Response to the Commentators

JEFFREY GOLDSWORTHY

I would like to repeat my expression of gratitude to all the commentators for the attention they have given to my book, and the careful and constructive comments they have made. In my response, I will naturally focus mainly on points of disagreement.

Response to Geoffrey Walker: obsolescence of parliamentary sovereignty

Professor Walker argues that the doctrine of parliamentary sovereignty either is already, or is becoming, obsolete.[1] I do not agree that the cases he discusses support this claim.

He relies, first, on the decisions in *Anisminic* and subsequent cases in which, he claims, 'the courts have disregarded the clear words of privative statutes and have entrenched judicial review of the executive'.[2] It is true that I do not mention *Anisminic* in my book.[3] But I do discuss at some length the general issue posed by the courts' practice of interpreting some statutory provisions restrictively, even to the extent of distorting their literal meanings, in order to protect fundamental common law principles.[4] I point out that the courts invariably claim to be giving effect to Parliament's implicit intention, or, at least, to a strong interpretive presumption, which Parliament has not indicated with sufficient clarity an intention to override.[5] Even Trevor Allan, a major critic of the doctrine of parliamentary sovereignty, once said of the decision in *Anisminic* that '[i]t is quite as reasonable to suppose that Parliament intended the courts to superintend the Foreign Compensation Commission, as regards the extent of its jurisdiction, as to suppose the contrary. Far more reasonable – it would seem almost absurd to think that Parliament intended the Commission's activities to be

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1 Geoffrey de Q Walker, 'The Unwritten Constitution' 144 this volume.

2 Ibid 147.

3 Ibid.

4 *The Sovereignty of Parliament, History and Philosophy* (Clarendon Press, Oxford, 1999) 250-2.

5 Ibid 250.

free from all legal control.'[6] He expressly repudiated the claim that the courts in such cases were resisting parliamentary intention, or defying the doctrine of parliamentary sovereignty.[7] Allan, of course, may be wrong – but it is significant that someone otherwise sympathetic to Walker's views disagrees with him here. I would add that even if Walker is right about *Anisminic*, there is virtually no basis for his further suggestion that 'judicial review of legislation has plainly resumed its former place in the constitutional order.'[8] Much of my book is devoted to a detailed refutation of the notion that judicial review of legislation ever had such a place, and Walker offers almost no evidence to the contrary.[9]

The other decision that Walker relies on is *Factortame 2*, in which the court 'disapplied' a British statute that was inconsistent with the law of the European Union. He rejects the theory that the decision can be explained in terms of statutory construction, and prefers Sir William Wade's thesis that 'a common law constitutional revolution' has occurred.[10] I am more attracted to something like the statutory construction theory. It is not possible to defend that theory here, but it is also unnecessary, given Geoffrey Lindell's superb recent exposition of it.[11] Alternatively, it is possible to argue (as I do in the book) that even if the rule of recognition of statute law has changed in Britain, it has changed only to the extent of rejecting the old assumption that Parliament cannot control the form in which future legislation must be enacted. That assumption was never entailed by the concept of parliamentary sovereignty. Even Sir William Wade agrees that the British Parliament is still legally free to sever its ties with the European Union, although it is required to state its intention to do so explicitly.[12] A Parliament that can only effectively legislate if it uses a particular form of words, to ensure that its intentions are unmistakable, is still free to legislate whenever it wishes to do so.[13] I therefore share Sir

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6 T R S Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 *Cambridge Law Journal* 111,127.

7 Ibid. He has not subsequently resiled from this opinion: see T R S Allan, *Constitutional Justice; a Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001) 211-2.

8 Walker, above n 1, 147.

9 The little evidence he does offer is discussed in section discussed below.

10 Walker, above n 1, 149.

11 Geoffrey Lindell, 'Invalidity, Disapplication and the Construction of Acts of Parliament: Their Relationship With Parliamentary Sovereignty in the Light of the European Communities Act and the Human Rights Act' (1999) 2 *Cambridge Yearbook of European Legal Studies* 399.

12 H W Wade, 'Sovereignty – Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568, 570-1.

13 Goldsworthy, above n 4, 15 and 244-5.

Anthony Mason's opinion that 'the decision [in *Factortame*] did relatively little damage to the doctrine of parliamentary sovereignty.'[14]

Walker says that 'judicial creativity' may, in the future, 'outflank' the doctrine of parliamentary sovereignty.[15] Later, he adds that 'in extreme cases ... the courts are prepared to engage in the legal acrobatics needed, under current constitutional structures, to bring about a civilized result.'[16] It surely follows that my account of these 'current constitutional structures' is correct, because otherwise, judicial creativity and acrobatics would be unnecessary.

Overlooked precedents

Walker also argues that there are important oversights or errors in the historical evidence that I present.[17] I agree that there are some cases that might support the notion of judicial invalidation of statutes, in addition to those discussed in my book.[18] But of the seven cases that he lists, I construe five as involving statutory construction rather than judicial invalidation, the judges being concerned with interpreting broad statutory words on the assumption that Parliament intended to do justice. This is clear in the cases of *Dr Bentley*, *R v Inhabitants of Cumberland*, and *Leader v Moxton*, and seems to me the best interpretation of *Lord Sheffeild v Ratcliffe* and *Dr Foster's* case.[19] That leaves two decisions of Coke CJ in *Rowles v Mason* and *Calvin's Case*,[20] which perhaps confirms Professor Sherry's opinion, quoted approvingly by Walker, that '[t]he phenomenon of judicial review ... owes its existence to Coke alone'.[21] Since, as I show in my book, Coke's later views are inconsistent with judicial invalidation of statutes, this is hardly a firm basis for the practice.[22] Moreover, Coke's remarks in *Rowles v Mason* are clearly open to the same interpretive difficulties as his more renowned comments in the earlier case of *Dr Bonham*, which he cites in *Rowles*, and which I discuss in my book.[23]

In *Calvin's Case*, Coke plainly states that certain rights and duties fixed by natural law are immutable by statute. I agree with Walker (and Dr Kelly) that *Calvin's Case* is very important, and that I should have

14 Sir Anthony Mason, 'Commentary' 172 this volume.
15 Walker, above n 1, 144.
16 Ibid 154.
17 Ibid 145.
18 Goldsworthy, above n 4, 111 and 122-4.
19 References are supplied by Walker.
20 References are supplied by Walker.
21 Walker, above n 1, 145-146.
22 Goldsworthy, above n 4, 112-7.
23 Ibid 111.

discussed it in my book rather than mentioning it only in passing.[24] But I would argue that the views expressed by Coke in that case reflect the kind of royalist theory that I do discuss at some length.[25] According to that theory, there were some matters that even the King in Parliament could not interfere with. These were matters pertaining to or associated with the King's own sovereignty, which includes the relationship between the King and his natural born subjects, which was the issue in *Calvin's Case.*

American revolutionary thought

Walker argues that American revolutionary thought did not, as I assert, take legislative sovereignty as its starting-point.[26] I stand by my account of American revolutionary thought, and the extensive historical evidence that I cite to support it. It is wholly consistent with the views of the most eminent contemporary historian of that thought.[27] But even if it is wrong – even if a majority of American lawyers and statesmen at that time did believe that (independently of written constitutions) legislatures were limited by judicially enforceable natural law or common law – that would not affect my main argument, which concerns the evolution of parliamentary sovereignty in Britain. I certainly reject Walker's suggestion that a handful of obscure American *obiter dicta* is significant evidence of 'the state of the common law at the time', merely because they were uttered 'at a time when the American courts were still strongly influenced by English law'.[28] If they did accurately reflect English common law, it should be possible to find the English precedents that they reflected!

Walker states that '[t]he courts in these [American] cases placed considerable reliance on Blackstone, whose *Commentaries* contain as much language inconsistent with parliamentary omnipotence as supporting it, a fact usually overlooked by Diceyans'.[29] I hope he is not insinuating that I am among these ignorant or evasive Diceyans. I devote considerable space to explaining why Blackstone's enunciation of the doctrine of parliamentary sovereignty is perfectly consistent with his natural law rhetoric.[30]

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24 Ibid 133, fn 396.

25 Ibid 91-6.

26 Walker, above n 1, 149.

27 See Gordon S Wood, 'The Origins of Judicial Review Revisited, Or How the Marshall Court Made More Out of Less' (1999) 56 *Washington & Lee Law Review* 787.

28 Walker, above n 1, 151.

29 Ibid 149.

30 Goldsworthy, above n 4, 10, 19, 152 and 181-3.

Extreme cases

Walker notes my denial that the courts would have a moral obligation to enforce an evil enactment, but alleges that 'when it comes to their legal obligation, he [Goldsworthy] changes the subject or otherwise fails to answer the question'.[31] I am disappointed to hear this, because I thought I had made it clear in my lengthy discussion of 'the argument from extreme cases' that in Britain, the courts would have a legal obligation to enforce an evil enactment.[32] I have no motive for trying to conceal that opinion. The point is that moral obligations override legal ones – or rather, that legal obligations have practical force only when harnessed to moral obligations.

Popular sovereignty

Walker objects that my argument fails to give due prominence to the principle of popular sovereignty.[33] He says that 'the idea that a nation's constitution is whatever the ruling elite says it is at a given time conflicts with the logically prior political fact of popular sovereignty. Elite consensus cannot be a source of political legitimacy in a democratic society.'[34]

With respect, this confuses two questions. The first is what facts or norms determine the contents of a nation's constitution. I argue, based on HLA Hart's theory of law, that agreement among senior legal officials largely determines this. In the alternative, I argue that even if Dworkin's theory of law is superior to Hart's, the 'interpretation' of law that Dworkin advocates is necessarily constrained by the practices and beliefs of senior legal officials. Where this first issue is concerned, popular sovereignty is relevant only insofar as it can fairly be ascribed to the practices of senior legal officials.

The second question concerns the norms by which the moral legitimacy of a constitution is assessed. It would be silly to suggest that these norms are determined by consensus among senior legal officials, and I do not do so. Moral legitimacy is determined by moral norms, which include the principle of popular sovereignty.

The distinction between these two questions reflects the fact that many countries have constitutions that are inconsistent with popular sovereignty, and partly for that reason, are not morally legitimate. Only extreme natural lawyers would dispute that fact, by arguing that because such a constitution lacks moral validity, it lacks legal validity as well, and is therefore not really a 'constitution' at all. I doubt that Walker is an extreme

31 Walker, above n 1, 153.
32 Goldsworthy, above n 4, 261-271.
33 Walker, above n 1, 154.
34 Ibid.

natural lawyer, and therefore, he must accept that determining the content of a constitution is different from determining its moral legitimacy.

Response to Margaret Kelly

Dr Kelly has a deep knowledge of the legal history with which my book is concerned. But I believe that her criticisms of my book stem, not from factual disagreements, but from misunderstandings of my definitions of the crucial concepts 'Parliament', 'sovereignty', and 'law'.

Parliament

Kelly takes issue primarily with my definition of 'Parliament'. She says that, instead of accepting the legal definition of Parliament as the monarch and the two Houses, I define it as 'the King in Parliament'– thereby adopting Dicey's 'infelicitous and gratuitous' adumbration.[35]

I have to say that I do not understand the difference. When I first stipulate what I mean by 'Parliament', I say:

> 'Parliament' will be used in its usual legal sense, meaning 'the King [or Queen] in Parliament'. The subject of this investigation is the legislative sovereignty of Parliament considered as a whole, including the Crown as well as both Houses, and not the political sovereignty of the two Houses of Parliament.[36]

Moreover, in many passages throughout the book I explain that, according to what I call the 'parliamentarian theory', the 'King in Parliament' consisted of three partners - the King, the Lords, and the Commons - who shared the power to make laws. I argue that in 1688 this theory, which had been adopted by the Whigs, triumphed over the competing 'royalist theory' of the Tories, which held that the legislative authority of the 'King in Parliament' was that of the King alone, which he graciously chose to exercise with the assent of the Lords and Commons.[37]

I had hoped that this made it quite clear that the traditional expression 'the King [or Queen] in Parliament', which has been used for centuries (it was not coined by Dicey),[38] now means exactly the same as the monarch and the two Houses. Kelly objects that 'Parliament' cannot mean 'the King

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35 M R L L Kelly, 'Historical Review' 156 this volume.

36 Goldsworthy, above n 4, 9.

37 Ibid 9, 53, 63-4, 78, 125, 230-2, 256.

38 For many examples of the term in use by historians, who presumably found it in their primary sources, see ibid, 39 fn 134, 52 fnn 8 and 10, 53 fn 17, 64 fn 111 and 115, 65 fn 118, 72 fn 188. For some examples of uses of the term by actual historical personages, see ibid 90 fn 95, 125 fn 343, 126 fn 354, 132 fn 389, and 178 fn 135.

in Parliament', because if so the second expression would mean 'the King in the King in Parliament'[39] – and she could have added that this expansion should logically continue *ad infinitum* ('the King in the King in the King etc'). But this is to employ a pedantic literalism in order to make nonsense of a traditional and well understood idiom. Kelly also complains that the phrase 'King in Parliament' risks elevating the two Houses to the status of 'Parliament'. But the main point of my definition (quoted above) is to guard against precisely that mistake. Given that definition, I do not believe that my use of the phrase can be the cause of semantic difficulties throughout the book,[40] even if semantic difficulties do occasionally arise. Kelly describes how, during the 1640s, apologists for the two Houses argued that Parliament's law-making authority ultimately belonged to them alone, as the representatives of the community.[41] I describe the same events in my book,[42] although I was not aware of the false claims made about the King's coronation oath.

Sovereignty

Kelly claims that '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', by Coke, Bacon, Ellesmere and Locke in the seventeenth century, and Blackstone in the eighteenth.[43] But definitional problems are lurking here as well. Kelly overlooks the way in which my definition of sovereignty distinguishes between the concept of legislative power being morally limited by divine and natural law, and the concept of it being legally limited by judicially enforceable laws.[44] If she means 'invalid' in a moral sense, then I would agree with her. I argue in my book that most claims about municipal laws being 'unlawful' or 'void' because of incompatibility with higher laws should probably be understood in that sense.[45] If, on the other hand, she is referring to the idea that judges have legal authority to declare statutes invalid, then I still believe she is wrong. I discuss the views of all the people she mentions in my book, and on the basis of extensive quotations show that all of them (even Coke, in his later years) supported the doctrine of parliamentary sovereignty as I define it.[46] Kelly cites Bacon's argument, and Ellesmere's judgment, in *Calvin's Case*, but without referring to any

39 Kelly, above n 35, 160.
40 Ibid.
41 Ibid 167-169.
42 Goldsworthy, above n 4, 119-20 and 130-1.
43 Kelly, above n 35, 160.
44 Goldsworthy, above n 4, 16-21.
45 Ibid 121-2.
46 Relevant passages can easily be found in the Index of Names. See ibid 154-169, nn 3, 5, 26, 31, 42, on Coke.

specific passages.[47] I do not believe that any of their statements in that case support the idea of judicial invalidation of statutes. Kelly's remark that 'the issue has been exhaustively examined by John Finnis in the twentieth century' is ironic, because one of Finnis's main points, in discussing classical natural law theorists, is to dispel the popular myth that they regarded legislation inconsistent with natural law precepts as legally null and void.[48]

It is true that Blackstone referred to 'the omnipotence of parliament' as 'a figure rather too bold', presumably because Parliament could only do 'every thing that is not naturally impossible'.[49] But the idea that Parliament cannot do what is impossible has never been in issue – many theologians have said the same thing about God. As I point out in the book, 'the orthodox understanding of parliamentary sovereignty ... concedes that Parliament cannot do what is impossible.'[50] And the best explanation of Blackstone's apparently contradictory endorsement of both parliamentary sovereignty and natural law remains the one provided in my book: that he regarded natural law limits as enforceable only by the non-legal means of popular rebellion.[51] Kelly ignores my discussion of the issue, and by omission, insinuates that I am one of the 'apologists of the doctrine of 'the sovereignty of parliament'' who ignore the natural law rhetoric in Blackstone's writings.[52] When she claims that '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',[53] she again ignores my treatment of the issue, since I quote many passages in which Blackstone explicitly endorsed Locke's assertion.[54]

The Coronation Oath

Kelly's most original claim is that in exercising their powers, including the legislative power they exercise as part of Parliament, English monarchs are bound by their coronation oaths to govern according to the laws of God, and with justice and mercy. 'Therefore, 'The Parliament' ... will always have constraint upon its power to make laws, because Parliament includes the King ... 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

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47 Kelly, above n 35, fn 28.

48 John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) 26, 50 and ch XII.

49 Kelly, above n 35, 162.

50 Goldsworthy, above n 4, 133.

51 See n 30, above.

52 Kelly, above n 35, fn 30.

53 Ibid 162.

54 Goldsworthy, above n 4, 19, 181-183.

law-making power.'[55] The King could not '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.'[56] Kelly concludes that the King's coronation oath is the true sovereign at the foundation of the legal system, '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.'[57]

I agree that the coronation oath is an important piece of evidence of the location of sovereignty. In my book I mention the change to the oath made in 1689, as evidence of the triumph of the parliamentarian, or Whig, theory of legislative sovereignty.[58]

But there are several reasons why Kelly's claim does not affect the arguments made in my book. First, to say that 'the oath is sovereign' might be true in some sense of the term 'sovereign', if the oath can be regarded as the fundamental norm of the legal system. But that is not the sense in which I use the term 'sovereign'. By 'sovereignty', I mean (roughly) legally unlimited law-making power.[59] An oath cannot be sovereign because it cannot make law. It could conceivably confer sovereignty (in my sense) on the King, but then the King makes law only 'in Parliament', and even the royalist theory agreed that the sovereign authority of the King was at its highest 'in Parliament', which I argue comes close to a theory of parliamentary sovereignty.[60]

Sovereignty, as I define it, can be conferred by more fundamental norms.[61] The coronation oath could conceivably be regarded as among those more fundamental norms. On the other hand, this might be doubtful given that in many periods, even deeper norms seem to have determined who was the rightful successor to the throne, and therefore entitled to take the oath (eg, the eldest son etc). Not just anyone was entitled to take the oath and become king or queen. My discussion of Parliament's role in affirming the depositions of kings is relevant here.[62] It suggests that at least before 1530, Parliaments or quasi-Parliaments that declared who was the rightful king did not purport to make kings by their mere say-so, but claimed authoritatively to recognise who was the rightful king according to

55 Kelly, above n 35, fn 7.
56 Ibid fn 10.
57 Ibid fn 12.
58 Goldsworthy, above n 4, 159.
59 Ibid 9-16.
60 Ibid 95.
61 Ibid 13-4 and 236-8.
62 Ibid 31-8.

independent, fundamental norms. Those norms must be more fundamental than the oath taken by the person they identify as the rightful king.

Secondly, Kelly's argument that the coronation oath limits the authority of the king, including his authority to assent to laws, and therefore does not confer sovereignty on Parliament, is also incompatible with the way that I define sovereignty. By 'legally unlimited' law-making authority, I mean authority that is not limited by any norms that are *either* judicially enforceable, *or* are 'expressed in written, canonical form, in formally enacted legal instruments, such as constitutions; are expected to be obeyed ... [and] are in fact generally obeyed ...; and ... are sufficiently clear that some possible actions of those institutions would plainly be inconsistent with them.'[63] The limits that Kelly argues are imposed by the coronation oath have never been regarded as judicially enforceable, and in my opinion do not satisfy the alternative criteria. 'The law of God', 'justice', and 'mercy' are moral rather than legal norms, and as I point out, 'parliamentary sovereignty is perfectly compatible with the existence, and *a fortiori* with widespread belief in the existence, of a 'higher law' by which statutes are evaluated, as long as that 'law' is neither enforceable by the courts or any other human agency, nor set out in a formally enacted legal instrument.'[64]

Kelly is apparently unable to cite a single instance of any historical figure invoking the coronation oath as a practical, legal limit to the authority of Parliament. I mention in my book one occasion on which George III asked whether he could properly (given his coronation oath) consent to a bill relaxing laws against Roman Catholics, and Lord Chancellor Kenyon replied that 'the supreme power of a State cannot limit itself.'[65]

Response to Sir Anthony Mason

Sir Anthony Mason discusses two recent legal developments that Walker also discusses: the *Factortame* decision,[66] and administrative law cases in which courts seem to have evaded privative clauses.[67] In essence, he agrees with me about *Factortame*, but agrees with Walker about the privative clause cases.

I think that Sir Anthony is right that 'there is a strong case for saying that the courts in applying some strong presumptive rules of a fictional kind (because they do not reflect the actual legislative intent) are violating

63 Ibid 12.
64 Ibid 17.
65 Ibid 199.
66 Sir Anthony Mason, above n 14.
67 Ibid 175.

parliamentary sovereignty.'[68] But it is not a conclusive case, for the reasons I have already given in response to Walker.[69] When Parliament enacts a privative clause, there is usually genuine doubt about the extent to which it intends to exclude judicial review, especially now that there are so many precedents (of which parliamentary counsel are fully aware) in which the courts have made it clear that exceptionally explicit wording is required. I admit in my book 'that in some other cases, the judges claim to be faithful to Parliament's implicit intention has been a 'noble lie', used to conceal judicial disobedience'. I add that 'such cases are rare, and the fact that the lie is felt to be required indicates that the judges themselves realize that their disobedience is, legally speaking, illicit'.[70] The judges have not to my knowledge ever openly flouted Parliament's authority.

At the end of his paper, Sir Anthony poses an 'extreme case' in which Parliament enacts legislation to extinguish democracy. He states that the courts would be 'justified' in striking down the legislation, and concludes that 'however fundamental the doctrine [of parliamentary sovereignty] may be thought to be it is nevertheless capable of qualification in the hands of judges in order to preserve the core elements of the common law tradition'.[71]

I am not sure whether, by 'justified', he means morally or legally justified, and whether, by 'capable', he means a *de facto* or a *de jure* ability to qualify the doctrine. I agree that in an extreme case such as the one he poses, the judges would be morally justified in striking down the legislation, and I would hope that they would possess the *de facto* ability to prevail. Nevertheless, I do not agree that they would be legally justified, or would possess the *de jure* ability, to do so. This distinction between moral and legal justification and authority is defended in detail in the final chapter of my book.[72] The examples of successful judicial creativity that Sir Anthony discusses do not, in my opinion, establish that the doctrine of parliamentary sovereignty is a common law doctrine, and that the courts therefore possess *de jure* authority to modify it unilaterally. The High Court's decision that there is an implied freedom of political speech in the Australian Constitution does not do so. Although Sir Anthony is right to observe that the decision was strongly criticized by many other senior officials, the Court's authority to interpret the Constitution was never questioned. This does not show that the courts have authority unilaterally to alter the most basic norms that underpin the constitutional system as a whole.

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68 Ibid.

69 See 193-194 above.

70 Goldsworthy, above n 4, 252.

71 Mason, above n 66, 176.

72 Goldsworthy, above n 4, 254-72.

Response to Ian Harris

I was gratified to learn that my book has been found useful within the walls of the Australian Parliament, and I thank Mr Harris for his kind compliments.

He asks 'how qualified must a parliament's power be before it loses its sovereignty? It would appear ... that all the parliaments in Australia have their powers so heavily constrained that they cannot be considered to be sovereign in any widespread sense ... Sovereignty resides somewhere else. Again, the *Constitution* suggests an answer: the people.'[73]

I certainly agree that no Australian parliaments are fully sovereign: they are sovereign only within the ambits of their constitutional powers. This is just a short-hand way of saying that they are not subject to any judicially enforceable limits other than those set out in the written constitutional instruments that bind them: in other words, that they are not legally bound by other principles, such as those of morality, common law, or international law. I do not agree with those who argue that the concept of sovereignty is 'all or nothing', and therefore inapplicable to parliaments whose powers are legally limited.[74] The idea of 'sovereignty within limits' has its uses. Even in the United States, older generations of lawyers used to say that the doctrine of parliamentary sovereignty applied to their legislatures 'except as constitutional limitations are infringed'.[75] As the federal courts continued inexorably to extend their review of legislation, that kind of language disappeared, and no doubt there is a point at which it ceases to be illuminating. That must be a question of degree.

I would not agree that in Australia the people are legally sovereign as I define the term. They have no authority at all to make laws of their own volition. In amending the *Constitution*, they can act only when the Commonwealth Parliament asks them to. No institution or body in Australia possesses full legal sovereignty, and the people merely share a portion of it (albeit a very important portion). They may be described as sovereign only in a loose, political sense of the term.

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73 Ian Harris, 'Commentary' 177 this volume.

74 Eg, David Kinley, 'Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law' (1994) 22 *Federal Law Review* 194, 197.

75 Roscoe Pound, 'Common Law and Legislation' (1908) *21 Harvard Law Review* 383, 392. See also J Kent, *Commentaries on American Law* (Little Brown & Co, Boston, 10th ed, 1860) vol I, 503: 'if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government.'

Harris's discussion of the law on parliamentary privilege has made me think more carefully about the relationship between it and parliamentary sovereignty. I had (without much reflection) thought that sovereignty and privilege are different concepts, because sovereignty concerns the legislative authority of the institution as a whole, rather than special powers and immunities of the two Houses and their members. They are certainly closely related, because historically many of the same reasons why people accepted Parliament's sovereignty also persuaded them to accept its privileges. Indeed, in earlier centuries Parliament's right to be obeyed was sometimes described as one of its highest privileges.[76] For that reason, I refer to cases on parliamentary privilege in tracing the historical pedigree of parliamentary sovereignty.[77]

But perhaps there is a more intimate relationship between the two concepts. If the Houses of Parliament and their members did not enjoy certain immunities from external interference – if, for example, they did not have unfettered freedom of speech – would not the legislative sovereignty of Parliament as a whole be jeopardised? Could an institution be truly sovereign, if its component parts could be threatened or coerced by an external person or body? Even if its laws could not be invalidated after enactment, would there not be a danger that it could be prevented from enacting certain laws at all? As Harris points out, 'parliamentary privilege [is] vital to the exercise of the functions of parliament'.[78] His suggestion that 'there was a surrender of an element of sovereignty in the passage of the *Privileges Act*' must therefore be taken more seriously than I initially thought.[79] These are interesting and important questions that I cannot pursue here, but I am very grateful to Harris for making me think about them.

Response to Geoffrey Lindell

Apart from thanking Professor Lindell for his kind compliments, there is little I can say in response because (as usual) I agree with all of his comments. I very much like the distinction he draws between constitutions such as the British, which are based heavily on trust of elected legislators, and those such as the American, which are much more influenced by distrust.[80] I agree that there has recently been a shift in the *zeitgeist* (for want of a better word) in countries such as Australia, from an attitude of trust to one of distrust. It must be acknowledged that the behaviour of our politicians (as Walker points out) has contributed to the erosion of trust in

76 See Goldsworthy, above n 4, 101, 110, 130-1.
77 Eg, ibid 198-9, 222-4, 242, 273.
78 Harris, above n 73, 181.
79 Ibid 182.
80 Geoffrey Lindell, 'Commentary' 185 this volume.

them. This is fuelling agitation for a stronger protection of rights, either by the formal adoption of a bill of rights, or by 'judicial acrobatics' (to use Walker's term) in the creative 'interpretation' of existing law.

Judges are not immune from this deep shift in the public mood, as can be observed in their current tendency to take arguments based on hypothetical 'extreme cases' much more seriously than formerly. Fear of an imagined future tyranny tempts some of them to seek to equip future judges with the means to resist it, even at the cost of exceeding their own authority as interpreters rather than makers of law. But apart from that obstacle, these judges often ignore the need to consider the full range of possible future dangers, all of them fearful, but in different respects. As I argue in my book:

> The price that must be paid for giving judges authority to invalidate a few laws that are clearly unjust or undemocratic is that they must also be given authority to overrule the democratic process in a much larger number of cases where the requirements of justice or democracy are debatable. The danger of excessive judicial interference with democratic decision-making might be worse than that of parliamentary tyranny, given the relative probabilities of their actually occurring.[81]

One question is how these relative probabilities, and the extent to which they are to be feared, should be assessed. A second question is whether, and if so how, our constitutional arrangements should be changed in response to that assessment. My book does not offer any answers to those questions. A third question is: who has constitutional authority, after answering those questions, to actually change our constitutional arrangements? As Lindell understands, that is the subject-matter of my book.

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[81] Goldsworthy, above n 4, 269.