

WHY IS THE CONSTITUTION BINDING? AUTHORITY, OBLIGATION AND THE ROLE OF THE PEOPLE

I INTRODUCTION

In 1986, Geoffrey Lindell asked ‘Why is Australia’s Constitution Binding?’. He considered whether the answer was different in 1900 and 1986 and what the effect of independence had been.¹ Lindell’s answer to this question, which I summarise in Part II, has been enormously influential (Part III). It directed attention to the original enactment of the *Constitution* by the Imperial Parliament but also identified the role of the Australian people as an additional explanation for the *Constitution*’s legally binding status.

In this article, I argue for a far more modest conception of the people’s role in explaining why the *Constitution* is legally binding (Part IV). In particular, I argue that recent statements about the *Grundnorm* of the Australian constitutional order now being located in the people are entirely mistaken. I then consider why the *Constitution* might be morally binding (Part V). I argue that the agreement or acquiescence of the people is a minor element in explaining why the *Constitution* is morally binding and therefore that the language of ‘popular sovereignty’ ought to be avoided in elaborating the role of the people. Finally, I argue that attempts to explain the moral authority of the *Constitution* must invoke and defend a substantive moral theory.

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¹ Geoffrey Lindell, ‘Why is Australia’s Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29.

II LINDELL'S ANSWER: WHY THE CONSTITUTION IS BINDING

According to Lindell, in 1900, a lawyer would rely on the *Constitution's* 'status as a British Imperial enactment ... in explaining its legally binding character'.² This was because the basic sources of law which then operated in Australia included:

1. 'So much English law (common law and statutory) as was applicable to the new situation and condition of the Australian colonies.'
2. 'Statutes enacted by the British Parliament which were intended to apply to those colonies *ie* applying by paramount force.'
3. Statutes enacted by local colonial parliaments under law-making powers conferred by the British Parliament, provided they did not exceed the law-making powers conferred by the British Parliament or alter or repeal British legislation applying by paramount force.³

The *Constitution*, as a statute applying by paramount force, operated as a source of law in Australia and was accorded supremacy over inconsistent statutes purportedly enacted by Australian legislatures.⁴

Lindell observed that this explanation of the *Constitution's* legally binding status in 1900 did not 'treat as legally relevant the agreement of the Australian people to federate however important such a factor may have been in explaining the political reason for the adoption of the Constitution'.⁵ In this, he was in full agreement with Dixon, writing extrajudicially in 1935:

[The *Constitution*] is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.⁶

Lindell then turned to consider whether a different answer was required in 1986. He stressed 'the essential continuity in the chain of legislative authority'.⁷ The legal explanation for the *Constitution's* legally binding status in 1900 remained correct in 1986 because 'nothing ha[d] happened to change the pre-existing inability of the

² Ibid 30.

³ Ibid 31–2.

⁴ Ibid 32.

⁵ Ibid 33.

⁶ Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597, quoted in G Lindell, above n 1, 29.

⁷ G Lindell, above n 1, 37.

Parliaments of the Commonwealth and the States to legislate inconsistently with the Constitution'.⁸

However, Lindell went on, the 'necessary reliance' of this explanation 'on Australia's colonial past' may lead to a search for 'an additional, although not necessarily alternative, way of explaining the reason for the legally binding and fundamental character of the Constitution'.⁹

He found that additional explanation in three places:

1. in 'the agreement of the people to federate' mentioned in the Preamble to the *Constitution Act*;
2. in their role in approving constitutional amendments; and
3. in their 'acquiescence in the continued operation of the Constitution as a fundamental law'.¹⁰

In short:

According to this approach the Constitution enjoys its character as a higher law because of the will and authority of the people. Such an explanation more closely conforms to the present social and political reality and has the advantage of ensuring that the legal explanation for the binding character of the Constitution coincides with popular understanding.¹¹

The additional explanation for the binding status of the *Constitution* had the merit 'of being readily understandable by persons who are not versed in the niceties of constitutional law'.¹² It is worth noting that here Lindell claimed that 'the will and authority of the people' provided an explanation (albeit an additional explanation) for the *legally* binding status of the *Constitution* and not merely for its *morally* or *politically* binding status.

⁸ Ibid (emphasis removed).

⁹ Ibid 37 (emphasis added).

¹⁰ Ibid 37.

¹¹ Ibid.

¹² Ibid 49. Lindell went on to consider the consequences that the reasons that the *Constitution* is binding have for constitutional interpretation. These consequences are beyond the scope of the present article.

III LINDELL'S IMPACT AND THE ASCENDANCY OF POPULAR SOVEREIGNTY

Lindell's answer to the question, 'Why is the Constitution binding?', has had a considerable direct and indirect impact on judicial decision-making. Perhaps the most significant, if not the most faithful to Lindell's argument, was the reference that Mason CJ made to it in *Australian Capital Television Pty Ltd v The Commonwealth* ('ACTV').¹³ The Chief Justice wrote:

Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people. Hence, the prescribed procedure for amendment of the Constitution hinges upon a referendum at which the proposed amendment is approved by a majority of electors and a majority of electors in a majority of the States (s 128). And, most recently, the *Australia Act 1986* (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people.¹⁴

He cited Lindell's article at this point and continued:

The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.¹⁵

This passage crystallised earlier suggestions that the *Constitution* derived its authority from the sovereignty of the Australian people.¹⁶ Contrary to Lindell,¹⁷ however, Mason CJ held that the sovereignty of the people could be used to ground implications limiting Commonwealth (and later State) legislative power.

In the decade since *ACTV* in the course of fleshing out these implications, many judges have referred to the role of the people in explaining the authority of the

¹³ (1992) 177 CLR 106 ('ACTV').

¹⁴ (1992) 177 CLR 106, 138. The last sentence, and the citation of Lindell, suggests that Mason CJ was of the view that legal and political sovereignty lay with the people.

¹⁵ Ibid.

¹⁶ *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 383 (Murphy J); *Leeth v The Commonwealth* (1992) 174 CLR 455, 483-484 (Deane and Toohey JJ).

¹⁷ G Lindell, above n 1, 44.

Constitution. They have often done so in terms of ‘political’, ‘legal’ and ‘ultimate’ sovereignty. The meaning of these terms and how they are to be distinguished are not clear. Bryce’s analysis appears to have been particularly significant to members of the High Court. For Bryce, *political* sovereignty encompasses that which ‘[lies] outside the questions with which Law is concerned’, in other words, the justification of the sovereign’s claim of authority.¹⁸ The *legal* sovereign is

the person (or body) to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power either of laying down general rules or of issuing isolated rules or commands, whose authority is that of the law itself.¹⁹

Finally, *ultimate* sovereignty enters Bryce’s analysis through his consideration of federations, in which legal sovereignty may be divided, and other states governed by rigid constitutions, in which legal sovereignty may not encompass all potential subjects of legislation.²⁰ As McHugh J wrote in *McGinty v Western Australia* (*McGinty*),

Lord Bryce asserted that, in a country governed by a rigid Constitution which limits the power of the legislature to certain subjects or forbids it to transgress certain fundamental doctrines, the sovereignty of the legislature is necessarily restricted. In that case, ultimate sovereignty resides in the body which made and can amend the Constitution.²¹

McHugh J therefore wrote that ‘the political and legal sovereignty of Australia now resides in the people of Australia’²² and ‘ultimate sovereignty resides in the body which made and can amend the Constitution’.²³ Brennan CJ and Gleeson CJ have similarly linked political and legal sovereignty with the people and their role in amending or replacing the *Constitution*.²⁴

¹⁸ James Bryce, *Studies in History and Jurisprudence* (1901) vol 2, 57.

¹⁹ Ibid 51.

²⁰ Ibid vol 2, 58.

²¹ *McGinty v Western Australia* (1996) 186 CLR 140, 236–7 (*McGinty*), citing Bryce, above n 18, 53. Compare to similar effect *ibid* 274–275 (Gummow J). As Daley points out this proposition requires some modification – although the Imperial Parliament made the *Constitution*, it can no longer make laws for Australia (John Daley, ‘The Bases for the Authority of the Australian Constitution’, (DPhil Thesis, Oxford University, 1999) 18–9) and it would be ‘nonsensical’ to describe it as having sovereignty today.

²² *McGinty* (1996) 186 CLR 140, 230.

²³ Ibid 237.

²⁴ (1995) 183 CLR ix, x (Brennan CJ on his swearing in) (‘the Constitution can now be abrogated or amended only by the Australian people in whom, therefore, the ultimate

But that role,²⁵ whether it is labeled political, legal or ultimate sovereignty, does not explain the legal or moral authority of the *Constitution*. The people's role in amending the *Constitution*²⁶ that is contemplated in these judicial comments arises *under* the *Constitution* and can hardly provide a foundation *for* the *Constitution*. The people's capacity to abrogate the *Constitution*²⁷ — to bring it to an end by revolution — marks the limits of the *Constitution*'s authority but does not provide that authority or define those limits. Equally, as will be seen below, neither the adoption of the *Constitution* by a small number of people now long dead nor acquiescence in the *Constitution* by people alive today²⁸ can supply its moral authority.

What then is the explanation for the legal and moral authority of the *Constitution*? Do the people have a role? And what of the fashion for casting answers in terms of popular sovereignty? It is to these questions that I now turn.

IV LEGAL AUTHORITY

First I consider the *Constitution*'s legal authority: Why is the *Constitution* binding legally? In asking why the *Constitution* was binding, Lindell raised a question that rarely troubles lawyers. The legally binding nature of the *Constitution* is simply assumed without need for further explanation or justification. One might point to

sovereignty of the nation resides'); A M Gleeson, *The Rule of Law and the Constitution* (2000) 6 ('the sovereignty of our nation lies with the people, both as a matter of legal principle and as a matter of practical reality'). Perhaps Gleeson's view is that popular sovereignty actually 'does not generate competing visions of governance but rather demands careful adherence to the terms of what was agreed': see Andrew Lynch, 'The High Court – Legitimacy and Change: Review Essay: Haig Patapan, *Judging Democracy – The New Politics Of The High Court Of Australia*' (2001) 29 *Federal Law Review* 295, 304.

²⁵ The role of the people in constitutional amendment is easily overstated. The agreement of the people is necessary but not sufficient to amend the *Constitution* and what constitutes their agreement is subjected to federal requirements. Perhaps their agreement is not even necessary given *Australia Act 1986 (Cth)* s 15. See *McGinty* (1996) 186 CLR 140, 274–5 (Gummow J).

²⁶ Or, more weakly, following Toohey J in *McGinty* (1996) 186 CLR 140, 199, in exercising the 'ultimate power of governmental control reserved to the people under the *Constitution*'.

²⁷ See (1995) 183 CLR ix, x (Brennan CJ on his swearing in).

²⁸ Note especially *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104, 171 (Deane J) ('The present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people.').

covering clause 5 of the *Commonwealth of Australia Constitution Act 1900 (Imp)*.²⁹ But that does not demonstrate for more than a moment that the *Constitution* is legally binding; it only invites the further question ‘But why is covering clause 5 binding?’ Within the Australian legal tradition the appropriate starting points for answering these questions are the twentieth century positivist accounts of Kelsen and Hart.

A *A Shifting Grundnorm?*

Some judges and commentators who take the view that the *Constitution* is now legally binding by reason of the sovereignty of the people, identify this as a consequence of a shift in the ‘*Grundnorm*’ (or basic norm) of the Australian legal system from which all other norms are ultimately derived.³⁰

There is considerable uncertainty as to what exactly the Austrian jurist Hans Kelsen meant by the ‘*Grundnorm*’ and the role it was to play in his concept of a legal system.³¹ For present purposes, it suffices to regard the *Grundnorm* as a norm (an *ought*-statement) of the form ‘The (first) constitution ought be obeyed’. A rule, then, is a rule of the legal system only if it can be derived, directly or indirectly, from this basic norm. Importantly, for Kelsen, the *Grundnorm* is a presupposition, not a norm that is derived from social understandings or practices. It is ‘just a way of thinking that is necessary for a range of statements and conclusions about the law to make any sense at all.’³²

²⁹ ‘This Act, and all laws made by the Parliament of the Commonwealth under the *Constitution*, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.’

³⁰ Michael D Kirby, ‘Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution’ (1996) 3 *Deakin Law Review* 129-46; *Egan v Willis* (1996) 40 NSWLR 650, 685-686 (Mahoney P) (‘The effect and, indeed, the purpose of the [Australia Acts] was (to follow the language of Kels[e]n) to alter the grundnorm of the Australian legal system.’). Compare Harley G A Wright, ‘Sovereignty of the People – The New Constitutional Grundnorm?’ (1998) 26 *Federal Law Review* 165; Anthony Dillon, ‘A Turtle by any Other Name: The Legal Basis of the Australian Constitution’ (2001) 29 *Federal Law Review* 241, 257 n 104.

³¹ Julius Stone, *Legal System and Lawyers’ Reasoning* (1964, revised reprint 1968) Ch 3. For subsequent references, see Frederick Schauer, ‘Amending the Presuppositions of a Constitution’ in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) 149 n 10.

³² F Schauer, *ibid*, 149. In particular, it explains the normativity of law – the fact that law makes claims about what *ought* to be the case. Absent the presupposition of such a norm (such an *ought*-statement), the law would be a set of facts – the events when law is made by legislatures and courts. Norms cannot be derived from facts. The

The *Grundnorm*, then, is not something that can be changed from within the legal system and the acts of judges and legislatures can at best reflect, rather than effect, a change in the *Grundnorm*.

This conception of the *Grundnorm* makes it difficult to regard popular sovereignty as the *Grundnorm*. Popular sovereignty is most naturally regarded as a moral concept used in justifying political authority and political obligation and explaining their legitimacy. But it is a category error to associate the *Grundnorm* with the legitimacy or moral authority of a legal order. The fundamental political or moral justification of a legal order may be that it reflects and pursues the people's sovereignty or capacity for self-rule (I consider this below). But that is not the *Grundnorm* in Kelsen's terms; and it is best not to obscure the moral analysis with the metaphysics of Kelsenian analysis.

Moreover, the *Grundnorm* must, in Julius Stone's words,

be discovered in tolerably precise terms, for it is common ground that these terms control in an absolute way the candidacy of all subordinate norms to the title 'legal'. They are like genes, performing their work of shaping and limiting and controlling the legal system down to the furthest and lowliest generations of legal norms.³³

'Popular sovereignty' cannot be the *Grundnorm* for the simple reason that it is not a norm. But can it be elaborated as a norm in sufficiently precise terms to constitute a *Grundnorm*?³⁴ Consider three possible norms derived from the features Lindell saw as central to popular sovereignty or 'the will and authority of the people'.³⁵

- First, 'The terms of "the agreement of the people to federate" is law'.
- Secondly, 'The terms of constitutional amendments approved by the people is law'.
- Thirdly, 'The terms of the constitution in whose continued operation the people acquiesce is law.'

Grundnorm supplies the missing *ought*-premise and accounts for the law as a normative system and not a set of brute facts.

³³ J Stone, above n 31, 127.

³⁴ The simplest specification of the *Grundnorm* might be that '[o]ne ought to behave according to the actually established and effective constitution': Hans Kelsen, *Pure Theory of Law* (1967) 212.

³⁵ G Lindell, above n 1, 37; see text above n 10.

As to the first, the terms of the people's agreement are *not* law. The people's agreement does not identify the terms of *Constitution* s 74 as amended at Westminster; nor does it identify the terms of the covering clauses.

The second can only explain why the eight successful amendments to the *Constitution* are law — it does not provide an apex norm from which any other elements of the Australian legal order can be derived.

And the third does not appear to be a presupposition of the legal system, even if it could be recast in sufficiently precise terms,³⁶ except to the extent that the acquiescence of some of the people some of the time is necessary for an effective legal order in which it makes sense to talk about validity.

This is not to say that the *Grundnorm* is unchanged since 1900. In 1900 most likely it included, 'What the Crown-in-Parliament at Westminster enacts is law'. The relevant part may now be, 'The terms of the *Constitution of the Commonwealth of Australia Act 1900* (Imp) are law', so that the current *Grundnorm* makes no reference to the role of the Imperial Parliament in producing the constitutional text and denies that any new Acts of the Imperial Parliament are law for Australia. (I consider this possible reformulation of the *Grundnorm* below.) But once again this does not make popular sovereignty the *Grundnorm*.

For all these reasons, I find the Kelsenian analysis of the legal authority of the *Constitution* unhelpful when attempts are made to link it with notions of popular sovereignty.

Finally, it is worth noting that if a shift in the *Grundnorm* has occurred, it could not have been effected by the statutes leading to Australian independence.³⁷ The *Grundnorm* is not a norm of the legal system that can be changed by the direct effect of norms belonging to that system. Rather these statutes *depend* for their legal operation on the *Grundnorm*. Nonetheless, the *Australia Act 1986* (Cth), as interpreted by the High Court, *presupposes* a change in the traditional, unrestrained view of the sovereignty of the Imperial Parliament. This is because

Australian courts are, as a matter of the fundamental law of this country, [no longer] immediately bound to recognise and give effect to the exercise of legislative ... power by the institutions of government of the United Kingdom,

³⁶ That would require that 'the people' be specified and 'acquiescence' defined in clear, though not necessarily morally defensible, terms.

³⁷ The *Australia Act 1986* (Cth), the *Australia Act 1986* (Imp), the *Statute of Westminster Adoption Act 1942* (Cth) or *Statute of Westminster 1931* (Imp).

including any attempt by the Imperial Parliament to repeal the *Australia Act*.³⁸ To that extent a shift in the *Grundnorm* is presupposed by the *Australia Act*. Without such a shift in the *Grundnorm*, covering clause 5 of the *Constitution* could not immunise s 1 of the *Australia Act* from implied repeal by later Imperial legislation.

B *A Changed Rule of Recognition?*

Can a Hartian analysis do any better than the Kelsenian analysis in explaining how popular sovereignty might be relevant to the legal authority of the *Constitution*?

On H L A Hart's analysis, a rule is a valid legal rule only if it can be derived from a rule that a rule of recognition identifies as a valid legal rule. In other words, valid (primary) legal rules have pedigrees that can be traced back to legal rules that the (secondary) rule of recognition recognises. Like Kelsen's *Grundnorm*, the rule of recognition prevents infinite regress in the attempt to identify the authority of a legal rule. Like the *Grundnorm*, the rule of recognition (at least on conventional analyses) is not a norm of the legal system. (And therefore just as the *Constitution* is not the *Grundnorm*, neither is it the rule of recognition.) But unlike the *Grundnorm*, the rule of recognition is more than a metaphysical presupposition. Hart regarded the rule of recognition as a social convention, an observable fact (albeit a fact concerning a norm) rather than a metaphysical postulate³⁹ — a rule is a rule of recognition only if it is accepted by some relevant part of the society whose legal system it grounds. But, as commentators have noted,⁴⁰ Hart was somewhat ambiguous about which social group must accept a rule if it is to constitute the rule of recognition:

At some points he spoke about 'the practice of judges, officials, and others,'⁴¹ or about the presuppositions that lie behind '[s]tatements of legal validity made about particular rules in the day-to-day life of a legal system whether by judges, lawyers, or ordinary citizens.'⁴² At other points,

³⁸ *Sue v Hill* (1999) 199 CLR 462, 490 [59], 492 [64] (Gleeson CJ, Gummow and Hayne JJ) (see also *ibid* 491 [63]).

³⁹ See H L A Hart, *The Concept of Law* (1994) 293 (characterisation of the *Grundnorm* as a 'postulated ultimate rule' 'obscures, if it is not actually inconsistent with, the point stressed in this book, viz. that the question what the criteria of legal validity in any legal system are is a question of fact. It is a factual question though it is one about the existence and content of a rule.')

⁴⁰ Melvin A Eisenberg, 'The Concept of National Law and the Rule of Recognition' (2002) 29 *Florida State University Law Review* 1229, 1246. See also Joseph Raz, *The Authority of Law* (1979) 92.

⁴¹ H L A Hart, *ibid* n 39, 109.

⁴² *Ibid* 108.

however, he spoke only of the acceptance of the rule of recognition by 'officials,'⁴³ or as a rule of recognition as 'existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts.'⁴⁴

This ambiguity raises the question how changes in the rule of recognition occur. Some points should be obvious. The rule of recognition *cannot* be changed directly by norms of the legal system and was not changed directly by the statutes leading to Australian independence.⁴⁵ Equally, it cannot be changed by referendum.⁴⁶ (It is a rule of recognition that directs legal actors to pay attention to the results of the referendum.) It will change, however, to reflect the practice of the relevant legal officials. But which ones? In particular, can the courts change the rule of recognition unilaterally? Should they hold, as some have argued, that it imposes substantive limits on parliamentary sovereignty based on ideas of popular sovereignty? I consider these questions in the next section.

C *The Rule of Recognition as a Common Law Rule*

Some commentators regard the rule of recognition (more commonly discussed in terms of parliamentary sovereignty) not simply as a sociological fact but as a rule of the common law. The *Constitution* is then binding because a rule adopted *and alterable* by the courts so holds. Here I argue that this is not the case. I argue further that the rule of recognition does not impose substantive limits on Parliamentary legislation. The starting point is Dixon J's observations about the British constitution:

[T]he British conception of the complete supremacy of Parliament developed under the common law; it forms part of the common law and,

⁴³ Ibid 117.

⁴⁴ Ibid 256.

⁴⁵ Contrast Neil MacCormick, *Questioning Sovereignty* (1999) 86–93 who argues that the *European Communities Act 1972* (UK) s 2(1), (4) changed part of the UK rule of recognition, unless and until the change is repealed by a later Parliament. The flaw in MacCormick's argument may be that he treats the rule of recognition as law (see especially *ibid* 88). The argument that (1) the rule of recognition is 'a central part of constitutional law'; (2) the constitution can be amended; therefore (3) the rule of recognition can be amended if, and in the manner that, the particular constitution permits, is similarly flawed (see *ibid* 86).

⁴⁶ As proposed by John W Tate, 'Giving Substance to Murphy's Law: The Question of Australian Sovereignty' (2001) 27 *Monash University Law Review* 21, 74–6. It is also hard to see how a referendum conducted under *Constitution* s 128 is 'a process whose ... results are not dependent on Westminster but arise from Australian sources alone', absent an *already-established* change in the rule of recognition: *ibid* 75.

indeed, it may be considered as deriving its authority from the common law rather than as giving authority to the common law.⁴⁷

Again referring to the British constitution, he wrote, the common law was ‘the ultimate constitutional foundation’,⁴⁸ providing, amongst other things, authority for the Imperial Parliament to enact law for Australia.

A recent commentator, Michael Wait, takes a substantial leap from here to assert that Dixon’s view was that the common law was the source of *Australian* constitutional authority.⁴⁹ Such a view is inconsistent with Dixon’s rejection of parliamentary sovereignty as a feature of Australian constitutionalism (that rejection is something that Wait rightly emphasises).⁵⁰ Neither am I persuaded by Wait’s argument that sourcing the authority of the *Constitution* in the common law explains features of Dixon’s jurisprudence (judicial deference, legalism-textualism in interpretation, and the ‘source and stream’ principle).⁵¹ Clearly Dixon did regard

⁴⁷ Owen Dixon, ‘Sources of Legal Authority’ in Judge Woinarski (ed), *Jesting Pilate: and other legal addresses* (1965) 198, 199, misquoted slightly in Michael Wait, ‘The Slumbering Sovereign: Sir Owen Dixon’s Common Law Constitution Revisited’ (2001) 29 *Federal Law Review* 57, 64.

⁴⁸ Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ in Judge Woinarski (ed), *Jesting Pilate: and other legal addresses* (1965) 203.

⁴⁹ M Wait, above n 47, 64. Chief Justice Doyle and Wendy Harris in their comments on this paper both noted the tension inherent in holding simultaneously that the common law is subject to the *Constitution* and that it is its ultimate foundation: see further Graeme Hill and Adrienne Stone, ‘The Constitutionalisation of the Common Law’ in this volume. Doyle suggested however that there might be two types of common law, one ‘the common law applied by the courts on a daily basis’, the other ‘a kind of constitutional common law, which deals with the foundational questions of our legal system’. I agree with Doyle that to describe the latter as law ‘probably puts the tag of law on a political fact’.

⁵⁰ M Wait, above n 47, 60ff. See also Dixon, above n 6, 597. In any event, Dixon regarded the doctrine of parliamentary sovereignty as a rule of the common law only in an extended sense. He appears to have agreed with Salmond that the rule was ‘ultimate legal principle’ whose source was ‘historical only, not legal’: Dixon, above n 48, 207.

⁵¹ M Wait, above n 47. Wait also appears to fail to note the multiple senses of ‘sovereign’ and ‘sovereignty’. In *Sue v Hill*, Gleeson CJ, Gummow and Hayne JJ wrote, ‘The sovereign, being a constitutional monarch, acts, as the term indicates, in accordance with the limitations developed over time as part of what is identified as the British Constitution.’ ((1999) 199 CLR 462, 494 [70]; referred to in Wait, above n 47, 57–8, 68–9, 70.) ‘Sovereign’ here refers to ‘the person occupying the hereditary office of Sovereign’ ((1999) 199 CLR 462, 503 [92]) of the United Kingdom or Australia. I perceive nothing in this passage to raise the doubts Wait perceives as to

principles embodied in the common law (most notably the rule of law⁵²) as relevant in constitutional interpretation. But there is no necessary connection between this proposition and the authority of the *Constitution*. If, as Dixon argued, the common law was ‘antecedent in operation to the constitutional instruments which first divided Australia into separate Colonies and then united her in a federal Commonwealth’,⁵³ those common law principles were available regardless of the source of the *Constitution*’s authority. They were, as Dixon wrote, the assumptions against which the *Constitution* was framed.⁵⁴

Wait does not identify anything in Dixon’s writing that suggests Dixon would agree with T R S Allan that the authority of the Imperial Parliament (let alone the Commonwealth Parliament) is ‘circumscribed’ by the common law.⁵⁵ And to the extent that Dixon held that the Commonwealth Parliament was limited by the rule of law, it was a thin conception of the rule of law; one that simply required a subordinate legislature empowered by a written instrument to adhere to the limits of its law-making authority contained in that instrument and precluded it from authoritatively determining those limits for itself.⁵⁶ The common law was a substantially formal source of the doctrine of parliamentary sovereignty for Dixon, much like his conception of the role of the Crown as sovereign for Australia.⁵⁷ And neither has a role for the people as the source of the *Constitution*’s authority.

D *Constitutional Morality and the Rule of Recognition*

T R S Allan on the other hand has long argued that the fundamental norm of English constitutional law, the sovereignty of Parliament, is a common law doctrine that (i) was devised by the courts; (ii) (here departing from anything in Dixon’s writing that I have been able to find) imposes substantive limits on the Parliament;

whether ‘the Australian people have retained their sovereign status’ (M Wait, above n 47, 57).

⁵² See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (*‘Communist Party Case’*).

⁵³ Owen Dixon, ‘Address to the Section of the American Bar Association for International and Comparative Law’ (1943) 17 *Australian Law Journal* 138, 139.

⁵⁴ *Communist Party Case* (1951) 83 CLR 1, 193.

⁵⁵ See M Wait, above n 47, 64. Recognition that the monarch is a constitutional monarch, ‘constrained by the rule of law’, and not a Hobbesian sovereign (ibid 69) says nothing about the source of authority of the constitution under which the monarch exercises power. Wait refers to T R S Allan, ‘The Common Law as Constitution; Fundamental Rights and First Principles’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 156.

⁵⁶ Compare *Liyanage v The Queen* [1967] 1 AC 259.

⁵⁷ See generally M Wait, above n 47.

and (iii) is within the power of the courts to alter.⁵⁸ Most importantly, in Allan's view, the doctrine of parliamentary sovereignty is a conclusion to be drawn from 'a ... fundamental constitutional morality',⁵⁹ which underlies the legal order.⁶⁰ The doctrine of parliamentary sovereignty 'articulates the courts' commitment to the current British scheme of parliamentary democracy' and 'ensures the effective expression of the political will of the electorate through the medium of its parliamentary representatives'.⁶¹ In later works Allan has emphasised individual dignity, autonomy and equal citizenship as the values that drive this constitutional morality.⁶² In other words, Allan sees *parliamentary* sovereignty as grounded in and limited by values that are associated with a liberal conception of *popular* sovereignty. Parliamentary sovereignty therefore must serve the morality in which it is grounded and not go beyond 'some irreducible, minimum concept of the democratic principle'.⁶³ It follows, on Allan's account that

[a] parliamentary enactment whose effect would be the destruction of any recognisable form of democracy ... could not consistently be applied by the courts as law. Judicial obedience to the statute in such (extreme and unlikely) circumstances could not coherently be justified in terms of the doctrine of parliamentary sovereignty since the statute would plainly undermine the principle which the doctrine serves to protect.⁶⁴

These are not the only limits. The 'political morality which underlies the legal order' consists also in 'attitudes about what justice and fairness require in the relationships between government and governed, and some of these must be fundamental',⁶⁵ in particular the rule of law rather than the rule of arbitrary power.

Allan's approach is problematic for at least three reasons.

⁵⁸ See, eg, T R S Allan, 'The Limits of Parliamentary Sovereignty' [1985] *Public Law* 614; T R S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993); Allan, above n 55; T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001). See generally Thomas Poole, 'Dogmatic Liberalism? T R S Allan and the Common Law Constitution' (2002) 65 *Modern Law Review* 463–75. Allan does not make the simplistic argument, exploded by Goldsworthy, that parliamentary sovereignty must be a common law rule, made and alterable by the courts *because* it cannot have been made and cannot be alterable by the Parliament: Jeffrey Goldsworthy, *The Sovereignty of Parliament* (1999) 240.

⁵⁹ T R S Allan, 'The Limits of Parliamentary Sovereignty', above n 58, 624.

⁶⁰ *Ibid* 622.

⁶¹ *Ibid* 620.

⁶² T R S Allan, *Constitutional Justice*, above n 58, 2, 6, 25, 27–8.

⁶³ T R S Allan, 'The Limits of Parliamentary Sovereignty', above n 58, 620.

⁶⁴ *Ibid* 620–1.

⁶⁵ *Ibid* 623.

1. It is problematic for the legal positivist because it attempts to draw a conclusion of legal invalidity from a contravention of the moral norms derived from individual dignity, autonomy and equal citizenship.⁶⁶ Moral norms are not necessarily judicially enforceable, even when they provide the normative support for the constitutional order.⁶⁷
2. Even from a non-positivist perspective, Allan's approach is problematic. He argues:

The common law articulates the content of the common good, according to the society's shared values and traditions. The judges are its authoritative exponents because their role is to express the collective understanding.⁶⁸

How is this to be reconciled with the ideals of liberal democracy⁶⁹ in which competing conceptions of the common good are equally valued and in which democratic institutions are pre-eminent? How is it to be realized in a modern state in which diverse cultural traditions claim recognition?⁷⁰ Why are the people, on whose dignity, autonomy and equal citizenship Allan's theory is founded, not capable of determining for themselves what those principles require?⁷¹

⁶⁶ J Goldsworthy, above n 58, 254–9.

⁶⁷ See *ibid* 258–9. But perhaps the argument can be completed. It may be that in the circumstances identified by Allan, the moral norms derived from democratic values outweigh the moral case for legal positivism. Of course, this would not satisfy those who regard positivism as an analytical feature of legal systems; for them, direct use of moral norms to decide whether a law is valid might be morally legitimate but it would not be a *legal* decision.

⁶⁸ T R S Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *Law Quarterly Review* 221, 239. Compare Allan, *Constitutional Justice*, above n 58, 229–31.

⁶⁹ And here I assume that the Australian constitutional order is committed to some version of those ideals. Strong evidence for that commitment comes from the very invocation of Lockean versions of popular sovereignty in the decisions of the High Court. Other elements of the legal-political order may be more republican in outlook.

⁷⁰ See generally James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995).

⁷¹ See Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18 but see also Adrienne Stone, 'Disagreement and an Australian Bill Of Rights' (2002) 26 *Melbourne University Law Review* 478–97 on the limits of this argument.

3. Finally it appears to me that Allan is wrong to argue that the fact that the rule of recognition ‘can be questioned and debated by those who accord it authority’, including the courts, means that the rule is a legal rule subject to change in the ordinary way by the courts.⁷² True it is that there can be ‘good reasons ... for resolving doubts about the rule in one way rather than another’ and that courts can engage in reasoned debate about what constitute ‘good reasons’.⁷³ But it does not follow that the courts are engaging in legal reasoning about a legal rule. As Allan recognises,⁷⁴ they may be engaged in political decision-making. But that does not make the decision-making illegitimate.⁷⁵

For all these reasons Allan’s argument should be regarded with extreme caution.

Nonetheless, hints of such an approach linking popular sovereignty with constraints on parliamentary sovereignty appear occasionally in the extra-judicial remarks of Australian judges. In a 1992 lecture, influenced by Allan’s writing, Toohey J said:

[I]t might be contended that the courts should ... conclude, for instance, that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties – a presumption only rebuttable by express authorisation in the constitutional document.⁷⁶

In 2001, in a lecture on the rule of law, Gleeson CJ said:

⁷² T R S Allan, ‘Parliamentary Sovereignty: Law, Politics and Revolution’ (1997) 113 *Law Quarterly Review* 443–52, 444.

⁷³ Ibid.

⁷⁴ Ibid 445.

⁷⁵ J W Tate, above n 46, 62–70 refers to such decision-making as being outside the High Court’s ‘hermeneutic limits’. But that would be right only if the High Court existed within a purely legal hermeneutic tradition. Decisions about changes in the rule of recognition evidenced by changes in the practices and expectations of participants in a legal order do not ‘place the legitimacy of the law as a whole in question’ (ibid 65) unless one conceives of the legal order in static (non-diachronic) terms. In Tate’s terms, decisions about changes in the rule of recognition can be ‘reflective’ rather than ‘constitutive’: ibid 65.

⁷⁶ John Toohey, ‘A Government of Laws, and Not of Men?’ (1993) 4 *Public Law Review* 158, 170.

In Australian legal and political discourse, a governing authority could not satisfy the requirements of the rule of law merely by being able to point to a fundamental law which empowered it to act in an arbitrary manner.⁷⁷

This approach regards the rule of recognition as including substantive constraints on law-making which can be moulded by the courts to suit their vision of the constitutional order.

A third and more dramatic example of this approach can be seen in *Thoburn v Sunderland City Council* ('*Thoburn*'),⁷⁸ a decision of the English Divisional Court. Laws LJ wrote in the principal judgment:

The common law has in recent years allowed, or rather created, exceptions to the doctrine of implied repeal: a doctrine which was always the common law's own creature. There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided.⁷⁹

He regarded this as the basis of the *Factortame* decisions, rather than the more modest interpretive explanations of those decisions.⁸⁰ Further, he wrote:

In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental ... We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. ... The special status of constitutional statutes follows the special status of

⁷⁷ Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (2003) 179–80. But contrast Gleeson's example (a 'law' that authorises the imposition of an arbitrary tax is not a law) with *MacCormick v FCT* (1984) 158 CLR 622 (holding that it is not a 'law[] ... with respect to ... taxation').

⁷⁸ [2003] QB 151. The example is dramatic because on one reading it lacks Allan's guardedness about the desirability of judicial unilateralism: see Allan, above n 72, 443–52, discussed by Goldsworthy, above n 58, 246.

⁷⁹ [2003] QB 151, [60].

⁸⁰ See 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.

constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998. The [European Communities Act 1972 (UK)] clearly belongs in this family.⁸¹

These constitutional statutes constituted a set of exceptions to the doctrine of implied repeal which, on most accounts, forms part of the rule of recognition. The approach in *Thoburn* is, of course, inconsistent with the analysis of the Privy Council in *McCawley v The King* ('*McCawley*').⁸² The Privy Council there rejected an argument that the constitution of Queensland could not be amended by implication and could only be amended by legislation that 'in plain and unmistakable language refers to it; asserts the intention of the Legislature to alter it; and consequently gives effect to that intention'.⁸³ The Privy Council regarded both the Queensland constitution and the British constitution as 'uncontrolled constitutions' to which such a principle was inapplicable.

If *Thoburn* is right and *McCawley* wrong, there are intriguing implications for Australia. Candidates for treatment as constitutional legislation that could only be repealed explicitly and not by implication might include:

- the unentrenched parts of State constitutions;
- the British constitutional statutes identified by Laws LJ to the extent that they remain in force in Australia or have been re-enacted by state legislatures;
- anti-discrimination legislation;
- native title legislation;
- legislation providing for a right to seek judicial review of administrative decisions;
- s 11 of the *A New Tax System (Commonwealth–State Financial Arrangements) Act 1999* (Cth) (which provides that the rate of the GST and the GST base are not to be changed unless each State agrees to the change); and
- s 3(2) of the *Flags Act 1953* (Cth) (which provides that the Australian National Flag can only be changed if the change is approved by the majority of Australian electors voting at a plebiscite).

⁸¹ [2003] QB 151, [62] (citations omitted). Contrast the orthodox interpretive approach to laws that affect fundamental rights: eg *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 381 [89].

⁸² *McCawley v The King* [1920] AC 691 ('*McCawley*'), discussed in Lindell, above n 80, 411–12, on which this paragraph draws.

⁸³ *McCawley* [1920] AC 691, 705–6.

This diverse set of candidates for treatment as “constitutional” statutes’ suggests four things.

1. First, the boundaries of the category of legislation with respect to which the rule of recognition has been altered are likely to be unclear and contested. It is far from clear that the courts are the appropriate bodies to determine them.
2. Secondly, there is little evidence that a nuanced approach to the principle of implied repeal is incapable of delivering comparable results while leaving control of the process in the hands of the Parliament.⁸⁴
3. Thirdly, any adoption of the doctrine in Australia would have to demonstrate that implied (and therefore unacknowledged) amendment of such legislation is not adequately addressed by the political process. Arguably the very nature of legislation of the types mentioned by Laws LJ suggests that the political process is likely to be alert to the possibility and consequences of amendment.⁸⁵
4. Fourthly, any such adoption would have to demonstrate that the existing political sanctions that would follow failure to heed (currently unenforceable) manner and form requirements, such as those in the GST legislation and the *Flags Act*, are inadequate. Again this is far from clear.

In short, the decision in *Thoburn* is a vivid illustration of the kinds of issues that face courts that adopt the view that the rule of recognition is a common law rule that is open to judicial development. The argument that the rule of recognition is a common law rule that imposes substantive limits on law-making is analytically and normatively suspect. *Thoburn* shows that unilateral action by the courts in defining the rule may be problematic. But *Thoburn* also demonstrates that this is the case whether or not the rule is a common law rule. Even if *Thoburn* is recast as a judicial decision changing a social convention, the court appears institutionally unsuited to the task. Courts may find political (non-legal) decisions about the content of the rule of recognition unavoidable. But they would be on firmer ground if they acted

⁸⁴ See, for example, *City of Collingwood v Victoria* [1994] VR 652, 670, discussed by G Lindell, above n 80, 413, n 43. See also *Marquet v Attorney-General of Western Australia* (2002) 26 WAR 201; *Attorney-General (WA) v Marquet* (2003) 202 ALR 233 (HCA).

⁸⁵ But recall the doubts expressed by Lord Hoffman in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131 (‘Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.’).

only when changes were firmly established in the practices of other institutions, rather than initiating those changes themselves.⁸⁶

E *Changes in the Australian Rule of Recognition*

So, then, has the Australian rule of recognition changed? In particular, is it the case, as suggested above might be the case with the Australian *Grundnorm*, that the rule of recognition now recognises the *Constitution* as law without reference to its status as an enactment of the Imperial Parliament?⁸⁷ The statements by members of the High Court on popular sovereignty (noted above) appear to suggest that they believe that such a change has occurred.⁸⁸ Equally, the suggestion in *Sue v Hill* that Australian courts would not be bound by an Imperial repeal of s 1 of the *Australia Acts* suggests that such a change has occurred.⁸⁹ The attitudes and presuppositions of other ‘senior officials’ are harder to identify but there is little evidence of officials acting on any other basis.

How did this change occur? Nothing in the judicial statements suggest that the judges regarded this as a step they were taking unilaterally; rather they were giving effect to a process of evolution initiated for the most part elsewhere. Some elements of the change are, however, no doubt of judicial origin, even if they consist of little more than clearing away obstacles to recognition of the evolutionary process. One example is the developing analysis of the source of the authority of the State constitutions in the *Australian Constitution*.⁹⁰ A change in the source of

⁸⁶ Compare J Goldsworthy, above n 58, 245–6.

⁸⁷ Even if the *Constitution* is now recognised as law without reference to its Imperial origins, this does not mean that British and Imperial legislation is no longer to be recognised as law or that it must be recognised as law without reference to its British and Imperial origins. See for example the attempt to invoke the *Limitation Act 1623* (21 James 1 c 16) s 3 as part of the law of the ACT in *Commonwealth of Australia v Stankowski*; *Commonwealth of Australia v May* [2002] NSWCA 348 (8 October 2002).

⁸⁸ See above, Part 3.

⁸⁹ *Sue v Hill* (1999) 199 CLR 462, 502 [93]. See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409 [91] n72.

⁹⁰ See Neil F Douglas, ‘The Western Australian Constitution: its source of authority and relationship with section 106 of the Australian Constitution’ (1990) 20 *University of Western Australia Law Review* 340–352; *McGinty* (1996) 186 CLR 140, 171–2 (Brennan CJ); *New South Wales v The Commonwealth* (1975) 135 CLR 337, 372 (Barwick CJ); *The Commonwealth v Queensland* (1975) 134 CLR 298, 337 (Murphy J); *Bistrivic v Rokov* (1976) 135 CLR 552, 566 (Murphy J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 58 [197] (Kirby J); cf *Egan v Willis* (1998) 195 CLR 424, 496 (Kirby J); *Handberg v Walter*

the authority of the *Constitution* would be hollow if State constitutions still derived their authority from the Imperial Parliament.⁹¹ Perhaps the judicial attitude to s 74 is another example. The power to grant inter se certificates is not simply one that the judges regard as unlikely to be used but one that is ‘obsolete’ or ‘spent’.⁹² But even here the judges source the change in events outside the courts, in ‘[t]he march of events and the legislative changes that have been effected — to say nothing of national sentiment’.⁹³

Unilateral judicial steps ought to be taken cautiously, assuming that they are ever legitimate. Far better is that changes in the rule of recognition follow the lead of political actors and the people. Only in that sense is ‘the sovereignty of the people’ the source of the *Constitution*’s legal authority.

Lindell was right, therefore, in suggesting that ‘the will and authority of the people’ (but only in the sense of the people’s acceptance of/acquiescence in the *Constitution* as part of the Australian legal order) may be an ‘additional’ explanation for the *Constitution*’s legal authority in 1986 (and implicitly today). However, three substantial caveats are called for.

1. The acquiescence of some people (perhaps just some senior officials) in the *Constitution* is a very weak sense of ‘the will and authority of the people’ and an even weaker sense of ‘popular sovereignty’.
2. The people’s acquiescence was equally a necessary element of the *Constitution*’s legal authority in 1901. The rule of recognition that identified the enactments of the Westminster Parliament as law ultimately rested on the people’s acquiescence. To the extent that ‘popular sovereignty’ in this attenuated sense explains why the *Constitution* is legally binding today, it also explains why the *Constitution* was binding in 1901.
3. Notwithstanding these observations, ‘popular sovereignty’ in a more robust sense might become relevant to judges’ and other officials’ attitude to the *Constitution*. If there is a sense in which ‘popular sovereignty’ expresses an important moral principle and the *Constitution* fails to secure it, there will come a point at which judges and officials morally have to reconsider whether they should follow the conventions that identify the *Constitution* as

& *Registrar of Titles* [2001] VSC 177 (28 May 2001) [11]. Contrast *Western Australia v Wilsmore* [1981] WAR 179, 182-183.

⁹¹ The re-enactment of received British legislation as State legislation (as, eg, in the *Imperial Acts Application Act 1969* (NSW)) facilitates this disengagement of the rule of recognition from the British legislature.

⁹² *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461, 465; *Sue v Hill* (1999) 199 CLR 462, 493 [66].

⁹³ *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461, 465.

law. ‘Popular sovereignty’ then might be a moral constraint on the legally binding nature of the *Constitution*.⁹⁴

V MORAL AUTHORITY

I can now turn to consider whether the *Constitution* is morally binding and whether this too can be traced to popular sovereignty in one or more of the three senses discussed above. The question is important. Its answer is what distinguishes law from arbitrary exercise of brute power.

A preliminary issue needs to be noted. Are the questions ‘Why is the *Constitution* binding?’ and ‘What is the basis of the moral authority of the *Constitution*?’ distinct?⁹⁵ In other words, is the subject’s duty of obedience distinct from the legitimacy of the state’s commands, or does a legitimate command entail a duty of obedience? The general view among political scientists is that the questions are distinct. On this approach, it is possible for an authority to be legitimate or morally justified without subjects having a correlative (moral) duty to obey the law.⁹⁶ Many writers find it implausible that subjects have a general duty to obey the law but do not want to abandon the law’s claim to legitimate authority.⁹⁷ The distinction between the law’s legitimacy and the subject’s duty to obey is particularly attractive for them.

However in this article, I follow Soper and Raz in rejecting the distinction because ‘it is simply not “faithful to the main features of the notion of political authority prevalent in our culture”’.⁹⁸ Accordingly, I treat the law’s claim to legitimate authority and the subject’s (moral) duty of obedience to law as correlative and assume that an account of one that does not entail the other is inadequate.

As discussed in Part III above, the current orthodoxy is that the moral (political) authority of the *Constitution* derives from popular or ultimate sovereignty of the Australian people. I consider and reject this argument before turning to alternative explanations of the *Constitution*’s moral authority.

⁹⁴ But see J Goldsworthy, above n 58, 264–72, on how judges should respond to such a moral constraint.

⁹⁵ As the titles of Lindell, above n 1, and Daley, above n 21, might suggest.

⁹⁶ See William A Edmundson, ‘Introduction’ in W A Edmundson (ed), *The Duty to Obey the Law* (1999) 1; Phillip Soper, ‘Legal Theory and the Claim of Authority’ in W A Edmundson (ed), *The Duty to Obey the Law* (1999) 213.

⁹⁷ W A Edmundson, *ibid* 12–4; P Soper, *ibid* 222.

⁹⁸ P Soper, *ibid* 223, quoting Joseph Raz, ‘Authority and Justification’ (1985) 14 *Philosophy and Public Affairs* 3, 6.

A *The Problems with Popular Sovereignty*

Despite its superficial attractiveness, popular sovereignty is a problematic concept for use in legal and moral reasoning.

1. Popular sovereignty is often linked with concepts of self-rule, equality, dignity and autonomy. These are fundamental values, and key concepts in the analysis of political and legal obligation and any coherent explanation of a constitution's authority will inevitably show how those values are protected. But 'popular sovereignty' is not one concept but many. (It shares that feature with the root concept 'sovereignty'.⁹⁹) It is invoked in theories that range from Lockean individual rights theories to Hobbesian monarchical absolutism.¹⁰⁰ Unless popular sovereignty is further specified it is likely to hinder rather than assist analysis.

⁹⁹ *Joosse v ASIC* (1998) 159 ALR 260; 73 ALJR 232 [16], noting the caution expressed by H L A Hart, *The Concept of Law* (1961) 218. See also *Sue v Hill* (1999) 199 CLR 462, 487 [48] n 76 (Gleeson CJ, Gummow and Hayne JJ); *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* [1999] HCA 56 (7 October 1999). Sovereignty is capable of referring to:

- the status of an independent state in international law (*Joosse v ASIC* (1998) 159 ALR 260; 73 ALJR 232; *Sue v Hill* (1999) 199 CLR 462; *Horta v The Commonwealth* (1994) 181 CLR 183);
- the political dominion over territory that arises on conquest or settlement and gives the Crown radical title over the unoccupied parts of the territory (*Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 63; *Newcrest Mining (WA) Ltd v The Commonwealth* (1996) 190 CLR 513, 615);
- the status of the constitutional monarch (*Sue v Hill* (1999) 199 CLR 462, 494 [70]);
- the exclusive power to make and enforce laws in a territory (cf *Lipohar v The Queen* (1999) 200 CLR 485, 506-507 [48]);
- the unlimited power to make and enforce laws in a territory (*Kruger v The Commonwealth* (1997) 190 CLR 1, 155; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 419 [42]);
- the totality of power to make laws for a territory, divided or shared between different institutions (none of which itself is sovereign) under a federal system (*Lipohar v The Queen* (1999) 200 CLR 485, 501; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534 [65], 536 [74].);
- the power to alter the constitution (*McGinty* (1996) 186 CLR 140, 237, 274-275);
- the capacity for personal or national self-rule (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ)).

¹⁰⁰ Similar observations are collected in A Dillon, above n 30, 250 (especially n 55), and M Wait, above n 47, 72-3.

2. Popular sovereignty risks being defined by inapposite analogies with various conceptions of sovereignty. For example, if it is regarded as a successor to parliamentary sovereignty as the foundation of the constitutional order, it must not be forgotten that the people are sovereign in a very different sense from the Parliament.¹⁰¹

The Hobbesian conception of sovereignty, which influenced Austin and the traditional British conception of parliamentary sovereignty, also continues to resonate in the language of popular sovereignty. This conception insisted on a single absolute sovereign in each state. The sovereign was autonomous and its power was exclusive within its domain. But this model of sovereignty, in its traditional or popular guises, is implausible in Australia today. In a democratic constitutional state, no institution ever has plenary *or* exclusive power and no institution ‘has unilateral power to immunise itself completely from the actions of another’.¹⁰² This is all the more true in a federation, ‘a political structure whose very point is to divide power’,¹⁰³ and in any state where the constitution is entrenched.

3. Moreover, in the post-Westphalian world, claims to sovereignty plausibly assert autonomy but struggle to claim exclusivity.¹⁰⁴ It follows, in my view, that Tate’s aspiration that Australian become sovereign in the sense of being ‘entirely self-determining, and therefore free of dependence on the authority of another power’ is misconceived.¹⁰⁵ No state is sovereign in that sense today. States are constrained by international obligations, some voluntarily assumed and some applying irrespective of the consent of the state, in

¹⁰¹ Leslie Zines, ‘The Sovereignty of the People’ in Michael Coper and George Williams (eds), *Power, Parliament and the People* (1997) 94–8; *McGinty* (1996) 186 CLR 140, 274–5 (Gummow J), see also *ibid* 230, 236–7 (McHugh J).

¹⁰² J Daley, above n 21, 15, 17.

¹⁰³ *Ibid* 15. Compare MacCormick, above n 45, 129.

¹⁰⁴ See Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317, 345–56. This is also an important theme of Neil MacCormick’s work: Neil MacCormick, ‘Beyond the Sovereign State’ (1993) 56 *Modern Law Review* 1. N W Barber, ‘Sovereignty Re-examined: The Courts, Parliament and Statutes’ (2000) 20 *Oxford Journal of Legal Studies* 131 observes that multiple sovereignties can exist even within Westphalian states as where the courts and the Parliament each claim authority to resolve disputes about parliamentary privilege but lack a (mutually recognised) rule for resolving disputes about the competing claims.

¹⁰⁵ J W Tate, above n 46, 35.

spheres of action formerly regarded as essential to sovereignty.¹⁰⁶ They are also constrained by markets and global financial institutions. Increasingly, international law and international relations are discussed in terms of globalisation and the interpenetration of norms rather than in terms of sovereign states. The state's legitimacy is not determined solely by its relations with its own people.

4. Within the state, popular sovereignty analysis has a tendency to consolidate state power in one set of hands.¹⁰⁷ Barnett observes the tendency to regard the legislature as 'the people personified, entitled to exercise all the powers of a sovereign people':¹⁰⁸

Because 'the people' can 'consent' to alienate any particular liberty or right ... legislatures, as the people's surrogate, can restrict almost any liberty and justify it in the name of 'popular consent'. The fiction of popular rule, as opposed to a popular check on rulers, allows a legislature to justifiably do almost anything it wills.¹⁰⁹

Once the people and the legislature are assimilated in this way it becomes easy to characterise checks and balances on the exercise of legislative power (and on the exercise of executive power where the executive is formally the creature of the legislature) as illegitimate restrictions on the rights of the people.¹¹⁰

¹⁰⁶ See generally Dora Kostakopoulou, 'Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?' (2002) 22 *Oxford Journal of Legal Studies* 135; Walker, above n 104.

¹⁰⁷ Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999) 121–2. The former Lord Chancellor of the United Kingdom, put a more positive spin on the phenomenon: '[T]he theories of government which obtain in both America and the United Kingdom are founded on the idea of popular sovereignty. ... [V]iewed from a contemporary perspective, the principles of constitutional and parliamentary supremacy are rooted in the same basic political philosophy which recognizes that government depends, for its legitimacy, on the imprimatur of the people.' (Lord Irvine of Lairg, 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' (2001) 76 *New York University Law Review* 1, 14.)

¹⁰⁸ Randy E Barnett, 'Constitutional Legitimacy' (2003) 103 *Columbia Law Review* 111, 129.

¹⁰⁹ *Ibid* 130.

¹¹⁰ Compare *ibid* 26.

Kostakopoulou traces this tendency to the link that sovereignty discourse of all stripes draws between the state and its ruler.¹¹¹

A chain of equivalence was created between the governmental will, state sovereignty and popular or national sovereignty, whereby limitations on the exercise of executive power became tantamount to limiting state sovereignty, since the executive is the representative of the state, and, consequently, to limiting to the people's or the nation's sovereignty, since the state is the authentic representative of the people or the nation.¹¹²

Traces of this kind of reasoning can be found in French's J judgment in *Ruddock v Vadarlis*¹¹³, where he reasoned from a premise concerning the importance of the power to exclude aliens to national sovereignty to the conclusion that that power must be held by the executive.¹¹⁴ It is the same impulse that members of the High Court have recognised needs to be kept in check when considering the implied nationhood power: it is easy enough to proceed from the casual observation that a particular end would be beneficial for the nation and its people to the conclusion that the power must be possessed by the national legislature.¹¹⁵ Far from dispersing power to the people, popular sovereignty discourse runs the risk of centralising power in the hands of those best placed to assert that they are the true judges of what the people will.

5. Finally, for so long as debate about governmental authority is framed (or reframed) in terms of sovereignty it is unlikely that indigenous Australians' claims to be able to make laws for their own governance will bear fruit. The image of the single, indivisible and exclusive, Austinian sovereign remains potent, even when that sovereign is identified with the people.¹¹⁶ Recall that Mason CJ's reasoning in *Walker*¹¹⁷ and *Coe*¹¹⁸ was explicitly based on the notion of sovereignty and the assumptions that there can only be one

¹¹¹ Kostakopoulou, above n 106, 141–3.

¹¹² Ibid 143.

¹¹³ (2001) 110 FCR 491, especially at 545.

¹¹⁴ Compare with Kostakopoulou, above n 106, 152.

¹¹⁵ See, for example, *Victoria v The Commonwealth and Hayden* (AAP case) (1975) 134 CLR 338, 397-398 (Mason J).

¹¹⁶ Lisa Strelein has pointed out that there is a risk of participants in the debate talking past each other, using different conceptions of sovereignty: Lisa Strelein, 'Missed Meanings: The language of sovereignty in the Treaty debate' (2002/2003) 20 *Arena Journal* 83.

¹¹⁷ *Walker v New South Wales* (1994) 182 CLR 45, 48.

¹¹⁸ *Coe v The Commonwealth* (1993) 68 ALJR 110, 115; 118 ALR 193, 200.

sovereign in any territory and that the sovereign has exclusive law-making powers for that territory. Popular sovereignty discourse threatens to emphasise the traditional single sovereign over autonomy and self-determination. It constrains the claims that can be made so that, as James Tully writes, indigenous people ‘seek recognition as “peoples” and “nations”, with “sovereignty” or a “right of self determination”, even though these terms may distort or misdescribe the claim they would wish to make if it were expressed in their own languages’.¹¹⁹ And it risks suppressing the distinct interests of indigenous Australians within an undifferentiated ‘people’.¹²⁰

B *Popular Sovereignty and Political Obligation*

Despite these problems, it is not surprising that popular sovereignty figures in the High Court’s attempts to state the basis of the *Constitution*’s moral authority. The myth of a founding moment at which the people’s consent established the state and their ongoing acquiescence in state authority have together been elements of theories of political obligation since at least Hobbes. Lindell’s identification of the people’s role in adopting and amending the *Constitution* and their continued acceptance of it in practice draws on Hobbes’ model and those of his liberal successors.¹²¹

The key problem for liberal theories¹²² in justifying political authority and obligation is to reconcile their commitment to personal autonomy with the duty of obedience demanded by the state and the coercive powers with which it backed those demands. Consent based theories take the direct route and characterise the duty of obedience as a voluntarily assumed obligation. But the embarrassing fact

¹¹⁹ J Tully, above n 70, 39.

¹²⁰ Compare N MacCormick, above n 45, 134–5.

¹²¹ Why did judicial discussion of the *Constitution*’s legal and moral authority, particularly after 1992, take place in terms of popular sovereignty? Any explanation is necessarily psychological but some likely elements can be identified. The first is the strong cultural resonance of the Hobbesian and Austinian view that there must be a single sovereign in each state. (Note the warning about this danger given by H L A Hart, *The Concept of Law* (1961) 218 quoted by Hayne J in *Joosse v ASIC* (1998) 159 ALR 260; 73 ALJR 232 [16].) After the enactment of the Australia Acts and the achievement of independence, the Imperial Parliament no longer occupied that place. It had been long acknowledged that the Australian Parliaments were not sovereign in this sense. What options remained? The people as the holders of sovereignty resonated with the Lockean idea of sovereignty, its well-known place in American constitutional theory, and the strengthening republican sentiment in Australia.

¹²² I focus first on Hobbes’ liberal successors because they have had the clearest influence on the High Court when it has invoked popular sovereignty since 1992.

for such theories is that the requisite consent is simply absent in any modern political society. When the *Constitution* was adopted in the 1899–1900 referenda, 11.5 per cent of the population voted for it; 4.3 per cent voted against it.¹²³ A consent based account can therefore call on an explicit manifestation of consent from 11.5 per cent of the population in 1900. What demonstration of consent is available for the remainder of the population in 1900, let alone the population today?

The usual response to this problem is to invoke a concept of tacit consent. We are taken to consent tacitly either because our behaviour is interpreted as consenting or because we *would* consent *if asked* because the *Constitution* establishes a government that complies with reasonable standards of justice. The kinds of behaviour that are typically interpreted as tacit consent include (the nebulous) ‘acquiescence’ in the political order (as in judicial explanations of popular sovereignty);¹²⁴ residing in the jurisdiction; voting in elections; and so on. But such actions simply cannot provide the type of moral input that a consent based theory requires in order to legitimate the *Constitution*. Consent theories attempt to provide an explanation for the subordination of individual autonomy to the coercive exercise of state power. They locate that explanation in a deliberate exercise of that individual autonomy – an expression of individual consent to the exercise of state power. The kinds of behaviour considered above lack the deliberateness required or are ambiguous as to whether they demonstrate any consent at all. Acquiescence or residence is morally neutral without an option to emigrate or secede.¹²⁵ Moreover, these kinds of behaviour take place against a background in which the state already exists. ‘The choice implied by our behaviour is about what policy this government should adopt, given its existence and activity, not about whether this government should continue to exist in its present form.’¹²⁶

It follows that a defence of the *Constitution*’s moral authority on the basis of popular sovereignty requires a reformulation of consent based theories of political obligation. However most reformulations of consent theory themselves face considerable difficulties. Attempts to ground authority in the acceptance of political benefits (such as welfare benefits or the benefits of inheritance laws) may succeed

¹²³ Peter Botsman, *The Great Constitutional Swindle* (2000) 52. For a more detailed analysis see Anne Twomey, ‘The Constitution: 19th century Colonial Office document or a People’s Constitution?’, Parliamentary Library Background Paper, No. 15 1994–5, 25 August 1994.

¹²⁴ *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J).

¹²⁵ Compare R E Barnett, above n 109, 124 (‘For consent to bind a person, there must be a way of saying “no” as well as “yes” and that person himself or herself must have consented.’)

¹²⁶ K E Whittington, above n 108, 130.

but fail to establish a corresponding duty of obedience or a duty to contribute to the provision of those benefits.¹²⁷ Fairness based theories rely either on a general obligation for subjects to contribute to schemes that benefit them (which seems implausible) or on acceptance of benefits (which eviscerates the theory for the same reason that absence of an opportunity to emigrate or secede eviscerates consent based theories).¹²⁸ Theories that posit a natural duty to support just institutions must demonstrate how this translates into a duty to support the state rather than other just institutions; and must explain why the state is a just institution without relying on the earlier theories whose deficiencies they were invoked to avoid.¹²⁹

C *Alternatives to Popular Sovereignty: The Argument From Coordination*

If liberal popular sovereignty theories will not suffice to provide an account of the *Constitution's* moral authority, what alternatives exist?

John Daley builds on Joseph Raz's and John Finnis' theories to support the moral authority of the *Constitution*. He sees the *Constitution* as serving primarily to address coordination problems about the location of authority. Moral reasoning does not identify a uniquely 'best' constitution for Australia or any nation. But 'the advantages of a (relatively) clearly defined answer, identifiable by its source rather than moral reasoning, outweigh[] any advantages of leaving the issue unresolved in the hope that practice might converge on a better answer'.¹³⁰ What are those advantages? According to Daley:

A system of authority is desirable to provide goods unobtainable except through cooperation, and to coerce desirable conduct. If the authoritative regime is itself substantially identified by a system of rules – a *constitution* – then the regime will fulfil these functions more readily, and will also possess rule of law advantages.¹³¹

Daley's argument from the virtues of coordination converges with the approach of others who, despite differences in their ethical theories,

1. 'posit a single right answer to the question whether revolution or anarchy are worse than the imposition of a reasonably just political system';

¹²⁷ Christopher Heath Wellman, 'Toward a Liberal Theory of Political Obligation' (2001) 111 *Ethics* 735, 736–7.

¹²⁸ *Ibid* 737–8.

¹²⁹ *Ibid* 739–40.

¹³⁰ J Daley, above n 21, 212.

¹³¹ *Ibid* 208.

2. ‘claim that there is a multiplicity of answers to the question of which political system is most just’; and
3. ‘combine these two propositions to deduce that it is desirable to accede to a system of authority which determines the reasonably just political system for a particular community’.¹³²

However, this approach depends critically on the ethical theory on which it is premised. What counts as a ‘reasonably just political system’ will be different depending on whether one’s ethical theory assumes the good of social cooperation ‘to promote a fair distribution of goods and opportunities within a society’¹³³ or assumes that the only legitimate role of centrally organised authority is to protect each individual’s pre-political natural rights. This approach cannot establish the authority of the *Australian Constitution*, even as a ‘reasonably’ (that is, adequately) ‘just political system’, without a full defence of an ethical theory that supports state authority to coerce, for example, large-scale redistribution of material resources as *Constitution* ss 51(i), (xxxiii) and (xxxiiiA) make possible. Such a defence may well be available. But it does not come simply from an intuitive appeal to the virtues of ‘cooperation’. The ends at which ‘cooperation’ may be directed range from the minimal ‘nightwatchman state’ to the modern welfare state. It is the ends at which cooperation is directed that require defence and not the bare notion of cooperation.¹³⁴

Further, the argument from coordination does not provide a convincing account of the duty to obey the *Constitution*. Daley attempts such an explanation¹³⁵ but it seems to me that it suffers the problem commonly faced by benefit based theories of political obligation (discussed earlier). Ultimately, Daley’s theory of the constitutional legitimacy rests on the pursuit of the common good. What is not explained is how provision of benefits to individuals as part of the common good obliges them to assist in the provision of goods to others. Norms of reciprocity or

¹³² Ibid 213.

¹³³ Ibid 210. Daley notes the vagueness of ‘reasonably just’ and indicates that he prefers a limitation based on regimes that the subject has a duty to obey: *ibid* 214 n 13, 62-73.

¹³⁴ Mark C Murphy has presented a related criticism against John Finnis’ arguments: Mark C Murphy, ‘Surrender of Judgment and the Consent Theory of Political Authority’ in W A Edmundson (ed), above n 97, 345 n 22 (citations omitted). Compare Wellman, above n 128, 757-9 who acknowledges that absent an existing constitution it would be necessary to resort to arguments other than samaritanism (the moral principle on which he attempts to base a liberal theory of political obligation) to fill the gaps.

¹³⁵ See J Daley, above 21, Ch 4.

fair play¹³⁶ or samaritanism¹³⁷ or natural obligations¹³⁸ might do so but as noted above those are equally problematic accounts of political obligation.

Assume, however, that Daley's analysis can be completed to this point by specifying a sufficiently rich ethical theory and an argument complementing the moral authority of a constitution with a duty to obey. It would then be capable of justifying the moral authority of, and obedience to, the *Australian Constitution*. But it would also be capable of justifying a constitution in similar terms that I draw up and circulate among my colleagues. Which constitution is a legitimate authority? To which one do Australians owe duties of obedience?¹³⁹ Daley concludes, correctly in my view:

I should obey that constitution which is generally obeyed within a state. Which constitution is generally obeyed? Ultimately, that constitution which people expect to be obeyed. This is usually, but not necessarily, the constitution promulgated in accordance with previous authoritative legal norms.¹⁴⁰

In other words, the *Constitution* is the legitimate authority, not my newly drafted version, because it is the constitution that is generally obeyed in Australia. (Note that on this account the *Constitution's* legitimacy is defeasible: if the uncertainties of transition to a new constitution are outweighed by the improvements that new constitution confers when compared with the existing constitution, obedience to the new constitution rather than the existing constitution is justified.¹⁴¹) The fact that the *Constitution* was enacted in accordance with a 'previous set of authoritative rules' (that is, by the Imperial Parliament) does not in itself confer moral authority on it; rather, its moral authority derives from its ability to solve coordination problems. That ability derives contingently from its enactment in accordance with previously authoritative rules because that is usually 'the most convenient means to describe' a new constitution; because that is usually 'the means which provides the most certainty about their content'; and because that is usually 'the means which accords with the self-understanding of typical participants'.¹⁴²

¹³⁶ A John Simmons, 'The Principle of Fair Play' in W A Edmundson (ed), above n 97, 107.

¹³⁷ C H Wellman, above n 127.

¹³⁸ Jeremy Waldron, 'Special Ties and Natural Duties' in W A Edmundson (ed), above n 97, 271.

¹³⁹ Recall that I assume that the questions are equivalent.

¹⁴⁰ J Daley, above n 21, 208–9.

¹⁴¹ Ibid.

¹⁴² Ibid 218 (see also *ibid* 216).

Daley's argument is sophisticated and it is not possible to do full justice to it here. It is clear, however, that on its own it is incomplete. Analytic moral philosophy can clarify what is at stake in analysing the moral authority of constitutions; but it cannot provide justifications for them in the real world. What is required is a fully developed political theory. I have argued here that liberal theories have grave deficiencies and that 'popular sovereignty' is too nebulous (and problematic in some versions) for use as a justificatory tool. Accordingly, attempts to justify the *Constitution's* moral authority will need to explore other political theories.

VI CONCLUSIONS

The questions investigated in this article are essentially foundational. They seek, as Neil MacCormick describes it, 'a starting point in something interpersonally certain and indubitable from which to carry forward the search for reliable forms of knowledge'.¹⁴³

In the 1980s and 1990s, 'popular sovereignty' appeared as a possible foundation for the legal and moral authority of the *Constitution* and the basis for the interpretation of that instrument. I have argued here that 'popular sovereignty' is not a viable foundation for the authority of the *Constitution*. To the extent that 'popular sovereignty' accounts suggest that authority rests on the consent or acquiescence of the people the argument simply fails. And the term carries too much historical baggage to be a useful term of analysis.

There is no escape from the need to articulate and defend the political theories on which the moral authority of the *Constitution* may be seen to rest. Equality, human dignity and autonomy — for which 'popular sovereignty' is a beguiling proxy — are likely to be central elements of such theories and a constitution that does not advance and protect these values is unlikely to command moral authority.

But this does not mean that there is a unique foundational theory that explains the *Constitution's* moral authority. The *Constitution* is a text, but as analysis of its legal authority showed, it is also part of the life of the peoples of Australia. It is diachronic, not static. It is multiple, not single. Its authority may lie, then, to use the words of James Tully, in its capacity to 'negotiate[e] and mediat[e] ... claims to recognition in a dialogue governed by the conventions of mutual recognition, continuity and consent'.¹⁴⁴ That seems to be a more fruitful line for further inquiry than the search for a single comprehensive account.

¹⁴³ N MacCormick, above n 45, 123.

¹⁴⁴ J Tully, above n 70, 209.