

The Old Commonwealth Model of Constitutionalism

David Dyzenhaus¹

Abstract

My title is a riff on a classic article by Stephen Gardbaum, ‘The new Commonwealth model of constitutionalism’. I criticize Gardbaum and Ran Hirschl for ignoring completely the fine work done in the 40s and 50s on comparative Commonwealth constitutional law. The result, I will claim, is a huge blind spot both when it comes to our colonial pasts and the question of sovereignty, which loomed large at that time in comparative Commonwealth constitutional law. I will suggest that neglect of their contribution spills into our current political situation in which there is a revival of the ideology of colonialism and imperialism linked to concerns about the loss of sovereignty, with the gaze of the colonial and imperial imaginary turned inward on the presence of the ‘other’ within the Western nation state. I will suggest that neglect of their contribution spills into our current political situation in which there is a revival of the ideology of colonialism and imperialism linked to concerns about the loss of sovereignty, with the gaze of the colonial and imperial imaginary turned inward on the presence of the ‘other’ within the Western nation state.

Sovereignty talk is back in fashion, as politicians around the world obsess about regaining sovereignty, in the Brexit saga, in the assertion of national identity in Hungary, Poland and in the MAGA slogan. It is, it appears, to be regained externally from the grip of other countries, whether legal or economic, or internally from elites whether in politics, the bureaucracy (the ‘deep state’), or the judiciary. At the same time, law is being used in the bid to regain sovereignty often in exercises of what I call ‘faux legality’, measures which have only the appearance of legality, but which are in fact aimed at undermining both the rule of law and constitutionalism.

The Hungarian and Polish governments are perhaps the world leaders in the art of faux legality. But both the Johnson government in the UK and the Republican Party in the USA have

¹ University Professor of Law and Philosophy, University of Toronto. This is the first draft of a paper for an inaugural issue of a new Australian journal, *Comparative Constitutional Studies*.

shown themselves to be quick studies. Neither of these phenomena have to my knowledge been much the focus of comparative constitutional law (CCL). I will suggest below that the reason for this lack of attention lies in the methodologies of its practitioners.

In the first part of my paper, I set the stage for my argument in a sketch of the problem I perceive in contemporary CCL and suggest that it may be worthwhile to examine the work of an older generation of CCL scholars. In Part 2, I say more about the issues of scope and methodology and pose two challenges to contemporary CCL. Part 3 sketches the contribution of this older generation through the lens of constitutional drama in the 1950s in apartheid South Africa. Part 4 argues that in our contemporary situation of ‘illiberal democracy’ in which both constitutionalism and the rule of law are under severe stress, it may be high time to revisit the work of the older generation. In the spirit of this colloquium, and because I have run out of time, an unfinished conclusion follows.

1 Setting the Stage

In his book on the methodology of CCL, Ran Hirschl—a towering figure in the CCL field—comments that discussions ‘often proceed as if there is no past, only present and future.’² ‘The underlying assumption’, he continues, ‘is that contemporary intellectual endeavors in the field

² Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014), 77.

constitute a necessary advance over previous ones. When the past *is* referenced, the focus is often on the introduction of the US Constitution or the constitutional aftermath of World War II.³

Hirschl's comments seem to me be absolutely right, though I should mention that I am at best a consumer of CCL, at worst a 'cherry picker' who looks for judgments to support my own work at the intersection of public law with legal and political philosophy.⁴ But I will argue that these comments apply to Hirschl's own work as well to much of the work of other leading practitioners of CCL. To make this argument, I focus on a significant absence from the practitioners' purview, the field of 'Commonwealth CCL'. By this I mean a scholarly endeavour that flourished in the periods immediately before and after World War II on the comparative study of the constitutional law of the countries that made up the British Empire, as they achieved Dominion status, that is, status as self-governing entities.

I will discuss four such studies: RTE Latham, *The Law and the Commonwealth*, first published in 1937 in the *Survey of British Commonwealth Affairs*;⁵ DV Cowen's 1951 *Parliamentary Sovereignty and the*

³ Ibid. His emphasis.

⁴ For comments about the 'case selection bias' and 'result-driven' practice of cherry picking 'friendly examples', see Hirschl, *ibid*, 9, 19, 98.

⁵ RTE Latham, *The Law and the Commonwealth* (London: Oxford University Press, 1949).

Entrenched Provisions of the South Africa Act;⁶ Edward McWhinney's 1956 *Judicial Review in the English-Speaking World*⁷ and Geoffrey Marshall's 1957 *Parliamentary Sovereignty and the Commonwealth*.⁸

Latham seems largely forgotten even in work in his native Australia, despite the fact that he happened to be the son of a prominent Chief Justice. His brilliance was evidenced not only by a Rhodes scholarship and a Fellowship at All Souls, but also in his immense influence on post-war Commonwealth CCL.⁹ Indeed, it extended to the pages of the most important work in philosophy of law published in English since World War II, HLA Hart's 1961 *The Concept of Law*.¹⁰ His absence from contemporary CCL may seem explicable by the fact that he died aged 30 in 1943 when the RAF aircraft in which he was an observer went missing over the Norwegian coast. But Cowen (1918-2007), Marshall (1929-2003) and McWhinney (1924-2015) had long and illustrious careers and their absence can only be explained, I will suggest, by the underlying assumption Hirschl accurately

⁶ DV Cowen, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act* (Cape Town: Juta and Co., 1951.)

⁷ Edward McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1960, 2nd edition).

⁸ Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press, 1957).

⁹ For an excellent account of Latham's life and work, see Peter Oliver, 'Law, Politics, the Commonwealth and the Constitution: Remembering R.T.E. Latham, 1909-43' (2000) 11 *Kings College Law Journal* 153.

¹⁰ HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, 2nd edition).

diagnosed that the past does not generally matter and that, when it does, all that matters is the US constitution and the constitutional aftermath of World War II.

Particularly striking in this regard is the absence of these scholars from Stephen Gardbaum's influential study of the 'New Commonwealth Model of Constitutionalism'. In an article published in 2001, Gardbaum argued that CCL scholarship had been dominated by two narratives: one about the charters of rights adopted after World War II, the other about the profusion of dedicated constitutional courts in the 1990s in Central and Eastern Europe.¹¹ In promoting these two narratives, he suggested, CCL scholars assumed that there was no middle ground between, on the one hand, entrenching fundamental rights in charters and, giving judges unreviewable power over their interpretation and, on the other, having the rights subject to the power of the legislative majority of the day. As a result, CCL scholars neglected the bills of rights adopted in the UK, Canada, and New Zealand between 1982 and 1988 in which judges had a guardianship role but the legislature retained the 'last word' on interpretation.¹² This model, Gardbaum claimed, offered a 'radically direct' solution to the countermajoritarian difficulty created by pitting unelected judges against democratic legislatures since it promised a 'genuine dialogue' and 'joint responsibility between courts and legislatures with respect to rights'. Attention to it could 'help to reinject matters of principle back into legislative and popular debates'.¹³

¹¹ Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, at 707-8.

¹² *Ibid.*

¹³ *Ibid.*, 710. At 721, note 55, Gardbaum did cite a work by McWhinney, but one devoted to Canada. This absence continues in the account he elaborated in *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2013).

Again, Gardbaum's comments seem to me to be right. The explosion of CCL scholarship in the wake of the surge in entrenching rights in written constitutions in the 1990s did suffer from a severely blinkered approach to constitutionalism. In fact, one can see from his comments the otherwise unexplained link between the two factors Hirshl identified: first, the general irrelevance of the past, second, that 'when the past *is* referenced, the focus is often on the introduction of the US Constitution or the constitutional aftermath of World War II.'¹⁴ For constitutional theory in the USA is obsessed with the countermajoritarian difficulty which emerged through the development by the US Supreme Court of its 'last word' guardianship role over the interpretation of constitutional rights, a role which came to include the determination of whether the constitution contained rights which were not explicitly enumerated. And it is that guardianship role that, as Gardbaum alleged, dominates the inquiry of much CCL.

Indeed, to say that the constitutional aftermath of World War II matters to some extent to CCL is something of an exaggeration. What matters in that aftermath is really Germany's constitutional experience with the introduction in 1949 of the Basic Law as a reaction to its immediate past and then the 1990s when countries around the world reacted to their own authoritarian pasts by crafting entrenched bills of rights. In other words, the Commonwealth CCL of the 1950s does not figure in the aftermath.¹⁵

Moreover, what CCL scholars study is the extent to which these various experiments can help to surmount the countermajoritarian difficulty. In this light, it is unclear to me that Gardbaum's introduction of the New Commonwealth Model either did--or indeed could have done--

¹⁴ Ibid.

¹⁵ Cowen was, however, a polymath who made his mark in several fields and is probably best known for his work on banking law.

-much to disturb the CCL mindset. He too assumes that the main problem is surmounting the countermajoritarian difficulty and the New Commonwealth Model is adduced to show that rights can be protected by getting legislative majorities to take them seriously without the sword of judicial 'last word' review hanging over their heads.

I will argue that the work of Latham, Cowen, Marshall and McWhinney deserves close study by the contemporary practitioners of CCL, not only because it is so striking that they seem oblivious to it, but also because it has much to contribute to them, both in terms of highlighting the narrow scope of much of their work and in raising methodological questions which they do not squarely confront. In particular, the neglect of these thinkers perpetuates a neglect of the colonial and imperial dimensions of the Western constitutional project of which these thinkers were well aware. Indeed, this was their central problem, fascinated as they were by the issue of how to understand sovereignty in the British empire in which some entities were on the path to full independence while others were intent on that same end. And while they were not radical critics of that project, they were alive to its hegemonic and exclusionary nature. I will suggest that neglect of their contribution spills into our current political situation in which there is a revival of the ideology of colonialism and imperialism linked to concerns about the loss of sovereignty, with the gaze of the colonial and imperial imaginary turned inward on the presence of the 'other' within the Western nation state.¹⁶

¹⁶ The issue at stake is beautifully articulated in the last lines of a recent book on Indian constitutionalism:

The global unraveling of constitutional democracy risks feeding nicely into the political ontology of the age of colonialism, where individual actors are defined in specific ways and they are somewhat condemned to the terms of their shared experience. Such a narrative would be not only tragic but also perilous. For freedom, whether at the end of the British

2 Two Challenges to Contemporary CCL Methodology

Contemporary CCL scholarship either wholly or partially avoids what I will call the ‘jurisprudential perspective’, by which I refer to two connected dimensions of that branch of philosophical inquiry.

First, there is the dimension in which the questions arise which were the preoccupation of Hart’s *The Concept of Law*: What is law? What is legal order? What is sovereignty? What is the relationship between law, on the one hand, and justice and morality, on the other? In what does the authority of law lie? Is international law ‘law’, or as John Austin liked to say in his *Lectures on Jurisprudence*, law ‘properly so-called’?¹⁷

Second, there is the dimension of the perspective of actors in a legal order who take what Hart called the ‘internal point of view’.¹⁸ Such figures assume that law has authority and ask the question ‘What does the law require in this particular matter?’ Within such an inquiry, the role of

empire or now, has been endangered not only by extremism but perhaps even more so by cynicism.

Madhav Khosla, *India’s Founding Moment: The Constitution of a Most Surprising Democracy* (Cambridge, Mass.: Harvard University Press, 2020), 160.

¹⁷ John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (London: John Murray, 1885, 5th edn.).

¹⁸ Hart, *The Concept of Law*, 89.

judges looms large since they are the officials in the modern legal state who have the final authority to determine what the law is on any matter, even when their answer is that some other institution of the legal order, for example, the legislature or an administrative agency, has the last word on the content of the law in issue.

The two dimensions are connected in CCL because the raw data of the field consists in significant part of the judgments of apex courts on high constitutional matters, precisely those sorts of matters in which the philosophical questions just listed may be implicated in the legal question posed to the judges. But philosophers of law divide about the implications of that connection in a way I want to highlight because that same division seems to me to shape the field of CCL.

Within philosophy of law the division was indicated when Hart in 1958 set the agenda for post-war legal philosophy in a manifesto for legal positivism in which he asserted that such questions are decided in a 'penumbra' of indeterminacy in which judges have to legislate an answer.¹⁹ In other words, the judges' decisions are determined not by law but by extra-legal considerations; for example, by their sense of what politics or morality requires. Hart remarked that 'it is good to be occupied with the penumbra' because its 'problems are rightly the daily diet of law schools'.²⁰ But he also said that it would be bad to be 'preoccupied' with it since preoccupation ignores that the authority of law resides in the 'core' not the penumbra, in the 'settled' content of the law.²¹ He did not, however, infer that such cases are necessarily decided in an arbitrary fashion. Rather, he

¹⁹ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, at 607.

²⁰ *Ibid*, 615.

²¹ *Ibid*.

suggested that once we accept that problems such as those that make up the judicial data of CCL are resolved in the penumbra, we can see that they ‘must’ be decided ‘rationally by reference to social aims’.²²

I will not in this paper dwell too long on the debate initiated by Ronald Dworkin, who argued against Hart that, on the best understanding of law, law does determine right answers in the penumbra. Rather, I want to note its existence and attend to the way in which, in my view, that same division exists but plays out differently in CCL because it does so in a manner which raises interesting methodological issues for CCL scholars to confront, in particular, the role that both dimensions of jurisprudence could and perhaps should play in their inquiries.²³ At its starkest, the division is between ‘internalists’, who take in some form the internal point of view of the jurist, and ‘externalists’ who take what Hart called the ‘external point of view’,²⁴ for example, the point of view of the social scientist who is primarily interested in explaining patterns of behaviour without taking into account the justifications the subjects themselves would offer from their internal point of view.

My first challenge is to the strand of CCL externalism I will call ‘cynical political science’ which is exemplified in Hirchl’s critique of the 1990’s surge in rights constitutionalism. Put at its strongest, the critique alleges that this process is to be understood as just one example of a power grab by a political elite, in this case a ‘juristocracy’, in a bid to shore up the Western hegemon and its neo-liberal regime, akin to the role that independent central banks have come to play in the

²² Ibid, 614.

²³ I will also later suggest that these issues do reflect back on philosophy of law in ways which may be helpful for practitioners in that field.

²⁴ Hart, *The Concept of Law*, 89.

world's political economy.²⁵ As I have already indicated, this makes cynical political science into a perspective that contests the jurisprudential perspective since it enters into a normative terrain in which its claim is that the latter seeks to legitimate the illegitimate.

As such, it contrasts, for example, with a study of the political economy of the changes in the world that led to a turn to written constitutions, with entrenched bills of rights and dedicated constitutional courts. That kind of study may do a lot more than illuminate constitutionalism. It may also shed more light on it than any study of the reasoning of the judgments of several carefully selected apex courts. But the point is that light will be different, and it is perfectly possible—indeed, quite likely—that both perspectives have much to learn from each other. In other words, the division I have in mind is one where the political science perspective is adopted because the scholar rejects as misleading and even normatively flawed the jurisprudential perspective on the allegation that it seeks to legitimate the ‘judicialization’ of politics and thus rule by a judicial elite. I do not, however, mean to suggest that any kind of inquiry into CCL is inherently more worthwhile than others. Rather, I will argue that if cynical political science is to have a claim to be engaged in the project of CCL—to be studying what is *legal* in its subject matter—the onus is on its practitioners to offer a justification for rejecting the internal point of view. Put differently, its entry into normative terrain is, for reasons I will elaborate below, not properly prepared since it rejects the jurisprudential perspective without engaging with it.²⁶

²⁵ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004).

²⁶ For a similar point, see Ronald Dworkin's argument against ‘external skepticism’ in *Law's Empire* (London: Fontana, 1986), 78-86.

The second challenge is to internalist CCL scholarship, as exemplified in Gardbaum's work, because, while it does take the perspective of judges seriously, it neglects most of the other dimension of jurisprudence. While CCL internalists are concerned with the way judges reason, their concerns do not generally reach the philosophical questions listed above other than, and then obliquely, the relationship between law, on the one hand, and justice and morality on the other. For their focus is on the surge in constitutionalising rights of the 1990s, most prominently, on the question already identified above which has a distinctly US provenance: 'the countermajoritarian difficulty', i.e., how (if at all) judicial review on the basis of entrenched rights can be reconciled with a commitment to democracy, to 'rule by the people'.

This question is the main factor creating an overlap between their work and cynical political science. They do, however, differ in the following respect. Internalists see a potential for reconciliation, through, for example, as we saw with Gardbaum, 'dialogue', or 'collaboration',²⁷ or 'law as a conversation between equals'.²⁸ In contrast, cynical political science begins with the assumption that the reconciliation is not only impossible, but also necessarily seeks to legitimate judicial usurpation of power, a process which is as much at work in the jurisdictions in which Gardbaum argues the new Commonwealth constitutionalism lives. In other words, cynical political science and CCL internalism share an assumption that the matter of constitutionalism in CCL is almost exclusively the rights that were at the heart of the surge. They differ in that for internalists

²⁷ As in Aileen Kavanagh, *The Collaborative Constitution* (Cambridge: Cambridge University Press, forthcoming).

²⁸ As in Roberto Gargarella, *Law as a Conversation among Equals* (Cambridge: Cambridge University Press, forthcoming).

the issue is how judges can vindicate those rights in some kind of partnership with other institutions, while for cynical political scientists guardianship of rights should be taken away from the courts and given back to the people, without, or so it seems, really inquiring into who ‘the people’ are and how they would exercise their guardianship.

Of course, it is not all that easy to fit some CCL scholars into these categories. For example, Mark Tushnet, another towering CCL figure, may seem an obvious candidate for cynical political science given his jeremiads over the years against judiciary, notably his 1999 book which inspired the last sentence in the last paragraph: *Taking the Constitution Away from the Courts*.²⁹ But on my account, Tushnet is more of an internalist than an externalist. He seeks to debunk the work of judges by analyzing their reasoning and only then arguing that their role in legal order be reduced and other means of ascertaining the content of the constitutional law devised which give ordinary citizens and or their elected representatives, a role in constitutional interpretation.³⁰ Indeed, to the extent that it

²⁹ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999.) See also Sanford V Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2006.)

³⁰ The same is true of ‘political constitutionalists’, notably Richard Bellamy and Jeremy Waldron, who while they are political and legal theorists rather than CCL scholars, think that the mistake made in the various rights revolutions was not that fundamental legal rights became central to political debate, but that judges were made their guardian, whether final guardian or with a more limited role, as in the ‘new Commonwealth model’. See Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86 and Jeremy Waldron,

is difficult to fit these figures into my categories of cynical political science and internalists this is because of an ambiguity in their methodology, which is most easily explained by pointing out the same problem in Hart's account of judicial discretion.

When Hart attempted to debunk the 'childish fiction' of the common law tradition that judges' decisions are always fully determined by law he offered two different arguments.³¹ His main argument was that it is in the nature of law that the law provides answers to questions about its content only when the answer can be found in the core, in the area of settled law. His ancillary argument was that one should resist on moral grounds the invitation to adopt the view that—to adopt Dworkin's later formulation—there is always 'a right answer' to any question of law.³² In Hart's view, it is better to understand that decision making in the penumbra is discretionary as that precludes judges from hiding their political choices about what the law ought to be under the fiction that they are merely stating what the law is. On this view, the judicial decisions that form part of the subject matter of CCL studies are quintessentially political and for disciplines other than philosophy of law to study.

However, as Dworkin liked to point out, if one takes the internal point of view of judges seriously, one finds that judges do present their conclusions as fully determined by law even if they

'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346. See my *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, forthcoming), chapter 4.

³¹ Hart, 'Positivism and the Separation of Law and Morals', 610.

³² *Ibid*, 612-13.

vehemently disagree about what the law is. Hart was badly placed to deny that. Not only did he argue that the internal point of view must be adopted if, as he argued one should, one is to understand how law works in the register of authority. But also, on the few occasions when he discussed adjudication from the perspective of judges, discretion vanished from his account.

Given this tension in Hart's position, his first argument looks question begging. The claim about judicial discretion in the penumbra can't just be asserted, as it needs a justification given the alternative from the internal point of view. The justification on offer is Hart's second ancillary argument. It is, as Liam Murphy has put it, better to see law this way.³³ But here the problem is that that argument, one which says that the external point of view is morally superior, competes on the same terrain as judicial reasoning from the internal point of view which seeks to justify claims about the content of law as fully determined by legal reasons. And to enter that terrain is to accept the onus of showing why it would be morally better to abandon that practice, an argument that must show that this practice of reasoning is morally problematic. In other words, if one accepts as one's starting point that law in the register of authority must be understood from the internal point of view, a move to the external point of view is justified if and only if the attempt to elaborate that understanding can be shown to fail.

I will later explain both why there are plausible arguments that dispute that starting point and why it is important for internalists to confront those arguments. For the moment, I want just to note that internalists who sometimes sound like cynical political scientists do so because of the same ambiguity in their position. At times, they make arguments that seek to disqualify the internal point of view from the start. For example, the argument that by definition what judges do in constitutional cases is 'political' rather than 'legal' and that it is illegitimate for reasons to do with democratic

³³ Liam Murphy, 'Better to see Law this Way' (2008) 23 *New York University Law Review* 1088.

legitimacy, or with capacity to consider and debate evidence, or both, to allow them to have a role in deciding such issues. At other times, they make internal arguments which seek to show that judges tend to make the wrong decisions, or that their decision making is arbitrary, and hence their role in making decisions on high matters of constitutional law should be diminished or abolished. There is of course nothing wrong with deploying both points of view together. Indeed, I doubt that CCL can be successfully done without this. But how it is done matters a great deal. Indeed, as I will now argue, Latham, Cowen, Marshall and McWhinney were particularly adept at weaving together the two points of view in a way that preserved their internalist perspective, which they had to do if they were to be true to their aim of inquiry into CCL.

3 Commonwealth CCL

In the 1950s a constitutional drama played out in a trilogy of cases in South Africa on Voters Rights. Marshall devoted the last long chapter of his book to it and it was one of the factors that prompted McWhinney to bring out a second edition of his. It also prompted some anxiety in the pages of Hart's *The Concept of Law*. I have analyzed this episode in other work. Here I focus on why it figured so large in these works of Commonwealth CCL, why, as Marshall put it at the beginning of his chapter, this was a 'history of conflict between two irreconcilable views as to the nature and limits of parliamentary sovereignty' and why, as he also claimed, '[t]he dialectic of this struggle is one which deserves detailed examination, both as a chapter in the development of a Commonwealth system of government and for the juristic importance of the questions which it has made explicit'.³⁴ The story must begin with an account of the jurisprudential perspective Marshall, McKinney and Cowen

³⁴ Marshall, *Parliamentary Sovereignty*, 138.

adopted from Latham's pioneering prewar monograph and which Cowen had deployed in his own work of 1951 which played an important role in the drama.

As I have just suggested, the big issue for all four scholars was sovereignty. The question of sovereignty loomed large because politicians and lawyers were trying to make sense of the evolving nature of the Commonwealth, or, as one might say, the disintegration of the British empire. But it was far from their sole focus. For, as they rightly saw, the question of sovereignty arises at the intersection of the 'legal' and the 'political'. As such, it implicates not only the question 'What is law?', but also all the other legal philosophical issues that Hart was later to discuss. 'Sovereignty', in other words, is a cluster concept, a term I use loosely to denote a concept that unites under one head various other important concepts, but which cannot be reduced to any of them or to any set of them such that it would be more useful to talk about something else. I begin with Latham.

i Latham on Sovereignty

Latham had gone a long way in his monograph to answering the question of sovereignty in addressing the issues that set the stage for the drama that unfolded in the 'Voters Rights Cases' in which the Appellate Division—South Africa's apex court—faced off against the first apartheid government. For it was clear at the time he wrote his monograph that at some point a South African government would assert South Africa's sovereign independence as a nation state. The ground had already been prepared by the Statute of Westminster, a 1931 enactment of the British parliament, which provided that no future Acts of the parliament would apply as part of the law of the Dominions—the self-governing entities within the Commonwealth—without their consent. But the Statute of Westminster did not make clear how the parliaments of the various entities were to exercise their sovereign authority which left unresolved the issue at the centre of the drama, one

which applied to all of the Dominions on the path to fully independent or sovereign status: How, if at all, could an entity which derived its legal status from its place in the unified legal system of the Empire break free of it by non-revolutionary or legal means? This for Latham raised the question whether there was an imperial legal system and the answer to that question would, he said with an apology, lead him to discussions that ‘trespass upon philosophy on the one hand and politics on the other’.³⁵

In a section Latham titled ‘Formal Unity’,³⁶ he observed that in every community there are competing sources of legal authority. It is of ‘primary importance’ that the citizen should not be faced with contradictory legal requirements, and the only way to avoid this is for provision to be made for ‘resolving apparent conflicts’; only in that case does an ‘agglomeration of laws become a *system of law*’.³⁷ He then set out Hans Kelsen’s account of legal order as a hierarchy of norms, with norms at a lower level tracing their validity to higher order norms until one reaches the *Grundnorm* or basic norm, the ultimate norm of the system ‘whose validity depends on non-legal considerations’.³⁸

³⁵ Latham, *The Law and the Commonwealth*, 521.

³⁶ *Ibid*, 522-540.

³⁷ *Ibid*, 522, his emphasis.

³⁸ *Ibid*, 522-23, at 522. In note 3 at 522, Latham explained what he meant by ‘non-legal considerations’:

The nature of the non-legal considerations which are called upon to justify obedience to law as such by the theorist, by the conscientious citizen seeking a reason for his obedience to the State, or by the judge examining the postulates of his office vary infinitely, and include considerations of ethics, religion, political principle, tradition, and mere blind reflex loyalty. They are preponderantly inexplicit in legal systems of long standing like that of Great

In Latham's view, Kelsen's *Grundnorm* contained the key to answering the question of sovereignty. The dominant conception of sovereignty is the empire was John's Austin's command theory of law in which the sovereign is the legally unlimited entity at the apex of a legal system which is habitually obeyed by all other members of the system. As Latham noted, this theory could seem to fit well the British constitution with its doctrine of parliamentary supremacy, but in fact it did not well describe even that kind of sovereignty. I will set out his argument on this point at length since it provided the fulcrum for subsequent Commonwealth CCL scholars.

Where the sovereign is any one but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him. Further, the mere assertion of the omnipotence of a sovereign leaves completely uncertain the fundamental question whether or not he can bind himself; but the addition of a ruling in either sense on this point makes the basic rule of the system something more than a mere designation of the sovereign. Thus even the theoretic possibility of sovereignty as a *Grundnorm* is questionable. But however that may be, and however happy the Austinian theory may be in its application to the British constitution, it manifestly breaks down when

Britain, and explicit by comparison where conflicts between systems have rendered the acceptance of judicial office, and even of the duties of citizenship, something like a choice between real alternatives.

He did not seem aware that, as I will later explain, the 'real alternatives' might amount to, on the one hand, the rule of law and constitutionalism and, on the other, the rule of legally unmediated political power.

applied to a constitution where either a partition of powers between different authorities or fundamental guarantees are ‘entrenched’ behind a procedure of amendment more difficult than the process of ordinary legislation. Here the *Grundnorm* ... is clearly prior to and superior to the legislature and is daily so treated by the courts. The theory of the *Grundnorm*, then, provides a general scheme or calculus of the formal validity of law, a scheme, moreover, which follows from the nature of law itself. The theory of sovereignty, at best, provides neither.³⁹

As Marshall was later to sum up this view: ‘Sovereignty is a legal competence to change the rules of a system of law’.⁴⁰

The question Latham thus posed was whether a *Grundnorm* could be found for Commonwealth law, notably in the ultimate authority of the ‘Imperial Parliament’. But if that were the ultimate authority, the following juridical problem arose. No Dominion could by its own act sever its legal ties from Britain as any attempt to do this could be overturned at the whim of the Imperial Parliament. Indeed, given the doctrine of parliamentary supremacy, even if the Imperial Parliament purported to make an irrevocable grant of its authority to a Dominion, ‘established constitutional doctrine held that it was in strict law impossible for the Imperial Parliament to put it beyond its own power to repeal any of its own Acts’.⁴¹

In this regard, Latham thought that South Africa was likely to prove the test case given the probability of what he called the ‘white South African nation’ attempting to secede either by a political act of rupture or by some ‘legal’ device, i.e., an attempt to cover the political fact of

³⁹ Ibid, 523-24.

⁴⁰ Marshall, *Parliamentary Sovereignty*, 10

⁴¹ Latham, *The Law of the Commonwealth*, 530.

secession with a veneer of legality. And he thought the latter more likely in a ‘nation of jurists’, as evidenced in the Status of Union Act of 1934,⁴² an enactment which for most part re-enacted provisions of the Statute of Westminster, which would have seemed redundant but for the obvious intention behind it—to give the South African constitution a ‘local root’ in an ordinary statute, thus making its provisions susceptible to override by a further ordinary statute. The question this raised, said Latham, is ‘Will the courts comply?’ The answer was, he thought, difficult to predict. The courts are ‘not the blind servants of the legislature; they are the servants of the law’. But even if they chose to ‘maintain the Imperial *Grundnorm*’, ‘public opinion, the wish of the legislature, and local loyalty will tell in the opposite direction’. He also predicted that the legislature ‘might indirectly assist that tendency by requiring an oath of unequivocal allegiance from newly appointed judges’.⁴³ As we will now see, although the drama did not involve secession and no oath of allegiance was required, his analysis and his prediction were remarkably prescient.

ii The Voters Rights Cases

In 1948 the National Party became the majority party in South Africa and formed the government which set about turning the system of white supremacy there into the version it named ‘apartheid’. A priority was to remove those ‘Coloureds’—mixed-race South Africans—who still had the vote from the common electoral roll. In 1909 the British parliament had enacted the South Africa Act which put in place the Constitution of the Union of South Africa. Section 152 of the Act required that certain of its provisions could be changed only by a two-thirds vote of both houses of the South

⁴² Ibid, 533.

⁴³ Ibid, 534.

African parliament—the House of Assembly and the Senate—sitting together. One such provision was Section 35, which protected the right to vote of all those entitled to vote under ‘laws existing in the Colony of the Cape of Good Hope at the establishment of the Union’ and precluded their disqualification from being registered as voters ‘by reason of ... race or colour only’ unless the special procedure was followed. The provision was designed to protect the male Coloured and African voters of the Cape Province and was anathema to any government intent on ensuring a more complete white domination.⁴⁴ The provisions of the Act had been negotiated at a National Convention by thirty white delegates of the four South African colonies, who decided to maintain in the Constitution the franchise rules of each colony, which ranged from not permitting any non-white participation in the franchise to permitting a limited participation.⁴⁵

Only Coloured voters were in issue after 1948 because in 1937 the parliament, using the special unicameral procedure, enacted the Representation of Natives Act to remove protected black voters from the common roll and give them separate representation. In 1951, the National Party government brought about the enactment of the Separate Representation of Voters Act providing that Coloured voters who were on the common roll be represented separately from whites. The government could not muster the two-thirds majority of both houses of parliament required by the South Africa Act to effect this change, so the parliament passed the statute using the bicameral procedure for ordinary legislation, a simple majority in separate sittings of the two houses. The Appellate Division was then charged with deciding a challenge to the validity of the statute on the basis that this statute was *ultra vires*.

⁴⁴ At that time, the franchise was limited to men.

⁴⁵ See Ian Loveland, *By Due Process of Law: Racial Discrimination and the Right to Vote in South Africa, 1855-1960* (Hart Publishing: Oxford, 1999), 133-17.

In *Harris v. Minister of the Interior*,⁴⁶ the Appellate Division declared the statute invalid. Chief Justice Centlivres, giving the unanimous judgment of the court, held that, while it was correct to assert that the parliament was a supreme and sovereign law-making body, the fact that it could validly enact certain laws only when sitting unicamerally did not affect its sovereign status. This, he claimed, was a result reached in a completely ordinary process of statutory interpretation.

The Court in declaring that such a Statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by Statute. Its duty is simply to declare and apply the law and it would be inaccurate to say that the Court in discharging that duty is controlling the Legislature. It is hardly necessary to add that Courts of law are not concerned with the question whether an Act of Parliament is reasonable or unreasonable, politic or impolitic.⁴⁷ This bald proposition concealed not only the high political stakes but also the deep jurisprudential basis of the decision. In fact, the Court implicitly adopted Cowen's argument in the 50 page monograph he had published in 1951 in anticipation of this matter reaching the courts.⁴⁸ And in adopting Cowen's argument, it adopted by implication Latham's Kelsenian idea of legal sovereignty.

⁴⁶ *Harris v. Minister of the Interior* 1952 (2) SA 428 (A).

⁴⁷ *Ibid*, 456.

⁴⁸ Counsel for Harris, one of the affected voters, relied extensively on Cowen's text in their argument to the Court and also acknowledged the passage from Latham from which Cowen launched his argument. See *Harris v. Minister of the Interior* 430, 431, 432, 436, 437. The government lawyers ignored Cowen altogether, but did make one reference to Latham, who had suggested in a note at 529 of *The Law of the Commonwealth* that a statute of the Union Parliament-- the Status of the Union Act of 1934—had removed the entrenched clauses from the 'fundamental law of the Union'.

Cowen was then Professor of Comparative Law at the University of Cape Town and while the title--*Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act*—accurately indicates his focus, it as well as the brevity of the work, are somewhat deceptive in that he covered the relevant constitutional jurisprudence of Australia, Canada, New Zealand and the Irish Free State. He began by distinguishing between a ‘static’ and a ‘dynamic’ conception of parliament, with the former focusing on elements which constitute parliament, for example, the King, the Senate and the House of Assembly, and the latter on those ‘elements functioning as a law-making body’. As he made clear, this argument depended heavily on Latham. He stated as a

fundamental legal principle that in all cases where legislative power is vested not in one person, but in a number of persons, that number must combine for action in accordance with certain rules prescribing the manner in which their will is to be ascertained. And this principle applies even to sovereign law-making bodies. Thus, as Latham has pointed out, ‘where the ... sovereign is any one but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him’.⁴⁹

It followed, Cowen argued, from this legal idea of parliamentary sovereignty that one should distinguish between what parliament may do by legislation and what the constituent elements of Parliament must do in order to legislate.

But they did not address the argument Latham made about sovereignty on which Cowen, and later Marshall and McKinney, relied.

⁴⁹ Cowen, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act*, 5-6, quoting from Latham, *The Law of the Commonwealth*, 523.

The doctrine of Parliamentary Sovereignty merely emphasizes the unlimited scope of what Parliament may do by legislation. It does not bear on what must be done by the constituent elements of Parliament in order to legislate. This distinction, so far from being incompatible with the doctrine of Parliamentary Sovereignty, actually points to a reconciliation of two great principles: the supremacy of Parliament and the supremacy of the law; for these two concepts are not antithetical. Parliament is sovereign but the concept of Parliament is itself defined by law.⁵⁰

Cowen conceded that the British Parliament no longer had power to make new laws for South Africa and that the South Africa Act was a British Act, but, he claimed, it could 'not be seriously contended that the provisions of the South Africa Act which define what is the Union Parliament are no longer law in South Africa'.⁵¹

He relied, he claimed, on 'accepted statutory canons of interpretation' of the South African Act considered as 'being no more than an Act of the United Kingdom Parliament.' But he also thought that the same conclusion could be reached on the basis

that the South Africa Act is a fundamental declaration of the will of the South African people. That Act was forged after much travail at a National Convention. At the request of the four self-governing colonies, it embodied the essential terms of a contract entered into between them to unite for the purposes of government. Accordingly, it would not be a contention without force that the South Africa Act is a British Act in form only, but in substance a constitution created by the will of the South African people.⁵²

⁵⁰ Cowen, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act*, 10.

⁵¹ *Ibid*, 12.

⁵² *Ibid*, 49.

He added that such ‘a contention would ... raise difficult legal problems. Jurisprudentially, the ultimate nature of what Kelsen would call the *grundnorm* of the South African legal system is involved’.⁵³

In invoking Kelsen, Cowen was clearly relying on Latham’s more extensive discussion of the *Grundnorm*. But in connecting the *Grundnorm* to a rather substantive conception of the constitution and the ‘will of the people’, he was going beyond both Kelsen’s and Latham’s understanding of the norm as a formal hypothesis, which (as he correctly observed) raised ‘difficult legal problems’, as was immediately illustrated by the next two cases in the trilogy.

The National government reacted with fury to the decision. The Prime Minister, Dr. Malan, said in the House of Assembly:

Neither Parliament nor the people of South Africa will be prepared to acquiesce in a position where the legal sovereignty of the lawfully and democratically elected representatives of the people is denied, and where an appointed judicial authority assumes the testing right, namely the right to pass judgement on the exercise of its legislative powers by the elected representatives of the people ... [T]he government would be grossly neglecting its duty towards the people and towards a democratically elected Parliament if steps are not taken to put an end to this confusing and dangerous situation. It is imperative that the legislative sovereignty of Parliament should be placed beyond any doubt, in order to ensure order and certainty.⁵⁴

⁵³ Ibid, 49, note 125.

⁵⁴ Excerpted from the much longer quotation in Marshall, *Parliamentary Sovereignty*, 185.

And as Dr. Dönges, the Minister of the Interior, who was guiding the process, asked in the debates, ‘Who is to have the final say as to the validity or otherwise of Acts? This Parliament which represents the people or the courts which are appointed to interpret the laws?’⁵⁵

Indeed, as one can see from Marshall’s full account of the debates in the House of Assembly both about the government’s proposed legislation and in reaction to the Appellate Division’s decisions, while the tone was sometimes so vehement that the Speaker would evict a member from the debate, the quality of legal even jurisprudential argument about sovereignty was extremely high, and deeply informed by a knowledge on both sides of the classic works on the topic, for example, AV Dicey’s *The Law of the Constitution*,⁵⁶ but also by contemporary academic writing on the topic, including opinions solicited from prominent constitutional lawyers in Britain on precisely the issues at stake.

The Union Parliament responded by enacting, again by the bicameral ordinary procedure, the High Court of Parliament Act of 1952. It provided that when the Appellate Division declared a statute invalid, its decision would be subject to review by the ‘High Court of Parliament’ on the application of a member of the cabinet. Every member of the two houses would be a member of this ‘court’; one would be appointed as President by the Governor-General (the head of state); the President would select a ten member ‘judicial committee’ from the members of parliament to make a recommendation to the full body; the full body would then decide the matter by majority vote and

⁵⁵ Ibid, 196.

⁵⁶ AV Dicey, *The Law of the Constitution* (Oxford: Oxford University Press, 2013, John Allison, ed.).

that decision would be taken as final and binding, to be executed as if it were a decision of a division of the Supreme Court.⁵⁷

The High Court of Parliament Act was challenged in *Minister of the Interior v. Harris*.⁵⁸ In the main judgment, Centlivres held that the Constitution envisaged that the rights protected by Section 152 would be enforceable by the sanction of invalidity exercised by a ‘Court of Law’, and that while the parliament had the power to enact laws that established courts, the bodies had to be courts in substance not just in form. Since in substance the High Court of Parliament was no different from a select committee of parliamentarians, it was not a ‘Court of law’. Rather, it was a court only in name, which stripped the constitutional protections of any force. Hence, the statute was invalid.

It is important to note that the term ‘Court of Law’ was not used in the Constitution. But Centlivres pointed out that Section 152 entrenched a right and provided the sanction of invalidity for a statute which infringed the right unless it were enacted in proper form. Since it is judges who in the course of deciding disputes determine whether an enactment is invalid, the issue in such cases must be decided by a ‘Court of Law’.⁵⁹ He thus rejected the government’s ‘startling proposition’ that the High Court Act affected only unentrenched ‘procedural law’, and not the entrenched ‘substantive right’.⁶⁰

I want to emphasize just one passage from Justice Schreiner’s concurring judgment because it both prepared the way for his dissent in the next case and proved a shrewd anticipation of what was on the cards. He stated that he did not wish to proceed on the lines that the High Court of

⁵⁷ Ibid, 496.

⁵⁸ *Minister of the Interior v. Harris* 1952 (4) SA 769 (A).

⁵⁹ Ibid, 780.

⁶⁰ Ibid, 780-1.

Parliament was not a ‘Court of Law’ because that would permit an Act passed bicamerally to nominate, for example, a magistrate’s court as the final court in constitutional cases. That would be a ‘Court of Law’ but nevertheless ‘a radical departure from the judicial hierarchy set up in the Constitution and a grave impairment of the protective system implicit in sec. 152’.⁶¹ In his view, an ‘entirely sufficient and convincing reason ... for holding that the High Court of Parliament Act is invalid’ was that ‘implicit’ in the Constitution was ‘a protective judicial system ... with the Appellate Division set up at the apex’.⁶²

The government responded by getting the parliament to enact the Senate Act of 1955, which provided for the reconstitution of the Senate in such a way that the government secured the two thirds majority it needed in a unicameral session. The South Africa Act Amendment Act of 1956 was then passed. It disenfranchised the Coloureds and ‘compensated’ them with a separate roll which elected four members to the House of Assembly and one to the Senate.⁶³ In addition, the Appellate Division Quorum Act of 1955 enlarged the Appellate Division from six to eleven judges and provided that all eleven had to sit in cases to determine the validity of a statute. In defending the Senate Act in parliament, the Minister of Justice said that by it the government intended to ‘reinstate the sovereignty of Parliament’.⁶⁴

⁶¹ 788.

⁶² Ibid, 788-9.

⁶³ In 1968 this representation was abolished by the Separate Representation of Voters Amendment Act of 1968.

⁶⁴ 1955 House of Assembly Debates, columns 4425–7.

The Senate Act was challenged in *Collins v. Minister of the Interior*.⁶⁵ Centlivres held that although the purpose of the Senate Act was plain, it was irrelevant as the parliament sitting bicamerally had ‘plenary power to reconstitute the Senate’.⁶⁶ He recognized that the Act rendered the rights protected by the Constitution ‘nugatory’ in the same way as had the High Court of Parliament Act. But he reasoned that the Senate Act did not affect protected rights since a further legislative step was required and the reconstituted Senate was a ‘senate’, while the High Court of Parliament was not a ‘Court of Law’.⁶⁷ Eight of the judges concurred with this result, including all of the judges from the old bench, save for Schreiner.

In his dissent, Schreiner focused on what he called the ‘proviso’ to Section 152 of the Constitution: that a statute amending the section has to be ‘passed by a two thirds of the total number of members of both Houses ... at [a] joint sitting’. For the purposes of the proviso, he reasoned, the Senate was the body as contemplated by the Constitution, even if the parliament could for other purposes constitute the Senate in any way it liked. The parliament, he reasoned, could no more use the two-step process than it could if, acting bicamerally, it first set out an education requirement for the franchise, and second, prohibited persons of a particular race from attaining that qualification. There are, he said, ‘only two separate fields if they are really kept separate, not if they are only separate as a matter of form. Once legislation in the one field is used as a stage preparatory to legislation in the other, there ceases to be real separation and in substance they become one field’.⁶⁸ In response to the argument that purpose was irrelevant, he reasoned that if in issue is a

⁶⁵ *Collins v. Minister of the Interior* (1957) (1) A 552 (A).

⁶⁶ *Ibid*, 565.

⁶⁷ *Ibid*, 568-9.

⁶⁸ *Ibid*, 575.

‘legislative plan to do indirectly what the Legislature has no power to do directly ... the purpose may be crucial to validity’.⁶⁹

Schreiner’s dissent was, as Marshall pointed out, true to the logic of the first decision in the trilogy.⁷⁰ But, rather like Centlivres’s judgment for the court in the first case, it relies, at least on the surface on what we saw Cowen call ‘accepted canons of statutory interpretation’. As such it may seem something of a puzzle why some commentators, familiar with both South African constitutionalism in the era of the surge and this episode regard it with some veneration. For example, Edwin Cameron, one of South Africa’s leading jurists and a former justice of the post-apartheid Constitutional Court, asserts that ‘Schreiner’s stand left a moral and political legacy’:⁷¹

It laid a paving stone that would eventually open a path to a constitutional future. The appeal court’s decisions striking down apartheid legislation, and [his] ... dissent ..., showed what principled judges might achieve if they remained true to legal values. They can provide a bulwark for legal rights and liberties, even when powerful lawmakers try to undercut them.

I will now argue that the solution to the puzzle lies in Cowen’s suggestion, following Latham, that at stake in all three cases was ‘[jurisprudentially, the ultimate nature of what Kelsen would call the *grundnorm* of the South African legal system’.⁷²

4 The Will of the People: The ‘Legal’ and the ‘Political’

⁶⁹ Ibid.

⁷⁰ Marshall, *Parliamentary Sovereignty*, 248

⁷¹ Edwin Cameron, *Justice: A Personal Account* (Cape Town: Tafelberg, 2014), 20.

⁷² Cowen, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act*, 49, note 125.

I pointed out that Cowen, in connecting the idea of the *Grundnorm* to a rather substantive conception of the constitution and the ‘will of the people’, was going beyond both Kelsen’s and Latham’s understanding of the norm as a formal hypothesis. In this section, I attempt to answer two questions raised by this connection. First, there is the more ‘legal’ question whether it depended on the fact that the rights at stake were protected by an entrenched constitutional provision which required a special procedure for its amendment. Second, there is the more ‘political’ question of what exactly was the will of the South African people in 1909, indeed, of who *were* the South African ‘people’. As we will see, any attempt to answer these questions must contend with a third, which is the extent to which either answer is subject to the way power politics happen to play out.

In regard to the first question, Marshall suggested that the issue raised in the third case was of ‘great importance for all constitutions which contain provisions for legislative action by a specified majority procedure’ and that if Schreiner’s dissent were not correct in law, then, quoting from *Marbury v Madison*, entrenched provisions were only ‘absurd attempts, on the part of the people, to limit a power in its own nature illimitable’.⁷³ If that were the main or only issue, then this drama would at most be another story to be added to the stock of CCL accounts of judges, the protection of

⁷³ Marshall, *Parliamentary Sovereignty*, 248. Erwin Griswold, one of the most influential US constitutional lawyers of his day, and at this time Dean of Harvard Law, published in 1952 and 1953 in the *Harvard Law Review* laudatory notes on the first two decisions: Erwin N Griswold, ‘The “Coloured Vote Case” in South Africa’ (1952) 65 *Harvard Law Review* 1361, ‘The Demise of the High Court of Parliament in South Africa’ (1953) 66 *Harvard Law Review* 864. In the latter, he suggested at 871 that the main lesson of the decisions was for jurisdictions which entrenched rights in a written constitution and that it might not apply in ‘countries whose parliaments are subject to no legal limitations’.

entrenched rights and the countermajoritarian difficulty, though with the twist that in this context, the majority was a representative of a minority group intent on rationalising a system of white supremacy.

In regard to the second question, and related to the last point, we should recall Latham's assumption that at stake in the constitutional debates was only the fate of the 'white nation', when in fact the issue was the entrenched rights of the Coloured voters in the Cape Province, which, while this protection lasted, was a major obstacle to the apartheid ideology which required expunging the other from the political community. His assumption may be the product of a hardly unusual blinkered approach of his day to what kinds of people counted in the political community, despite the fact that he was a socialist, deeply concerned about the injustices of his day, a concern which extended to driving a lorry in Spain to help relief groups on the Republican side of the civil war and trying in tangible ways to provide assistance to German Jews.⁷⁴

In the 1950s a different sensibility was emerging, the product of both the experience of the war and, even more important, of the gathering strength of black and brown skinned nationalists in the British empire. The latter prompted British Prime Minister Harold MacMillan's tour of parts of Africa in 1960, culminating in his address to the South African parliament in which he futilely urged the National Party to take heed of the 'wind of change ... blowing through this continent' and that 'whether we like it or not, this growth of national consciousness is a political fact. And we must all accept it as a fact, and our national policies must take account of it.'⁷⁵

⁷⁴ See Oliver, 'Law, Politics, the Commonwealth and the Constitution', 155, 162-66, 168.

⁷⁵ For the full text, see <https://www.speech.almeida.co.uk/harold-macmillan>. Note that MacMillan pitched his appeal to the white nationalists as a concern about the new nationalists looking to the Soviet Union and China for their inspiration rather than to the West. But he did say, very politely:

In regard to the third question, we can note that McWhinney, in a penetrating analysis of the trilogy, pointed out that in 1953 the National Party had been re-elected with a greatly increased majority, albeit one not large enough to exploit the unicameral procedure. And he suggested that in ‘none of the crisis situations in the great English-speaking countries where courts have been involved in power conflicts with executive or legislative authority, have the courts for any considerable length of time withstood a co-ordinate authority that has a substantiality of public opinion behind it’.⁷⁶

Despite this counsel of doom, McWhinney did not endorse the court’s reasoning in the third case, and as, we will now see, his remarks bear on the first two questions.

As a fellow member of the Commonwealth we always try I think and perhaps succeeded in giving to South Africa our full support and encouragement, but I hope you won’t mind my saying frankly that there are some aspects of your policies which make it impossible for us to do this without being false to our own deep convictions about the political destinies of free men to which in our own territories we are trying to give effect. I think therefore that we ought, as friends, to face together, without seeking I trust to apportion credit or blame, the fact that in the world of the day, today, this difference of outlook lies between us.

⁷⁶ McWhinney, *Judicial Review i*, 195-6. There is no reference to Latham in this book. But the understanding of sovereignty is clearly his and first developed by McWhinney with explicit reference to Latham in ‘The Union Parliament, the Supreme Court, and the “Entrenched Clauses” of the South Africa Act’ (1952) 30 *Canadian Bar Review* 692 and “Sovereignty” in the United Kingdom and the Commonwealth Countries at the Present Day’ (1953) 68 *Political Science Quarterly* 511.

McWhinney found that Centlivres and most of the judges resorted to a positivistic mode of reasoning in the vain hope that it would help them to avoid a confrontation with the government. As he pointed out, that mode in the end made it impossible for them to find legal resources to continue their resistance. In relying on what Centlivres in a 1955 lecture called a ‘strict and complete legalism’⁷⁷—very formal modes of reasoning which left the substantive issues of principle buried below the surface—the judges put themselves in a position which the government could exploit by manipulating form.

In this light, one can appreciate the significance of Schreiner’s disagreement with Centlivres in the second case. His rationale in ‘the judicial hierarchy set up in the Constitution’, which he took to be implicit in a rights-protecting section, gave him the resources he needed for his dissent in the third. He connected form to substance in a way which permitted him to keep substance in place as the basis for repudiating future manipulations of form. Lorraine Weinrib, a Canadian constitutional scholar, in the course of a Schreiner Memorial Lecture, aptly commented that ‘Schreiner’s remarkable vision was to see in the South Africa Act the components of a modern constitutional instrument protecting fundamental rights and freedoms, as higher law, against encroachment by the ordinary political process’. She continued that he had ‘persevered in his role as guardian of the freedom and equality of all members of the political community, especially the weakest members’ and thus ‘constrained the temporarily elected government to the higher law strictures of the South

⁷⁷ See Albert van de Sandt Centlivres, ‘The Constitution of the Union of South Africa and the Rule of Law’, in Arthur E Sutherland, ed., *Government Under Law* (Cambridge, Mass: Harvard University Press, 1956) 423, at 427.

Africa Act, understood, to the extent possible, as the framework of a polity of free and equal citizens'.⁷⁸

Weinrib's qualification 'to the extent possible' is important. As McWhinney had pointed out, an 'activist' judicial approach maintained beyond the first two cases would eventually have had to consider 'principles of political representation going beyond the 50,000 "coloured" voters affected by the Separate Representation of Voters Act of 1951, and in this regard both major contending European factions (English and Afrikaner) seemed to be agreed on fundamentals', which he summed up as 'the general principle of political *non*-representation of the non-European majorities in the Union of South Africa'.⁷⁹

Moreover, in his chapter on 'Constitutional Law in the Commonwealth Countries', McWhinney drew the reader's attention to a mode of judicial action different from 'direct judicial review' or the power to annul or override statutes, 'a form of indirect judicial review frequently referred to as "judicial braking"', in which the court 'in effect' says 'that the legislature may or may not have the claimed legislative power, but it has not, in the language it has used in the enactment now in question, employed that power'.⁸⁰ However, he did not therefore suppose that these two modes amounted to two different 'models' of constitutionalism; rather, they are modes of interpretation that are to be found in all of the constitutional orders of the 'English-speaking world' he examined in his book, including the USA. These orders, he suggested, had in common an understanding of a constitutionalism as committed to the protection of rights and liberties,

⁷⁸ Lorraine E Weinrib, 'Constitutionalism in the Age of Rights - A Prolegomenon' (2004) 121 *South African Law Journal* 278, at 283.

⁷⁹ McWhinney, *Judicial Review*, 197. My emphasis.

⁸⁰ *Ibid*, 13.

including what he called ‘a postulate of political democracy—the full realization of the Benthamite principle of every man to count for one’. And despite the outcome of the Voters Rights saga, he remarked that ‘the courts in South Africa have been tending towards bringing their country into line ultimately with such a principle, in the face of a most complex racial situation hardly paralleled elsewhere in the Commonwealth’.⁸¹

McWhinney diagnosed as the ‘major vice’ of the Commonwealth courts in constitutional matters the problem we already saw him identify in Centlivres’s reasoning--‘their incurable positivism, which has obscured the process of analysis of the conflicting interests involved in the cases before the courts and thereby prevented any very conscious, intelligent balancing of those interests to arrive at the end decision’. If constitutionalism was to be preserved, one should see that the ‘choice’ is not, as positivists would have it, ‘between judicial policy-making and absence of judicial policy-making; but between policy-making based on a full and open canvassing of alternative lines of action and policy-making in the dark’.⁸²

In one major respect, McKinney’s diagnosis agrees with Hart’s thought that judges should make the values explicit that underpin their choices so that we are aware that such cases ‘must’ be decided ‘rationally by reference to social aims’.⁸³ But Hart would have rejected any thought that legal positivism is to blame for occluding the choices at stake since, as he understood his positivist tradition, it requires us to see that the choice is discretionary, i.e., a quasi-legislative extra legal and hence political choice.

⁸¹ Ibid, 25.

⁸² Ibid, 29-30.

⁸³ Hart, ‘Positivism’,

Marshall anticipated this view of judicial discretion in responding to the same claim made by made by HWR Wade in 1955 in a famous article—"The Basis of Legal Sovereignty".⁸⁴ Wade continued in the path Latham had set in arguing that 'the rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the legal system depends', but also that 'no statute could alter that rule'.⁸⁵ 'It is the ultimate political fact upon which the whole system of legislation hangs'; hence, 'legislation owes its authority to the rule: the rule does not owe its authority to legislation'.⁸⁶ '[T]his law itself is unalterable by any legal authority'.⁸⁷ But Wade also proclaimed of the first decision that there that 'the whole case was argued as there was a right or wrong legal answer. In fact ... there was no such necessary legal answer: the court had reached the ultimate boundary of the legal system and had in substance to make a political decision'.⁸⁸ And he suggested that in order to get to its conclusion, the court had disregarded the 'manifest will of the "sovereign legislature"'.⁸⁹

However, Marshall pointed out that whether the decision did this 'turned in fact on the very question in issue. He added that though it may be appropriate to describe as "political" any important decision which involves an obvious choice between competing lines of argument, there seems no reason to deny that such a decision may also embody a legal principle'.⁹⁰

⁸⁴ HWR Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172.

⁸⁵ *Ibid*, 187, note 45.

⁸⁶ *Ibid*, 188.

⁸⁷ *Ibid*, 189.

⁸⁸ *Ibid*, 192.

⁸⁹ *Ibid*.

⁹⁰ Marshall, *Parliamentary Sovereignty*, 45

Hart's view of the same decision is subject to the same critique. In *The Concept of Law*, Hart rejected Kelsen's idea of the *Grundnorm* as the foundational norm of legal system and substituted for it his 'rule of recognition' which certifies the criteria of validity of other legal rules of the system and which is to be found in the practice of the officials of the system, who manifest their voluntary acceptance of the rule in continuing their practice.⁹¹ Since he saw the rule as the cure for the uncertainty that would plague rule-following in a society which lacked the rule, yet thought (as we have seen) that there is a penumbra of uncertainty to any rule, he had to confront the problem posed for his legal theory of uncertainty in the ultimate rule of legal order. And here he found the first two cases in the trilogy relevant and made the following observation:

Had this process not been stopped (because the Government found it unwise to pursue this means of getting its way), we should have had an endless oscillation between two views of the competence of the legislature and so of the criteria of valid law. The normal conditions of official, and especially of judicial, harmony, under which alone it is possible to identify the system's rule of recognition, would have been suspended. ... All we could do would be to describe the situation as we have done and note it as a substandard, abnormal case containing within it the threat that the legal system will dissolve.⁹²

He also said that when courts decide 'previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success'.⁹³ In contrast, with 'less vital social issues', it could happen that

⁹¹ Hart, *The Concept of Law*, 94-5.

⁹² Hart, *The Concept of Law*, 122-3.

⁹³ *Ibid*, 153. His emphasis.

a very surprising piece of judicial law-making concerning the very sources of law may be calmly ‘swallowed’. Where this is so, it will often in *retrospect* be said that there always an ‘inherent’ power in the courts to do what they have done. Yet this may be a pious fiction, if the only evidence for it is the success of what has been done’.⁹⁴

It is somewhat strange that Hart, writing some years after the third case was decided, seemed aware only of the first and perhaps the second decision.⁹⁵ But it may be that the only difference the third case would have made is to his sense of the outcome of the particular political battle. It is also strange that Hart, who referred to both Marshall and Wade, as well to work by Latham and Cowen, in developing his account of the rule of recognition, seemed oblivious to Marshall’s critique of Wade.⁹⁶

⁹⁴ Ibid. His emphasis.

⁹⁵ Indeed, even this is unclear. Hart cites directly only one of the cases and gives a different date in the text—1954—for a case cited as decided in 1952. Ibid, 122.

⁹⁶ In *The Long Arc of Legality*, I argue that the rule of recognition is a candidate only for the fundamental norm of a legal order in which there is parliamentary supremacy and that, even in that context, the *Grundnorm* provides a superior account of the law’s authority. In *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005), Peter Oliver follows in Marshall’s footsteps by examining the quiet legal revolutions in the ‘well-behaved’ Dominions. But he departs from Marshall in that he abandons Latham’s Kelsenian idea of legal sovereignty for Hart’s and conducts his analysis using Hart’s distinction between ‘continuing’ and ‘self-embracing’ sovereignty. In a later version of this paper, I want to suggest that this distinction merely restates the problem that needed to be solved and which Latham went a long way to solving. Note that Oliver’s fine book also does not seem to have attracted notice in contemporary CCL.

His oblivion allowed him to ignore the stakes in the battle, indeed, the very nature of the battle, which was not only about the voting rights protected by Section 152, but also about the nature of sovereignty and of legal order. The government's win in the third decision in which it perpetrated what Cameron called a 'fraud' on legal order,⁹⁷ as the same time as it stacked the court, was not the victory of a conception of government under law or of a legal idea of sovereignty. Rather, it was the victory of a political idea of sovereignty in which law is merely one instrument of the possessor of legal unlimited political authority.

This was still not a total victory. It did not spell the demise of the rule of law and constitutionalism in South Africa, a death which was not in fact desired by what we saw Latham term a 'nation of jurists'. But from that point on, the only bulwark against the entirely instrumental use of law for political ends was official abuse was what we saw McWhinney describe as a mode of judicial action different from 'direct judicial review' or the power to annul or override statutes, 'a form of indirect judicial review frequently referred to as "judicial braking"', in which the court 'in effect' says 'that the legislature may or may not have the claimed legislative power, but it has not, in the language it has used in the enactment now in question, employed that power'.⁹⁸ To this extent, as I have argued extensively elsewhere, apartheid South Africa remained on what I call the 'continuum of legality'; that is, it remained a rule-of-law order (albeit a highly problematic one), and thus by definition committed to constitutionalism.⁹⁹

⁹⁷ Cameron, *Justice: A Personal Account*, 20

⁹⁸ McWhinney, *Judicial Review*, 13.

⁹⁹ See my *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010, 2nd edn.); *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford, Hart Publishing, 1998); and *The Long Arc of Legality*, chapter 5.

(Elliptical Notes Toward a Possible) Conclusion

Kelsen's *Grundnorm* account of legal order is a good tool for understanding the importance of the legal idea of sovereignty in these contexts because:

1 Contra Latham, the *Grundnorm* provides a dynamic account of legal order in which unity is produced by the juristic activity of officials.

2 Unity is the formal place holder for the classical idea of the social contract. One might say it is the juridical expression of that idea in the modern legal state.

3 The legal order of the modern legal state thus has an 'elective affinity' with the project of representative democracy, with what we saw McWhinney describe above as 'a postulate of political democracy—the full realization of the Benthamite principle of every man to count for one'.

4 In every modern legal state, one will find both modes of judicial review McWhinney described, with the power to 'annul or override statutes' existing at least to the extent that the existence of legal order itself is at stake.

5 The distinction between the 'legal' and the 'political' has to be put into question because the preservation of the legal is a political ideal and requires that legislatures and other institutions not undermine fundamental principles of legality that come into view when legal order is put under stress.

6 Whether it is a political ideal worth preserving is now in question, even in the most long-established legal states. But that answer must be investigated from the internal point of view before one is entitled to retreat to cynicism.

7 CCL should be attentive to the work of the Commonwealth CCL scholars discussed here because they addressed these questions in a way that might illuminate our current predicaments.