# Historical Review

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## Introduction

> Legal questions are usually answered on the basis of unquestioned assumptions about the foundations of the legal system in question. When those assumptions are questioned, it can be difficult to know where to turn for answers.[1]

Professor Goldsworthy has made a praiseworthy attempt to investigate one such assumption, the doctrine of the sovereignty of parliament. But as he himself points out in his Preface, he is a constitutional lawyer, not an historian, and has relied solely upon secondary sources, using some interpretations of history by some historians, at least one of whom strongly disagreed with his analysis. Goldsworthy also notes that he has no expectation that this book will be read by professional historians, but rather by lawyers.[2]

It is therefore of the utmost importance that the historiography and the historical data be as clear and accurate as may be, so that historical errors are not perpetuated as a basis for legal thinking. In Australia this is of particular importance, because of the dearth of constitutional historical examination of the Westminster and Australian systems of governance, and because of the propensity of High Court judges to rely upon books and articles when they are formulating their judgments.[3] One judge at least has

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1 See Jeffrey Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Clarendon Press, Oxford, 1999) 236.

2 Ibid vii-viii.

3 For example, Justice Kirby in *Durham Holdings Pty Ltd v The State of New South Wales* (2001) 177 ALR 436, 448 referred to Goldsworthy's *Sovereignty of Parliament*. In that case Kirby J indicated that he might be willing to entertain argument on the relative merits of the 'sovereignty of

gone so far as to assert that 'the doctrine of parliamentary sovereignty is a doctrine as deeply rooted as any in the common law'.[4]

Therefore the definitions of 'Parliament', 'sovereignty' and 'parliamentary sovereignty' and their legal and historical contexts are crucial to Goldsworthy's book, and it is with these that I take issue.[5] 'What is Parliament?' is the vital question here. Only after it is answered can one come to any conclusion as to its alleged 'sovereignty'.

## Legal definition of Parliament

The legal definition of 'Parliament' has remained constant since English law reports have been collated.

Sir Edward Coke defined 'Parliament' as the King, the Lords spiritual and temporal, and the Commons.[6] Sir William Blackstone defined 'Parliament' as the King, and 'the three estates of the realm; the lords spiritual, the lords temporal, ...and the commons'.[7] A V Dicey said that 'Parliament means, in the mouth of a lawyer, (though the word has often a different sense in ordinary conversation), the Queen, the House of Lords and the House of Commons' – and he immediately went on infelicitously and gratuitously to say: 'these three bodies acting together may be aptly described as the "Queen in Parliament"'.[8]

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parliament' and the capacity of the judiciary to invalidate parliamentary enactments of the basis of certain kinds of 'extreme instance which would enliven any of the foregoing constitutional implications'. Australian High Court judges have also infelicitously drawn upon Bagehot (a nineteenth-century journalist): Stephen J referred with approval to Bagehot's aphorism on the position of the monarch as describing 'the core of the Sovereign's power', in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 354. In the same case Wilson J referred to Bagehot's aphorism as being 'still good law and good constitutional practice' (ibid 400). Sir Edward Coke, a seventeenth-century judge, is still quoted by Australian judges – see, for example, in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 64 (Brennan CJ) and 73 (Dawson J).

4 See Dawson J, in dissent, in *Kable's case*, ibid 76.

5 There are very many historical and historiographical issues that could be addressed. This commentary addresses only the definition of 'Parliament' and the consequences of that for the definition of 'sovereignty'.

6 See 4 Co Inst c1, 1; Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (M Flesher, London, 1644).

7 See Sir William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769* (University of Chicago Press, Chicago, 1979) 4 vols, bk 1, ch 2, s 2, 149.

8 See A V Dicey, *An Introduction to the Study of the Law of the Constitution*, (10th ed, Macmillan, London, 1959) 39.

The *Australian Constitution* states that 'the Parliament' is 'the Queen, [the] Senate, and [the] House of Representatives'.[9] Thus the *legal* definition of 'Parliament' in the United Kingdom and the Commonwealth of Australia is the Queen, an Upper House, and a Lower House. Perhaps the most potent argument in favour of accepting this as the legal definition of 'Parliament', is that it was advanced by Coke in his 'parliamentary phase',[10] and by Blackstone who was perceived as a Whig,[11] as indeed was Dicey.[12]

## Goldsworthy's definition of 'Parliament'

But Goldsworthy does not adopt this definition. Rather he defines 'Parliament' as 'The King in Parliament', which he says (wrongly in my view) is its 'usual legal sense', relying upon some usage by historians,[13] and also thus adopting Dicey's infelicitous adumbration.

On 'sovereignty', Goldsworthy chooses 'sovereignty' to mean 'legislative sovereignty' of 'the King in Parliament', rather than the 'political sovereignty' of one or both houses of Parliament.[14] He suggests that legislative sovereignty occurs if the legislator has a 'legally unlimited legislative authority', unlimited by any norms.[15]

Constitutional lawyers do not see 'Parliament' as being the 'King/Queen *in Parliament*'. To do so effectively would be to say the 'Parliament' is 'the monarch in the monarch and the two houses'. While Dicey may have considered this an 'apt' means of referring for political purposes to the legislature, it is not legally correct (as he acknowledged), nor does it make any sense. In addition, use of the term 'the King in

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9 *Australian Constitution* s 1.

10 The *Fourth Institute* was written after his dismissal from King's Bench in 1616, and after his election to the Commons in 1621. It was published posthumously in 1644.

11 See references in n 28 below.

12 See Joseph M Jacob, *The Republican Crown* (Dartmouth Publishing, Aldershot, 1996) 289.

13 See Goldsworthy, above n 1, 9; and compare with 229-30. Moreover he cites as his authority a comment made in the context of the fourteenth-seventeenth centuries by G R Elton, an historian (not a lawyer). See Goldsworthy, ibid 9, n 1 referring to Elton's '"The Body of the Whole Realm": Parliament and Representation in Medieval England', in G R Elton, *Studies in Tudor and Stuart Governance and Politics*, vol II (Cambridge University Press, Cambridge, 1974) 32-5. It should be noted that at the beginning of his exposition on Parliament, Elton remarked (ibid 20) that '[t]he long history of the medieval and Tudor Parliaments is shot through with obscurities and surrounded by controversy'.

14 See Goldsworthy, ibid 9.

15 See ibid 16, 233.

Parliament' elevates the position of the two houses themselves to *be* 'Parliament'—raising real semantic difficulties as to what the word 'Parliament' means whenever it is used in the book: is it the houses? or the King with the houses?

The translation then of Goldsworthy's 'sovereignty of Parliament' is: *legally unlimited legislative (law-making) authority* (ie sovereignty) of the *King in the King with the two houses* (ie King-in-Parliament), or of the *King* (ie, King) *with* (ie, in) *the two houses* (ie, Parliament)'.[16]

## Analysis of historical conclusions

Indeed, the difficulty with this definition of 'Parliament' can be seen in Goldsworthy's 'Historical Conclusions'. His conclusions are to do with 'The King in Parliament' and all his discussion[17] is to do with the 'doctrine' or 'dogma' of the 'sovereignty of Parliament' as being one accepted by the 'political nation' 'as a whole', which included 'almost all politicians, lawyers, and political theorists'[18] – the 'Parliament' that is discussed here is the King, Lords and Commons in Parliament[19] (the 'political' not the 'legal' definition). Goldsworthy states:[20]

> But the nature of Parliament and its authority was the subject of disagreement. Was it 'the King in Parliament', or a composite institution, 'The King-in-Parliament'? ... Even before the 1640s, many statesmen and lawyers described Parliament's legislative authority as legally unlimited. ... When the monarchy was restored in 1660, so was the idea of the King in Parliament. [21]

He adds:

> It was unnecessary for the law to recognize any limits to Parliament's authority, because the people [drawing presumably on

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16 Goldsworthy, ibid 9 says that both meanings of 'the King in Parliament' – 'the King-in Parliament' and 'the King, in Parliament' are compatible with 'sovereign lawmaking authority 'being vested in the 'King in Parliament'. See also below n 21.

17 Ibid 233. This is the second of the references cited by Kirby J mentioned earlier: see above n 3.

18 See Goldsworthy, above n 1, 233. His use here of 'political nation' extends from the seventeenth century to the late nineteenth century, and presumably, also today.

19 See ibid 232-235.

20 And I apologise for the elliptical quoting of his words here, but space does not admit of the reproduction of 230-5 in their entirety.

21 Ibid 230-31. Many others also stated that 'Parliament's' power was legally limited – it depended which side of the ideological fence one stood, and how one defined 'Parliament'.

> Locke in the second of the *Two Treatises*[22]] had not in the past, and would not in the future, need any legal pretext to resist tyranny.[23]
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> Although many lawyers maintained that Parliament was bound by natural or divine law, there is no evidence of substantial support in any period for the notion that the judiciary rather than Parliament possessed the ultimate authority to interpret and enforce that law. The idea that the courts could invalidate statues contrary to fundamental principles of the common law appeared briefly in the seventeenth century, but did not enjoy substantial influence either then or since. If the doctrine of parliamentary sovereignty was a dogma, it was not Dicey's dogma, but that of the political nation as a whole.[24]

He concludes:

> Judges in Britain, Australia, and New Zealand are sometimes invited to repudiate the doctrine of parliamentary sovereignty. It is said that '[t]his would not be at all revolutionary. What is revolutionary is talk of the omnicompetence of Parliament.' This is false. There can be no doubt that for many centuries there has been sufficient consensus among all three branches of government in Britain to make the sovereignty of Parliament a rule of recognition in HLA Hart's sense, which the judges themselves did not create, and cannot unilaterally change. That is what is meant by saying that the rule is a 'political fact'. At the fundamental level of a rule of recognition there is no difference between legal and political facts.[25]

These conclusions are highly disputable.

Firstly, the notion that enactments of the two houses and the King (the legal Parliament) are capable of being invalid as being contrary to higher laws does and did enjoy substantial legal support, not only in the seventeenth century by Sir Edward Coke, Sir Francis Bacon, Lord Ellesmere,[26] and John Locke,[27] but also by Blackstone in the

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22 See below n 27.

23 See Goldsworthy, above n 1, 232. A 'legal pretext' did in fact exist, either in natural law or the law of reason [see references to Locke below n 27, or was found in the oath of governance of the king [see text to nn 38-46 below].

24 See ibid 233, footnotes omitted. This is the reference quoted elliptically by Kirby J in *Durham Holdings*, above n 3.

25 See ibid 234, footnotes omitted.

26 Goldsworthy says that this 'idea appeared briefly in the seventeenth century, but did not enjoy substantial influence either then or since'. See for the seventeenth century, for example, Sir Edward Coke in *Calvin's case, the Postnati* (1610) 7 Co Rep; 77 ER 390. Coke did not report Lord Ellesmere and Sir Francis Bacon's speeches: see 2 *State Trials* 575 for Bacon and 659 for Ellesmere. See also Coke in *Dr Bonham's case* (1610) 8 Co Rep 113 b; 77 ER 646.

eighteenth.[28] The issue has also been exhaustively examined by John Finnis in the twentieth century.[29] Indeed, it was the contentious nature of the doctrine of the sovereignty of parliament and the ambit of judicial power that prompted Goldsworthy to write this book in the first instance.[30]

Secondly, the notion of 'omnicompetence' of 'Parliament' has *not* been the subject of consensus among the three branches of government for many centuries. For example, Blackstone said in the eighteenth century:

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27 This was the basis on which Locke envisaged the people resisting laws made by the legislature. See John Locke, *Two Tracts on Government* (1660), not published until 1967: P Abrams (ed), (Cambridge: Cambridge University Press, 1967). This writing is referred to and summarised in Mark Goldie (ed), John Locke, *Two Treatises of Government* (London: Everyman, 1993) xvi-xvii. In *Two Tracts* Locke endorsed 'an absolute and arbitrary power' in the King in anything *not contrary to the Law of God* (see Goldie, ibid xvi). Locke was in essence supporting the prerogative at this stage as means of combating popery and non-conformism; he changed his mind in an *Essay on Toleration* (but only to support his patron, Shaftesbury, a non-conforming anti-papist). His later *Two Treatises* saw the culmination of his attack on 'absolute power' through any divine right, and proposed his variant of the 'original compact'. It is interesting to note that it appears to be from the time of Locke's *Two Treatises* (as opposed to his *Two Tracts*) that the use of 'absolute' and 'arbitrary' begin to have the pejorative connotations they have in common parlance today. Note, however, that in *Two Treatises* Locke said that any kind of government is circumscribed by the laws of nature, which are the laws of God, and municipal laws are only right in so far as they are in accordance with these laws. See Locke, *Second Treatise*, ch 2, para 12-13, in Goldie, ibid 120-21.

28 See Blackstone, above n 7, 'Introduction', s 2, 43, 54-55: 'For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong. But with regard to things in themselves indifferent, the case is entirely altered.' This aspect of Blackstone is overlooked by apologists of the doctrine of 'the sovereignty of parliament', who appear to rely on those parts of Blackstone, bk 1, ch 2, 142 ff. Blackstone is described as 'an Old Whig whose ideals were enshrined in the Glorious Settlement of 1688': see A W B Simpson (ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 59. See also H T Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament' (1976) 26 *Transactions of the Royal Historical Society* 189.

29 John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980); and see also his compendium of articles on the various approaches to and views on natural law in John Finnis (ed), *Natural Law*, 2 Volumes, (Dartmouth Publishing Company, Aldershot, 1991).

30 See Goldsworthy, vii.

> [Parliament] can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. *It can, in short, do every thing that is not naturally impossible*; and therefore some have not scrupled to call it's (sic) power, by *a figure rather too bold, the omnipotence of parliament.*[31]

Blackstone clearly stated that there were some things that the Parliament could not 'naturally' do. One reason was because he recognised the underlying importance of the laws of God or nature.[32] The second was because municipal law-givers or parliaments, could make laws with regard to things

> in themselves indifferent,[33]... [which] become either right or wrong, just or unjust, duties or misdemesnors ... according as the municipal legislature sees proper, for promoting the welfare of the society, and more effectually carrying out the purposes of civil life. Thus our common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies to be a public offence: yet that right, and this offence, have no foundation in nature; but are merely by the law, for the purposes of civil society.[34]

Blackstone also disputed Locke's assertion of the people's right to resist and remove legislators if they acted contrary to the trust reposed in them, [35] saying that while this may appear just in theory, such a devolution of power to the people would annihilate all sovereign power and repeal all positive laws which theretofore had been made. Such an event would be so desperate that therefore, *in this context*, he affirmed that '[s]o long ...as the English Constitution lasts... the power of the Parliament is absolute and without control'.[36]

Thirdly, one of the reasons why 'Parliament' in Blackstone's terms is neither omnipotent nor omnicompetent is because the 'Parliament' is

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31 Blackstone, using Coke's legal definition of Parliament (see above n 6) as his authority: see Blackstone, above n 7, bk 1, ch 2 'Of the Parliament', s 3, 156 (emphasis added).

32 See above n 28.

33 Blackstone relies here on his understanding of Aristotle. For a discussion of the what Blackstone means by 'indifferent' in the context of the Aristotelian initial use of the term [*adiaphora*] – 'things naturally indifferent', which are based on convention and expediency, and differ in different *milieu,* which *adiaphora* he counterpoises to those natural rights which have validity everywhere – see John Finnis, *Natural Law*, above n 29, 295.

34 Blackstone, above n 7, bk 1, Introduction, s 2, 54-5.

35 Ibid, bk 1, ch 2, s 3, 157, referring to and quoting Locke, *Second Treatise on Government*, paras 149 and 227.

36 Ibid.

comprised of *the King*, and the three estates – the lords spiritual, lords temporal, and the commons.[37] The King is bound by the terms of his oath of governance, and to him the members of the houses (and the judges) swear obedience. Blackstone said: 'it [is] a maxim of law that protection and subjection are reciprocal' and went on to describe this mutuality of obligation and duty as the 'original contract'.[38]

> The principal duty of the king is to govern his people according to law. ... And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, ... [and he goes on to refer to Bracton[39]and Fortescue[40]]
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> [A]s to the terms of the original contract between king and people, these I apprehend to be now couched in the coronation oath...[41] [T]he principle articles of which appear to be at least as ancient as the mirror of justices,[42] and even as at the time of Bracton.

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37 See ibid, ch 2, s 2, 149.

38 Ibid, bk 1, ch 6, 'Of the King's Duties', 226. Blackstone reproduced the oath of 1689, as is now set down in *The Coronation Oath Act* (Eng) 1689 [NS]; 1 Will & Mary c 6, 1688 (Old Style); *Statutes in Force*, Official Revised Edition, Revised to 1st February 1978, Her Majesty's Stationery Office, London. It should be noted that the author does not necessarily agree with Blackstone's use of the term 'original contract'.

39 Henry de Bracton, *Bracton De Legibus et Consuetudinibus Angliae*, 1250-1260.

40 Sir John Fortescue, c 1385-1479, *De Laudibus Legem Anglie*, *The Governance of England.*

41 Blackstone, above n 7, bk 1, ch 6, 'Of the King's Duties', 227-28.

42 This was an apocryphal text generally accepted as stating the law by Coke and lawyers of the Civil War and the 1688-89 Revolution as well as by Blackstone. *The Mirrour of Justices, written originally in the Old French, long before the Conquest, and many things added, by Andrew Horne, to which is added The Diversity of Courts and their Jurisdictions*, translated into English by W H [William Hughes], of Gray's Inn, Esq, 1642 (John Byrne & Co, Washington DC, 1903); (reprinted from the 1903 edition by Rothman Reprints, Inc, NJ; Augustus M Kelley, Publishers, New York NY, 1968). *The Mirror of Justices*, edited for the Selden Society by William Joseph Whittaker, with an introduction by Frederic William Maitland; Publications of the Selden Society, Vol VII, 1898; reissued, 1978. Maitland castigates the author of the *Mirrour* as a liar, and says at xlviii 'We feel sure that in Paradise, or wherever else he may be, he was pleasantly surprised when Coke repeated his fictions as gospel truth, and erudite men spoke of him in the same breath with Glanvill and Bracton.'

## The King's oath of governance

Kings of England took an oath of governance[43] at least as early as the eighth century, which bound them to maintain the peace, forbid injustice, and exercise justice and mercy in all their dooms.[44] By the seventeenth century, the oath of governance required the King to: reaffirm the existing just laws and customs which conformed to the laws of God, while recognising the prerogative of the King; maintain the peace; exercise judgements with law, mercy, truth and discretion; and to grant and keep the laws and customs of the people, defending them to the honour of God.[45] Presently, Elizabeth of Australia and of the United Kingdom is constrained by her oath to govern according to law, maintain the laws of God, and exercise law, justice and mercy in her judgements.[46]

Therefore, 'The Parliament', consisting of the King and the two houses will always have constraint upon its power to make laws, because Parliament includes the King, whose assent must be given for Bills to become lawful Acts, and he in turn is constrained by the terms of his oath as to what he may or may not consent to.

Parliament therefore *does not have* an unlimited law-making power. The boundaries of that power are set down in the oath of governance which the monarch takes for, to, and before the people.

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43 So did Irish, Welsh and Scottish Kings, including the Lord of the Isles. Only the English oath is mentioned here because of space constraints. Goldsworthy, above n 1, 159 adverts to the king's oath of governance only once in passing, overlooking throughout the book the pivotal role that it played in the seventeenth century (and indeed, earlier and later centuries).

44 'Dooms' is Old English for 'laws' or 'judgements'. This ancient form of the oath of governance was called the *Tria Precepta*, or the *Prommissio Regis*, and dates from the first known written form in the Echberht Pontifical, c 732.

45 See the oath of James VI and I, in Tanner manuscript, in the Bodleian Library (Tanner MSS (Bodl), vol. 94, f 121, as reproduced at 391 in *Select Statutes and other Constitutional Documents illustrative of the reigns of Elizabeth and James I*, edited by G W Prothero, 1st ed, 1894; 4th edn (Oxford: Clarendon Press, 1963). For Charles I see Charles' own words in Edward, Earl of Clarendon in his *History of the Rebellion and Civil Wars in England*, written between 1641 and 1648, in Book V, paras 293-305, at Vol II (Books V and VI), 155-57 of the 'edition re-edited from a fresh collation of the original MS. in the Bodleian Library', by W Dunn Macray, in six Volumes, (Clarendon Press, Oxford, 1888); reprinted (Oxford University Press, Oxford, 1958).

46 See Oath of Governance or Coronation Oath in John Arlott and ors, *Elizabeth Crowned Queen* (Odhams Press Ltd, London, 1953) 53-4.

## The political definition of 'Parliament'

But it is true to assert as Goldsworthy does that 'the sovereignty of Parliament ' is a *doctrine*. To go further, as he does, and assert that 'the sovereignty of Parliament' is a 'rule of recognition' and as such is a political fact, and that there is no difference between a political and a legal fact[47] is to confuse propaganda with fact, and law with politics.

The problem is that the 'political fact' relates not to the 'sovereignty' of the King and the two houses, but rather to that of the houses of Parliament alone. This is the 'political' perception of 'Parliament' which is reinforced by Goldsworthy's definition, but it has nothing to do with the legal definition of Parliament.

This political usage grew up in the seventeenth century, when the Commons attempted to undermine the authority of the King.

The 'King-in-Parliament'[48] was used by James Whitelocke in the Commons debates of 1610[49] on impositions:

> The sovereign power is agreed to be in the King; but in the King it is a twofold power; the one in parliament, as he is assisted with the consent of the whole state; the other out of parliament, as he is sole and singular, guided merely by his own will... It will then be easily

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47 See Goldsworthy, above n 1, 234, and quotation above n 25.

48 The role of the King with his houses of parliament had been extolled before, by Henry VIII in *Ferrers' case* (1543) *Holinshed Chronicle* (1577) III, 824-6. Usually the king is quoted out of context as saying that 'we at no time stand so highly in our estate royal as in *the time of parliament*' (emphasis added). See, for example, Goldsworthy, ibid 58, relying on a quotation from a secondary source (see n 69). But this case was one of the privileges of a member of the Commons, Ferrers being a servant of the King and also elected to the Commons, who was arrested as an indemnifier of a debt. The King finally settled the matter after contretemps between the Speaker and the courts, saying that as Ferrers as his servant would enjoy privileges attached to a servant of the king, no less would the members of the Commons, as the king's servants, in that 'whatsoever offence or injury (during that time) [ie, *the time of parliament*, or the sitting of the Commons when called by the king] is offered to the meanest member of the house is to be judged as against our person'. G R Elton, *The Tudor Constitution* (Cambridge University Press, Cambridge, 1965) 257 fn 1, and 230 doubts the veracity of the reportage of the case, which appears only in *Holinshed's Chronicle* (1577) written some 30 years after the actual event. The text is at Elton, *Tudor Constitution*, ibid 267-70.

49 Speech of Mr James Whitelocke, 2 July 1610, *Parliamentary Debates (CS)* 103, and *Commons Journals* I, 445; See G W Prothero, above n 45 above, 351, for text; note Prothero says that the speech is misreported in *State Trials* as being made by Yelverton.

> proved, that the power of the King in parliament is greater than his power out of parliament, ...; for if the King make a grant by his letters patent out of parliament, it bindeth him and his successors; but by his power in parliament he may defeat and avoid it, and therefore that is the greater power.[50]

Two things should be noted here: first, the acknowledgment that the King held 'sovereign power'. Secondly, that 'Parliament' is used to mean 'the houses of Parliament'. But the argument is rendered nugatory when it is considered that the people in the houses of Parliament are called together by the King's writ of summons, and without such a writ, they are not legally constituted houses, that King may also dissolve the houses, and that it is, by Whitelock's own acknowledgement, the King's own will to assent or not to assent to things with the houses. The King, then, has exactly the same power within as without 'Parliament'.

Here too, is the idea in embryo (developed to its zenith in propaganda during the English civil wars and later in the revolution of 1688-9) that the 'three estates' no longer meant the lords spiritual, the lords temporal, and the commons, but rather the lords (both spiritual and temporal), the commons, *and the King*.[51] This error is perpetuated by Goldsworthy.[52]

The Commons saw 'Parliament' as being themselves, and perhaps also the Lords.From the debate of 1610 through to the execution of Charles I, the arguments of the Commons became increasingly sophisticated. From the tentative position on impositions in 1610, they had moved by 1642 to arrogating to themselves all the rights and duties of the King, including

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50 Ibid, quoted even more elliptically by Goldsworthy, above n 1, 125.

51 See the use of this latter meaning of the three estates in Goldsworthy, ibid 125, 141. The development of the idea of the three estates being the lords spiritual, lords temporal and the commons is discussed at length in S B Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge University Press, Cambridge, 1936), reissued by American Scholar Publications, NY, 1966, in ch 2, esp 81-126. The idea of the 'three estates' being instead the king, the lords and the commons, was I think, a development of the thinking of the members of the lower house during the reigns of James I and Charles I, and formed the basis of what some scholars have seen as a 'community-centred' ideology, incorporating doctrines of coordination and coevality developed prior to and after the revolution of 1688 – these doctrines are discussed by Janelle R Greenberg and Janelle R Weston, *Subjects and Sovereigns, the Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge University Press, Cambridge, 1981), and by Lois G Schwoerer, 'The *Bill of Rights*: Epitome of the Revolution of 1688-89', in J G A Pocock (ed), *Three British Revolutions: 1641, 1688, 1776* (Princeton University Press, Princeton, 1980) 224-243.

52 See Goldsworthy, ibid 125.

arming the militia,[53] declaring war,[54] peace,[55] and treason,[56] as well as asserting that they alone made the laws,[57] to them not the King was allegiance owed,[58] that the 'high court of Parliament' (meaning the houses) held the 'sovereign power',[59] and that it was the houses of Parliament not the people who recognised the King.[60]

The Commons found justification for their position in an old Latin text[61] of a coronation oath which they translated to mean that the King *must do* what the people (that is, the Commons) shall choose when it came to making laws. They asserted that this oath had been the one taken by the

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53 *The Militia Ordinance*, 5 March 1642, Journals of the House of Lords, iv, 587; quoted in S R Gardiner, *The Constitutional Documents of the Puritan Revolution, 1625-1660* (Oxford University Press, Oxford, 1889) (3rd rev'd ed, Clarendon Press, Oxford, 1951) 245-247.

54 *Militia Ordinance*, ibid.; and see Remonstrance of 26 May 1642 in Edward, Earl of Clarendon, *The History of the Rebellion and Civil Wars in England*, written, 1641-48, 'edition re-edited from a fresh collation of the original MS in the Bodleian Library', by W Dunn Macray, in six volumes, (Clarendon Press, Oxford, 1888) reprinted (Oxford University Press, Oxford, 1958) Vol II (Books V and VI) 130, para 241.

55 *Militia Ordinance*, ibid.; and see Remonstrance, in Clarendon, ibid 130, para 241.

56 See the Protestation of the House of Commons, 2 March, 1628-29, in Gardiner, *Constitutional Documents*, above n 53, 82-83, sourced to Rushworth, i 660; and see *Militia Ordinance*, ibid;. and see Remonstrance, in Clarendon, ibid.

57 See Remonstrance, in Clarendon, ibid 123, paras 224-6. And see extracts, 'Remonstrance of both Houses in answer to the King's declaration concerning Hull', 26 May 1642, in J P Kenyon *The Stuart Constitution, Documents and Commentary* (Cambridge University Press, Cambridge, 1965) 242-4.

58 Remonstrance in Clarendon, ibid 133-134, paras 246-7.

59 Remonstrance, in Clarendon, ibid 125, para 231.

60 Remonstrance, in Clarendon, ibid 133-134, paras 246-7.

61 The text is a shortened version of the oath in the *Liber Regalis* (*The Royal Book; The Book of the King's Office*) which had been drafted as part of a clerical ordine for guidance at English coronations, and which dated from some time between 1351-1377. It has been thought that the oath in the *Liber Regalis* was first taken by Edward II in 1308 (though my research shows that this is unlikely). The Commons attributed the oath to Henry IV – see Clarendon, above n 54, 123, para 226. Sir Matthew Hale in *Prerogativa Regis*, 1640-1660, D E C Yale (ed), (Selden Society, London, 1976), also attributes this to Henry IV (1 Henry IV, n 17, RP iii, 417b, 67, but he includes all the words of the *Liber Regalis*, including those relating to Edward the Confessor. We do not know what oath Henry actually swore. For details on the oaths of the kings, see the author's PhD dissertation, *King and Crown* (1998) in Macquarie University Library, Sydney.

King; and if it had not, it should have been,[62] and if the King had not taken it, then someone (and they chose Archbishop Laud[63]) must have deliberately changed the oath from the one which Charles' predecessors had taken, so as deliberately to exclude the Commons' power to decide what should be the law.[64] This re-writing of not only ancient, but also for them, modern, history, was vital to show that the King *must do* what the houses wanted him to do, and in the immediate instance, assent to the *Militia Ordinance* and support the Commons' taking up of arms.

In fact, none of the Stuarts ever took an oath in Latin, nor had Charles taken the oath which the Commons asserted he had, nor indeed had it been taken by any English King for at least three hundred years, (if even then).[65] Charles decried the ingenious use of an old Latin oath, which the

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62 See the Remonstrance, in Clarendon, ibid, 156, para 226, sourced by the commons to 'Rot, Parl [1] H. IV, n 1 Rot Parl Vol. III 417'.

63 See F W Maitland, *The Constitutional History of England* (Cambridge University Press, Cambridge, 1908), 1950 reprint, 286; and see Leopold G Wickham Legg, *English Coronation Records* (Archibald Constable & Company Limited, Westminster, 1901) 245 who says that Laud was (also?) accused of changing the words of *Sta et retine.* And see P E Schramm, *A History of the English Coronation,* translated by L G Wickham Legg (Clarendon Press, Oxford, 1937) 220-221. Archbishop Laud was impeached by the Commons in December 1640, but not tried till 1644 during the war; he was executed on 10 January 1645, by beheading, during the war: see J R Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* (Cambridge University Press, Cambridge, 1928) 1962 reprint, 95.

64 See Maitland, ibid 286 (emphasis added). And see Legg in *English Coronation Records* 245, and see Schramm, ibid 220-221. See also the 'speech' of John Cook, Clerk of the 'court' that 'tried' Charles I, in J G Muddiman, *Trial of King Charles the First* (William Hodge & Company, Edinburgh and London, 1928) Appendix C, 233 ff, 236, 238 respectively.

65 For the continuing controversy over the oath taken in 1308 and the *Liber Regalis*, see Bertie Wilkinson, 'The Coronation Oath of Edward II', in J G Edwards, V H Galbraith, and E F Jacob (eds), *Historical Essays in Honour of James Tait* (Printed for the Subscribers, Manchester, 1933); H G Richardson and G O Sayles, 'Early Coronation Records' *Bulletin of the Institute of Historical Research*, XIII, 1935-36, 129-45; H G Richardson and G O Sayles, 'Early Coronation Records, (concluded) '*Bulletin of the Institute of Historical Research*, XIV, 1936-37, 1-9, and 145-8; P L Ward, 'The Coronation Ceremony in Mediaeval England' *Speculum*, XIV, 1939, 160-178; H G Richardson, 'The English Coronation Oath' *Transactions of the Royal Historical Society*, Vol 23, 4th series, 1941, 129-58; B Wilkinson, 'The Coronation Oath of Edward II and the Statute of York' *Speculum*, Vol XIX, 1944, 445-69; H G Richardson, 'The English Coronation Oath' *Speculum*, Vol XXIV, 1949, 44-75; Robert S Hoyt, 'Recent Publications in

Commons knew well that 'many of his subjects could not, and many of themselves did not, understand',[66] and he directly went on the reproduce the English oath which he actually had taken.[67] This was a blatant unhistorical, and deliberately misleading propaganda attempt by the Commons to redefine the King's duties and obligations in his oath of governance so as to assert that the Commons, (together perhaps with the Lords) alone had to right to determine what the law was.[68] It was also used as the basis to kill the King.

The outcome of these developments is well known. Civil war between the King and 'Parliament' followed, the King was brought to the bar of a 'court' commissioned by remaining members of a purged Commons, purportedly tried, and executed. His Highness Oliver Cromwell became Lord Protector of the Commonwealth, and the army and the 'parliamentarians' ruled from 1649-1660. The word 'Parliament' became indelibly associated with the members of the houses without the King.

But in 1660, on the acceptance by the English people of Charles II, the rule of law as established by the oath of governance was reinstated. Charles II was recognised by the people, and took the same oath of governance as had his father. As a result, none of the purported enactments under the Commonwealth were recognised as statutes, because they were not made according to law by the two houses and the King, and to this day they do not appear on the statute books. Again for this reason, the period of

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the United States and Canada on the History of Representative Institutions before the French Revolution' *Speculum*, Vol 29, 1954, 356-77; Ernst H Kantorowicz, 'Inalienability' *Speculum*, Vol XXIX, 1954, 488-502; L B Wilkinson, 'Notes on the Coronation Records of the Fourteenth Century' *English Historical Review*, Vol 70, 1955, 581-600; Robert S Hoyt, 'The Coronation Oath of 1308' *English Historical Review*, Vol 71, 1956, 353-83; Robert S Hoyt, 'The Coronation Oath of 1308: the Background of "Les Leys et les Custumes"' *Traditio*, Vol XI, 1955, 235-7; H G Richardson, 'The Coronation in Medieval England' *Traditio*, Vol 16, 1960, 111-202; for other articles, see Walter Ullmann, '"This Realm of England is an Empire"' *Journal of Ecclesiastical History*, Vol 30, No 2, April 1979, 175-203; Diarmaid MacCulloch, 'Henry VIII and the Reform of the Church', in Diarmaid MacCulloch (ed), *The Reign of Henry VIII, Politics, Policy and Piety*, (Macmillan Press Ltd, Basingstoke, 1995) 159-80. See also Kelly, above n 61.

66 Charles I's Reply to the Remonstrance of 26 May 1642, Clarendon, above n 54 , 156, para 293.

67 See Charles' Reply, Clarendon, ibid 156-159, paras 293-308. See also text to notes 44-6.

68 It was the old Latin oath that was used also by the revolutionaries of 1688-89 as a pretext for revising the coronation oath in terms which they required William of Orange and Mary to take in 1689, and this text is set down in the *Coronation Oath Act* [England]1689 – see above n 38.

the Commonwealth is popularly known as 'the Interregnum', as it was a period of time where the English were not governed according to law.

## Restrictions on the power of the legal Parliament

It was the King's recognition and acceptance by the people and his taking the oath of governance which both established, continued, and confined the law. Charles I could not assent to the Militia Bill as it contravened the fundamental common law of the realm that prerogatives of war and peace lay with the King, which prerogatives in turn had been expressly recognised in his oath; nor could he have assented to any Bill calling for the extermination of blue-eyed babies, as that would infringe the laws of God. Had he done so, he would have broken his oath, and would have been answerable for that breach to the people, to God, and the law. Similarly, Charles I could not recognise the authority of the purported court that later purported to try him,[69] because it was not a court established according to law. And it was his oath that his accusers charged him with breaking[70] as only in this way could they allege a wrongdoing by the King.[71]

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69 See *The Trial of Charles the First, King of England Before the High Court of Justice, for High Treason*, 4 *State Trials*, 989 ff. Note that Edward St John, a relative by marriage of Cromwell, long an opponent of Charles, and counsel for Hampden in the *Ship-Money case*, who had recently been appointed Chief Justice of the Court of Common Pleas by the 'Parliament' in 1648, refused to serve on the so-called court. Note also that William Prynne, author of *The Soveraigne Power of Parliaments and Kingdomes* and a dauntless opponent on Charles, nevertheless in many tracts condemned the army as traitors, was removed from Parliament in the purge and imprisoned, and argued in support of the king – see 4 *State Trials*, note † at 989, and see C V Wedgwood, *The Trial of Charles I* (Collins, London, 1964), reprint by the Reprint Society Ltd, London, 1966, 53-4, 87, 114-5. See also *A Declaration and Protestation of William Prynne and Clement Walker against the present proceedings of the Army*, 19 January 1649, *Thomason Tracts*, 669 f. 13 (74), referred to by Wedgwood at fn 40, 115

70 The charge itself is included in the record in *State Trials* at 1070-1072— it took many days to formulate, and was finalised only on the morning of 20 January 1649, the day of the 'trial'—the first time Charles heard the charges was when they were read out by John Cook, (who with Isaac Dorislaus had framed the charge) at the beginning of the 'trial'. Cook, the 'clerk of the Court', read the charges, which included: 'That ... by his trust, oath and office, being obliged to use the power committed to him, for the good and benefit of the people, and for the preservation of their rights and liberties: yet nevertheless, out of a wicked design to erect and uphold in himself an unlimited and tyrannical power ... he ... hath traitorously and maliciously levied War against the present parliament, and the people therein represented. ... he ... is the occasioner, author, and continuer of the said

The 'sovereignty of Parliament' has always been a myth (though a very comforting one to parliamentarians who propound it). So long as there is a King who is recognised by the people and who takes an oath of governance to the people and for the governance of that people, it is that which is sovereign, as it is the terms of the oath which govern the actions of the King, including his assenting to Bills from the houses of Parliament.

unnatural, cruel and bloody wars, and therein guilty of all treasons, murders, rapines, burnings, spoils, desolations, damages and mischiefs to this nation acted and committed in the said wars ... And ... John Cook ... doth ... impeach the said Charles Stuart as a Tyrant, Traitor, Murderer, and a public and implacable enemy to the Commonwealth of England ...' Cook in his speech prepared for delivery at the 'trial' said: '... the King took an oath at his coronation to preserve the peace of the nation, to do justice to all and to keep and observe the laws that the people have' but had instead he had waged war on the parliament and people; and had not taken 'the Oath so fully as his predecessor did that so when the parliament should tender good laws to him for the Royal assent, he might readily answer that he was not by oath obliged to confirm or corroborate the same'. See John Cook's Speech, written should the King have been prepared to answer the charges, in Muddiman, above n 64, Appendix C, 233 ff, 236 and 238 respectively.

71 The role of the judges vis-à-vis the Parliament (King and two houses) and the King himself is not discussed here.