Oxford Journal of Legal Studies, Vol. 23, No. 3 (2003), pp. 435–454

Back to the Future? Unearthing the Theory of Common Law Constitutionalism

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Abstract—This article charts the rise of a new, and increasingly influential, theory of public law: *common law constitutionalism*. The theory can best be seen as a response to a 'crisis' within contemporary public law thought produced by an array of different pressures: Thatcherite reformation of the state; the growing prominence (and potential politicization) of judicial review; constitutionalization of the EU; and trends towards globalization. The core of argument underlying the theory is elucidated by means of an analysis of the work of a number of leading public law scholars. The essence of the theory is the reconfiguration of public law as a species of constitutional politics centred on the common law court. The theory constitutes, it is suggested, an attempt to turn inwards, in the face of change, towards the familiar form of the common law, reinvigorated as a burgeoning site of normativity.

1. *Introduction*

In 1978, Patrick McAuslan enjoined public lawyers 'to live dangerously, to chance their arm and philosophise'.[1] Public lawyers today might be forgiven for thinking that theory has become all-pervasive within their field. Certainly, public law theory has become an established and vibrant aspect of the discipline.[2] Many of the central debates within public law now take place either openly on a theoretical level or are infused with theory to an extent hitherto unknown.[3] This explosion of theory is not simply a by-product of the growing intellectualization of legal scholarship.[4] Systematic reflection into the nature of constitutional and administrative law—and the relationship between the two[5]—represents,

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[1] P. McAuslan 'Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers' (1978) 9 *Cambrian Law Rev* 40 at 41.

[2] On theory and public law, see, e.g. B. O'Leary 'What should public lawyers do?' (1992) 12 *OJLS* 404; P. Craig, 'What should public lawyers do? A Reply' (1992) 12 *OJLS* 564.

[3] The best recent example of which is the debate over the conceptual foundations of judicial review and the *ultra vires* principle. For a brief analysis of this debate see below, 439.

[4] See, e.g. A.C. Hutchinson 'Casuabon's ghosts: the haunting of legal scholarship' (2001) 21 *Legal Studies* 65; N. Duxbury, *Jurists and Judges* (Oxford: Hart Publishing, 2001), 101–15; R.M. Unger, *What Should Legal Analysis Become?* (London: Verso, 1996).

[5] See, e.g. M.R. Freedland 'Government by Contract and Public Law' (1994) *PL* 86.

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rather, an unprecedented soul-searching on the part of public lawyers into the meaning and value of their discipline at a time when traditional operating conditions seem, in large part, to have disappeared.

The prime factors driving this general inquest are well known, at least within public law circles. The reform of the public sector in the Thatcher and post-Thatcher era[6] has put pressure on public lawyers to articulate afresh the relevance and, indeed, the very coherence, of the notion of *public* law, previously so serviceable in the age of the Welfare State.[7] Public law, by definition, must deal exclusively—or at least primarily[8]—with the realm of the public. But the divisions within and the reclassification of what was once the public sector have made it increasingly difficult to isolate with exactness the 'public' to which public law should now pertain.[9] The divide between public and private has become blurred, some would argue, to the extent that it can no longer serve as a basis for a conceptual and jurisdictional distinction between public and private law.[10] In practice, this problem has a number of dimensions. Empirically, it has become increasingly difficult in the wake of privatization, regulation, compulsory competitive tendering, the Private Finance Initiative (PFI) and the like to define with precision the outer limits of public law's jurisdiction.[11] Normatively, it has become harder to assume that traditional 'public law values' still retain their worth as key Beveridge era ideals like impartiality and equitable public service,[12] consonant with the central notions of traditionalist public law, are replaced (or relegated) by the managerialist values of the market—'value-for-money', regulation, the 'three E's' and the other trappings of the audit society.[13]

[6] On the constitutional impact of the Thatcher years see, e.g. D. Marquand, *The Unprincipled Society* (London: Jonathan Cape, 1988); S. Jenkins, *Accountable to None: The Tory Nationalization of Britain* (Harmondsworth: Penguin, 1995); C. Graham and T. Prosser (eds), *Waiving the Rules: the constitution under Thatcherism* (Milton Keynes: Open University Press, 1988); K.D. Ewing and C.A. Gearty, *Freedom Under Thatcher* (Oxford: Clarendon Press, 1990). On the constitution under the governments of Tony Blair see, e.g. H. Fenwick, *New Labour, Freedom and the Human Rights Act* (Harlow: Longman, 2000); A. Rawnsley, *Servants of the People: The Inside Story of New Labour* (Harmondsworth: Penguin, 2001).

[7] On the Beveridge era and the post-War social consensus, see, e.g. D. Marquand and A. Seldon (eds), *The Ideas that Shaped Post-War Britain* (London: Fontana, 1996).

[8] Although this issue has become increasingly complicated in recent times. See, e.g. the lines of case law stemming from *O'Reilly* v *Mackman* [1983] 2 AC 237 and *R* v *Panel on Take-overs and Mergers, ex p Datafin* [1987] 1 QB 815. See also, e.g. C. Harlow '"Public" and "Private" Law: Definition Without Distinction' (1980) 43 *MLR* 241; S. Fredman and G. Morris 'The Costs of Exclusivity: Public and Private Re-examined' (1994) *PL* 69; P. Cane 'Public Law and Private Law: A Study in the Analysis and Use of a Legal Concept' in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence, 3rd Series* (Oxford: Clarendon Press, 1987).

[9] On the external boundaries of the judicial review jurisdiction, see, e.g. D. Pannick 'Who is Subject to Judicial Review and in Respect of What?' (1992) *PL* 1.

[10] See, in particular, D. Oliver, *Common Values and the Public–Private Divide* (London: Butterworths, 2000).

[11] On these developments see, e.g. C. Scott 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38; C. Hood 'Public Service Managerialism: Onwards and Upwards, or "Trobriand Cricket" Again?' (2001) *Political Quarterly* 300; J. Stewart and K. Walsh 'Change in the Management of Public Service' (1992) 70 *Public Administration* 498; A. Barron and C. Scott 'The Citizen's Charter Programme' (1992) 55 *MLR* 526; M. Freedland 'Public Law and Private Finance—Placing the Private Finance Initiative in a Public Law Frame' (1998) *PL* 288.

[12] See, e.g. C. Harlow and R. Rawlings, *Law and Administration* (London: Butterworths, 2nd edn, 1997), ch 2.

[13] See, e.g. M. Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in M. Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997); P. McAuslan 'Public Law and Public Choice' (1988) 51 *MLR* 681; T. Prosser 'Towards a Critical Public Law' (1982) 9 *Journal of Law and Society* 1.

The exponential growth in judicial review during the same period, monitored by Bridges, Sunkin, Le Sueur, and others,[14] has lent urgency to this inquiry. It may be true that an increase in power and influence may lead, in itself, to a heightened awareness of one's self (and of one's inadequacies).[15] But, in any case, the high profile nature of some of the increasingly frequent conflicts between courts and government brought home for any public lawyers who—even post-Griffith[16]—may have been inclined to doubt the fact, the irreducibly political nature of their subject.[17] Whereas Thatcherite public service reforms question the integrity of the discipline by questioning the category of the *public*, the enmeshing of public law with politics might be thought ultimately to challenge the *legal* nature of public law.

Things are no less tempestuous on the international front either. Developments on this plane have conspired to make the inherited state-bound, Diceyan model of constitutional and administrative law and complacent 'Little Englander' mind-sets about the role of public law increasingly difficult to sustain.[18] The constitutionalization of the EU most directly,[19] but also the more amorphous but ultimately, perhaps, even more profound pressures of globalization,[20] have encouraged scholars to rethink (amongst other things) the role of the state[21] and the implications of the internationalization of human rights law.[22] At this rarefied level, the debate often centres on a sweeping challenge to the perceived 'imperialism' of the discourse of constitutionalism itself. James Tully, for

[14] M. Sunkin and A. Le Sueur 'Can Government Control Judicial Review?' (1991) 44 *Current Legal Problems* 161; M. Sunkin 'What is happening to applications for judicial review?' (1987) 50 *MLR* 432; L. Bridges, G. Meszaros and M. Sunkin, *Judicial Review in Perspective* (The Public Law Project, 2nd edn, 1995). The actual impact of judicial review on administrative practice remains uncertain: see, e.g., M. Sunkin and K. Pick 'The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund' (2001) *PL* 736; G. Richardson and M. Sunkin 'Judicial Review: Questions of Impact' (1996) *PL* 79; G. Richardson and D. Machin 'Judicial Review and Tribunal Decision-Making' (2000) *PL* 494; S. Halliday 'The Influence of Judicial Review on Bureaucratic Decision-Making' (2000) *PL* 110.

[15] This issue seems to feature more in literature than political philosophy: see, e.g. Hermann Hesse, *The Glass Bead Game* (1945). Shakespeare, by contrast, would appear to hold that introspection into the nature of power and power-holding tends to occur either once power is lost (e.g. King Lear) or by someone who expects (e.g. Hamlet) or desires (e.g. Henry Bolingbroke in Richard II) to accede to it.

[16] J.A.G. Griffith, *The Politics of the Judiciary* (London: Fontana, 5th edn, 1997).

[17] See, e.g. A. Le Sueur 'The Judicial Review Debate: From Partnership to Friction' (1996) 31 *Government and Opposition* 8. Examples of politically sensitive cases include: *R* v *Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (overturning the government's regulations depriving certain categories of asylum seeker of welfare payments); *R* v *Ministry of Defence, ex p Smith* [1996] QB 517 and *Smith and Grady* v *United Kingdom* (1999) 29 EHRR 493 (challenge to government's policy preventing homosexuals from serving in the Armed Forces).

[18] See, e.g. N. Walker 'Beyond the Unitary Conception of the United Kingdom Constitution?' (2000) *PL* 384; C. Harlow 'Export, Import. The Ebb and Flow of English Public Law' (2000) *PL* 240.

[19] See, e.g. J.H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999); N. Walker 'The Idea of Constitutional Pluralism' (2002) 65 *MLR* 317; N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Clarendon Press, 1999).

[20] W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000); D. Kostakopoulou 'Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?' (2002) 22 *OJLS* 135.

[21] See, e.g. MacCormick, *Questioning Sovereignty*, above n 19; H. Thompson 'The Modern State, Political Choice and an Open International Economy' (1999) 34 *Government and Opposition* 203.

[22] C. McCrudden 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *OJLS* 499; F. Webber, 'The Pinochet Case: The Struggle for Realization of Human Rights' (1999) 26 *Journal of Law and Society* 523.

instance, argues that constitutional language, although it might sport the mask of neutrality, in fact imposes a framework designed to entrench a dominant conception of politics and society, thereby creating an 'empire of uniformity' which stifles cultural diversity. The 'question of our age', Tully maintains, is 'whether a constitution can give recognition to the legitimate demands of the members of diverse cultures in a manner that renders everyone their due'.[23]

There is absolutely no reason to think that this situation, which seems almost to demand generalized reflection on the contemporary purpose of public law, will change in the near future. For one thing, the trends articulated in the preceding paragraphs have in no sense gone away, although the dynamics surrounding them naturally change according to prevailing political pressures and developments. For another, the incorporation of the European Convention on Human Rights via the introduction of the Human Rights Act brings with it an additional demand to reassess the role of the (British) judge in the age of rights. There is little doubt that this drive for further reflection will in time produce more, rather than less, theoretically-inclined work.[24]

This, then, is the context in which the recent articulation by public law theorists of the notion of a common law constitution ought to be situated. This new theory, which arguably is beginning to dominate the field,[25] is the most recent variant of what Loughlin calls 'liberal normativism'[26] and what Dyzenhaus calls 'Blackstonian anti-positivism'.[27] Versions of the theory have been advanced explicitly in the work of writers like T.R.S. Allan, Sir John Laws, Dawn Oliver and Paul Craig; it has also served as the conceptual underpinnings of other, more doctrinally focused work within the discipline.[28] The main aim of this article is to map out this theory with more precision than anyone has done hitherto.[29] It is thus primarily a work of exposition and analysis, designed to clear the field so that the task of criticism can be accomplished later with more fluency and accuracy.[30]

[23] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 7. See also Tully 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 *MLR* 204.

[24] See, e.g. T. Campbell, K.D. Ewing, and A. Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001); A. Tomkins 'In Defence of the Political Constitution' (2002) 22 *OJLS* 157; N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era* (London: Butterworths, 2001), ch 1.

[25] A potential rival may be a theory of public law based on (a different understanding of) the ideal of civic republicanism: see, e.g. R. Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' and M. Loughlin, 'Rights, Democracy, and Law' in Campbell, Ewing, and Tomkins, *Sceptical Essays on Human Rights*, above n 24.

[26] M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992).

[27] D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Taggart, *The Province of Administrative Law*, above n 13.

[28] See, e.g. S. Schønberg, *Legitimate Expectations in Administrative Law* (Oxford: Clarendon Press, 2000); M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998).

[29] But see also M. Loughlin, 'Rights Discourse and Public Law Thought in the United Kingdom' in G.W. Anderson (ed.), *Rights and Democracy: Essays in UK–Canadian Constitutionalism* (London: Blackstone, 1999).

[30] The criticism has already begun. See, e.g. J.A.G. Griffith 'The Brave New World of Sir John Laws' (2000) 63 *MLR* 159; Griffith 'The Common Law and the Political Constitution' (2001) 117 *LQR* 42; T. Poole 'Dogmatic Liberalism? T.R.S. Allan and the Common Law Constitution' (2002) 65 *MLR* 463.

One preliminary note. The theory outlined here encapsulates an important strand within contemporary public law discourse. While it is true to say that the theorists grouped together here as common law constitutionalists tend to take one side in the ongoing debate (saga?) over the *ultra vires* principle, the connections between them are far more extensive. The *ultra vires* debate, in essence, turns on the continued relevance of the *ultra vires* doctrine as the foundational principle of judicial review.[31] Laws, Oliver, and Craig are all leading *ultra vires* sceptics. They reject the *ultra vires* principle as an outmoded and unnecessary 'fig-leaf'[32] and advance instead what they call a 'common law' model of judicial review. This model recognizes, in a way that its rival supposedly does not, that 'the principles of judicial review are in reality developed by the courts' and that the courts 'impose the controls which constitute judicial review which they believe are normatively justified on the grounds of justice, the rule of law, etc.'.[33] But the affinities between these theorists (and others) extend far beyond their understanding of the doctrinal underpinnings of judicial review. One of the great benefits of seeing things in this way is that it turns the debate over *ultra vires*, always rather sterile and increasingly claustrophobic of late, into a side-show. Whereas the *ultra vires* debate has, as Trevor Allan puts it in a recent article, 'obscured the most important questions about the nature and legitimacy of the judges' constitutional role',[34] the repositioning of the common law theorists as espousing a much broader theory of constitutional justice has the potential to lead to a more honed—and more candid—debate on the role and legitimacy of judicial review in the modern state.

2. *Common Law Constitutionalism—the Common Law as Higher-Order Law*

The essence of the theory of common law constitutionalism is the reconfiguration of public law as a species of constitutional politics centred on the common law court. The court, acting as primary guardian of a society's fundamental values and rights, assumes, on this account, a pivotal role within the polity. John Griffith's notion of the 'political constitution' is thus turned on its head.[35] The claim that the common law is unique in that it necessarily constitutes a higher order of law-making—the idea of *common law exceptionalism*—is pivotal to the

[31] On the *ultra vires* debate see, e.g. C.F. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000); N.W. Barber 'The Academic Mythologians' (2001) 21 *OJLS* 369; A. Halpin 'The Theoretical Controversy Concerning Judicial Review' (2001) 64 *MLR* 500.

[32] Sir J. Laws 'Law and Democracy' (1995) *PL* 72 at 79.

[33] P. Craig 'Competing Models of Judicial Review' (1999) *PL* 428 at 429. See also, e.g. D. Oliver 'Is the *Ultra vires* Doctrine the Basis of Judicial Review?' (1987) *PL* 543; J. Jowell 'Of *Vires* and Vacuums: The Constitutional Context of Judicial Review' (1999) *PL* 448.

[34] T.R.S. Allan 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' (2002) 61 *CLJ* 87 at 123. See also P. Joseph, 'The Demise of *Ultra vires*—Judicial Review in the New Zealand Courts' (2001) *PL* 354; M. Taggart, '*Ultra vires* as Distraction' in Forsyth, *Judicial Review and the Constitution*, above n 31.

[35] J.A.G. Griffith 'The Political Constitution' (1979) 42 *MLR* 1.

theory and common law theorists advance a number of arguments in support of it. In the following sections, three central arguments which, together, form the core of common law constitutionalism are analysed and discussed.

A. *The Common Law and Essentialist Philosophy*

One distinctive argument advanced in support of the idea of common law as higher-order law is that the common law necessarily constitutes a species of moral reasoning (in a way that is not true of political decision-making in general). This argument has been put with most vigour by Sir John Laws. Although a Court of Appeal judge, Laws has advanced a bold and highly individual theory of public law in a series of articles. His approach is avowedly philosophical. Following Aristotelian precedents,[36] Laws defines the public law theorist's task as a search 'for the good constitution'.[37] The search for the good constitution is nothing less than an exercise in moral philosophy: it involves reflection on how people in society ought to live. Since constitutions exist for the benefit of individual citizens, Laws maintains, the primary task is to identify the essential needs and requirements of mankind.

Laws claims that this essentialist method[38] reveals that there is one basic, general criterion of the human condition: namely, the moral autonomy of the individual. 'The true starting-point in the quest for the good constitution consists in . . . the autonomy of every individual, in his sovereignty'.[39] Autonomy is defined by Laws in Kantian terms:

> [Autonomy] is reflected, but not defined, in modern liberal thinking which excoriates discrimination. It is the ideal which drives all post-war international human rights texts. It is expressed in the well-known Kantian perception that the individual is an end in himself, never a means.[40]

[36] On the Aristotelian method see, e.g. M.C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 2001), chs 8–12; R. Polin, *Plato and Aristotle on Constitutionalism* (Aldershot: Ashgate, 1998), chs 8 and 9; M. Galston 'Taking Aristotle Seriously: Republican-Oriented Political Thought and the Moral Foundations of Deliberative Democracy', 82 *California LR* 331 (1994).

[37] Sir J. Laws 'The Constitution: Morals and Rights' (1996) *PL* 622 at 623.

[38] On the essentialist method, see, e.g. M.C. Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2000) ch 1; M. Perry, *The Idea of Human Rights* (Oxford: Oxford University Press, 1998); J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980). For critiques of the essentialist method, see, e.g. R. Rorty, 'Human Rights, Rationality and Sentimentality' in *Truth and Progress: Philosophical Papers, Vol. 3* (Cambridge: Cambridge University Press, 1998); R. Geuss, *History and Illusion in Politics* (Cambridge: Cambridge University Press, 2001); C. Geertz, 'Anti Anti-Relativism' in *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton, NJ: Princeton University Press, 2000).

[39] 'Constitution: Morals and Rights', above n 37 at 623.

[40] 'Constitution: Morals and Rights', above n 37 at 623. See also the similar Kantian analysis of the notion of human dignity in D. Feldman 'Human Dignity as a Legal Value—Part I' (1999) *PL* 682 at 685. On Kant see, e.g. I. Kant, *Groundwork of the Metaphysics of Morals* [1785] (Cambridge: Cambridge University Press, ed. M. Gregor, 1997); C. Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000), ch 8. Onora O'Neill argues, however, that Kant offers a modest, anti-rationalist, anti-foundationalist account of what it is to vindicate reason which is 'quite different from the foundationalist account that critics of "the Enlightenment project" target, and usually attribute to Kant'. See 'Vindicating reason' in P. Guyer (ed.), *The Cambridge Companion to Kant* (Cambridge: Cambridge University Press, 1992) at 281.

Laws thinks that it is possible to generate a constitutional model from this general philosophical exegesis. He argues that in 'real-world' (non-ideal) conditions people have the tendency, or at least the potential, to interfere with others to the extent that their ability to act autonomously is undermined. The need to protect autonomy requires a matrix of rights in order to protect individuals from such interference. In a very direct way, Laws claims, autonomy thus 'gives rise to rights'.[41]

Moreover, since in the non-ideal world we cannot rely on others not to interfere with our autonomy-protecting rights, the existence of rights demands an institution capable of enforcing them against the powerful, and especially the government. Laws maintains that the courts are ideal agents for assuming this role. Ordinary political institutions (like the legislature) cannot be trusted consistently to respect autonomy since it is their function to decide upon and implement policies which further particular ends, a process which may well produce results that are antithetical to the autonomy of particular individuals.[42] The common law stands in stark contrast. Although courts also wield considerable power, they are unique in that they 'have no programme, no mandate, no popular vote',[43] and are, for that reason, in a position to prioritize autonomy in their decision-making. Not only are courts capable of giving precedence to autonomy, Laws argues, but they in fact have a *duty* to do so. The absence of any electoral support means that the court must establish a moral foundation with which to justify the exercise of its power. Its decisions are justifiable only insofar as they are *good* decisions, and decisions are good, Laws assumes, if they further the ends of autonomy. Courts, on this account, are *necessarily* moral institutions because their ability to make decisions at all rests on their being so. They have, Laws concludes, 'no choice but to translate Kant's imperative into legal principle'.[44]

Laws' basic thesis, then, is that the court is the only institution that wields political power which can be trusted to ensure that the conditions essential for individual flourishing are preserved. This argument finds considerable support from other public law theorists. For instance, the central feature of Dawn Oliver's theory of public law is the identification of a set of 'common values'—autonomy, dignity, respect, status and security—which pervade the law and legal decision-making.[45] Oliver's theory is also grounded in an essentialist method since she makes clear that the common values she isolates are deontological; they are, she says, 'fundamental to the human condition'.[46] The five common values are

[41] 'Constitution: Morals and Rights', above n 37 at 624. See also 'Law and Democracy', above n 32 at 81.

[42] But compare, for instance, the conception of legislation advanced in J. Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

[43] Sir J. Laws, 'Wednesbury' in C. Forsyth and I. Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford: Clarendon Press, 1998) at 190. (No programme, that is, other than to follow the dictates of the cardinal moral principle of autonomy.)

[44] 'Wednesbury', above n 43 at 192.

[45] *Common Values and the Public–Private Divide*, above n 10, ch 3.

[46] *Common Values and the Public–Private Divide*, above n 10 at 59.

accorded overriding or paramount status within Oliver's theory: they generate, collectively, a framework of '*higher order* duties of good administration, high principles or institutional morality'[47] which finds its most consistent expression in the common law.

Jeffrey Jowell has also allied himself with the philosophical platform erected by Laws. In a recent article exploring the possibility that courts in this country are beginning to operate a system of 'constitutional judicial review', Jowell makes explicit reference to the position staked out by Laws:

> [O]ur courts have begun to shift the boundaries of administrative law into the constitutional realm by explicitly endorsing a higher order of rights inherent in our constitutional democracy. These rights emanate not from any implied Parliamentary intent but from the framework of modern democracy within which Parliament legislates. They are "not a consequence of the democratic process but logically prior to it".[48]

B. *Common Law Adjudication as the Exemplar of Public Reason*

While essentialist ideas about the necessity for the legal protection of (particular) liberal values required for human flourishing pervade the work of common law constitutionalists,[49] it is not the only argument offered in defence of common law exceptionalism. Another argument that occurs frequently within these writings relates instead to the structures and reasoning process underlying decision-making at common law.

Although he shares the essentialism so characteristic of Laws' account, Trevor Allan has been the most persistent advocate of this second line of argument. Allan's theory centres upon a rejuvenated rule of law, imbued with liberal substance, against which governmental action is to be scrutinized by the courts in the name of fundamental values and rights.[50] But, in Allan's account, it is the common law which gives practical shape and substance to the rule of law ideal. His starting-point is the classification of the common law as a 'body of reason'. Drawing in particular on the work of Lon Fuller,[51] Allan argues that the special

[47] D. Oliver, 'The Underlying Values of Public Law and Private Law' in Taggart, *The Province of Administrative Law*, above n 13, 230–1 (emphasis added).

[48] J. Jowell 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) *PL* 671 at 675. (Citing Laws, 'Law and Democracy' above n 32.) For a similar analysis see Lord Lester of Herne Hill, 'Human Rights and the British Constitution' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (Oxford: Clarendon Press, 4th edn, 2000).

[49] Although Sir S. Sedley purports to reach similar conclusions from a non-essentialist theoretical platform: 'Human Rights: a Twenty-First Century Agenda' (1995) *PL* 386.

[50] See, e.g. T.R.S. Allan 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *LQR* 221. For a more thorough analysis of Allan's constitutional theory see my 'Dogmatic Liberalism: T.R.S. Allan and the Common Law Constitution', above n 30.

[51] See, e.g. L.L. Fuller 'The Forms and Limits of Adjudication', 92 *Harvard Law Rev.* 353 (1978); *The Morality of Law* (New Haven, Conn.: Yale University Press, 2nd edn, 1969); J.W.F. Allison 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *CLJ* 367. The legal philosophy of Ronald Dworkin has also been a significant influence on Allan: see, e.g. T.R.S. Allan 'Dworkin and Dicey: The Rule of Law as Integrity' (1988) 8 *OJLS* 266.

nature of adjudication makes the common law an inherently moral mode of decision-making. He maintains that, in adjudication, the interests of the litigants themselves can be said to control proceedings. Litigants are, he says, free to frame their claim and debate the appropriateness of a challenged action in the manner of their own choosing. It is this, the 'essentially collaborative nature' of adjudication, from which the special moral quality of the common law is derived. The 'central role accorded the litigant's participation by adjudication, in its traditional form', he says, 'gives the proceedings an intrinsic moral value akin to that of democracy itself'.[52]

Allan extends the argument by claiming that, since common law adjudication is necessarily a moral mode of decision-making, the courts ought to be recognized as the best existing forum for moral/political deliberation. This claim can be understood only in the context of Allan's general theory of politics. Allan stipulates that the theory of public law he advances makes sense 'only in the wider context of a "republican" conception of politics, in which the claims of justice are treated as fundamental'.[53] Republicanism means, for Allan, a form of politics in which 'all strive to articulate and further a conception of the common good'.[54] Political debate is understood, on this account, as a species of moral deliberation amongst equal, autonomous citizens about what shared fundamental values may be said to require in particular instances of dispute.

Allan uses the Rawlsian terminology of public reason to express this aspect of his theory. For Rawls, public reason is the mode of argument through which citizens 'conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse'.[55] Using a version of Rawls' ideal modified to 'permit a more thorough-going, less circumscribed, moral debate',[56] Allan maintains that the 'exemplar' of the ideal of public reason 'may be regarded as the ordinary courts, deciding cases at common law'.[57] And, since according to

[52] T.R.S. Allan, 'Common Law Constitutionalism and Freedom of Speech' in J. Beatson and Y. Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford: Claredon Press, 2000) at 30.

[53] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Clarendon Press, 2001) at 24.

[54] 'Common Law Constitutionalism' above n 52 at 27. On republicanism, see, e.g. P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); J.G.A. Pocock, *The Machiavellian Moment* (Princeton, NJ: Princeton University Press, 1975); D.T. Rodgers 'Republicanism: the Career of a Concept', 79 *Journal of American History* 11 (1992); P. Springborg 'Republicanism, Freedom from Domination, and the Cambridge Contextual Historians' (2001) 49 *Political Studies* 851.

[55] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 226. (Quoted by Allan in *Constitutional Justice*, above n 53 at 284.) On the notion of public reason, see, e.g. D. Ivison 'The Secret History of Public Reason: Hobbes to Rawls' (1997) 18 *History of Political Thought* 125; J. Habermas 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls' Political Liberalism' (1995) 3 *Journal of Political Philosophy* 92; D. Zaret, *Origins of Democratic Culture* (Princeton, NJ: Princeton University Press, 2000), ch 1.

[56] *Constitutional Justice*, above n 53 at 287. Allan thinks that Rawls is wrong to exclude certain categories of moral/political argument. In particular, he maintains that 'recourse to controversial moral and metaphysical convictions', drawn for instance from religious beliefs, 'is more often necessary, and more generally legitimate, than Rawls seems willing to concede.' See *Constitutional Justice*, above n 53 at 286.

[57] *Constitutional Justice*, above n 53 at 290. On this point, Allan directly echoes Rawls' claim that the US Supreme Court stands as 'exemplar of public reason': see *Political Liberalism*, above n 55 at 231.

Allan's republican ideal the best forum for political decision-making is the one most capable of ensuring the highest quality of moral/political debate, Allan concludes that, 'in many respects, the common law is superior to the legislative process as a means of resolving questions of justice'.[58]

C. *Ancient (and Modern) Constitutionalism*

Common law constitutionalists advance a third argument in defence of the exceptionalism of the common law. According to this argument, the uniqueness of common law decision-making derives from the longevity of the common law and the evolutionary nature of the principles of which it comprises.

Paul Craig has provided perhaps the most thorough version of this argument to date. In his article 'Public Law, Political Theory and Legal Theory', Craig offers an interpretation of some aspects of English[59] constitutional history. In common with other common law constitutionalists, Craig believes the early 17th century—and particularly the judgments of Sir Edward Coke[60]—to be particularly worthy of attention.[61] Craig draws three main points from his analysis. He argues, first, that 'in historical terms the courts did not conceive of review in terms of legislative intent, but reasoned in the manner argued for by advocates of the common law model [i.e. the *ultra vires* sceptics]'.[62] Second, he suggests that 'this approach to judicial review was natural' since the common law was seen by Coke and contemporary common lawyers as 'the embodiment of reason which could be modified so as to meet the challenge of a new age'.[63] Third, Craig claims that the historical absence of a rigid dichotomy between public and private law serves to undermine further the 'idea, represented as traditional orthodoxy, that review had to be legitimated through legislative intent'.[64]

[58] 'Common Law Constitutionalism' above n 52 at 22. The conception Allan advances here is similar to Dworkin's 'moral reading' of the United States constitution: see Dworkin, *Freedom's Law* (Oxford: Oxford University Press, 1996).

[59] The absence of a clearly defined state entity covering the whole of the period in question—are we talking about the political history of England, or England and Wales, or Britain, or the United Kingdom?—is problematic for a theory resting on organicist notions of community/nation. See, e.g. N. Davies, *The Isles—A History* (London: Macmillan, 1999), Introduction. On organicist/nationalist understandings of history, see, e.g. J. Habermas, 'On the Public Use of History' in Habermas, *The Postnational Constellation* (Cambridge: Polity, trans. M. Pensky, 2001); E. Hobsbawm and T. Ranger (eds), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

[60] On Coke's life and career, see, e.g. J.P. Kenyon, *The Stuart Constitution* (Cambridge: Cambridge University Press, 1966) ch 3; S.D. White, *Sir Edward Coke and the Grievances of the Commonwealth* (Manchester: Manchester University Press, 1979). On Coke's thought, see, e.g. C. Gray, 'Reason, Authority, and Imagination: the Jurisprudence of Sir Edward Coke' in P. Zagorin (ed.), *Culture and Politics from Puritanism to Enlightenment* (Berkeley, CA: University of California Press, 1980); H.J. Berman 'The Origins of Historical Jurisprudence: Coke, Selden, Hale', 103 *Yale Law Journal* 1651 (1994); J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999), ch 5.

[61] On the early 17th century generally, see, e.g. C. Russell, *The Causes of the English Civil War* (Oxford: Clarendon Press, 1990); Russell, *The Crisis of Parliaments: English History 1509–1660* (Oxford: Oxford University Press, 1971), chs 5–7; C. Hill, *The Century of Revolution 1603–1714* (London: Routledge, 2nd edn, 1980), Pts 1 and 2.

[62] P. Craig 'Public Law, Political Theory and Legal Theory' (2000) *PL* 211, at 231.

[63] Ibid at 233.

[64] Ibid at 234.

The direct context in which Craig makes this 'argument from history' is the ongoing debate over *ultra vires*. By illustrating the context-specific and—he would argue—historically anomalous nature of the *ultra vires* principle, Craig hopes to outflank the position taken by supporters of *ultra vires* like Forsyth and Elliott.[65] But the conception of the common law as a continuous tradition of normative decision-making has implications that extend far beyond the confines of the *ultra vires* debate. These general implications are most readily apparent in the work of Trevor Allan. As we have seen, Allan understands the common law as a matrix of practical reason that generates 'an evolving body of legal principle'.[66] Allan thinks that the principles of the common law, secreted over time through the workings of an autonomous system of moral reasoning, *necessarily* embody the fundamental values of a society. The common law represents, he says, a 'scheme of justice that embodie[s] the traditions of the community, including traditions of liberty and tolerance'.[67] In fact, Allan argues, the common law has to be the principal repository of accrued wisdom in the polity because it is unique as a site of evolutionary moral reason. It provides, then, the 'common morality' which reflects and embodies the experience and enduring values of the community. (Allan assumes that these values will correspond to the liberal values he regards as central to the flourishing in the human condition and which comprise the essential elements of his ideal of the rule of law.[68]) Since the common law connects with a society's basic values in this organic way, it can be understood as performing a foundational role. In other words, for Allan and other common law constitutionalists the common law actually *constitutes* the basic order of political society:[69]

> The common law articulates the content of the common good, according to the society's shared values and traditions. The judges are its authoritative exponents because their role is to express the collective understanding, by interpretation of the precedents, as a basis for the impartial determination of particular disputes.[70]

The argument from history made by Craig and Allan is echoed by other common law constitutionalists.[71] While Allan makes repeated use of the famous dictum in *Bonham's Case*—that 'the common law will controul Acts of Parliament, and

[65] See, e.g. C.F. Forsyth 'Of Fig Leaves and Fairy Tales: The *Ultra vires* Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 *CLJ* 122; M. Elliott 'The *Ultra vires* Doctrine in a Constitutional Setting' (1999) 58 *CLJ* 129.

[66] T.R.S. Allan, 'Fairness, Equality, Rationality: Constitutional Theory and Judicial Review' in Forsyth and Hare, *The Golden Metwand and the Crooked Cord*, above n 43 at 25.

[67] *Constitutional Justice*, above n 53 at 19.

[68] See further, e.g. T.R.S. Allan, 'Equality and Moral Independence: Private Morality and Public Law' in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995).

[69] 'Common Law Constitutionalism', above n 52 at 21.

[70] 'The Rule of Law as the Rule of Reason', above n 50 at 239.

[71] The mining of historical material as a basis for normative legal argument is more fraught an exercise than common law constitutionalists seem to imagine. See, e.g. Q. Skinner 'Meaning and Understanding in the History of Ideas' (1969) *History and Theory* 3; F.W. Maitland, 'Why the History of English Law is Not Written' in *Collected Papers, Vol. 1* (Cambridge: Cambridge University Press, ed. H.A.L. Fisher, 1908); G.R. Elton, *F.W. Maitland* (London: Weidenfeld and Nicolson, 1985), ch 1.

sometimes adjudge them to be utterly void'[72]—Oliver takes the judgment of Coke in *Bagg's Case*[73] to be an early example of the application by the courts of generic common law values to counteract abuse of power. The case illustrates, for her, the long-standing concern of the courts 'with upholding rights, and avoiding in particular the kind of injustice that might lead to civil disorder by providing remedies'.[74] Laws, similarly, refers to Coke's decision in *Rooke's Case*[75] as an illustration that English courts have always sought to limit public power in the name of reason and law. The case, he says, stands as part of 'a long line of cases, stretching centuries before *Wednesbury*, which vouchsafe the principle of reasonableness as providing the legal limit to the use of discretionary power'.[76]

It is no coincidence that every common law constitutionalist who advances the argument from history draws heavily on the judgments and dicta of Sir Edward Coke.[77] Coke was a central figure within 17th century ancient constitutionalism,[78] a school of thought—or perhaps, more accurately, a *mentalité*[79]—which parallels the position advocated by contemporary common law theorists in many significant respects. At the heart of the theory of ancient constitutionalism, as espoused by 17th century common lawyers, was the idea that the common law embodied an ancient constitution stretching from 'time immemorial'[80] combined

[72] (1609) 8 Co. Rep. 107 at 118a. See *Constitutional Justice*, above n 53 at 205; T.R.S. Allan, *Law, Liberty, and Justice* (Oxford: Clarendon Press, 1993), 267–9. On *Bonham's Case*, see, e.g. T.F.T. Plucknett 'Bonham's Case and Judicial Review', 40 *Harvard Law Review* 30 (1926).

[73] (1615) 11 Co. Rep. 93b.

[74] *Common Values*, above n 10 at 52.

[75] (1598) 5 Co. Rep. 99b.

[76] 'Wednesbury', above n 43 at 190.

[77] See also *Darcy* v *Allein*, or the 'Case of Monopolies', 44 Eliz., 11 Rep. 846. In that case, Darcy brought an action against Allein for infringing his exclusive patent to make, import, and sell playing cards. The court held that (a) the Crown grant of the manufacture patent was 'utterly void'; and (b) the exclusive right to import was 'utterly against law'. 'Monopolies in times past', Coke wrote, 'were ever without law, but never without friends'. Contrast, however, *Bate's Case* (1606)—decision of James I to increase his revenue by levying new duties on goods without the authorization of Parliament upheld by the courts; *Ship's Money Case* (*R* v *Hampden*) (1638)—courts upheld the decision of Charles I to lay ship's money levies against all the counties of England (where traditionally only port towns were liable); *The Five Knights Case* (1627)—the courts supported the king's practice of holding men without charge in an attempt to extract a forced loan from the merchants. See, e.g. D.O. Wagner 'Coke and the Rise of Economic Liberalism' (1935) 6 *Economic History Rev*. 30; C. Hill, *Intellectual Origins of the English Revolution Revisited* (Oxford: Clarendon Press, 1997), chs 5 and 9.

[78] Coke's significance within ancient constitutionalist thought is contested by historians. Coke was the central figure within J.G.A. Pocock's classic account: *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 2nd edn, 1987). More recently, however, this interpretation has been challenged. Guy Burgess argues that Coke's thinking was 'untypical and confused'—John Selden serves, he says, 'as a better paradigm of the "common law mind" '—and that it is 'perhaps the major weakness of Pocock's account of English ancient constitutionalism that it treats Coke as a norm rather than the exception'. See *The Politics of the Ancient Constitution* (London: Macmillan, 1992) 57–8 and 63–8. See also, e.g. J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore: John Hopkins University Press, 2000), ch 7; R. Tuck, *Natural Rights Theories: Their Origins and Development* (Cambridge: Cambridge University Press, 1979), 132–9. In addition, the extent to which ancient constitutionalist ideas are specific to English (or British) political thought is also a matter for debate: see M.P. Thompson 'The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution', 91 *American Historical Review* 1103 (1986). Other historians regard ancient constitutionalism as a recurring rhetorical trope: see, e.g. M.I. Finlay, 'The Ancestral Constitution' in *The Use and Abuse of History* (London: Chatto & Windus, 1975).

[79] See Pocock, *The Ancient Constitution*, above n 78.

[80] Which probably meant, in 17th century terms, that its origins lay prior to the Norman Conquest (at least): see, e.g. C. Hill, *Liberty Against the Law* (Harmondsworth: Penguin, 1996).

with the belief that the language and values of the common law properly possessed hegemonic status within political debate.[81]

> The relations of government and governed in England were assumed to be regulated by law; the law in force in England was assumed to be the common law; all common law was assumed to be custom, elaborated, summarized and enforced by statute; and all custom was assumed to be immemorial, in the sense that any declaration or even change of custom . . . presupposed a custom already ancient and not necessarily recorded at the time of writing.[82]

On reflection, there seem to be strong parallels between 17th century ancient constitutionalism and present-day common law constitutionalism. Each of the theories, ancient and modern, seeks to carve out a central position in the constitutional and political pantheon for the common law court and depends, in so doing, on an idealized conception of the common law as a site of evolutionary practical/moral reason which reflects and embodies the fundamental values of society.[83] Both theories articulate, in other words, a descriptive and normative ideal according to which common law methods of argument and reasoning are the prime modes of political and moral debate and in which the common law can be said actually to *constitute* the political community.[84]

3. *Common Law Constitutionalism and the Relationship between Courts and the Legislature*

So far, three principal arguments advanced by common law constitutionalists in defence of their theory have been examined. The implications of these arguments will be explored by concentrating, first, on the conception of the relationship between courts and legislature and, second, on the type of judicial review envisaged by the theory. These issues are worthy of detailed analysis because they are the central and defining features of the theory under examination. That theory assumes, to recapitulate, that the common law court stands at the centre of a scheme of constitutional politics that is paramount within the political community and that the primary mechanism by which such a politics operates is through the process of judicial review.

[81] See, e.g. Burgess, *Politics of the Ancient Constitution*, above n 78 at 212. Margaret Judson talks of the 'profound belief' of 17th century Englishmen 'in the importance of law': see *The Crisis of the Constitution* (New York: Octagon Books, 1976), ch 2. This claim to hegemony was contested. Another central mode of political argument in the 17th century was religion: see, e.g. C. Hill, *Milton and the English Revolution* (London: Faber and Faber, 1977); M.P. Zuckert, *Natural Rights and the New Republicanism* (Princeton, NJ: Princeton University Press, 1994), chs 1–3. On the dialectics of Ancient Constitutionalism and the notion of the Elect Nation, see Pocock, *The Machiavellian Moment*, above n 54, 340–48.

[82] See Pocock, *The Ancient Constitution*, above n 78 at 261.

[83] On common law idealism, see, e.g. W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: Clarendon Press, 1987); G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Claredon Press, 1986); M.J. Detmold, 'Law as Practical Reason' (1989) 48 *CLJ* 436.

[84] Note that the argument here is purely analytical. It should not be taken to imply that the author accepts either the common law constitutionalists' analysis of 17th century constitutional and legal history or their contemporary, normative use of that analysis.

The first argument analysed above—the argument from essentialist philosophy—claims that a common law protective of individual rights is a necessary consequence of a constitution designed to meet the essential needs of the human condition. Sir John Laws, its principal exponent, is explicit about the consequences of this argument for the relationship between courts and parliament. He accepts that democracy is the best form of politics in that it best respects the cardinal value of individual autonomy: by according citizens an equal voice in the law-making process, democracy presupposes that individuals are of equal worth. But Laws is at pains to point out what he sees as the secondary or *derivative* nature of democracy. Democracy is not good in and of itself, as it were, but by virtue of the fact that it is the mode of politics that accords most closely with the cardinal value of autonomy. The ideals of the good constitution are, for this reason, Laws argues, 'logically prior to democracy'.[85]

Laws compares political decision-making of the sort that occurs within the legislative process unfavourably with the type of constitutional politics whose primary forum is the common law court. While, as we saw in the previous section, judge-made law is said to be necessarily connected to the moral law relating to autonomy, Laws claims that this is not the case in relation to statute law:

> Logically, it is a matter of great fortune, and not of necessity, that Parliament does good things. This is a function of the very fact, and the heavy burden, of its absolute power. Its power being absolute, it is of necessity morally neutral, for it is a condition of any morality that the actor in question recognises limits on what he may do.[86]

So, whereas 'reasonableness is a *defining* function of the common law, it is no more than an *adventitious* function of legislation'.[87] Judge-made law thus becomes, on this account, a 'higher-order law to which even Parliament is subject'.[88]

It is at this point that the moral philosophical platform erected by common law constitutionalists—the 'good constitution'—comes into its own. The articulation of moral fittingness as the ultimate criterion for the legitimate exercise of political power enables common law constitutionalists to make two crucial manoeuvres. It allows them, first, to disassociate legitimate political authority from the mere fact of holding political power and offers, in so doing, a means of escaping the counter-majoritarian difficulty associated with judicial review identified by Bickel and others.[89] It affords them, second, a basis from which to make their central argument in favour of the constitutional supremacy of judge-made law.

[85] 'Constitution: Morals and Rights', above n 37 at 613. See also Laws 'Judicial Remedies and the Constitution' (1994) 57 *MLR* 213 at 223.

[86] Sir J. Laws 'Public Law and Employment Law: Abuse of Power' (1997) *PL* 455 at 455. But compare Waldron, *The Dignity of Legislation*, above n 42.

[87] 'Wednesbury', above n 43 at 199 (emphasis in original).

[88] 'Law and Democracy', above n 32 at 84.

[89] A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Conn.: Yale University Press, 2nd edn, 1986). See also J. Madison, A. Hamilton and J. Jay, *The Federalist* [1787–8] (London: Phoenix Press, 1992), No. 78; J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999); M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999).

If legitimate political authority rests upon an assessment of the moral capabilities of particular political institutions, then moral superiority entails constitutional/political superiority. The question now becomes relatively simple: namely, which institution, legislature or court, is best able to respect consistently in its decision-making structures those cardinal moral principles that relate to individual autonomy? At this stage, common law constitutionalists need only to pit certain strengths of common law reasoning against the perceived deficiencies and inadequacies of the ordinary political process.

This is precisely what the second argument analysed in the previous section aims to do. Common law adjudication, regarded as the exemplar of public reason because it is litigant-driven and inherently rational, is set against a 'bleak analysis'[90] of contemporary legislative politics. Allan, for instance, observes that in British politics today '[i]mportant freedoms are at the mercy of a temporary majority of the House of Commons, generally manipulated by the executive government which cannot even claim the support of a clear majority of the electorate'.[91] Laws makes a similar observation: Parliament is simply too weak, he says, 'to vindicate to the just satisfaction of the citizen its historic power to control the Executive in the name of the people'.[92] The conclusion to be drawn from this analysis is spelt out clearly by Dawn Oliver:

> My own sense is that the courts are taking on a role as a forum for political debate and settlement of disputes with a political dimension—a Grand Inquest of the Nation forum—in response to the increasingly obvious inability and unwillingness of the House of Commons to do so.[93]

The third argument analysed in the previous section can be seen as providing additional, historical support for this political scientific analysis. According to this argument from history, good precedents are said to exist for the type of constitutional framework common law constitutionalists articulate. The argument serves a number of related purposes. First, it enables common law theorists to dismiss rival conceptions—in particular those that take legislative sovereignty as their starting point or otherwise underestimate the normative potential of the common law—as being anomalous within British constitutional history. (This point has particular relevance, of course, in the context of the debate over *ultra vires*.) Second, the claim that constitutional politics as practised by the common law courts has a continuous history since (at least) early modernity supports the argument that the common law performs a constitutive or foundational role within the political community:

> [T]he common law must serve as a constitutional framework and expression of the community's most important values. It therefore enjoys a superiority to legislation in the

[90] T.R.S. Allan 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1986) 44 *CLJ* 111 at 116.
[91] Allan 'Legislative Supremacy', above n 90 at 116.
[92] 'Judicial Remedies', above n 85 at 223.
[93] 'Underlying Values', above n 47 at 241.

> sense that a statute must be interpreted consistently with deep-rooted common law principles even where the consequence is some diminution in its efficacy. When an Act of Parliament contradicts "common right and reason", as Coke C.J. expressed it, it must be appropriately "controlled".[94]

Finally, and most importantly, the central feature of the argument from history—the claim that there is a unique connection between the common law and a particular society's 'fundamental values'—serves the same basic purpose as the designation of the common law as a superior form of public reason: it aims to compare Parliament with the common law court to the advantage of the latter. To argue that the common law is unique in being connected organically with the deep-rooted values of society is an attempt to strengthen the connection forged by common law theorists between the common law and common values. The argument emphasizes, in other words, the continuity of the common law as opposed to the transience of legislation. Echoing Hayek,[95] common law constitutionalists attempt to use history to demonstrate how judge-made law, by virtue of its evolutionary and rational method, is capable of acting as the guarantor of liberty in a way that cannot be true of legislation, vulnerable as it is to the whim of those who happen to wield power.

On examination, then, the three arguments analysed in the previous section—the argument from essentialist philosophy, the argument from public reason, and the argument from history—can be said to develop a set of contrasts between the common law and legislation, the cumulative effect of which, when combined with the moral philosophical presuppositions of this approach, is to support the claim that common law ought to be considered a constitutionally superior—or 'higher-order'—form of law. Common law, on this account, is necessarily moral, the exemplar of public reason, and has a continuous and evolutionary history. Legislation, by contrast, is amoral, imperfect as a mode of public reason, and both transient and potentially capricious. The constitutional model developed by common law constitutionalism is thus markedly 'dualist': that is, it separates firmly the sort of 'constitutional politics' practised within the common law court from the ordinary democratic politics that occurs primarily within the legislative process.[96]

4. *Judicial Review within the Common Law Constitution*

If, for the sake of argument, we accept the account of politics articulated by common law constitutionalists which, by ascribing a higher-order of law to the keeping of the courts, appears to invert the traditional hierarchical relationship

[94] 'Rule of Law as the Rule of Reason', above n 50, 241–2.
[95] See F.A. Hayek, *Law, Legislation and Liberty, vol. 1, Rules and Order* (London: Routledge, 1973).
[96] The term 'dualist' derives from B. Ackerman, *We The People—Vol. 1 Foundations* (Cambridge, MA: Harvard University Press, 1991).

between court and parliament, judicial review becomes an absolutely vital site of political deliberation—the mainstay of a system of constitutional politics. Judicial review is charged, on this account, with primary responsibility for ensuring that the requirements stemming from the moral law relating to autonomy are enforced in political practice. In so doing, it aims to prevent government from impinging unduly on fundamental values and rights. 'The modern law of judicial review', Allan writes, 'may plausibly be interpreted as a scheme for protecting the rights of citizens in public law'.[97]

This conception of the basic function of judicial review may be contrasted profitably with the traditional British understanding of the practice.[98] According to that account, which is dominated by the notion of *ultra vires*, the primary function of judicial review is to enforce the commands of Parliament as expressed, for the most part, in enacted statutes. While the *ultra vires* theory arguably shares with common law constitutionalism the same ultimate political goal—namely, the preservation of individual liberty—the two models differ sharply in terms of how best that goal might be fostered. The *ultra vires* model has the same presuppositions as Dicey's constitutional theory: conformity to the dictates of Parliament, in harness with the political pressure generated in a well-functioning democracy, and if properly enforced by the ordinary courts, will ensure that traditional liberties are not undermined.[99] It assumes that the main threat to individual liberty comes not from the legislature but from subordinate decision-makers. Action inimical to liberty is likely to occur when public officials seek to exceed the scope of the powers Parliament has granted them. Parliament, by contrast, is assumed to preserve rather than threaten liberty. (And, even if it fails to do so, the *ultra vires* model insists that the remedy must be political rather than legal.) Common law constitutionalism, by contrast, assumes that action inimical to liberty may come from either source: Parliament may enact oppressive general laws; public officials may apply otherwise non-oppressive laws oppressively. The only political institution which common law constitutionalists seem to exempt from this sense of principled distrust is the common law court.[100]

In addition, common law constitutionalism appears to invert the traditional constitutional hierarchy which undergirds the *ultra vires* theory. Whereas, on the traditional understanding, all legitimate law is ultimately derived from

[97] 'Dworkin and Dicey', above n 51 at 273.

[98] On the traditional conception of judicial review, see, e.g. D.J. Galligan 'Judicial Review and the Textbook Writers' (1982) 2 *OJLS* 257; C. Harlow, 'A Special Relationship? American Influences on Judicial Review in England' in Loveland, *A Special Relationship?*, above n 68; J. Morison and S. Livingstone, *Reshaping Public Power* (London: Sweet & Maxwell, 1995), ch 1.

[99] See P. Craig 'Dicey: Unitary, Self-Correcting Democracy and Public Law' (1990) 106 *LQR* 105.

[100] The *ultra vires* model and common law constitutionalism may also be said to entail different conceptions of *law*. The conception of law contained within the *ultra vires* model is rigidly positivistic: it assumes that there is no authoritative source of law other than the official commands of Parliament. The common law constitutionalist theory is more complicated. On the one hand, the assumption that the common law courts apply a morally consistent body of principles has clear natural law undertones. On the other hand, the theory seems to retain a positivistic conception of statute law in that it refuses to assume that statute law is necessarily connected with morality.

Parliament—an idea that stems from the Diceyan notion of indivisible sovereignty—common law constitutionalists advance a conception in which there are two orders of valid law: legislation and common law. And, within common law constitutionalism, legislation has a weaker claim to legitimacy. As we saw in the previous section, the moral philosophical underpinnings of that theory entail that legal authority becomes a function of the moral qualities of the law-making institution rather than a consequence of the fact of holding political power. Since, according to common law constitutionalism, judge-made law necessarily connects with moral principles whereas legislation does not, common law should be seen as a constitutionally superior body of law to which even statute law is subject.

What would this conception of judicial review entail as a matter of juridical practice? The theory stipulates that the courts ought to apply fundamental standards of political morality, as enshrined in the principles of common law, to protect individuals from interference by the state. Common law constitutionalism can be said to demand, then, a *value-driven* approach to public law argument and decision-making. It posits, in other words, a framework of judicial review according to which argument is oriented directly towards the protection of fundamental values and rights and in which judges are to make their decisions by reflecting directly on what moral principles require in the instant case. This model of decision-making is reflected in the general test common law constitutionalists advance as a substitute for *ultra vires*:

> The appropriateness of judicial restraint, in any particular case [of judicial review], will be simply a function of the seriousness and apparent cogency of a complainant's objections to administrative action: the more serious, in terms of accepted constitutional rights and legal values, and the more persuasive the complaint of injustice, as presented to the court, the more demanding the court must be of the relevant agency, reluctant to accept anything less than convincing explanation of its decisions on plainly lawful and legitimate grounds.[101]

This understanding of judicial review flows directly from the main lines of the theory analysed in the previous sections. If politics is to be understood as moral deliberation about what shared fundamental values require in cases of dispute, and if the common law is seen as the highest form of law-making, two things can be said to follow. First, judicial review, regarded as the primary site of constitutional politics, must become the ultimate arbiter of the dictates of the moral law for the political community. Its basic purpose must be to make a final and

[101] Allan, *Constitutional Justice*, above n 53 at 10. Allan's formulation is mirrored by other leading common law constitutionalists. Compare the account of Dawn Oliver: 'Where there is an imbalance of power in relationships' then the courts should 'impose higher order duties on the superior'. ('Underlying Values', above n 47 at 233.) Or take the statement of Sir John Laws: 'In cases of judicial review, the greater the intrusion proposed by a body possessing public power over the citizen into an area where his fundamental rights are at stake, the greater must be the justification which the public authority must demonstrate'. (Laws 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1993) *PL* 59 at 69.)

authoritative determination as to what basic values require in particular cases. Second, the reviewing court, when making this determination, need have no truck with the opinions or decisions of other institutions (even the legislature). This must be the case since, according to common law constitutionalists, the courts are in a unique position to make morally correct decisions while the deliberations of other institutions, being amoral at best, ought generally to be treated with scepticism and, where necessary, hostility.

5. *Conclusion*

The theory of common law constitutionalism is a significant strand within contemporary public law discourse. The theory has received the explicit and detailed attention of a number of leading public law scholars in their theoretical writings. Ideas predicated on the analysis advanced by these theorists have also been increasingly influential in more doctrinal work to the extent that analyses premised on the overriding status of moral values like autonomy or dignity, and on the assumption of the moral integrity and constitutional superiority of the common law, seem almost to have become axiomatic within public law scholarship.

The preceding analysis has sought to map out the contours of this theory. The aim has been to highlight the precise nature of the conceptual ties that can be said to transform a series of perspectives and analyses into a connected and integrated body of work. At the heart of the theory of common law constitutionalism lies the idea that the common law is both the foundation-stone and lodestar of the political community: that is, it both constitutes the political community and contains the fundamental principles that ought to guide its political and legal decision-making. This claim, in itself highly distinctive, is underpinned by three characteristic arguments. The common law constitutes a higher order of law, common law constitutionalists argue, because it necessarily connects with basic moral principles in a way that is not true of statute law. In addition, they say, the common law represents a superior site of public reason on account of the necessarily rational and individual-respecting nature of its decision-making processes. And the common law is also unique in that it embodies a matrix of principles which, on account of their evolutionary nature, necessarily connect with society's deep-rooted moral/political values.

Other writers have drawn parallels between the work of the theorists analysed here, but only in the context of the debate over *ultra vires*. I have argued, however, that the associations within the work of (amongst others) Allan, Laws, Oliver, Craig, and Jowell are more wide-ranging and profound than this—rather narrow—analysis would allow. Although I myself have serious doubts about many of the dimensions of this body of work, it would be invidious not to acknowledge that these scholars have managed collectively to forge a theory elements of which have proved to be very popular amongst public lawyers. This appeal might be due to the fact that it represents a response to the wide-ranging political and legal changes that have swept domestic public law in recent times which is both

seemingly comprehensive and ultimately comforting for those with a traditional common lawyer's mind-set.[102] The common law constitutionalists' basic reaction to those changes—as well as to the more universal counter-majoritarian objection to judicial review—is to turn inwards to the familiar form of the common law, reinvigorated, in their eyes, as a burgeoning site of normativity. Common law constitutionalism aims, in other words, at nothing less that the restoration of faith in the moral vitality and superior political *nous* of the common law method.

[102] But not just, it would seem, to common lawyers: see, e.g. R. Scruton, *England: An Elegy* (London: Chatto & Windus, 2000), at 10: 'A piece of the earth is made safe by the common law; and because it is common—in other words, coextensive with the land itself—it becomes a familiar companion, an unspoken background to daily dealings, an impartial observer who can be called upon at any time to bear witness, to give judgment and to bring peace'.