The British Doctrine of Parliamentary Sovereignty: A Critical Inquiry

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The purport of this argument is that Dicey and other legal positivists, Austin and Bentham among them, have propounded a spurious doctrine of parliamentary sovereignty because they have uncritically accepted a mistake of Blackstone, who in turn has mistakenly construed Coke's remarks on the nature and analysis of sovereignty, or better, the supremacy, of the High Court of Parliament.

The law as a whole is a calculus,1 self-contained and self-explanatory, like a circle within which in geometry it is possible to trace the delineaments of the two-dimensional plane contained within the circle, as Waissman explains in his Essay on Language Strata; or like language which is also like a circle—that is, as Dr. Johnson explains, a lexicographer sees language by giving definitions of words by reference to other words, and those words by other words, so that in the end words like buck and doe, female and male, he and she, are tautologous in the sense that the one has to refer to the other. If we look at the law in this sense, as a complicated series of rules of a game, we shall not be inclined to ask misleading questions about how law derives its authority, and we shall not ask the sort of question that Austin was forced to ask when he defined the province of jurisprudence by reference to theories of command, of sovereignty, of sanction, of obedience, etc. Nor shall we ask, because it would not occur to us to consider, whether Parliament is supreme or how it is that the common law could overrule a statute. Nor would we be drawn to conclude, because a statute could re-

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1. Calculus. The law considered as a calculus reflected two sources. The first is 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 11 (2d ed. 1899), where estates are described as a calculus of rights, projected upon the plane of time; the other is the point that the law, like mathematics, exists whatever theory we may set up to account for it, conventional, intuitionist, etc. The point is put by Whistler in his attack on Ruskin in respect of art: “As well might he ask what is to become of mathematics under similar circumstances, were they possible. I maintain that two and two the mathematician would continue to make four, in spite of the whine of the amateur for three, or the cry of the critic for five.” Whistler, The Gentle Art of Making Enemies, quoted in KINSMILL, INJECTIVE AND ABUSE 196 (1944).
peal the common law in the way in which the Law of Property Act of 1925 overruled the rule in Shelley's Case, that statutes are omnipotent, superior to, sovereign over, the common law. And further we should not be led, as were Blackstone, Austin, Dicey and a whole host of writers on constitutional law, political theory, or history and jurisprudence, to assert in seeking a concept of sovereignty that Parliament can do anything except bind its successors.

In a modern jurisprudential setting there are rules of law, functions of the calculus, which describe, delineate, and define the position or the personality of the Crown in relation to all those other rules, functions of the calculus, which described, delineated, and defined the rights and duties of others. That the law might not completely articulate every conceivable rule to cover every conceivable situation does not entail supremacy over the law. The King and the Parliament, if we may use a metaphor, are like icebergs swimming in a sea of laws, two-thirds submerged and one-third riding above the sea. Their personality, however, is founded in the law. To this extent both King and Parliament can be said to be bound by the law, that is, all law. In this sense, then, neither Kings nor Parliament are superior to the law, are supreme, are sovereign, though they may make the laws as part of the whole law. It is submitted that this is the true position and this dispels or at least places within context any absolute claim of a divine-right-of Kings jurisprudence or a supremacy-of-Parliament case.

The mysteries which upset us about writing on the Constitution are threefold. The first is that there is a competition between the sources of law which is resolved not by the due and appropriate application of different rules within the function of the legal calculus, but by creating a superiority of one rule over another. The second is the wholly false attribution to the

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2. Marshall, Parliamentary Sovereignty and the Commonwealth (1957) makes some good points in a very full survey, but he does not distinguish enough between a legal account of sovereignty, a historical account and a theoretical account. He certainly notices, for he quotes Sir Ivor Jennings with approval to the effect that legal precedents are not historical precedents. The following is his account of the program to elucidate not the nature of sovereignty, not what sovereignty is, but in what set of rules is sovereignty appropriately used. The resulting conflict between academic logic and the facts of political life is an effective reminder that the traditional linguistic garb in which the theory of sovereignty has been clothed is an embarrassing apparel for a Parliament which passed the Statute of Westminster to make Dominion independence a legal reality.

"The language in which propositions about legal sovereignty have been formu-
English Constitution of the separation of powers into the legislative, the executive, and the judiciary, a doctrine propounded by Montesquieu, which may have been acted on in drawing up some constitutions, particularly that of the United States. In spite of its inapplicability to the English Constitution this misconception has had a deep effect upon jurisprudence and legal theory in leading men to believe that the functions of the legislature, of the executive, and of the judiciary are in competition, when they are, in reality and within the memory of historians, vested in the Crown. Blackstone described such a use of Parliament: “And the king and these three estates, together, form the great corporation or body politic of the kingdom.” To consider separate what is disparate has encouraged that competitive view of the sources of law among one another. The third mystery is to treat of Parliament without carefully showing that Parliament might mean one of three things. It might mean the institution that has had some traceable and fairly continuous identity since the Model Parliament, and which gives advice to the Crown in making statutes. It might mean one Parliament as distinct from another Parliament, as the Rump was distinct from the Long or the Model Parliament. Or it might mean one session of Parliament in this last sense as opposed to another. To confuse these senses is to invite unnecessary difficulties. When it is asserted as a legal rule that Parliament cannot bind its successors, it is difficult to know what a successor to Parliament is. In England so far we have had no successors to Parliament unless the Parliament following upon the Treaty of Union with Scotland in 1707 was a successor to the Parliament of England existing im-

lated is inevitably a language which leans upon traditional (and questionable) pieces of vocabulary in jurisprudence and political science. Questions, for example, asked about the parliamentary ‘sovereign’ have been put in the following way. What is sovereignty? What can a sovereign do? What limits can be placed upon its action? Can it bind itself or its successors? And the answers preferred have been that the sovereign body is legally illimitable; that it cannot be bound; that it ‘cannot’ place limits on its own or future action. But the substitution of such queries is What rules govern and define the legislative process?, or Under what conditions may rules of this kind be revised? (the answers to which need not be determined by any theory about the nature, or power, or commands of ‘bodies’ or legal entities) may in themselves suggest different answers. The term ‘sovereignty’ seems an eminently suitable candidate for a programme aimed at substituting questions having this form for questions of the form What is an X?

“Seen in this light the question raised by the Statute of Westminster and the United Kingdom 'abdication' becomes not whether a sovereign entity has effectively limited its future action, but whether the rules formulating and defining the elements competent to legislate in Britain and the Commonwealth have been amended.” Id. at 39-40.

3. 1 BLACKSTONE, COMMENTARIES *153.
mediately before the Act of Union. If Parliament is that shift-
ing and springing continuum we can trace and identify and in-
dividuate since the Model Parliament, we do not know whether
it can or cannot bind its successors: it seems not inconceivable
that it could, for the reason that in dissolving itself and creating
a constituent assembly it would make law by which the constitu-
ent assembly would be bound—the same law which I would
argue is binding on King, on people, and on Parliament alike.
If Parliament is considered as existing from one prorogation and
general election to the next, then it is true that one such Par-
liament cannot bind its successors, but this is no more alarming
than such propositions as that the decision of the Court of Crim-
inal Appeal is not binding upon the Court of Appeal, or that the
decision of one county court judge is not binding upon another.
Nor, indeed, is it any more alarming than the rule that the House
of Lords is bound by its own decisions. At all events, if this is
what is meant, the decision is trivial and nothing very much
about sovereignty should be deduced from the rule. If the rule
means that one session cannot bind the next, it is not either
alarming or important.

These three considerations, however, have been largely re-
sponsible for building up a theory of parliamentary supremacy,
and so a theory of sovereignty. I shall argue that the theory is
an attempt to replace what has been misunderstood, certainly
in English history and in English law.

PART I. COKE'S THEORY OF PARLIAMENTARY SUPREMACY

I wish first to turn to Coke's Institutes, particularly the
Fourth which deals with the High Court of Judicature, that is,
with Parliament as a High Court with the House of Lords and
the House of Commons each as a court, and with the other courts
of the land, common law courts, the court of chancery, etc. It is
in this Institute, which was written in retirement and published
posthumously by the order of Parliament itself, that we find the
first authoritative germs of a theory of parliamentary sover-
eignty. I use the word authoritative to distinguish the broader
claims of pamphleteers and speeches in Parliament from those
which have some weight as precedent in the legal game. Coke is
what Bacon thought Littleton and Fitzherbert to be, "institu-
tions of our law," and what Coke said might therefore have to
be considered as binding in any jurisprudential analysis of sov-
ereignty. We must therefore discover how far Coke went in the *Institute* to propound his theory of parliamentary sovereignty, or of parliamentary supremacy. I wish here to query whether Coke departed from his position of considering Kings and Parliaments to be rooted in the law, to ask whether what is clearly a dogmatic and probably correct statement of the law that certain matters appertaining to the laws of commons and certain things belonging to bills and acts were ultra vires common law entails a jurisprudential theory or analysis that the law was not to be treated as a whole but that the common law was somehow superior to all other sources of law save and except Parliament, that is the statute law, “what Parliament made” and the *lex et consuetudo parliamenti*, the law which governs Parliament. Finally, we must ask whether terms such as higher, sovereign, supreme, superior, are matters of exaggeration, hyperbole, or metaphor, or whether they are substantives containing substance. In short, did Coke in the *Institutes* resile from his opinions in the following cases: (a) *Articuli cleri*, (b) *Prohibitions*, (c) *Proclamations*, (d) *Non obstante*, (e) *Bonham's Case*, (f) *Commendams*?

“Sovereign power is no Parliament word.” In what sense does Coke use the words “sovereign” and “supreme”? Curiously, he does not use them in relation to the Parliament, but in relating to the position which he attributes to the Court of the King’s Bench in the judicial hierarchy: “It is truly said that the justices *de banco regis* have supream authority, the king himself sitting there as the law intends. They be more than justices in eire.

“The justices in this court are the soveraign justices of oier and terminer, gaol-delivery, conservators of the peace, &c. in the realm. See the books in the margent, you shall find excellent matter of learning concerning the supream jurisdiction of this court.

“In this court the kings of this realm have sit in the high bench, and the judges of that court on the lower bench at this

4. 2 *State Trials* 134.
foot; but judicature only belongeth to the judges of that court, and in his presence they answer all motions, &c.

"The justices of this court are the soveraign coroners of the land, and therefore where the sherif and coroners may receive appeals by bill, à fortiori the justices of this court may do it.

"So high is the authority of this court, that when it comes and sits in any county, the justices of eire, or oier and terminer, gaol-delivery, they which have conusance, &c. doe cease without any writing to them. But if any indictment of treason or felony in a foraign county be removed before certain commissioners of oier and terminer in the county where this court sits, yet they may proceed, because this court (for that this indictment was not removed before them) cannot proceed for that offence. But if an indictment be taken in Midd. in the vacation, and after this court sits in the next term in the same county (if this court be adjourned) then may speciall commissioners of oier and terminer, &c., in the interim proceed upon that indictment, but the more usuall way is by speciall commission. And all this was resolved by all the judges of England at Winchester term, anno I Jacobi regis, in the case of Sir Everard Digby and others; and so had it been resolved, Mich. 25 & 26 Eliz. in the case of Arden and Somervile, for this kind of speciall commission of oier and terminer."10

This passage precedes Coke's description and short history of the Court of Common Pleas. It is a strange use of supreme and sovereign if it is intended to show Coke's support of King's Bench as something more than coordinate with the Court of Common Pleas. In theory their jurisdictions were mutually exclusive though in practice a series of fictions enabled them to filch jurisdiction the one from the other. Insofar as they were rivals their rivalry did not derive from that disposition of the King's power of judicature which Bracton, cited with approval by Coke, ascribed to the separate jurisdictions of these courts as early as the reign of Henry III. There is no evidence that Coke was referring to these fictions and rivalries, and it may well be that the better opinion is that supreme and sovereign are used metaphorically. "To speak plainly," Coke said, "this will overthrow all our Petition. It trenches to all parts of it; it

flies at loans, and at the oath, at imprisonment and at the billeting of soldiers. This turns all about again. Look into the petitions of former times! They never petitioned wherein there was a saving of the King's sovereignty. I know that prerogative is part of the law, but sovereign power is no Parliamentary word. Should we now add it, we shall weaken the foundation of law and then the building must needs fall. Take heed what we yield unto! Magna Charta is such a fellow that he will have no sovereign. I wonder this 'sovereign' was not in Magna Charta, or in the confirmation of it? If we grant this, by implication we give a sovereign power above all these laws. 'Power' in law, is taken for a power with force: 'The Sheriff shall take the power of the county.' What it means here, God only knows. It is repugnant to our Petition that is a Petition of Right, grounded on acts of Parliament. We must not admit of it, and to qualify it is impossible. Let us hold our privileges according to the law."

There is, of course, some evidence that the Chief Justiceship of the King's Bench was somehow a better position than that of the Common Pleas, although it is asserted that Coke was demoted when he was translated from the Common Pleas to the King's Bench. This was because the Chief Justiceship of the Common Pleas was a richer office. There is evidence that, as the Common Pleas did not have jurisdiction over pleas of the Crown, Coke's supposed antipathy to prerogative rule by James I would be assuaged and that he would be a more compliant judge in the King's Bench than he had been in the Common Pleas. This was to prove both a false assumption and a bad bet on the part of the King. We see none of this reflected in the Fourth Institute. If supreme and sovereign were words expressive of legal, jurisprudential, or indeed philosophical theory reflecting power, authority, prerogative and an overall capacity, we would have expected Coke to use the words in connection with the position of the High Court of Parliament. All Coke does is to enunciate the rules of the law appertaining to Parliament, perhaps in the same high-flown style.

"And as every court of justice hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, &c. So the high court of parliament suis propriis legibus et consuetudinibus subsistit. It is lex et consuetudo parliamenti, that all weighty

11. 3 State Trials 189-94; 2 Cossett, Parliamentary History 357.
matters in any parliament moved concerning the peers of the realm, or commons in parliament assembled, ought to be determined, adjudged, and discussed by the court of the parliament, and not by the civill law, nor yet by the common laws of this realm used in more inferior courts; which was so declared to be *secundum legem et consuetudinem parliamenti, concerning the peers of the realm."

This seems to me to be a rule of law which declares nothing new, that Parliament and its privileges should be governed according to its own law and custom. It is no more conducive to a sovereign theory than the old rules which gave clerks of the common pleas a right to have actions which would otherwise have fallen within the jurisdiction of other courts, both common law and courts of conscience, heard in the common pleas. So too the Latin side of chancery admitted common law claims in suits between clerks and others attached to chancery and other persons when other courts would ordinarily have been competent. It was this sort of jurisdiction which Bacon was asserting as being peculiarly appropriate to matters concerning the King's prerogative powers and title in the Assize of Brownlow v. Michell. The earlier disputes concerning benefit of clergy and the competence of the ecclesiastical courts to try questions concerning ecclesiastical lands is no greater an assertion of sovereign power or supremacy. In Bates case the Barons of the Exchequer argued in part that the "records of this Court" were not general matters of the common law. It is not surprising that this doctrine was argued, and argued unconvincingly, for in places the barons themselves conceived that the records of the Exchequer were matters of common law, and in any case within a matter of a decade were to become such. I neither want to minimize nor to maximize the maxim that the *lex et consuetudo parliamenti* is outside the ordinary rules of the common law. What I do want to maintain is that they are part of the common law, in its general and undivided sense of which common law was but one source. How far Parliament could act outside the *lex et consuetudo parliamenti* is a question that does not seem to be asked. The tenor of Coke suggests that it could not. Of

course what is meant here by Parliament is a matter for discussion. Both Coke and I have in mind that springing and shifting continuum possessed of a distinct personality which in fits and starts has continued since the Model Parliament. Bacon when ascribing to Parliament a supreme will talks of "Parliament and its successors." He is talking of one Parliament from election to prorogation in comparison with a later Parliament from election to prorogation. This takes much pith out of the argument that Bacon conceived of Parliament as sovereign. "For a supreme and absolute power cannot conclude itself."\textsuperscript{15}

Coke makes a celebrated remark about Parliament, or rather the power of Parliament in respect of passing bills or in respect of what a bill could or could not do.\textsuperscript{16} It is worth noticing that the words "sovereign" and "supreme" are not used in this connection. Holdsworth remarks, perhaps not surprisingly for one who seems to be a Parliament man: "In the Fourth Institute, when he is dealing specifically with the powers of Parliament, and in other passages, he admits its supremacy freely and fully."\textsuperscript{17} The words of the Institute, however, are "Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds."\textsuperscript{18} There is here nothing of sovereignty or supremacy in Coke, but merely a description perhaps high-flown of what after all is a rule of law, a \textit{placitum legum}. Holdsworth substantiates his argument in the following manner: "talking of an act of attainder, he [Coke] clearly distinguishes the expediency of a law from the power to make it; ibid 42, 43, 'Acts against the power of subsequent Parliaments bind not'; cp. Second Instit. 498, where a record of Edward I's reign is cited to the effect that 'the award of Parliament was the highest law that could be;' Co. Litt. 155b, 'the common law hath no controller in any part of it but the high court of Parliament, and if it be not abrogated or altered by Parliament it remains still.'\textsuperscript{19} It is interesting that Holdsw-

\textsuperscript{15} Bacon, \textit{History of the Reign of King Henry VII} (1622), in 11 \textit{The Works of Francis Bacon} 240 (Spedding etc. ed.)
\textsuperscript{17} 4 Holdsworth, \textit{History of English Law} 187 (1924).
\textsuperscript{19} 4 Holdsworth, \textit{History of English Law} 187 (1924).
worth should cite in support of the supremacy of Parliament the very imprecise and rather uninformative rule that "'acts against the power of subsequent Parliaments bind not'"; Coke in fact refers to Acts of Henry VIII which seem to preclude subsequent acts of Parliament from being introduced, but such acts were introduced. Bacon also makes the same point in his life of Henry VII, in the *Maxims of the Law*, and in his arguments of the *Commission of Bridewell*. He does at least make it clear that he is talking about separate Parliaments, or sessions of Parliament, and not Parliament as a continuum with some personality.

"The principal law that was made this Parliament was a law of a strange nature, rather just than legal, and more magnanimous than provident. This law did ordain, That no person that did assist in arms or otherwise the King for the time being, should after be impeached therefore, or attainted either by the course of law or by act of Parliament; but if any such act of attainder did hap to be made, it should be void and of none effect; for that it was agreeable to reason of estate that the subject should not inquire of the justness of the King's title or quarrel, and it was agreeable to good conscience that (whatsoever the fortune of the war were) the subject should not suffer for his obedience.... But the force and obligation of this law was in itself illusory, as to the latter part of it; (by a precedent act of Parliament to bind or frustrate a future). For a supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed; no more than if a man should appoint or declare by his will that if he made any later will it should be void. And for the case of the act of Parliament, there is a notable precedent of it in King Henry the Eighth's time; who doubting he might die in the minority of his son, procured an act to pass, That no statute made during the minority of a King should bind him or his successors, except it were confined by the King under his great seal at his full age. But the first act that passed in King Edward the Sixth's time, was an act of repeal of that former act; at which time nevertheless the King was minor. But things that do not bind may satisfy for the time."\(^20\)

\(^{20}\) *Bacon, History of the Reign of King Henry VII* (1622), in *11 The Works of Francis Bacon* 240 (Spedding etc. ed.)
The comment "for a supreme and absolute power cannot conclude itself" must, I think, be taken to refer to what immediately preceded it, "by a precedent act of Parliament to bind or frustrate a future," that is to say, Act of Parliament. There seems no warrant in this observation of Bacon that supreme and absolute related to Parliament as a separate personality or entity. This statement represents a rule of law which it is thought is neutral so far as the sovereignty of Parliament is concerned. In the Maxims of the Law Bacon's comment on Regula XIX which concerned the King's prerogative in respect of non obstante raises the query nearer the mark when he discusses the effect of an act of Parliament which enacted that no more Parliaments should be held. His words are:

"So if an act of parliament be made wherein there is a clause contained, that it shall not be lawful for the king, by authority of parliament during the space of seven years, to repeal and determine the same act; this is a void clause, and the same act may be repealed within the years. And yet if the parliament should enact in the nature of the ancient lex regia, that there should be no more parliaments held, but that the King should have the authority of the parliament; this act were good in law; quia potestas suprema seipsum dissolvere potest, ligare non potest: for as it is in the power of man to kill a man, but it is not in his power to save him alive and to restrain him from breathing or feeling; so it is in the power of parliament to extinguish or transfer their own authority, but not, whilst the authority remains entire, to restrained the functions and exercises of the same authority."21

Bacon here raises the question, if we may use the language of Dicey and de Toqueville, whether Parliament as a continuum could make a law abolishing itself, or whether it could make a law creating a new legislative assembly which was not a constituent assembly, that is to say, an assembly which could make laws but which could not alter its own constitution. There seems to be no reason why such a position should not obtain. The better view of Bacon's comment seems to us to be that Bacon distinguishes in these passages between acts of Parliament and sessions of Parliament and particular parliaments on the one hand and Parliament as a continuum, the High Court of Parlai-

21. Bacon, Maxims of the Law — Regula XIX, in 14 The Works of Francis Bacon 253 (Spedding etc. ed.)
ment, on the other. There is not that mixed confusion which leads later writers to think that because Parliament can do anything but bind its successors, "it," being confused and ill-defined, is sovereign.

"So in 28 of K. H. VIII chap. 17. there was a statute made, that all acts that passed in the minority of kings, reckoning the same under years of twenty-four, might be annulled and revoked by their letters patents when they came to the same years; but this act of the first of K. Ed. VI (who was then between the years of ten and eleven) cap. 11. was repealed, and a new law surrogate in place thereof; wherein a more reasonable liberty was given, and wherein, though other laws are made revocable according to the provision of the former law with some new form prescribed, yet that very law of revocation, together with pardons, is made irrevocable and perpetual. So that there is a direct contrariety and repugnancy between these two laws: for if the former stands, which maketh all latter laws during the minority of kings revocable without exception of any law whatsoever, then that very law of repeal is concluded in the generality, and so itself made revocable; on the other side that law, making no doubt of the absolute repeal of the first law, though itself were made during the minority, which was the very case of the former law, in the new provision which it maketh hath a precise exception, that the law of repeal shall not be repealed. But the law is, that the first law by the impertinency of it was void ab initio et ipso facto without repeal: as if a law were made, that no new statute should be made during seven years, and the same statute be repealed within the seven years; if the first statute be good, then no repeal could be made thereof within that time; for the law of repeal were a new law, and that were disabled by the former law; therefore it is void in itself, and the rule holds, perpetua lex est, nullam legem humanam ac positivam perpetuam esse; et clausula quae abrogationem excludit initio non valet."22

In the discourse upon the Commission of Bridewell, Bacon argued that "if any Charter be granted by a King which is repugnant to the Maxims, Customs, or Statutes of the Realm; then is the Charter void. And it is either by quo warranto or by scire facias (as learned men have left precedents) to be repealed. Anno 19: Ed. 3.

22. Id. at 254.
"That a King's grant either repugnant to law, custom, or statute is not good nor pleadable in the law, see what precedents thereof have been left by our wise forefathers."23

"Hitherto ye see it very plainly that neither procurement nor act done either by the King or any other person, or any act of Parliament, or other thing may in any ways alter or change any one point contained in the said great Charter of England."24

Remembering St. Germain's divisions of the law into six heads and Bacon's into three, and remarking the jurisprudential point that the law is a calculus whose functions or rules may conflict but not compete in the sense that this or that rule or this or that source of law is supreme or sovereign, Bacon's observations in the discourse do not seem to conflict with Coke's observations in Bonham's case. "In many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void."25 This is not a startling dictum, especially when the equity of the statutes was a doctrine of the common law. It is not thought that Holdsworth's observation "I do not forget that Coke sometimes writes as if he believed in the supremacy of a law which even Parliament could not change"26 is warranted or supported by Coke's writings as a whole. Professor Thorne has adequately laid Bonham's case in perspective.27 The equity of the statute or "l'equite de la statut" was described by Plowden as "Equitas est correctio legis generatione latae qua parte defite."28 Coke says "per l'equite de la statut": "Equity is a construction made by the Judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same shall be within the same remedy that the statute provideth: and the reason thereof is, for that the lawmakers could not possibly set down all cases in express terms."29

It is submitted that Coke does not go as far as alleging any doctrine of the sovereignty of Parliament. It is Blackstone's Commentaries upon the Laws of England, commenting upon and

23. Bacon, A Brief Discourse upon the Commission of Bridewell, in 15 The Works of Francis Bacon 12 (Spedding etc. ed.)
24. Id. at 16.
27. Thorne, 54 L.Q. Rev. 543.
interpolating and interpreting Coke, which is perhaps the first legally authoritative opinion about the sovereignty of Parliament.\(^8\)

PART II. BLACKSTONE'S THEORY: HIS INTERPOLATION OF COKE

Blackstone's starting point, his hypothesis and assumptions, are somewhat naive. For example, he accepts tacitly a distinction between governor and governed. From this assumption it is easy to be led into a doctrine of sovereignty. Society, or the polis, is more complicated than this.\(^3\) Blackstone's words are:

"We are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private: and we will first consider those that are public.

"The most universal public relation, by which men are connected together, is that of government; namely, as governors and governed; or, in other words, as magistrates and people. Of magistrates, some also are supreme, in whom the sovereign power of the state resides; others are subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere."\(^3\)

Blackstone writes the commentaries very much as a lawyer. The last gobbet echoes Roman law with its talk of magistrates, and we discern hints of imperium et potestas. He does cite what he calls "Locke, and other theoretical writers,"\(^3\) one whom he quotes being Montesquieu, but he disapproves of and dismisses them in the following manner: "‘there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it.’"\(^3\) Blackstone's comment upon this is narrowly legal, and it shows that Blackstone had in mind a legal account of the Constitution, but one which was

30. See 1 BLACKSTONE, COMMENTARIES *160-61; DICEY, LAW OF THE CONSTITUTION 46 (5th ed. 1897).
31. BERTRAND DE JOUVENEL, SOVEREIGNTY ch. 2 (1957).
32. 1 BLACKSTONE, COMMENTARIES *145.
33. Id. at *161.
34. Ibid.
seen through a concept of the law which he himself had articulated earlier in the Commentaries, that is, the fiction that the judges declared, did not make, law; and it was seen through a jurisprudence which accepted at least a partial distinction between executive and legislature. "But however just this conclusion may be in theory, we cannot practically adopt it, nor take any legal steps for carrying it into execution under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual."36

Blackstone's description, partially historical, of the divisions of law seems to make the break with the view of law which we have suggested both Coke and Bacon, and indeed Bracton, held that it was indeed a calculus consisting of several sources. True, Blackstone cites Fortescue as saying that Parliament makes laws, and this shows that in the fifteenth century perhaps some distinguished between this all-embracing concept of law as binding on both King and people. Blackstone's definitions of law are distinguished between lex non scripta in which he includes common law, custom, and special custom, and lex scripta, which is statute law. But for him law (and he calls this "municipal law") is "'a rule of civil conduct prescribed by the supreme power in a state.'"38 "Municipal law, thus understood, is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'"39 This definition of law perhaps proceeds from and leads to Blackstone's conclusion, for legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another.41 "Wherefore

35. Id. at *69.
36. Id. at *161-62.
37. Id. at *164.
38. Id. at *46.
39. Id. at *44.
40. Id. at *46.
41. Blackstone's use of legislature is not always clear, and may in places
it is requisite to the very essence of a law, that it be made by
the supreme power. Sovereignty and legislature are indeed con-
vertible terms; one cannot subsist without the other."42 This
leads to the dichotomy between lex scripta and lex non scripta,
a dichotomy the more significant because Blackstone seems to
think they are different sorts of law and not merely different
sources of law. The common law which he describes is for him
lex non scripta,43 although he acknowledges the records and the
precedents and the books of wise men as sources of this law.
This lex non scripta is not made. He describes its enunciation
in these classic words: "For it is an established rule to abide
by former precedents, where the same points come again in litiga-
tion: as well to keep the scale of justice even and steady, and
not liable to waver with every new judge's opinion; as also be-
cause the law in that case being solemnly declared and deter-
dined, what before was uncertain, and perhaps indifferent, is
now become a permanent rule, which it is not in the breast of
any subsequent judge to alter or vary from according to his pri-
ivate sentiments: he being sworn to determine, not according
to his own private judgment, but according to the known laws
and customs of the land; not delegated to pronounce a new law,
but to maintain and expound the old one. Yet this rule admits
of exception, where the former determination is most evidently
contrary to reason; much more if it be clearly contrary to the
divine law. But even in such cases the subsequent judges do
not pretend to make a new law, but to vindicate the old one
from misrepresentation."44

Here then we find the germs of Blackstone's interpretation;
sovereignty and legislature are equivalences; the legislature
makes laws; judges or the common law declares and determines
law. "Make" is a stronger word than "declare" or "determine,"

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42. Id. at *46.
43. Id. at *62.
44. Id. at *69-70. See further id. at *73: "And thus much for the first ground
and chief corner-stone." I do not think this is anything more than hyperbole.
so that the shift into considering the statute laws as somehow more powerful than common law is an easy step. How easy a step is seen from the tenor of Blackstone's *Commentaries* when compared with Coke's *Institutes*. To Coke, as we have shown, statutes are transcendent and absolute, the King's Bench is the sovereign court and the supreme jurisdiction. To Blackstone, Parliament is sovereign and supreme and his authority is the citation from Coke attributing to Parliament a transcendency. How significant these verbal distinctions are must later be discussed. This is how Blackstone deals with the celebrated passage from the *Fourth Institute*: "The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And — of this high court, he adds, it may be truly said, 'si antiquitatem specetes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.' It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms."\(^{45}\)

It is in the nuance contained in the words "making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws" that Blackstone shows his position. We shall see later what his evidence for this proposition is. He confounds and confuses Parliament the Corporation with Parliament the Session, and in so confusing these two identities he confounds what is within the power of one with what is within the power of the other. "All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown; as was done in the reign of Henry VIII and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliament themselves; as was done by the act of union, and the several statutes for triennial and

\(^{45}\) *Id.* at *160. See text at note 12 *supra*. 
septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo. Equating the power of Parliament to protract its length to three or seven years with the power of Parliament to change its constitution is, it is thought, a confusion of two different uses of the word “Parliament.” To urge the former in support of the omnipotence of the latter is the same sort of argument as saying that Parliament can do anything except bind its successors and to allow this statement to go unanalyzed. Behind this statement are two assumptions which pass sub silentio, the one that Parliament is omnipotent, the other that its successor is omnipotent and cannot be bound by a predecessor. It is not at all certain what a successor to Parliament is: a Parliament, that is, which possesses legal personality and is a corporation or continuum. We have seen that Bacon had difficulty in resolving this query and we have also shown that the alleged rule means merely that one Parliament such as the Model, the Good, the Long, the Rump cannot bind another Parliament. In fact it has nothing to do with Parliament as a Corporation. Blackstone is nearer citing some authority, when he refers to Parliament before and after the Act of Union with Scotland, but recent judicial dicta in MacCormick v. The Lord Advocate seem to be against him on this point. The power of Parliament to change the religion is a matter which caused great difficulty at the time, as the argument by Sir Thomas More with Solicitor General Rich shows, and it was an argument which goes to the root of what is possible. How far discussing what is possible or impossible affects the omni-

46. My argument is that Parliament, like the law, cannot do anything that is not logically possible. They may produce pragmatic paradoxes, though not logical paradoxes. This is brought out in the Rich-More examination. See note 49 infra. Bacon remarked in A Brief Discourse upon the Commission of Bridewell, in 15 The Works of Francis Bacon 12 (Spedding ed. ed.) that statutes were the “absolute decrees and absolute judgements of the Parliament.” This involves the use of reason. It will be argued that reason would preclude the logically impossible.

47. 1 Blackstone, Commentaries *160-61.


49. The following account I take from Pickthorn, Early Tudor Government: Henry VIII 261 (1951): “Admit there were, sir (quoit Rich), an Act of Parliament that all the Realm should take me for the King, would not you take me for the King?” “Yes, sir (quoit Sir Thomas More), that would I.” “I put the case further (quoit Mr. Rich), that there were an Act of Parliament that all the Realm should take me for the Pope; would then not you, Mr. More, take me for the Pope?” “For answer (quoit Sir Thomas More) to your first case, the Parlia-
potency of Parliament is difficult to answer. I do not think it is necessary to defend Blackstone on this point, for if he is right in his allegation that legislature and sovereignty are equivalent it would be academic not to concede the limitation of Parliament to what was possible as an objection to its supremacy or sovereignty or indeed its omnipotence. In the writer's opinion a limitation upon Parliament's powers is that as a continuum it could not make law what is logically impossible. An act declaring that 2 and 2 made 5, or that the theorems of Euclidean geometry did not follow from the axioms, or that the laws of inference did not obtain in logic would be contrary to reason, against the common law and void.

Blackstone, like Coke, deals with the privileges of Parliament, and compares Parliament as a court to other Courts. "For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law." No one would deny these competing jurisdictions and rivalries, and few could marvel at the acquisitive fictions which filched jurisdiction from one court to another. There was indeed some sense in which the common law was in the words of Bacon "jus dicere," and another mode of lawmaking by Parliament "jus dare," but both were viewed as functions of a calculus, which calculus was "all laws" or law. Blackstone in his distinction between declaring and making,

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50. 1 BLACKSTONE, COMMENTARIES *163.
interpolates a sense of rivalry and so of superiority and then of supremacy and finally sovereignty to the law that is made. This is noticeable when he next deals with the privileges of Parliament and quotes Fortescue as follows: “The privileges of parliament are likewise very large and indefinite. And therefore when in 31 Henry VI the house of lords propounded a question to the judges concerning them, the chief justice, Sir John Fortescue, in the name of his brethren, declared, ‘that they ought not to make answer to that question: for it hath not been used aforetime that the justices should in any wise determine the privileges of the high court of parliament. For it is so high and mighty in its nature, that it may make law: and that which is law, it may make no law: and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices.’ ”

I do not see myself in the power of Parliament to judge of its own privileges any argument tending to make Parliament supreme. It was after all the same rule before sovereignty became a notion or a word bandied about by political theories. It was part of the law of medieval England.

How far Blackstone’s glosses on Coke’s position were caused by the Glorious Revolution and the establishment of the Prince of Orange on the English Throne, or by the writing of Locke and Montesquieu, and possibly Bodin, we do not propose to trace. Suffice it to say that the Commentaries reflect a measure of influence upon Blackstone imparted by the 1688 settlement and the theories. The Act of Union with Scotland and the creation of a new Parliament, in some senses a successor to the old English Parliament, gave some reality to discussions on whether Parliament as a corporation could bind its successors. We shall see from a discussion of MacCormick v. The Lord Advocate that, far from suggesting that Parliament as a Corporation or the continuum cannot bind its successors, apparently it can, though it is nevertheless true that Parliament cannot bind its successors when it is considered either as a session or as a different elected body.

Some criticism of Blackstone’s use of natural law as a let or hindrance to the validity of positive laws has been made. It

51. “[P]ut in competition together.”
52. 1 Blackstone, Commentaries *164.
is not curious nor odd that Blackstone propounding as he did a command theory of law and a sovereign theory of Parliament should have boggled at the implications of such an amalgam. It was tantamount to the alleged theory of the Roman Empire and the civilian law "quod principi placuit legis habet vigorem" and it is a theory which has led jurisprudence into a discussion of the relation of law and morals and the law that is and the law that ought to be. Blackstone avoids the logical extension of his view of the law and sovereignty by superimposing upon it a recourse to the law of nature. In this he was to call forth the scorn and the wrath of Bentham. Had he interpreted Coke and followed Bacon in considering that law as a calculus governed both King and people (including the representatives of the people) and that when the good and safety of the kingdom was in danger, or at the time of the breaking of nations, the judges should be the arbiters of the law, he would not have needed to erect the metaphysical superstructure of the law of nature to keep Parliaments within their bounds. Nor would he have attributed to Parliament a doctrine of sovereignty.

54. 1 Blackstone, Commentaries *39.

55. The problem of jurisprudence is at least in part to understand the conceptual scheme of the law, that is, the calculus of rights and duties, etc., and the functions and variables contained in the rules. Strawson, Individuals 40 (1959), arguing about individuals, puts the point with reference to physical objects or particulars, to the effect that we identify particulars within a framework of a three-dimensional space and time scheme in which there are limitations in observation. "Given a certain general feature of the conceptual scheme of particular-identification which we have, it follows that material bodies must be the basic particulars.

"The form of this argument might possibly mislead. It is not that on the one hand we have a conceptual scheme which presents us with a certain problem of particular-identification; while on the other hand, there exist material objects in sufficient richness and strength to make possible the solution of such problems. It is only because the solution is possible that the problem exists. So with all transcendental arguments." If jurisprudence is an attempt to describe the legea legeum out of the placita legum, the laws of laws out of the particulars of laws, in Bacon's language, it is well to remember that there is "a general character of the conceptual scheme" of the law and the legal system which might limit our power to classify or individuate or identify particulars in the same way as Strawson describes our difficulties in identifying particulars, as follows:

"First, is there a class or category of particulars such that, as things are, it would not be possible to make all the identifying references which we do make to particulars of other classes, unless we made identifying references to particulars of that class, whereas it would be possible to make all the identifying references we do make to particulars of that class without making identifying reference to particulars of other classes? Second, can we argue to an affirmative answer to this question from the general character of the conceptual scheme I have described?" Id. at 38.

Implicit in this argument concerning sovereignty is the understanding of the calculus of rights with its functions and variables, which makes up the "general character" of the (legal) conceptual scheme. It is a game analogous to the "language game" of Wittgenstein, having different rules for proof verification,
Between Blackstone and Dicey, who first wrote *Law of the Constitution* in 1885, fall the utilitarians Bentham and Austin. They both propounded a positivist theory of law, a command from a Sovereign enforced by a sanction. It is not my purpose here to criticize either Austin or Bentham, but merely to remark their existence and influence. Our concern is with Dicey whose work *Law of the Constitution*, expounding his theory of the Sovereignty of Parliament, has become a classic for those reading that spurious branch of law, constitutional law. Dicey’s work is to be commended and condemned—commended because he conceives that there are two accounts of sovereignty, a legal account and a political account, and because he shows, not quite as cogently as Buckland in his *Reflections of Jurisprudence*, that Austin erred in mixing up a legal and a political concept. Dicey is to be condemned, however, not merely for his somewhat infantile treatment of the political concept of sovereignty, but for falling into confusion over his legal treatment of the legal concept of sovereignty.

His discussion is not very clear. He uses the notion of “law” and “fact.” A legal fact is a fact, a particular or series or group of particulars of which the law takes notice. The law takes judicial notice of matters not requiring evidence. Dicey does not say whether sovereignty is a fact or a series or group of facts which the law notices upon evidence. He does not say whether it is fact or law, or finally whether it is *placitum legum* a particular of law, a rule of law, or one of the rules which form part of the complex calculus. After stating that sovereignty is a legal fact, Dicey quotes Blackstone, including evidence, causation, authority, and precedent from other disciplines. See, for example, Austin, *A Plea for Excuses*, in 57 *Aristotelian Society, Proceedings* 14 (1956-57). See also Hart & Honoré, *Causation and the Law* (1959).

The fallacy which causes unclarity is derived from the making of logical translations from one discipline to another, without appreciating either that a translation is being made, or the significance of what is being done in making the translation. This is a point which has occurred to philosophers, but not to jurists or political theorists. In cases themselves, half the difficulty for judge and counsel is to translate at the point of intersection the language of, say, a psychiatrist in a murder trial into the language of the law, commonly that of M’Naghten’s rule, into the language of ordinary speech for a jury. In the nineteenth century the coalescence of ordinary words, medical words, and legal words obscured the distinction between these disciplines, and so obscured the fact that some logical translation was being made. For general literature, see Berlin, *Logical Translations*, in *Aristotelian Society, Proceedings* (1950); Braithwaite, *Scientific Explanation* ch. iv. See also Stone, *Logical Translations in the Law*, 49 *Minn. L. Rev.* 447 (1965).
the citation of Coke. He notices no distinction between Coke's treatment and Blackstone's interpolation. He accepts without demur Blackstone's interpretation and also the confusion between Parliament and a session of Parliament, and the length of a Parliament from election to dissolution in citing the example in support of Parliamentary supremacy. He also accepts that they are in competition one with the other. He does not conceive that they are two sources of law, that complex calculus of rules, functions, etc., which he so forcefully enunciated in his Rule of Law.

Dicey describes parliamentary sovereignty as follows: "The principle of Parliamentary sovereignty means neither more or less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament." Dicey here says that parliamentary sovereignty is recognized by the law. He does not develop this suggestion, nor does he define what law he has in mind. In view of his analysis, it is hardly the common law, nor would we suppose that it could be. We submit that it is that law which is a calculus of those sources including statute, common law, custom, etc.; perhaps it is a hint at the "rule of law." In support of this thesis Dicey next cites Blackstone and draws support from: "This supreme legislative authority of Parliament is shown historically in a large number of instances."  

1. The descent of the Crown was varied and finally fixed under the provisions of the Act of Parliament whereby the King occupies the throne under a Parliamentary title.

2. He quotes 6 Anne, c. 7, a statute dealing with the King's title, and making it treasonable to doubt it.

3. "An Act declaring the rights and liberties of the subject, and settling the succession of the Crown;"

4. "One other Act made in England in the twelfth year of the reign of his said late Majesty King William the Third, in-

56. See text at note 45 supra.
58. Id. at 41.
59. Ibid.
60. Ibid.
61. Ibid.
tutled, An Act for the further limitation of the Crown, and better securing the rights and liberties of the subjects."\textsuperscript{62}

These acts concern Parliament and the powers of Parliament as a continuum or corporation. The next act cited might be argued to concern Parliament as such a continuum or corporation, and its powers to create a successor to itself as such a continuum or corporation—a successor both as a legislative and as a constituent assembly. As to the judicial interpretation of this act see *MacCormick v. The Lord Advocate*.

5. "The Acts lately made in England and Scotland mutually for the union of the two kingdoms."\textsuperscript{63}

Dicey's comment on this act and its apposition with his introductory remarks on the Septennial Act are worth noting in full.

"The Acts of Union (to one of which Blackstone calls attention) afford a remarkable example of the exertion of Parliamentary authority. But there is no single statute which is more significant either as to the theory or as to the practical working of the constitution than the Septennial Act. The circumstances of its enactment and the nature of the Act itself merit therefore special attention."\textsuperscript{64}

Dicey does not expound how remarkable an example of parliamentary authority the Act of Union was, nor does he draw a distinction between Parliament *qua* corporation and Parliament extending its duration, that is one Parliament extending its own life, although in his discussion of the Septennial Act he uses this expression. He ignores utterly the distinction between the powers of Parliament contained in the preceding acts which involve questions of creating successors to itself, or changes in the Constitution, and the purely law-making functions of a legislature, a High Court of Parliament extending its own life within the rule of that complex calculus known as the law. Parliamentary sovereignty, as applied to the last part, seems merely to mean that the complex calculus is changed, in that one of the rules or functions of the calculus is changed by altering 3 to 7 in the appropriate rule governing the dissolution of a

\textsuperscript{62} Ibid.
\textsuperscript{63} [1953] Scot. Sess. Cas. 396.
\textsuperscript{64} DICEY, LAW OF THE CONSTITUTION 42 (5th ed. 1897).
\textsuperscript{65} Ibid.
Parliament. It does not alter the criteria by which we are to judge what are the sources of law, that is, what are the sources of the rules and functions of the calculus itself.


Dicey's pertinent comment on the Septennial Act was "What was startling was that an existing Parliament of its own authority prolonged its own legal existence . . . To under-rate this exertion of authority is to deprive the Septennial Act of its true constitutional importance. That Act proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state, and the Septennial Act is at once the result and the standing proof of such Parliamentary sovereignty."\(^6\)

Here we find the shift from treating Parliament as Parliament, and a Parliament as a Parliament, to Parliament as a Parliament and a Parliament as Parliament. Deducing from the power to extend the life of a Parliament a sovereignty in Parliament to do all things except to bind its successors, as the phrase goes, is a jump in violation of logic. It may be an argument from an analogy but it is not an argument which is logically deduced. The analogy may have force, though, in view of the query of Bacon and subsequent thought on the matter contained in *MacCormick v. The Lord Advocate*, it is doubtful whether the analogy is either apposite or forceful.

7. The Indemnity Acts.

These acts made legal what was illegal and operated sometimes *ex post facto* and sometimes *in futuro*. They seem to me to be like any other statute and are merely a source of law. I see no difference between an indemnity act, a repealing act, an enabling act, a consolidating act or a declaratory act. When the Law of Property Act abolished the rule, in *Shelley's Case*,\(^7\) when the Act of the Long Parliament declared that the case of Ship Money was wrongly decided, they were doing neither more nor less than the Indemnity Acts did. What they were doing was adding a new rule or function to the complex calculus, and they were doing no more than a decision at the House of Lords.

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66. *Id.* at 44-45.
67. 1 Co. Rep. 88b (1581).
overruling a case or the Court of Exchequer Chamber sitting in error overruling a case. Dicey’s comment, however, “that such enactments being as it were the legalisation of illegality are the highest exertion and crowning proof of sovereign power”\textsuperscript{68} stems from the view that the sources of law are rivals and in competition, and this is inherent in his view next explained, and no doubt derived from Blackstone, that there is in our Constitution an absence of any competing legislative power. He expresses it thus. “The King, each House of Parliament, the Constituencies, and the Law Courts, either have at one time claimed or might appear to claim, independent legislative power.”\textsuperscript{69} It will be found, however, on examination that the claim can in none of these cases be made good. This diagnosis is not a matter of history, but a profound jurisprudential misconception contained in the competitive idea of conflicting jurisdiction. Maitland’s phrase summing up the rivalry between equity and common law suffices as a comment on Dicey’s heresy. “Equity had come not to destroy the law but to fulfil it.”\textsuperscript{70} It is difficult without an understanding of the jurisprudential account of theory and definition in jurisprudence and that cited from Marshall’s \textit{Parliamentary Sovereignty}, on the one hand, and a profound understanding of the internal relations and constructs of law and particularly the English legal system, on the other, to realize that the dynamism of the law countenances variables as well as constants, conflicts, doubts, queries, and inconsistencies as well as rules, certainties. Coke might speak of the King’s Bench as sovereign and superior and such a description would lead us to ask what rules he had in mind as particularly appropriate to the jurisdiction of the King’s Bench, and not to ask questions about the nature of sovereignty and supremacy, whether it is external or internal, limited or unlimited. The interplay of rules leads not to conclusions about the absolute nature or essence of one rule but merely to the recognition of its relevancy to another or other rules. In the history of English law, particularly in the seventeenth century, we find the common law courts settling the rules whose interrelation and whose relativity the law as a complex calculus is founded upon, the common law judges largely creating this jurisprudence and often declaring not merely the common law

\textsuperscript{68} DICEY, \textit{Law of the Constitution} 48 (5th ed. 1897).
\textsuperscript{69} \textit{Ibid}.
\textsuperscript{70} MAITLAND, \textit{Lectures on Equity} 17 (1916).
but that law of which the common law is one of the sources. There were appeals to some law that was fundamental or transcendent in cases submitted to the common law courts and a fundamental or transcendent law was not such that it could be articulated within the jurisdiction and so the jurisprudential framework of the common law courts. The tendency of the common law judges was to declare, according to common law, what was often a matter for that law of which the common law and custom and statute were the sources. What judges do and what the King in Parliament does, when they make or declare laws, is to fix the rules and functions or write new rules and functions within the jurisdictional area of their own competence and leave it to a jurist to describe the complex calculus; as Bacon put it, to describe the leges legum from the placita legum. When this is understood the sovereignty of Parliament theory becomes a shibboleth. Dicey was right, however, when he distinguished between a legal account of sovereignty and a political account of sovereignty, but not in finding what the legal sovereign was nor, indeed, what the political sovereign was. In the cases he next cites concerning legal sovereignty he consistently misinterprets the question, and this again because he is concerned with the rivalry of competitive or supposedly competitive legislative power. He attributes the Sovereignty of Parliament to “the absence of any competing legislative power.—The King, each House of Parliament, the Constituencies, and the Law Courts, either have at one time claimed, or might appear to claim, independent legislative power. It will be found however on examination that the claim can in none of these cases be made good.”

These matters can be dealt with shortly. The power of the Crown is raised and knocked down by a short and by no means complete account of the Statute of Proclamations and the common law rules relating to proclamations. That the King cannot do more by proclamation than he could at common law is of course the position which the common law provides and is in this sense no statutory limit upon the King. Theorists, obsessed with the competition between law making and law declaring, throw into acute relief the history and nature of proclamations. Parliament passed the Statute of Proclamations in the reign of Henry VIII, and it is very doubtful whether, pending the duration of this act, it could be said that the King was in any sense more or less sovereign than either before the

71. DICEY, LAW OF THE CONSTITUTION 48 (5th ed. 1897).
act or after its repeal. All that the act did was to enable the new rules to be written into the legal calculus by another source. The Case of Proclamations in 1610 is relied on by Dicey to show that Parliament is supreme and sovereign in some sense over the King. He argues that Parliament is sovereign over the King. He relies on the claim that the King cannot declare illegal what is lawful at common law. Coke decided this matter with the common law judges in the Case of Proclamations and this within a few years of another decision of Coke’s in Bonham’s case\textsuperscript{72} that common law could adjudge void a statute repugnant to the common law. Perhaps there is some historical development which Dicey does not systematically discuss and which, perhaps, if Dicey’s book is to be at all jurisprudential, he does not need to discuss. Perhaps the distinction between the legislative and judicial functions has become so much a part of Dicey’s conceptual scheme that he retrospectively imposes it, albeit obliquely, upon 17th century cases—“a typical mistake of the Whig interpretation of history.”

In discussing the legal position of resolutions of either House of Parliament, Dicey again sets up the competitive thesis, and of course manages to knock it down. He does this by quoting a judgment of Mr. Justice Stephen, a part of which is illuminating in that it shows that there is none of this competitive rivalry in this learned Judge’s conceptual scheme.

“‘I do not say that the resolution of the House is the judgment of a Court not subject to our revision; but it has much in common with such a judgment. The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal concerns, practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly, and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. The maxim that there is no wrong without a remedy, does not mean, as it is sometimes supposed, that there is a legal remedy for every

moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal, and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin; nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms; and it would be more intelligibly and correctly stated, if it were reversed, so as to stand, "Where there is no legal remedy, there is no legal wrong." 73 It is significant that Stephen uses the words "in regard to the law, in the making of which it has so large a share." The tenor of the judgment is moderate. It is significant that Stephen talks "of the making" of the law and attributes to Parliament a share. Although it were better not to use the metaphor "make" or "declare" Stephen uses "make" 74 in the sense of Bracton's legat, and does not import the Blackstonian dichotomy into his words. In consequence the word "share" is all the more significant in that according to Dicey's recognition of legal sovereignty, the legal sovereign does not "share" in law-making power.

Dicey's next rhetorical argument is to set up the proposition that the courts of law make laws. This he proceeds to knock down on the very spurious Blackstonian argument that judges declare and do not make laws. The passage which I consider objectionable contains these overtones of the Blackstonian dichotomy and Austinian jurisprudence, and the idea implicit in Dicey's conceptual scheme that the sovereign, that is the legal sovereign, is any person or group of persons who can change the law. It is significant that Dicey uses legislate, make, change, repeal, as words appropriate to the judicial process, which he merely refers to by mention of Pollock's Essays in Jurisprudence and Ethics and does not examine, explore or analyze.

Dicey states: "All that we need note is that the adhesion by our judges to precedent, that is, their habit of deciding one case in accordance with the principle, or supposed principle,

73. DICEY, LAW OF THE CONSTITUTION 53 (5th ed. 1897).
which governed a former case, leads inevitably to the gradual formation by the Courts of fixed rules for decision, which are in effect laws. This judicial legislation might appear, at first sight, inconsistent with the supremacy of Parliament. But this is not so. English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges." What the effect of judicial interpretation upon an act of Parliament amounts to, that is, alteration, amendment, repeal, addition, extension, or interpretation, is not discussed. The Statute De donis Conditionalibus was limited to heirs in the fourth degree by a remarkable judicial interpolation in that Hengham, C. J. had omitted certain words from the draft through carelessness, and these were judicially interpreted as if included. Judicial construction of finance acts, and indeed of the Statute of Uses, affords some case for saying that judges, in a loose sense, can change and certainly control an act of Parliament. In our view of the law, because of the absence of a competitive rivalry, there would be no need to use the word change or control. We would merely understand the operation of the appropriate rules. Dicey, however, does use the dichotomy make and declare, jus dare and jus dicere. Consequently without much difficulty he can then assert "judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament," a deduction derived from false premises at worst, or an induction made from insufficient evidence at best.

Dicey then goes on to consider whether Parliament is in fact the legal sovereign in the Austinian sense of sovereign, that is to say, some person, or combination of persons, which according to the Constitution, whatever its form, can legally change every law, and therefore "constitutes the legally supreme power in the state."

Austin, of course, did not consistently use this test and, as both Dicey and Buckland have pointed out, he hopelessly confused legal and political sovereignty. Dicey, however, at this point is quite clear what sovereignty means to him, and he proceeds to set up arguments showing that none of the suggestions addressed to the problem of limiting this sense of sovereignty stands examination. The suggested limitations are (1)

75. DICEY, LAW OF THE CONSTITUTION 57-58 (5th ed. 1897).
76. Id. at 88.
Blackstone's suggestion that laws against morals, international law, and the law of nature are void, (2) the prerogative and (3) the preceding act of Parliament. None of these shall I discuss here. The most interesting is that under (3), but because of Dicey's confusion about the meanings of the word Parliament, much of his discussion is beside the mark. His most important contribution is that concerning the Act of Union, where it is possible to suggest that Parliament as a corporation, as a springing and shifting continuum endowed with a legal personality, could have abolished itself as the English Parliament and recreated a successor to itself as a Parliament of the United Kingdom. How far therefore the Act of Union limited the powers of the successor to the Parliament which passed the act is of some interest, and upon this point there are dicta in the Scottish case of *MacCormick v. The Lord Advocate,*7 which are of interest: "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional

theorists of the same attitude to these markedly different types of provisions.”

How far the Lord President Cooper was justified in attributing to Coke the same constitutional theory which Blackstone, Bagehot, and Dicey propounded, is questionable. It is my contention that giving maximum effect to Coke's argument as to the transcendent nature of Parliament, his conception of the law as a calculus whose sources included statutes, the common law, and custom, and his views about the fundamental nature of Magna Carta, might easily have enabled him to support as binding, the Act of Union, entrenching as it did certain fundamental unalterable provisions. It is significant that the Lord President found that, "This at least is plain, that there is neither precedent nor authority of any kind for the view that the domestic Courts of either Scotland or England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent states and merged their identity in an incorporating union. From the standpoint both of constitutional law and of international law the position appears to me to be unique." Cases such as Dalkeith Ry. v. Warchope and Ellen Street Estates, Ltd. v. Minister of Health are not concerned with this problem, but only with the problem of whether one act of a Parliament can bind a future act of a Parliament, both Parliaments "in this sense" being sessions of Parliament from the election to dissolution, and not Parliament as a Corporation enjoying a legal personality. It is only in the sense of the English Parliament and its successor the United Kingdom Parliament that MacCormick v. The Lord Advocate and Harris v. Minister of the Interior have any relevance. The questions decided in the former line of cases have nothing to do with the latter, and the latter seem to me to decide that there is a legal concept to sovereignty, that the precedents are few, that there is nothing in legal theory dis-enabling the courts from articulating in the future more precise criteria of the legal sovereignty. Such a conception might

78. Id. at 411.
79. Id. at 413.
80. [1842] 8 Cl. & F. 710.
81. [1934] 1 K.B. 590.
82. [1952] 1 T.L.R. 1245.
contain the feature that a legal sovereign could be sovereign, although not entirely free or unlimited from and by the provisions constituting it sovereign. It is thought that the *Harris* case has gone some way to support this view. I see no reason either to resort to academic logic or to political reality when legal ratiocination can articulate a concept of legal sovereignty. The great query is whether there is jurisdiction either in the Scots' courts or the English courts, to hear matters arising out of the treaty of the Act of Union. There seems no authority either way in modern times and perhaps the question which was once mooted in the great case of *Ship-Money* as affecting the King's prerogative may be played in aid as affecting such a constitutional act of the legislature. Certainly without jurisdiction it would be hard to develop a jurisprudence. One way of affording the courts jurisdiction will be to re-examine the law and the Constitution afresh without the influence of Blackstone and particularly Dicey.

In discussing the Act of Union, Dicey modified his strict Austinian view about the nature of sovereignty being illimitable and owing nothing to a superior. The Lord President Cooper, in the *MacCormick* case, cites the relevant passage.

"The statesmen of 1707, though giving full sovereign power to the Parliament of Great Britain, clearly believed in the possibility of creating an absolutely sovereign Legislature which should yet be bound by unalterable laws."  

This idea that the imperial legislature might limit the sovereignty of a Dominion legislature is exactly the point in the *Harris* case. Dicey at least hints here at some legal conception of limited sovereignty, and very properly suggests that seventeenth century lawyers might not have been so entrenched in the conceptual scheme of a sovereign being absolute and unlimited or free and independent. Neither Bodin nor Austin completely entrenched legal thought until the nineteenth century. Dicey's comment upon the suggestion that sovereignty might be limited is, however, strange. The suggestion that the sovereign legislature might yet be bound by unalterable laws suggests that there is some legal limit to sovereignty, but he soon resiles from this position into talk about moral and political limits.

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83. *3 Howell, State Trials* 825.
to sovereignty. The point that by Austin's definition of legal sovereign we are inextricably bound by an inescapable logic to admit that sovereignty is illimitable carries little weight when Dicey has seen that there is at least one example of a sovereign, and the very sovereign about which Austin thought he was writing, itself being limited. Dicey should have re-examined Austin's definition. Instead, he treats it not for what it is worth, but rather for what it pretends to be.

"It represents the conviction of the Parliament which passed the Act of Union that the Act for the security of the Church of Scotland ought to be morally or constitutionally unchangeable even by the British Parliament... A sovereign Parliament in short, though it cannot be logically bound to abstain from changing any given law, may by the fact that an Act when it was passed had been declared to be unchangeable, receive a warning that it cannot be changed without grave danger to the Constitution of the country." 85

"Morally" and "constitutionally" are strange words to import into a legal discussion, and oddly enough constitutionally is perhaps the odder, because it imports some sense of legality, and some sense of the politic into a discussion which should at least distinguish between those elements of sovereignty which are legal, and those which are political. The word constitutional seems to me to blur two separate logics, that of law and that of politics, and the logical translation from one logic to the other is often unnoticed. Dicey diagnoses it in Austin, but suffers from the same disorder himself. The force of the sentence that the "sovereign Parliament cannot be logically bound to abstain from changing any given law" harks back to Austin's definition of legal sovereign. It refers also to the idea that political pressure and political sagacity are limits upon legal sovereignty. This is naive, in that it mixes up two different logics. Dicey's dilemma, which he did not resolve, was on the one hand to realize that Austin's definition was not empirically verifiable because of the Act of Union, and on the other hand to judge that Austin's definition was a priori true, and Dicey's own deductions from such a definition logically followed. This uneasiness, which dominated nineteenth century jurisprudence Dicey sought to resolve by reference to non-legal concepts and quasi-legal constructs, such as the Conventions of the Constitution. It is para-

85. DICEY, THOUGHTS ON THE SCOTTISH UNION 252-53.
doxical that Dicey's discussion of sovereignty should lead to the conclusion that it is the rule of law and not Parliament which is the legal sovereign. Dicey, of course, never suggested that his formulation of the rule of law was in any sense sovereign, because in the Austinian definition of sovereign there must be a person or body of persons. I do not see any evidence or argument for this requirement, but that is another question. All I wish to show here is the curious misinterpretation and interpolation of a sound Seventeenth century legal theory, by Eighteenth and Nineteenth century writers in the face of the evidence against the weight of argument and in spite of authority.