (1976) 591 at 604.

[26] Oliver, *Independence*, pp. 77–9. Winterton expresses the view that it is logically incoherent to maintain that sovereignty can be procedurally self-embracing but substantively continuing, but nevertheless advocates the manner and form theory for pragmatic reasons: Winterton, 'The British Grundnorm', 604–5.

[27] I advocated that the new theory be adopted in Goldsworthy, *The Sovereignty of Parliament*, at pp. 14–15 and 244–5. However, the failure of British courts to accept the theory means that it cannot yet be regarded as an established part of the rule of recognition in Britain. For my views on drawing the necessary distinction, see J. Goldsworthy, 'Manner and Form in the Australian States' *Melbourne University Law Review* 16 (1987) 403 at 417–25 and Chapter 7, below.

United Kingdom.[28] It is worth noting, in this regard, that the new theory is inconsistent with the popular notion that the doctrine of implied repeal is somehow essential to parliamentary sovereignty. As I will later argue in more detail, it is difficult to find any good reason for that notion.[29]

(2) The full self-embracing theory

Oliver discusses in more depth the theory that 'Parliament had unused (and therefore hidden) powers' (that is, not widely recognised) to limit, procedurally or substantively, or even to abdicate, its own authority.[30] He calls this the 'revised' theory of parliamentary sovereignty, and credits R.T.E. Latham with its first scholarly exposition.[31] It is an extension of the 'new' theory. In my opinion, the main objection to the 'revised', or full self-embracing, theory is essentially the same as the objection to common law constitutionalism. Indeed, the two theories may have originated in the same error. Ivor Jennings seems to have been among the first theorists to mistakenly claim that the doctrine of parliamentary sovereignty was a creature of common law,[32] and then to infer that, since Parliament can change the common law, it can change the law concerning its own authority. The problem is that the doctrine is quite unlike ordinary common law rules and principles, because it was not made by the judges and cannot be unilaterally revised by them. By the same token, it was not made by Parliament: it was not, and could not have been, prescribed by statute, since any such statute would beg the question of Parliament's authority to enact it. It is deeper and more enduring than both statute law and ordinary common law. Since it is the source of Parliament's authority, it is prima facie superior to Parliament, and the notion that Parliament can alter it at will is therefore implausible. It is a creature of consensus among the senior legal officials of all branches of government. It can be altered by Parliament unilaterally only if there is a consensus to that effect among senior officials, and there is little evidence that there is. Indeed, Oliver concedes that the continuing theory has traditionally enjoyed much more support among officials, as well as theorists, than the self-embracing theory.[33] A rule of recognition can be changed only if the consensus that constitutes it changes. Parliament can

[28] See the Conclusion to this chapter.

[29] See Chapter 7, Section III, below.

[30] Oliver, *Independence*, p. 9. [31] *Ibid*., pp. 85–6. [32] *Ibid*., p. 82.

[33] *Ibid*., pp. 77 and 294. The decision in *Factortame* v. *Secretary of State for Transport (No. 2)* [1991] AC 603 (HL) is arguably consistent with the continuing theory, as Oliver concedes at *ibid*., p. 10. For discussion of the case, see Chapter 10, Section III, Part C, below.

attempt to initiate such a change, by enacting legislation that purports to limit or abdicate part of its authority, but it will succeed only if the courts are willing to accept it.[34]

It is worth noting that there are reasons of political morality, as well as of jurisprudential analysis, to prefer that the doctrine of parliamentary sovereignty be changed – and Parliament's authority limited – only through a change in the consensus among senior legal officials in general, rather than by either the courts, or Parliament, unilaterally. In other words, there are reasons to prefer the weak version of the theory of continuing sovereignty, together with a theory of change in official consensus, to either common law constitutionalism or the theory of full self-embracing sovereignty. These are reasons of democratic principle. If the courts had authority unilaterally to change the doctrine, they could impose all kinds of limits on Parliament's authority without any democratic input. This would amount to a profoundly undemocratic process of constitutional change. And if Parliament had such authority, a political party with temporary control of both Houses could protect its partisan policies, enacted into law, from amendment or repeal by majorities in future Parliaments, which would also be undemocratic. Full self-embracing sovereignty is undiscriminating: it seems to maintain that Parliament has authority 'to bind itself by any and all means' so long as these means are very explicit.[35] This entails that Parliament can bind itself not only in ways that would generally be regarded as desirable, but also in ways that would generally be regarded as profoundly undemocratic. Requiring a change in the consensus of senior legal officials in general, builds some checks and balances into the process of constitutional change.[36]

(3) The constituent power theory

Another version of the second alternative is that, although the rule of recognition included the rule that Parliamentary sovereignty was continuing, Parliament possessed constituent (constitution-amending) authority to alter the rule of recognition, in order to give itself

[34] See text to n. 23 above.

[35] Oliver, *Independence*, p. 308.

[36] Elsewhere, Oliver has remarked that '[i]ronically, if Parliament's … self-limiting ambitions are to be checked in the future, Goldsworthy and others may find themselves arguing that it is up to the courts to intervene': P. Oliver, 'Sovereignty in the Twenty-First Century' *KCL* 14 (2003) 137 at 169. In a case such as that mentioned in the previous sentence, I would indeed urge them to do so. See also the second paragraph of the Conclusion, below.

self-embracing legislative authority, and it was then able to abdicate its authority over the dominions.

Oliver attributes this view to Neil MacCormick (whether correctly or not), and without advocating it himself, apparently regards it as arguable.[37] But to me it seems bizarre. Why would the rule of recognition maintain that Parliament has no authority to limit its own authority, but does have authority to give itself authority to limit its own authority, by changing the rule of recognition? What would be the point of an official consensus to that effect? Moreover, how in practice would Parliament alter the rule of recognition, other than by simply ignoring its supposed inability to limit its own authority, enacting a statute that imposes such a limit, and thereby altering the rule of recognition by implication? Surely it would not have to enact two statutes in sequential order: first, one that expressly changes the rule of recognition, by declaring that henceforth it can limit its own authority, and only then, one that imposes such a limit? According to Oliver, MacCormick's view was based partly on the *Factortame* case, which 'confirmed that the power of change was available even to modify the supreme criterion of the rule of recognition'.[38] But, as Oliver acknowledges, if the European Communities Act 1972 managed to impose limits on Parliament's authority by changing the rule of recognition, it did so in one fell swoop, rather than by a two-step process.[39] In other words, on this view, Parliament limited its authority by simply ignoring the supposed rule that it could not do so. What, then, could the practical point of that rule have been? Even if Parliament did have to use a two-step process, it would be so easy to do so that the point of initially denying that it could bind itself would be obscure. Perhaps that is why Oliver at one point describes MacCormick's position as 'an outright endorsement of the "revised" or "self-embracing" view of parliamentary sovereignty'.[40] If it is, then B(3) collapses into B(2).

In any event, the view attributed to MacCormick is incompatible with Oliver's acknowledgement that 'Parliament cannot literally amend or change the rule of recognition'. All it can do is 'propose' new criteria for potential recognition, which are 'confirmed' only if and when the courts accept them. Oliver emphasises that neither Parliament nor the courts have exclusive authority in such matters. 'A true account [lies] somewhere

[37] Oliver, *Independence*, pp. 307–8, summarising pp. 303–6. MacCormick's theory is also discussed in A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2009), pp. 89–90.

[38] Oliver, *Independence*, p. 305.

[39] *Ibid*., p. 309. [40] *Ibid*., p. 304.

in between, in the relationship between [Parliament's] power and [the courts'] recognition."[41] The consensus that constitutes the rule of recognition can only be changed by Parliament and the courts coming to agree on such a change. But this sounds like my own theory (C(3)), which is explained below.

(4) The abdication theory

A.V. Dicey's view was that, although Parliament cannot limit its authority, it can abdicate it. On this view its authority is for the most part continuing, but self-embracing in the case of abdication. Oliver, following H.W.R. Wade, doubts the coherence of this view and does not take it seriously.[42]

I agree that Dicey's view is erroneous, but not that it is incoherent. Indeed, it is superficially quite plausible. There are at least three important differences between an abdication of Parliament's authority, at least with respect to some external territory, and an attempt to limit its authority within (say) England itself: (a) a difference in political principle; (b) a difference in the likelihood of a subsequent attempt to reverse the abdication or limitation; and (c) a difference in the likelihood that an attempted reversal would succeed.[43]

The first difference is that the principle of democracy will often disfavour a limitation, but favour an abdication. As Oliver points out, from the perspective of democracy, continuing sovereignty may seem desirable if it disables a bare parliamentary majority from preventing its enacted policies being amended or repealed by a future majority of a different political persuasion, but is plainly undesirable if it prevents a majority of Canadians from governing their own affairs free of external interference.[44]

The second difference is straight-forward: the historical record shows that once Parliament abdicates its authority to change the law of a dominion, it is very unlikely that any future Parliament will seek to resume that authority. This is partly because it is almost always regarded as irreversible, for practical if not legal reasons. The same is not true of attempts to limit

[41] *Ibid*., p. 303–4, n. 71.

[42] *Ibid*., pp. 289 n. 15, 59–60 and 315 n. 1. See also Winterton, 'The British Grundnorm', 602.

[43] I acknowledge that Dicey may have had in mind only a complete abdication of the entirety of Parliament's authority, and not a partial abdication of its authority with respect to some external dominion: see Oliver, *Independence*, pp. 60 and 289, n. 15. But any reasons for conceding the possibility of a complete abdication apply equally to such a partial abdication.

[44] Oliver, *Independence*, p. 324.

Parliament's authority to legislate within territory over which it otherwise retains legislative authority. In many conceivable cases – admittedly not all – future parliaments are quite likely to want to repeal or even just ignore those limits.

The third difference is equally straight-forward. If Parliament purports permanently to abdicate its authority with respect to a dominion, whose officials (including judges) consequently regard their legal system as independent, it becomes impossible for Parliament unilaterally to reimpose its authority to change the law of their system. Its authority can be reimposed only with their acquiescence or by conquest. This was well understood by Sir William Anson in 1886:

> Suppose that legislative independence were to be conceded to the colony of Victoria … Would it be maintained that our Parliament could still legislate for Victoria, or that the Victorian Courts need regard such laws as anything but specimens of legislation, instructive perhaps, but certainly inoperative? I should be disposed to contend that Parliament could only regain its power in one of two ways. Acts passed by the Parliament of Victoria and the Parliament at Westminster might provide for a legislative re-union of the two countries … Or war and the suspension for a while of all legal relations might leave Victoria in the position of a conquered territory with which the Imperial Parliament could deal as it pleased.[45]

British judges could, of course, pretend that Parliament retained authority to change the former dominion's law – rather than merely to change British law concerning persons or activities within its territory[46] – but that would be transparent make-believe. Even they would know that it was pure fiction. On the other hand, if Parliament purports to limit its authority within territory (such as England) over which it otherwise retains general legislative authority, it is much less likely to be impossible for it subsequently to repeal the limit. Given the number of times British judges have endorsed the theory of continuing sovereignty, it seems very likely that, in many cases, they would uphold the validity of such a repeal.

The difference between abdicating and limiting legislative sovereignty is like the difference between a chocoholic giving his chocolate to someone else to eat, and keeping it while promising not to eat it. Once he has given the chocolate away, it may be practically impossible for him to get it back – and definitely will be, once it has been eaten; whereas his promise

[45] 'The Government of Ireland Bill and the Sovereignty of Parliament', *Law Quarterly Review* 2 (1886) 427 at 440.

[46] See the explanation of this distinction at the start of Section II, above.

not to eat chocolate remaining in his possession is unlikely to be effective once his craving for it revives.

This third difference is the most significant for legal purposes. Advocates of parliamentary sovereignty have always acknowledged that Parliament cannot do what is naturally impossible, such as to change a man into a woman. If it is practically impossible for Parliament unilaterally to reimpose its authority to change the law of an independent former dominion, why should the doctrine of parliamentary sovereignty not acknowledge that fact? On the other hand, someone once said that Parliament could require that a man be treated as if he were a woman. Perhaps, then, Parliament could require British judges to treat the law of Canada or Australia – for purposes of private international law, for example – as if it were something it is plainly not. But what would be the point? After all, Parliament could also enact a law purporting to change the law of France, Mexico or any other country, and require British judges to pretend that it had succeeded. When pushed this far, the theory of continuing sovereignty starts to look silly.

Another way of trying to tease out this third difference is as follows. The orthodox theory of continuing sovereignty does not assert that it is positively unlawful (whatever that might mean in this context) for Parliament to pass a statute including a provision purporting to restrict its authority to amend or repeal the statute. What that theory asserts is, instead, that any such provision is doomed to be ineffective, because it can at any time be repealed by a later statute, impliedly as well as expressly – which means that it can be ignored. According to Wade, such a provision is perfectly valid, but subject to the same infirmity that 'is shared by all the Acts that are ever passed, viz., the possibility of being repealed'.[47] This has been disputed: it has been argued that such a provision is therefore void *ab initio*, because it is in effect a nullity. As Michael Detmold puts it, 'nothing can be law which does not bind the only body it purports to bind'.[48] But now consider an Act granting independence to a dominion, which includes a provision that purports to terminate Parliament's authority to repeal the Act. If Wade is right, then if a later statute purporting to repeal that Act is ineffective, does it not follow that the provision, valid when passed, remains valid and effective? And even if Detmold is right, if the later

[47] See H.W.R. Wade, 'The Basis of Legal Sovereignty' *Cambridge Law Journal* (1955) 177 at 186.

[48] See M.J. Detmold, *The Australian Commonwealth, A Fundamental Analysis of Its Constitution* (Sydney: Law Book Co., 1985), p. 212.

statute is ineffective, is it not void in the independent former dominion, because there, it does not bind the only bodies that it purports to bind – namely, the officials including judges who administer the local law? To put this another way, if the original Act granting independence cannot *effectively* be repealed, then in practical terms, Parliament has succeeded in binding itself, even if British courts choose to pretend otherwise.

The most likely response to this argument is that it rests on practical rather than legal (normative) efficacy, and is a fig leaf for successful revolution and real-politic. Both Wade and Detmold rely on considerations of efficacy. Wade maintains that a provision that prohibits its own repeal is doomed to be ineffective – even though it is legally valid – because it can be repealed at any time. If it is, in fact, legally valid, then its repeal must be legally invalid, in which case Wade is relying on practical rather than legal efficacy. Perhaps this shows that Detmold is right – the original provision prohibiting its own repeal must have been void all along – and that Detmold is speaking here of legal rather than practical efficacy. But I will drop the analysis at this point: it is, perhaps, becoming unprofitably convoluted.

Whatever the merits of the preceding argument, Dicey's opinion that Parliament cannot limit, but can abdicate, its authority is flawed. Even when Parliament appears to have successfully abdicated its authority, independence is not the consequence of the abdication by itself, but of the abdication together with its acceptance by officialdom within the newly independent legal system. In other words, it is the consequence of a change in the official consensus that constitutes the rule of recognition of that legal system. An attempted abdication might not always contribute to such a change. Imagine a situation, for example, in which Parliament purports irrevocably to abdicate its authority with respect to a colony whose population and officials do not want independence. If a subsequent Parliament, at the request of the former colonials, were to pass a statute repealing the abdication and reasserting British sovereignty over them, that statute would no doubt be accepted as valid and binding by their courts as well as British ones. (Indeed, the original abdicating statute might simply be ignored – and repealed by implication – by Parliament passing ordinary legislation changing the law of the former colony.) Furthermore, it is possible – as we will see – for the rule of recognition within Britain itself to change, so that Parliament's authority might be limited at home. Dicey was wrong to say that Parliament can abdicate, but not limit, its authority. It cannot achieve either result unilaterally: such changes require a change in the broader official consensus

that constitutes the relevant rule of recognition. The truth in Dicey's distinction is that a purported abdication is much more likely to contribute to the requisite change in that consensus, and therefore to prove enduring, than a purported limitation.

C Limitations imposed by a change in official consensus

The third alternative is that, as explained previously, the rule of recognition is constituted by a consensus among all branches of government, and therefore can be changed neither by the courts, nor by Parliament, unilaterally, but only by a change in the consensus that they share. There are three versions of this alternative:

(1) The hard cases theory

Oliver's own theory is that prior to dominion independence, it was unclear whether parliamentary sovereignty was continuing or self-embracing. Both theories were equally plausible from the points of view of logic and precedent.[49] The apparent dominance of the continuing theory within Britain itself was based more on dogma than judicial authority, because Parliament had not yet made an unambiguous attempt to limit or abdicate its authority, and there had been no firm judicial determination of the question. (Oliver shows that the trio of early twentieth-century cases most often cited in support of the continuing theory are, in fact, equivocal on the point.[50]) When Parliament unambiguously purported to confer independence on its dominions, its actions raised a question not settled by determinate law. If judges are ever required to resolve that question, it will be a 'hard case' that requires them to make a choice guided by principles of political morality.[51] Judges in the former dominions could and should choose to interpret Parliament's sovereignty as self-embracing,

[49] If the law concerning Parliament's power to limit itself really is indeterminate, then is it arguable that Parliament is not legally barred from conferring independence on a dominion or limiting its powers in some other way – and therefore, that it has legal liberty to do so? In other words, is there a kind of default position, similar to the way in which common law liberty is usually conceived of: whatever is not positively prohibited, is permitted? The problem with this is that it is self-contradictory: the conclusion that Parliament is at liberty to limit its own power, because it is not positively prohibited from doing so, contradicts the premise that the law is indeterminate. If Parliament is at liberty to limit its own power, then a self-embracing theory (B(1) or (2)) should be preferred. In effect, on this view, a self-embracing theory is the default position if the continuing theory is not firmly established as law.

[50] Oliver, *Independence*, pp. 9, 70–2 and 306–8. [51] *Ibid*., pp. 54 and 341.

even if their British counterparts were to interpret it as continuing.[52] (At this point, Oliver invokes a theory of legal systems to show that there is no good reason why judges in separate legal systems should not adopt different, even contradictory, interpretations of legal norms, even those they once held in common: 'Australia, Canada and New Zealand are entitled to adopt distinct interpretations of the Westminster Parliament's powers in so far as that institution affects their own legal systems, just as they may adopt distinct interpretations of what was originally a common law of contract and tort.'[53]) This is because the former should choose the solution that is 'most fitting according to an amalgam of cultural, social, political and historical factors, including the issues of popular sovereignty, international acceptance and inter-societal acceptance and legitimation'.[54] Note that on this view, when the judges hold that Parliament has self-embracing sovereignty, they (together with Parliament) are changing the rule of recognition only by adding something to it in order to resolve an indeterminacy – they are not changing something that was previously well settled.

As previously mentioned, I also have reservations about this theory, which I will attempt to explain after summarising the other alternatives.

(2) The legal revolution theory

On one view, any change in the consensus that constitutes a rule of recognition, and therefore in the rule itself, amounts to a revolution, even if it is an amicable, 'legal' revolution. According to the original rule of recognition, Parliament's authority was continuing – in the strong sense of the term – not self-embracing.[55] Modern developments, including the acquisition of independence by former dominions, and the disapplication of statutes pursuant to the European Communities Act 1972, are incompatible with that rule. The rule has therefore been changed by a legal revolution. This is the theory of H.W.R. Wade, whom Oliver describes as Dicey's most eloquent apologist.[56]

There is much of merit in Wade's theory. He is right to deny that Parliament can unilaterally limit or abdicate its own sovereignty. What is required is a change in the official consensus that underpins Parliament's authority. But why describe a wholly consensual change in that consensus as extra-legal and revolutionary? There are two possible reasons. One

[52] *Ibid*., pp. 10–1 and 341. [53] *Ibid*., p. 311. [54] *Ibid*., pp. 341–2; see also pp. 318 and 24.
[55] See last two paragraphs in Section II, above.
[56] Oliver, *Independence*, pp. 8–9 and 20.

is that the current official consensus positively forbids such a change in relation to parliamentary sovereignty: this is the strong version of the theory of continuing sovereignty. I have already argued that this should be rejected, because it would be foolish and arrogant to purport to forbid the consensus from evolving to satisfy unforeseeable future needs.[57] The second possible reason is that the rule of recognition does not self-consciously recognise the process by which it was itself created, and can be changed, as authorised by a legal 'rule of change'. Because the rule of recognition is itself the foundation of the legal system, its own foundation – the circumstances that explain its own existence and content, and the process by which those circumstances change – are necessarily 'extra-legal', lying beneath or outside the law.

But surely it can be argued, to the contrary, that in an unwritten constitution such as Britain's, the most fundamental secondary rules including the rule of recognition are a kind of customary law, comprised of customary norms of legal officialdom that are acknowledged to be justiciable.[58] Customary law is not static: it evolves along with the consensus that constitutes it. Elsewhere, I have argued that '[t]here are important differences between abrupt changes to fundamental legal rules, imposed on many senior officials through their coercion or removal from office, and gradual changes resulting from a voluntary change of mind on their part in response to broader social developments. In the latter case, it may be appropriate to say that the rules have evolved legally.'[59] Hart himself had reservations about Wade's use of the term 'revolution' in this context, and called for criteria to distinguish non-revolutionary changes in *grundnorms* from genuine revolutions.[60] As John Allison observes, Hart's account of the rule of recognition as a kind of official customary rule, which changes by implication as custom changes, 'is less vulnerable to sociological criticism than is Wade's analysis of a fundamental rule changed only by judicial revolution'.[61]

This leads to the third version of this alternative:

[57] See the final paragraph of Section II, above.

[58] Other, non-justiciable, customary norms of legal officialdom are called constitutional conventions rather than constitutional laws.

[59] Goldsworthy, *The Sovereignty of Parliament*, p. 245.

[60] J. Allison, 'Parliamentary Sovereignty, Europe and the Economy of the Common Law', in M. Andenas (ed.), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer, 2000), 177 at p. 185, quoting unpublished correspondence between Hart and Wade.

[61] J.F. Allison, *The English Historical Constitution* (Cambridge: Cambridge University Press, 2007), p. 119, the conclusion of an illuminating discussion at pp. 110–19.

(3) The consensual change theory

A wholly peaceful, consensual change in a customary rule of recognition should be regarded as lawful, not revolutionary, and therefore dominion independence was acquired lawfully. This is my own theory, adapted from Hart,[62] although Oliver's description of my book as endorsing 'the traditional, absolutist, orthodox or Diceyan account' suggests otherwise.[63]

It is also a theory recently defended at length by Alison Young.[64] She argues that the theory is perfectly consistent with the doctrine of continuing parliamentary sovereignty, because both the theory and the doctrine deny that Parliament has authority to bind itself.[65] Therefore, she concludes, if Parliament were to be bound (for example, by a requirement that some future law can only be passed with the approval of a majority of voters in a referendum) as a result of a change in the rule of recognition, rather than just by Parliament itself, the doctrine of continuing parliamentary sovereignty would not be 'breached' or 'violated'.[66] This is true in one sense; but of course, if parliament were to be bound in that way, it would no longer possess sovereignty of any kind – continuing or self-embracing – and so the doctrine of continuing parliamentary sovereignty would be breached or violated in another sense. Perhaps all that Young has in mind in her discussion of a change in the rule of recognition is the imposition of 'manner and form' requirements that do not diminish Parliament's sovereignty because they leave intact its substantive power to change the law.[67] But if so, the main reason for Parliament continuing to possess sovereignty would be that such requirements pose no threat to it, regardless of how they are imposed. It would not matter very much

[62] See text to n. 59, above.

[63] Oliver, *Independence*, p. 76. It is not clear what this orthodox, Diceyan account is: of the alternatives listed above, is it B(4) – Dicey's own view – or C(2) – Wade's view? Oliver suggests that the Diceyan account is incompatible with twentieth century developments, such as dominion independence and European legal order: loc. cit. Yet neither B(4) nor C(2) are incompatible with both of those developments, although C(2) is incompatible with their being 'lawful'. Neither is my own theory, according to which the customary rule of recognition can evolve lawfully. Oliver's suggestions are therefore puzzling. Furthermore, in my book I explicitly adopt what Oliver calls the 'new view', which accepts the validity of 'manner and form' requirements: see n. 27, above.

[64] Young, *Parliamentary Sovereignty and the Human Rights Act*, ch. 3.

[65] *Ibid*., pp. 15, 66, 73–4, 82–5, 90 and 168.

[66] *Ibid*., pp. 15, 23–4, 65, 68, 75, 77, 83, 85, 86 and 93.

[67] This is suggested by statements at *ibid*., pp. 28 ('It is possible for rights to be entrenched and for Parliament to retain continuing sovereignty'), 83 ('the sovereignty of Parliament is preserved, as courts only recognise as valid those legislative measures passed by the sovereign law-making institution in the prescribed manner') and 161.

whether we were to explain their imposition in terms of a change in the rule of recognition, or in terms of the procedurally self-embracing theory (theory B(1) above).

My own theory requires some elaboration. If, contrary to a firmly established rule that a constitution or some part of it is either immutable, or can be changed only by a particular process, all the senior officials agree to change it – or perhaps even to adopt an entirely new constitution – without following that process, their behaviour could fairly be described as revolutionary even if it is wholly consensual. I am assuming that Britain's unwritten, customary constitution does not include any such established rule that either forbids fundamental constitutional change, or mandates a specific procedure for bringing it about.[68] As John Allison has shown, it is the nature of such a constitution that it undergoes 'minimal and gradual revision'.[69] Even so, a radical change from one system of government to another – say, from parliamentary democracy to fascist dictatorship – might aptly be described as revolutionary even if it were brought about by a peaceful change in the consensus among senior officials. The distinction between revolutionary and non-revolutionary change in an unwritten, customary constitution probably depends partly on the extent to which change is incremental rather than radical (however that is measured). It seems to me that the concept of revolution is incurably vague in this respect.

IV Oliver's theory scrutinised

If we reject Wade's talk of revolution, along with the other theories that I have previously criticised, the remaining contenders are Oliver's theory and my own. It is now time to explain my reservations about his theory.

1. Oliver often refers to the rule of recognition – which includes the doctrine of parliamentary sovereignty – as something that changes or evolves. He accepts that it is a kind of customary law.[70] In an important passage that is unfortunately relegated to a footnote, he acknowledges that it cannot be changed either by the courts or by Parliament unilaterally. Parliament cannot make changes by itself: it can only propose changes, which must then be accepted, or 'recognised' as law, by the courts. The courts also cannot change the rule of recognition on their own initiative

[68] See text to n. 47, and the final paragraph of Section II, above.
[69] Allison, *The English Historical Constitution*, p. 127.
[70] Oliver, *Independence*, pp. 19, 24, 82, nn. 41 and 313.

and by their own authority. Their role is limited to deciding whether or not to recognise changes to the rule proposed by Parliament when it enacts constitutionally novel legislation. Change to the rule of recognition is therefore the product of agreement between Parliament and the judiciary.[71]

The argument in this footnote does not fit altogether comfortably with Oliver's recommendation that dominion courts adopt the self-embracing theory of Parliament's sovereignty. The self-embracing theory holds that Parliament has authority to change the rule of recognition by limiting its own authority, whereas the footnote maintains that Parliament can only propose such a change. If Parliament has authority to make changes, then the courts must recognise them; but if Parliament is only able to propose changes, then the courts must choose (on grounds of political morality) whether or not to accept and recognise them. I take it that Oliver reconciles these positions in the following way: (a) before the courts adopt the self-embracing theory, Parliament does not have authority to change the rule of recognition by limiting its own authority, because the question is legally indeterminate; (b) when the courts accept Parliament's first attempt to do this, it acquires self-embracing authority, and can then change the rule of recognition in relevant respects by imposing new limits to its authority. In other words, the self-embracing theory becomes law prospectively, through the courts' acceptance of Parliament's innovation. I will return to this point.

2. The position Oliver adopts in this footnote sounds much like Hart's theory, which I have adopted, of how a customary rule of recognition can change.[72] Are there any significant differences between us? One difference is that Oliver apparently regards change in a customary rule of recognition as lawful rather than revolutionary only if it amounts to the resolution of indeterminacy in the rule, by way of clarification of some question that was previously unclear. He agrees with Wade that any change to a determinate, settled aspect of the rule – even if the change is consensual – must be classified as revolutionary.[73]

[71] *Ibid*., pp. 303–4 n. 71.

[72] So much so that I am puzzled as to why Oliver alleges that I pay little attention to the possibility of change initiated by Parliament (p. 300), claims that MacCormick has addressed precisely that issue (*ibid*.), but then while expounding MacCormick's views, adopts in a footnote a position much closer to mine than to MacCormick's (pp. 303–4 n. 71). See Goldsworthy, *The Sovereignty of Parliament*, pp. 244–5.

[73] See Oliver, *Independence*, p. 314: Parliament's relinquishing of its powers 'is a "disguised revolution" if that Parliament's powers are irrevocably continuing in nature'.

This position is vulnerable to two objections. The first is that the putative distinction between lawful judicial resolution of an indeterminate aspect of the rule of recognition, and revolutionary consensual change of a determinate aspect of it, is dubious. It seems to assume that, just as courts have acknowledged authority to resolve uncertainties in ordinary laws, or in written constitutions, they must also have authority to resolve uncertainties in unwritten, customary rules of recognition.[74] Hart denied this:

> The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success … Where this is so, it will often in *retrospect* be said, and may genuinely appear, that there always was an 'inherent' power in the courts to do what they have done. Yet this may be a pious fiction, if the only evidence for it is the success of what has been done.[75]

If Hart was right, then *any* substantial change to a customary rule of recognition – even the settlement of some previously unsettled question – requires a change in the consensus of senior officials that constitutes the rule. The courts should not be assumed to possess inherent legal authority to bring about any change of that kind. Oliver appears to agree. But if in some cases such a change is revolutionary, because it is brought about without lawful authority, why is it not revolutionary in all cases – in other words, whether or not the rule of recognition was previously indeterminate? My theory draws a different, arguably more plausible, distinction between lawful and revolutionary change.

The second objection is that, if the continuing theory of parliamentary sovereignty was, as a matter of law, firmly established immediately prior to dominion independence, then even Oliver would have to agree with Wade that independence was achieved through legal revolution. His theory is therefore hostage to proof that the continuing theory was indeed firmly established at that time. If it could be shown that Hart was right to assert, in 1961, that 'it is clear that the presently accepted rule is one of continuing sovereignty', then Oliver's theory would be refuted.[76] His own acknowledgements that, in the early part of the twentieth century, the continuing theory was almost universally accepted by lawyers in the dominions as well as the United Kingdom,[77] count against him. He has

[74] See Oliver, *Independence*, p. 94. [75] Hart, *The Concept of Law*, p. 149. [76] *Ibid*., p. 146.
[77] E.g., Oliver, *Independence*, pp. 5, 8, 9, 21 and 294.

two counter-arguments. One is that those lawyers were deceived by faulty logic and an erroneous reading of the case-law.[78] But it could be urged in response that a rule of recognition simply is whatever rule officials in fact accept, regardless of how erroneous their underlying reasoning might be. His second counter-argument is that the law on such a matter cannot be regarded as settled until it has been authoritatively determined by a court.[79] But this may be to confuse rules of recognition with ordinary common law rules. If it were sound, then arguably the doctrine of parliamentary sovereignty as a whole – and not just the side-issue concerning whether Parliament can limit itself – would be 'penumbral' and legally uncertain.[80] According to Hart, rules of recognition are often not explicitly formulated, but must be inferred from the practices of officials in general.[81] If so, then their existence does not depend on their being, like common law *rationes decidendi*, laid down by an authoritative judicial decision.[82]

My theory has the advantage that it does not depend on the rule of recognition being, in this respect, unsettled before dominion independence was achieved. Even if the rule did clearly maintain that Parliament's authority was continuing, I would describe the termination of Parliament's authority as lawful. My theory does not formally contradict the thesis that Parliament's power was continuing, if that is the sensible, weak version of the thesis, meaning merely that Parliament cannot bind itself.[83] My theory maintains not that Parliament can bind itself, but that Parliament can become lawfully bound as a result of consensual change in the customary rule of recognition. On the other hand, as previously noted, Oliver does not countenance this possibility.[84] He appears to assume that there are only two alternatives: either Parliament's authority is continuing, in the strong sense that rules out the imposition of any substantive limit on Parliament's authority, or its authority is self-embracing.[85] He ignores the

[78] *Ibid*., pp. 9 and 306.

[79] *Ibid*., pp. 10, 307 and 319.

[80] Oliver implies as much at *ibid*., p. 10, where he says that 'one sort of penumbral issue' is whether 'certain imaginary and as yet unenacted legislation by Parliament is beyond the pale'. But this seems inconsistent with his usual stance of accepting that the 'core' of the doctrine of parliamentary sovereignty is firmly established.

[81] Hart, *The Concept of Law*, p. 98.

[82] See Goldsworthy, *The Sovereignty of Parliament*, pp. 6 and 238–43.

[83] See the final paragraph in Section II, above.

[84] See text to nn. 18 and 19 above.

[85] For examples of his expression of this assumption, see Oliver, *Independence*, pp. 87 and 297.

possible third alternative: that Parliament's authority is continuing, in the sense that Parliament cannot unilaterally limit it, but can be lawfully limited through a change in the official consensus from which it derives.

3. Since Oliver's argument depends on the law on this point not being settled one way or the other – in other words, on the question being a 'hard case' – he can fairly be asked to choose between a Dworkinian and a positivist account of hard cases. He expresses a preference for a positivist account, but claims that both would reach the same conclusion on the question of dominion independence.[86]

I suspect that a Dworkinian account would be problematic for Oliver. For one thing, Dworkin does not accept the existence of rules of recognition that provide the foundation or source of legal authority. In addition, Dworkin assumes that there is always a 'right answer' to legal disputes. If so, the law must have granted either full self-embracing, partial self-embracing (abdicating), or continuing authority to Parliament, even though its content was so unclear that it may be impossible to conclusively establish except by a superhuman, omniscient judge (Dworkin's imaginary Judge Hercules). Courts are not free to adopt whatever answer seems most convenient, or most politic. They are duty bound to seek the right answer, which is the answer that makes the law as a whole 'the best it can be'. This means that it is the morally best answer of all those that 'fit' the institutional history of the legal system in question.

One obstacle to Oliver accepting such an approach is that it threatens his theory (C(1)) with collapse into the full self-embracing theory (B(2)) (or perhaps the abdication theory (B(4)). If the right legal answer, notwithstanding its obscurity, is that Parliament did possess some kind of self-embracing sovereignty, then either the full self-embracing theory, or the abdication theory, would seem to be vindicated. Parliament had self-embracing powers all along – either full or partial – even though they were 'hidden'.[87]

Oliver might reply that there is no single right answer, but many of them, because rightness varies from one legal system to another. It is possible that the right answer in a newly independent dominion might

[86] Oliver, *Independence*, p. 318, n. 10. Sometimes, though, Oliver writes as if he accepted a Dworkinian account. For example, he says that when courts resolve a hard case concerning whether or not Parliament possessed self-embracing authority, they settle the 'true' nature of its sovereignty – as if there were a 'right answer' waiting to be authoritatively identified: p. 319. But perhaps he means merely that a judicial determination creates legal truth prospectively, rather than discovers what the truth was all along.

[87] Oliver, *Independence*, p. 9.

be different from the right answer in Britain, because they have different bodies of law, and the answer that makes each of them 'the best it can be' might therefore be different. He sees no difficulty here, no reason why independent legal systems should not adopt distinct, even conflicting, interpretations of laws or legal processes they once held in common (in this case, the law governing parliamentary sovereignty).[88] Such 'local interpretations of the same Westminster processes are clearly incompatible, but as separately functioning internal perspectives this incompatibility is of no consequence'.[89]

At the risk of over-complicating matters, and then leaving them unresolved, I will simply pose some questions about this possible reply. One is whether Oliver would be begging the central question. The central question is whether or not the independence of the former dominions was acquired lawfully. Oliver relies on theories of legal systems to demonstrate that they are independent, and then argues that consequently, their courts are entitled to adopt distinct interpretations of the process by which they acquired independence.[90] But if the theories of legal systems that he relies on merely establish de facto independence, how can they assist in vindicating de jure independence? If, as a matter of law, their independence was acquired unlawfully, how can the mere say-so of de facto independent courts override that fact?[91] And if a court's legal system is not de jure independent, is it entitled to infer a distinct 'right answer' from a separate, selective institutional history?

My second, related question concerns Dworkin's thesis that the right answer must be derived from the principles of political morality that provide the best justification of the institutional history of the legal system in question. If a hard case concerns the nature of a power or right exercised by a person or institution at some past time, does the Dworkinian judge seek the best justification of the institutional history as it stood *at that time*, or of the institutional history right up to the time when the judge must decide the hard case? If the former, then there can be only one right answer to a question about the nature of the power possessed by the Westminster Parliament at a particular time. If the latter, then there could in principle be many right answers, because truth would be relative

[88] *Ibid*., pp. 11 and 17.

[89] *Ibid*., p. 23; see also pp. 16 and 311.

[90] *Ibid*., pp. 291–300.

[91] If the Westminster Parliament enacted legislation not only reasserting its legislative authority over a former dominion, but also reintroducing a right of appeal from that country's highest court to the Privy Council, then arguably that court would no longer enjoy de jure independence.

to the time and place at which the question is answered. Different answers given by courts in different legal systems at different times – even to a question concerning the same legal power that existed when all were part of a single legal system – might all be correct.

My third question, which arises whenever and from whatever perspective the central question is asked, is whether the morally best answer could possibly be that an obviously independent former dominion, with its own flourishing democratic institutions, is not lawfully independent? The moral case in favour of even British courts acknowledging the legality of independence might be overwhelming. But if so, then if they adopted a Dworkinian approach, they should accept something like the self-embracing theory, or at the very least the abdication theory, as the right answer.

We can perhaps bypass these questions, because Oliver prefers a legal positivist account of hard cases.[92] This assumes that there is no right answer as a matter of law: the law was indeterminate, and neither affirmed nor denied that Parliament possessed either full or partial self-embracing authority. Faced with such a question, courts are at liberty to exercise discretion on grounds of political morality. Oliver argues that courts in former dominions might legitimately choose one answer, and courts in Britain another, given that somewhat different considerations of political morality might bear on their choices. Considerations such as de facto independence, popular sovereignty and democracy should persuade courts in the former dominions to accept that their legal system has lawfully achieved independence, whereas considerations of democracy might persuade British courts to comply with a statute enacted by their Parliament, attempting to reassert its authority to change the law of an independent, former dominion.

A possible problem here concerns intellectual honesty. Oliver says that adopting a self-embracing interpretation of Parliament's powers would 'fulfil the function' of vindicating the constitutional independence of these dominions.[93] But if the law were truly indeterminate – if, as a matter of law, it were not true either that Parliament possessed self-embracing authority, or that it did not – then would it not be intellectually dishonest for courts to hold that as a matter of law it did possess such authority? It would amount to them adopting the self-embracing theory (B(2)) that Oliver himself rejects. It would also be a pious fiction. Its fictional nature would be accentuated if, as Oliver suggests, British judges were to adopt

[92] See text to n. 86, above. [93] Oliver, *Independence*, p. 24.

the opposite, but supposedly equally valid, answer to the same question. This might not, as he asserts, cause any practical difficulty. But to hold that both answers would be equally valid because they would express different 'perspectives' just reinforces the conclusion that they would both be pious fictions. The honest answer would be that the law was indeterminate, and therefore that whether or not independence was acquired lawfully is also legally indeterminate.[94] A court in a former dominion, which adhered to a legal positivist philosophy, could say as much, and then explain that since it must decide the question of independence one way or the other, it would hold the former dominion to be legally independent for reasons of political morality. Admittedly, courts do not usually speak so frankly about their exercise of necessary discretion to resolve legal indeterminacies: they usually speak as if they have uncovered the 'right answer' that was latent in the legal material all along. Dworkin cites just that kind of judicial rhetoric to support his theory. But there is no reason for Oliver to shy away from blunt truths.

Oliver might reply that for a court in a former dominion to hold, for reasons of political morality, that it acquired its independence lawfully, the court would have to hold that the British statute that granted independence was valid – and therefore, if only by implication, that the Westminster Parliament had authority to enact it. And that would amount to choosing the self-embracing theory. But this strikes me as fallacious. Why should the court attribute either continuing, or self-embracing, authority to the Westminster Parliament? Imagine that it must decide whether or not to recognise the validity of a British statute purporting to repeal an earlier statute that granted independence to the dominion. Arguably, all it needs to do is choose whether or not to regard its legal system as independent. It does not need to decide whether or not that independence was acquired lawfully, let alone attempt to explain why it was or wasn't. It could simply accept independence as an established fact, which must now be accepted for legal purposes. If it were to address the question of whether independence was acquired lawfully, it should say that no answer could be given because (*ex hypothesi*) the law was indeterminate. It might *deem* it to have been acquired lawfully, for reasons of political morality. Those reasons have to do with the irreversible change in the political allegiance of legal officials (the judges included), other political elites and the general public in the former dominion, together with principles such as popular sovereignty and democracy. My theory frankly acknowledges that these

[94] See n. 49, above, to help avoid a false step here.

would be the crucial reasons. But for Oliver, it seems, they are inadequate, because they cannot establish that independence was acquired lawfully. They must therefore be supplemented by a post hoc endorsement of the self-embracing theory, which given the fact of independence, has no remaining practical relevance other than as a fictional legal rationalisation for a decision really reached on other grounds.

Could it be plausibly argued that even if the retrospective adoption of the self-embracing theory would be pious fiction, it should be adopted prospectively?[95] The problem is that a hard case involving the granting of independence to a former dominion is unlike most hard cases that must be decided by courts. Usually, a legal indeterminacy concerning the scope of some right or power must be resolved prospectively, one way or the other, in order to pre-empt other disputes that might arise in the future. But here, no future disputes can arise. A court's acceptance that its legal system is lawfully independent entails that Parliament's authority is of no further relevance to it. Parliament no longer has any authority, continuing or self-embracing, to change its laws. Therefore, no future disputes about the nature of that authority can have any relevance to it.[96] It follows that there is no need for the court of the former dominion to adopt a position one way or the other, as to whether Parliament's authority is continuing or self-embracing. That is a matter that can and should be left to British courts.

To summarise this part of the argument: on a positivist analysis, if the nature of Parliament's authority when it purported to grant independence was, as a matter of law, indeterminate, then (a) a decision that it possessed self-embracing authority at that time would be a pious fiction, and (b) a decision that it should thenceforth be taken to possess full self-embracing authority (theory B(2)) would be irrelevant to the circumstances of independent former dominions, and therefore unnecessary.

4. My theory may have the additional advantage, compared with Oliver's, of enabling more fine-grained, discriminating conclusions to be reached. Mine can explain how the rule of recognition can come to accept the validity of some limits to Parliament's authority, but not others. For example, the rule might come to accept the validity of a Bill of Rights enacted by large majorities in both Houses of Parliament after being approved by a majority of voters in a referendum, which future parliaments

[95] See the conclusion of point 1 in this section, above.

[96] Subject to one exception: the nature of Parliament's authority might have some bearing on the nature of the authority that it originally conferred upon the Parliament of the dominion. But any questions of that kind could be decided if and when they arise.

cannot violate without the approval of voters in another referendum, but not the validity of a provision forbidding future parliaments to repeal an ordinary statute passed by a small parliamentary majority from only one political party. On the other hand, the self-embracing theory that Oliver recommends to courts in former dominions seems undiscriminating.[97] It is hard to see how that theory can be subject to qualification. To hold that Parliament has a general authority 'to bind itself by any and all means'[98] is to hold that it can bind itself for either of the purposes just mentioned, or any others.

Even if all of Oliver's premises are well founded, it seems unnecessary, unrealistic and somewhat presumptuous for the court of a former dominion to hold, not only that Parliament was able to abdicate its authority by granting independence to that dominion, but that it possessed full self-embracing sovereignty that could be used for other purposes as well. Oliver insists that the courts of the former dominions should choose the solution that is most fitting to their own circumstances, including 'an amalgam of cultural, social, political and historical factors'.[99] But surely they should also acknowledge that their circumstances are not those of Britain itself, and therefore, that Parliament's sovereignty might not be self-embracing with respect to Britain. Oliver says that dominion courts 'are entitled to adopt distinct interpretations of the Westminster Parliament's powers *in so far as that institution affects their own institutions*'.[100] As previously observed, the principle of democracy would condemn many conceivable attempts to limit parliamentary authority within Britain, while approving most attempts to abdicate authority over stable, self-governing dominions.[101] If so, then instead of adopting the self-embracing interpretation of Parliament's authority, dominion courts should go no further than to adopt the abdication theory (B(4) above), and hold that Parliament was able to abdicate its authority with respect to them, while leaving open the question of whether it could limit its authority in other ways, particularly within Britain itself. Indeed, it may be unrealistic even to assert that Parliament possessed general authority to abdicate its sovereignty. As previously suggested, if Parliament purported to confer independence irrevocably on a dominion that did not want it, and a later Parliament (with that dominion's consent) repealed the independence

[97] See text to n. 35, above.
[98] Oliver, *Independence*, p. 308 (so long as those means are very explicit).
[99] *Ibid*., p. 341. [100] *Ibid*., p. 311, emphasis added. [101] See text to n. 44, above.

statute and resumed its authority over the dominion, the dominion's own courts would no doubt accept the repeal as valid, thereby presumably rejecting the theory that the earlier Parliament possessed authority to abdicate its sovereignty.[102] Only my own theory, or Wade's, can accommodate the ad hoc, case-by-case way in which a customary rule of recognition might evolve in response to the wide variety of challenges to parliamentary sovereignty that might arise.

Admittedly, Oliver does at one point suggest that his theory could be applied in a discriminating fashion:

> [I]t is wrong to imply … that having identified the power of change … all manner of constitutional change is possible. Significant constitutional change may indeed be possible where recognition [by the courts] can confidently be predicted, as with the devolution legislation and constitutional independence legislation: however, on more controversial matters, the proposed constitutional change is only confirmed when the courts eventually shed light on the rule of recognition's previously penumbral areas.[103]

This implies that courts might accept that Parliament has only partial self-embracing authority, enabling it to limit its authority in some respects, but not others. This would require a case-by-case determination of whether or not attempts by Parliament to limit its authority should be accepted as valid. The problem for Oliver is that it is hard to see how this can be squared with his usual insistence that the courts must choose between the continuing and the self-embracing theory. A court that accepted the validity of any limit imposed by Parliament on its own authority would have to reject the continuing theory, but if it therefore accepted the self-embracing theory, it would be conceding the validity of any other limit that Parliament might attempt to impose in the future. What general rule, defining Parliament's authority to limit itself, could explain the validity of one limit, without conceding the validity of any others?

My own theory can account for the way in which some attempts by Parliament to limit its own powers have succeeded, and might succeed in the future, while others will probably not. It does so by frankly acknowledging that the difference lies in the evolution of the requisite consensus among senior legal officials whose opinions count for practical purposes. On this view, it cannot accurately be said that Parliament possesses either continuing sovereignty (in the strong sense), or self-embracing

[102] See the final paragraph of Section III, B(4), above.
[103] Oliver, *Independence*, p. 304, n. 71.

sovereignty. Both propositions are too general to be serviceable, and it would therefore be misleading for a court to endorse either of them.

5. Finally, I have some doubts as to whether Oliver's theory really does allow the former dominions to have their cake and eat it too: to have their independence established lawfully, and also to have it rooted in local political allegiances or popular sovereignty.[104] For Oliver, the conclusion that independence was established lawfully depends on the former dominions' courts holding that Parliament possessed self-embracing sovereignty, which enabled it to grant independence by abdicating its sovereignty with respect to them. Surely this is to conceive of independence as a gift from the imperial legislature. What Oliver calls 'new beginnings and popular acceptance' are for legal purposes irrelevant. He himself observes that respect for the rule of law can look 'thin and inadequate … if not accompanied by some measure of real authority and legitimation'.[105] My own theory, which explains independence in terms of the evolution of the rule of recognition accepted by officials in the former dominions, seems more compatible with the desire for local roots.

V Conclusion

In an earlier essay, Oliver expressed hope that '[o]nce the possibility of self-embracing sovereignty is acknowledged … over the coming decades and centuries, the United Kingdom could cautiously and pragmatically develop an organic constitution'.[106] I see no good reason why such a constitution should not be developed, but I doubt that the best way forward is for the courts to proclaim that Parliament possesses full self-embracing sovereignty. The adoption of such a general rule would allow Parliament to impose whatever limits it should choose – substantive, as well as formal and procedural – on its own authority. That would allow democracy to be subverted. For example, a political party might use a temporary majority in Parliament to prevent future parliaments from altering or repealing statutes implementing its favoured policies. Or it might include in a particular statute a requirement that the assent of an unrepresentative body, such as a private corporation, be obtained in order to amend or repeal parts of the statute. This may seem far-fetched, but a corporation entering into an agreement with the government involving the investment of a

[104] See text to n. 7, above. [105] Oliver, *Independence*, p. 11.
[106] P. Oliver, 'Sovereignty in the Twenty-First Century' *KCLJ* 14 (2003) 137 at 156.

large sum of money for the sake of long-term returns might seek binding guarantees that the agreement will not be unilaterally changed by either the government or Parliament.[107]

It might be thought inconsistent for me, having argued on a previous occasion that it is not unreasonable to trust Parliament with legislative sovereignty, to warn against possible abuses of self-embracing sovereignty. But one of the reasons for entrusting Parliament with ordinary legislative sovereignty is that mistakes and injustices can be corrected by future Parliaments, whereas if full self-embracing authority (theory B(2)) were used to limit their ability to do so, this could become difficult or impossible.

A more discriminating approach seems desirable, which enables the courts to uphold some limits, but not others. It would help if the courts adopted theory B(1) – the theory of procedural self-embracing sovereignty – which holds that Parliament can subject itself to manner or form requirements that do not limit its substantive authority.[108] Such requirements allow Parliament to exercise its substantive authority to legislate, which is 'continuing', but require it to follow some special but relatively undemanding procedure or form in order to do so. Manner or form requirements can be used to protect legislation of special importance from inadvertent or ill-considered amendment or repeal, by encouraging more careful or extensive deliberation than is usually required. For example, 'express repeal' requirements and absolute majority requirements can have this effect. This might be invaluable, provided the courts refuse to enforce substantive limits that are disguised as manner and form requirements.[109] On the other hand, for that very reason, this theory would not be able to accommodate every desirable reform. For example, a referendum requirement, despite being perfectly democratic, cannot logically be classified as a mere requirement as to manner or form. Such a requirement goes much further than just requiring Parliament to follow a particular procedure or adopt a particular form in exercising its substantive authority to enact law: by forbidding Parliament to enact law without the approval of an external body – namely, the electorate – it plainly limits its substantive authority.[110] (The usual way of attempting

[107] Two Australian cases in which this was argued to have happened are *Commonwealth Aluminium Corporation Pty Ltd* v. *Attorney-General* (Western Australia) [1976] Qd R 231 and *West Lakes Ltd* v. *South Australia* (1980) 25 SASR 389.

[108] See text to nn. 24–26, above; for further discussion, see Chapter 7, below.

[109] See n. 27, above.

[110] Contra, Winterton, 'The British Grundnorm', 604–6. For this reason, the decision of the High Court in *A.G. (NSW)* v. *Trethowan* (1931) 44 CLR 394 was legally erroneous,

to avoid this conclusion is to argue that a referendum requirement, rather than laying down a requirement as to the manner by which, or the form in which, Parliament must pass laws, changes the composition of Parliament, by making the electorate a part of it for special purposes. This is a patent rationalisation of a desired conclusion. A 'parliament' is a body that at least in part represents the electorate; it is nonsense to say that the electorate can be made part of the parliament that represents it.[111]) Super majority requirements raise particular difficulties, since they give a minority of members the power to veto legislation. They do diminish parliament's substantive power by making it considerably more difficult (and in an extreme case perhaps impossible) for it to legislate.

For the courts to adopt the theory of procedural self-embracing sovereignty – in response to an attempt by Parliament to subject itself to purely procedural or formal requirements – would involve a change in the rule of recognition, since that theory has not so far been authoritatively accepted. To go even further, and allow Parliament to impose constraints on its substantive powers, without running the dangers created by the full self-embracing theory, would require a more radical change in the consensus among senior legal officials that constitutes the rule of recognition. This has two desirable consequences. First, it requires the courts to determine whether the consensus among legislators themselves has truly evolved, as distinct from one political party attempting constitutional change without broader support. For example, there is a widespread consensus even among legislators that legislation inconsistent with European law should be disapplied pursuant to the European Communities Act 1972: the decision in *Factortame* did not provoke angry protests from any political party.[112] On the other hand, an attempt by one political party to use its temporary majority in Parliament to entrench partisan legislation should not prevail over a subsequent attempt to amend or repeal that legislation by the ordinary legislative procedure, partly because the entrenchment would not have been broadly accepted as legitimate even among legislators.

What about an attempt to entrench a Bill of Rights, by requiring that protected rights can be altered only by a future law approved of in a referendum? This might be controversial, and opposed by one side of politics, but if the Bill of Rights were itself first approved in a referendum, there

despite being pragmatically desirable: see Chapter 6, below. British judges, too, might be tempted to take the pragmatic rather than the logical course: see Winterton, 'The British Grundnorm', 605.

[111] See Chapter 7 Section IX, below.

[112] *Factortame* v. *Secretary of State for Transport (No. 2)* [1991] AC 603 (HL).

might be a broad consensus among legislators that the will of the electorate should be respected, and another referendum required in order to amend or repeal the Bill. In other words, by greatly enhancing the political legitimacy of a limit imposed on Parliament's authority, a referendum might also contribute to general official acceptance of that limit. The second consequence of my theory is that in each case, the judges would also have to be guided by their own assessment of constitutional principles, such as democracy and the rule of law, in deciding whether or not they should endorse any attempted entrenchment by Parliament. The danger of Oliver's approach is that the courts might be guided by such principles only in the first hard case that arises, which presents them with the opportunity to adopt the full self-embracing theory. Thereafter, that theory might – as a matter of logic – have to be applied in an undiscriminating fashion. That would make it more difficult for the judges to insist that only important constitutional rules or principles, which enjoy widespread, non-partisan support, may be entrenched, and only in ways that are consistent with democratic principle.[113]

[113] For similar reasoning, see Young, *Parliamentary Sovereignty and the Human Rights Act*, pp. 168–75.