Thomas Spencer –

Article 9 of the Bill of Rights: An Historical, Philosophical and Practical Primer

Paper – 11.15am to 11.30am, Thursday 28 September 2023

Parliamentary privilege at Westminster derives from each House constituting part of the High Court of Parliament. The supreme court of England was part of Parliament when it enacted Article 9 of the *Bill of Rights 1688*, guaranteeing parliamentary privilege. Specialisation separated the supreme court in *O'Connell* (1844). In itself the legislature can no longer be considered to be a court. Instead the parliamentary privilege of legislatures derives from specialist and separate supreme courts.

Introduction

Parliamentary privilege is founded upon the authority of the High Court of Parliament, according to *Erskine May*:

> Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute.[1]

Historically the supreme court of England, later the United Kingdom, was a constituent part of the High Court of Parliament.[2] The Lords sat as the supreme court as an ordinary part of their parliamentary duties, in addition to sitting as the upper house of the legislature. In 1844 the Lords finally conceded that the professional judges who "assisted" them constituted the true supreme court and departed, allowing it to become specialised and separate from the legislature in *O'Connell v R*.[3] Yet the supreme court continued to be a parliamentary body. Section 4 of the *Appellate Jurisdiction Act 1876* (UK) characterised it as "Her Majesty the Queen in Her Court of Parliament". The "House of Lords" became the "Appellate Committee of the House of Lords" in 1948.[4] The new Supreme Court of the United Kingdom was established in 2009, under the *Constitutional Reform Act 2005* (UK) which repealed the *Appellate Jurisdiction Act* but "does not adversely affect — (a) the existing constitutional principle of the rule of law".[5] The Justices of the

[1] *Erskine May*, Part 2, Ch 12, 'What constitutes privilege', para 12.1 ('*Erskine May*'). As to freedom of speech and debate generally see Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) ch 2.
[2] AF Pollard, *The Evolution of Parliament* (Longmans, Green, 2nd ed, 1964 impression) ('Pollard').
[3] *O'Connell v R* (1844) 11 Cl & Fin 155; 8 E.R. 1061. See Robert Stevens, *Law and politics: the House of Lords as a judicial body, 1800–1976* (Weidenfeld and Nicolson) ('Stevens'). Later history is set out in Louis Blom-Cooper QC, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords: 1870–2009* (Oxford University Press, 2009) ('Blom-Cooper'); and Alan Paterson, *Final judgment: The Last Law Lords and the Supreme Court* (Bloomsbury, 2013).
[4] Supreme Court of the UK (Web Page) <https://www.supremecourt.uk/about/appellate-committee.html>.
[5] *Constitutional Reform Act 2005* (UK), Schedule 17, s 9; Part 1 "The Rule of Law" 'The Rule of Law' (a); respectively.

Supreme Court continue to be styled "Lord" or "Lady", a formality that ensures consistency[6] and, it is submitted, reflects the parliamentary history of the Supreme Court.

That history falls to be examined in terms of the curiality of the High Court of Parliament. It bears directly upon the application of the *Bill of Rights 1688* (Eng), because it suggests that Article 9 confirms a juridical basis for parliamentary privilege and more broadly reflects a neglected, curial jurisprudence. I argue that parliamentary law and custom derive from the juridicality of the High Court of Parliament, rather than from its political, representative functions or the *Bill of Rights* alone. Curial jurisprudence, drawn from parliamentary history, philosophy and practice, complement the political basis regarding the provenance and rationale for Article 9, with which we may be more familiar.

1. Curial Jurisprudence

For centuries English jurisprudence was explicitly curial, in defining sovereignty as in other matters.[7] AF Pollard sets out how English sovereignty grew, from a weak juvenile condition, through the growth of the jurisdiction or *sovereignty* of Parliament demonstrating that supreme monarchical, aristocratic or democratic power acted ultimately inside the High Court of Parliament.[8] He cites Fleta, a pseudonymous author in the time of Edward I or II:

> The king has his court in his council in his parliaments, in the presence of earls, barons, nobles, and others learned in the law, where judicial doubts are determined, and new remedies are established for new wrongs, and justice is done to every one according to his deserts.[9]

Specialist judicial courts, administrative courts and the High Court of Parliament subsequently crystallised from a constitutional protoplasm of judicial, executive and legislative authority.[10] Holdsworth notes that even late medieval government was juridical in its form, allowing local communities autonomy in England, in contrast to Continental local governments that were instead becoming the mere delegates of a

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[6] https://www.supremecourt.uk/docs/pr_1013.pdf; from personal correspondence with a Court clerk, 16 September 2021.

[7] Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England*, 1450–1642, (Cambridge University Press, 2006) ('Cromartie'); WS Holdsworth, *History of English Law* (Methuen, eg vol 2) 404–5.

[8] In Chs XI – XVII he addresses, respectively, 'The growth of sovereignty in Parliament', 'The growth of sovereignty in Parliament', 'The separation of powers', 'The Crown in Parliament', 'The Council in Parliament', 'The Peers in Parliament', 'The Commons in Parliament', and 'The State in Parliament'. In *The Sovereignty of Parliament*, (Clarendon, 1999), Jeffrey Goldsworthy defines sovereignty as jurisdiction, emphatically, in his chapter "From James I to the Restoration", when identifying Coke's characterisation of Parliament's sovereignty as its "jurisdiction":

> In the First Institute he treated ordinary law-making as part of the 'jurisdiction' of the 'court' of parliament: '[t]he jurisdiction of this court is so transcendent, that it makes, enlarges, diminishes, abrogates, repeals, and revives laws, statutes, acts, and ordinances'. He concluded that discussion by noting that 'this properly does belong to the jurisdiction of courts, and therefore this little taste hereof shall suffice', anticipating his more detailed treatment of the topic in the Fourth Institute. At the time, the word 'jurisdiction' commonly meant the power of ruling in general, and not just the authority of a judge; for example, 'supreme jurisdiction' was the same as maiestas, which we now call sovereignty (115) (footnotes omitted).

[9] Pollard (n 2) 23–5.

[10] See Pollard (n 2) 25, 239; HD Hazeltine, G Lapsley, PH Winfield (ed), *Selected Essays, 'Introduction to Memoranda de Parliamento'* by FW Maitland (Cambridge University Press, 1935); CH McIlwain, *The High Court of Parliament and its Supremacy: An historical essay on the boundaries between legislation and adjudication in England* (Yale University Press 1910).

politically supreme state.[11] In 1576, Jean Bodin framed Renaissance jurisprudence by addressing monarchs' "sovereign power" in terms of the new polity, the "commonwealth" or the state, rather than relating the secular ruler's power primarily to the church which had by now fragmented.[12] Natural Law characterises posited law as participating in an antecedent system of justice, rather than the mere positing of law validating it, and Bodin referred to "the law of nature" as unenforceable equity.[13] Jeffrey Goldsworthy emphasises that lack of enforcement, when opposing judicial review of legislation, even to the point of suggesting that the violence of the American Revolution was necessary in its absence.[14] Supreme power, whether that of a monarch, aristocrat, or democrat, can act directly on that Continental view. It need not mediated by an autonomous court.

Early Stuart England defined sovereignty by juridically requiring that Bodin's "sovereign power" act through autonomous courts. The separation of autonomous courts in England can be traced to the fourteenth century. In 1305 a chief justice said to counsel "(d)o not gloss the Statute; we understand it better than you do, because we made it".[15] However, in 1365 the chancellor, before the king's council, reversed a decision by the court of common pleas.[16] Lord Coke referred to it in the *Case of Prohibitions*,[17] stating that "one had a judgment reversed before the Council of State; it was held utterly void for that it was not a place where judgment may be reversed".[18] JF Baldwin remarked that the King's Council was not regarded as the proper place, because it was not a court of common law, "and all the courts were ready to resist any such subjugation to the utmost. Parliament, on the other hand, was a court of record, which might review its own judgements on appeal of error".[19]

The formal separation of the judiciary, from the Council, manifested judicial independence from the executive power originated by the Council as the executive branch. In *Prohibitions* itself, Coke observed that the common law courts had specialised, such that the king lacked "the artificial reason and judgment of law, which law is an act which requires long study and experience".[20] We might wonder whether James could have studied and qualified in law, yet the principle would have remained. The presumption of independence from the executive branch

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[11] WS Holdsworth, *A History of English Law*, (Methuen, 1923, vol 2) 405.
[12] Jean Bodin, *Six Books of the Commonwealth*, (abridged and translated by MJ Tooley), (Blackwell, 1955). See MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 3rd ed, 2012) 43 ('Vile').
[13] Bodin (n 12) 35–6.
[14] Goldsworthy (n 8) 17–8.
[15] Year Books (Web Page) <https://www.bu.edu/phpbin/lawyearbooks/display.php?id=1813>. See Pollard (n 48) 34, and footnotes there.
[16] (1365) 39 Edw III 14. In the "Case of the King's Council": "… the Chancellor reversed this judgment before the Council, where it was adjudged in the same course as the bishop had certified, and they sent the record back into the Common Pleas. And there, … it was awarded that the plaintiff recover her seisin and her damages. But the Justices did not take any regard to the reversal before the Council, because this was not a place where a judgment could be reversed" (Web Page) <https://www.bu.edu/phpbin/lawyearbooks/display.php?id=13473>. David J Seipp of the Boston University School of Law compiled an index and paraphrase of Year Books from 1268–1535. He discusses the experience in 'Big Legal History and the Hundred Year Test', (2016) 34(4) Law and History Review 857.
[17] *Case of Prohibitions*, or *Prohibitions del Roy* (1607) 12 Co Rep 63 *('Prohibitions')*.
[18] Ibid 64.
[19] JF Baldwin, *The King's Council in England during the Middle Ages* (Clarendon 1913) 335–6.
[20] *Prohibitions* (n 17) 65.

gained by such specialisation would have been negated by his personally embodying executive power. In the *Case of Proclamations*,[21] James I sought to prohibit new buildings in and about London. In response, Coke foreshadowed the *Bill of Rights*. The King could not change the law "by his prohibition or proclamation".[22] More precisely, just a few sentences earlier Coke stated that "the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, *without Parliament*".[23] The *Prohibitions* separation of the judiciary was a preliminary, facilitating the *Proclamations* requirement that the prerogative of the Crown in right of the Executive be exercised and supervised ultimately inside the High Court of Parliament. These decisions accorded with Natural Law requiring that law and power be validated not by their mere assertion, but participate in greater principles; in England, autonomous courts. James I asserted the medieval view of jurisprudence in *Prohibitions*, when Coke reports "then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges".[24] In *Proclamations* we also see James asserting that the private morality of the Sovereign, unaided by an external framework, founds the constitutional order. Yet participatory, Natural Law, implicit in the medieval view of morality, was now embodied in autonomous courts; political power was to be mediated through autonomous courts, ultimately the High Court of Parliament, rather than directly.

The specialisation of the English judicature and specifically the Crown's High Court of Parliament separated the Crown's courts from the executive branch, making supreme power accountable, by requiring that it act through autonomous forums. Cicero wrote of true law being right or correct reason "in agreement with nature".[25] Medieval Europe and Hooker conceived true human law as based on and conforming to the higher or Natural Law of God.[26] It is submitted that in the new, juridified, English form of Natural Law, parliamentarians and other common lawyers differentiated legal authority from individual morality, to then require that individual conscience and Bodin's "sovereign power" act lawfully and be validated through autonomous courts. However, the consolidation of political supremacy in the Executive was delayed by the Interregnum which saw rule by parliamentary

[21] *Case of Proclamations* (1611) 12 Co Rep 74 *('Proclamations')*. De Smith and Brazier described it as "perhaps the leading case in English constitutional law" (Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, (Penguin, 8th ed, 1998) 74, n 26 ('de Smith and Brazier').
[22] *Proclamations* (n 21).
[23] *Proclamations* (n 21) (emphasis added).
[24] *Prohibitions* (n 17) 64–5. Goldsworthy records in detail how royalists were adamant the King "was accountable only to his own conscience, and to God, and not to any human tribunal or power" Goldsworthy (n 8) 80. He then propounds this view, as a precedent for parliamentary sovereignty.
[25] Marcus Tullius Cicero, *On the Republic*, 'On the Law of Nature' (tr with introduction, notes, and indexes by David Fott) (Cornell, 2014) 98.
[26] Richard Hooker, *Of the laws of ecclesiastical polity*, Book One; cf James Daly, 'Cosmic Harmony and Political Thinking in Early Stuart England' (1979) 69(7) *Transactions of the American Philosophical Society* 1, 21–2.

committees for example.[27] It let in a novel philosophy that did not require monarchical, aristocratic, or democratic power to act through autonomous courts.

2. Political Jurisprudence

Jeffrey Goldsworthy has traced the emergence of a distinctly legislative function to the 1640s.[28] Yet Professor Goldsworthy describes this "legislative sovereignty"[29] in terms of a political supremacy. Despite acknowledging that "parliaments … exercised a legislative as well as judicial power",[30] he neglects the participation of the supreme court in the High Court of Parliament.[31] His precedent for "legislative supremacy"[32] is the political supremacy of the monarch before the 1640s, despite the curiality of the monarch described above. In a 2022 article[33] he refers to *Jackson v Attorney General*,[34] a decision where the judicial House of Lords affirmed the validity of Prime Minister Blair's fox-hunting legislation. Professor Goldsworthy goes so far as to claim that statement by three Law Lords were "based on known falsehoods".[35] Further, in a footnote:

> Lord Steyn's assertion at [102] that the judges created the principle of parliamentary sovereignty is demonstrably false, as is Lord Hope's related assertion at [126] that the principle was 'created by the common law', if he means judge-made law.[36]

As proof of these strong assertions, Goldsworthy cites only his own chapters on "The Philosophical Foundations of Parliamentary Sovereignty", and "Defining Parliamentary Sovereignty".[37] In each of these chapters Professor Goldsworthy neglects how members of the House of Lords sat as judges, the supreme court of

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[27] Clayton Roberts, *The Growth of Responsible Government in Stuart England*, (Cambridge University Press, 1966) 118–9, 145–51 ('Roberts'); Martin Loughlin refers to the inadequacy of this experiment becoming "widely recognised" within just four years of the Commonwealth, leading to the replacement of parliamentary committees by the investiture of legislative power in the legislature, and executive power in the Lord Protector and Council, which after Cromwell's death led to the dominant faction in the army inviting Charles II to recover the throne (*Foundations of Public Law*, (Oxford University Press) 258. Loughlin also examines "political jurisprudence" at length (ch 6):

> But before coming directly to the power/liberty dynamic as it functions in public law, we should first address the question of why public law cannot be conceived as involving the perennial search for the key to a science of political right. Rather than being treated as an explication of the science of political right, public law should be recognized as an exercise in political jurisprudence (158).

It is respectfully submitted that this approach neglects the curial origination of political jurisprudence in the 1640s, described immediately below. In short, the curial, supervisory jurisdiction of the Crown's courts over the power of the Crown and other political actors was simply neglected by jurists, after 1642, for reasons set out below.

[28] Goldsworthy (n 8) 132–5.

[29] Goldsworthy (n 8) 135.

[30] Ibid.

[31] He likewise defends "legislative sovereignty" in *Parliamentary Sovereignty: Contemporary Debates*, (Cambridge University Press, 2010) ch 3. Again: "The truth in the widespread belief that the doctrine of parliamentary sovereignty was firmly established by the Revolution of 1688 is that the Whig theory of the constitution prevailed over that of the Tories" (274).

[32] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, 'The myth of the common law constitution' (Cambridge University Press) ch 2.

[33] Jeffrey Goldsworthy, 'Parliamentary Sovereignty and Popular Sovereignty in the UK Constitution' (2022) 81(2) *Cambridge Law Journal* 273.

[34] *R. (Jackson) v Attorney General* (2006) 1 AC 262.

[35] Goldsworthy, 'Parliamentary Sovereignty' (n 33), 291.

[36] Ibid, 129.

[37] Goldsworthy, *Sovereignty of Parliament*, (n 8) chs 10, 2. At fn 129 of Goldsworthy, 'Parliamentary Sovereignty' (n 33), he then makes further assertions which are not addressed here due to space, and offers authorities other than his own work for those assertions.

England, at the Glorious Revolution, which he recognises created the principle of parliamentary sovereignty.

Alan Cromartie instead founds the new parliamentary authority in the 1640s upon "an adjudicative supremacy".[38] A parliamentary vote used curial language to explain parliamentary authority to Charles I:

> When the Lords and Commons in parliament which is the supreme court of judicature in the kingdom nation shall declare what the laws of the land is, to have this not only questioned and controverted, but contradicted, and a command that it should not be obeyed, is a high breach of the privilege of parliament.[39]

Even more clearly, the *Nineteen Propositions of Both Houses of Parliament* were given on 19 May 1642:

> … if the question be whether that be law which the Lords and Commons have once declared to be so, who shall be the judge? (T)he king's judgement (is) in his highest court, though the king in his person be neither present nor assenting thereunto.[40]

The king's legislative judgment bore the authority of the Crown. However, Charles was not content for the Crown to remain the transcendent authority that united Parliament, the common law courts, and the executive branch itself. His advisors gave the more famous *Answer to the Nineteen Propositions of Both Houses of Parliament*, to establish the executive power as part of the positive, law-making, supervisory structure of Parliament:

> What concerns more the Publike, and is more (indeed) proper for the high Court of Parliament, than the making of Laws, which not only ought there to be transacted, but can be transacted no where else; but then you must admit Us to be a part of the Parliament, … and most unreasonable it were that two Estates, proposing something to the Third, that Third should be bound to take no advice, whether it were fit to passe, but from those two that did propose it.[41]

AF Pollard regarded the doctrine of the three estates as grafted onto Parliament comparatively late, and imperfectly, partly as a political convenience for foreign relations.[42] His scholarship has recently been reviewed, upon the centenary of his

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[38] Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642*, (Cambridge University Press, 2006) ('Cromartie').
[39] Edward Husbands, *An exact collection of all remonstrances, declarations, votes … betweene the Kings most Excellent Majesty and his high court of Parliament*, (London, 1643) 195; cf Cromartie, *The Constitutionalist Revolution* (n 38) 264.
[40] Edward Husbands, (n 39) 206–7; cf Cromartie, (n 38) 264.
[41] *Joyce Lee Malcolm, The Struggle for Sovereignty: Seventeenth-Century English Political Tracts (Vols 1 and 2)*, '1642: Propositions made by Parliament and Charles I's Answer', (Liberty Fund, 1999) (*'Lee Malcolm'*).
[42] See Paul Cavill, 'AF Pollard', *Parliamentary History*, (Parliamentary History Yearbook Trust, 2021) 52, n 53 ('Cavill').

founding the Institute of Historical Research in Britain.[43] Paul Cavill recounts how Pollard related the powers in Parliament to the Crown, and discounted assertions of parliamentary independence from the Crown as fortunately mistaken, given the failure of Parliaments on the Continent where sovereignty was not a common project.[44] Cromartie similarly casts the monarchy's claim to be one of the three estates, as a political step down; "inexplicable"[45] except as a reaction to Parliament's 19 May declaration. The revival of the estates of King, Lords and Commons was a "startingly sudden revival of an obsolete idea".[46] Professor Vile addresses this period in detail, upon the following political premise: "In England the acceptance of the idea of a single source of sovereign power led to the concept of parliamentary supremacy".[47] However, it is submitted that Coke was leading the common lawyers including parliamentarians to differentiate the Crown's power from the Crown's forums of power, ultimately its High Court of Parliament.

As the Executive, the King was politically superior to the Lords and Commons. Therefore, it was disingenuous for the monarchy to assert that the three were merely equal. Even more importantly, the Lords and Commons were juridically superior to the Executive. They formed a single "supreme court – legislature" that curially reviewed and defined the politically superior Executive itself; an archetype of the Crown's juridical definition of Crown power in the Crown's courts at large. The three estates did not produce political balance in the seventeenth century. Charles himself would be tried and executed, and the monarchy and House of Lords abolished in 1649, the monarchy restored in 1660, followed by the bloodless or "Glorious Revolution" of 1688.[48] As we shall see, the new "balance", creating the "parliamentary state" recently described by Martin Loughlin,[49] was the success of the "supreme court – legislature" in juridically refuting the monarch's "three estates" claim, by demonstrating that the Executive act ultimately inside the High Court of Parliament. The contest between the three estates was instead merely political. In *Leviathan*,[50] Hobbes referred to sovereign power but not to Bodin, nor to English juridicality that juxtaposed supreme power against autonomous courts, to then require that supremacy act as lawful sovereignty, inside autonomous, Crown courts.

The *Answer* was hastily retracted by the monarchy.[51] Yet it introduced a new form of "political jurisprudence" into England. Bodin had not juxtaposed his "sovereign power" against autonomous English courts. In the years after the *Answer*, the

[43] Ibid. Footnote 43 records that GR Elton, an "intellectual heir" of Pollard, had Pollard's "bad and misleading book", *The Evolution of Parliament*, removed from Cambridge University reading lists.
[44] Cavill (n 42) 53.
[45] Cromartie (n 38) 265.
[46] Ibid.
[47] MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 3rd ed, 2012) 43 ('Vile') 46.
[48] However, Warren Johnston contests whether it was bloodless (2010) 125 *English Historical Review* 515, 994–7; reviewing Steve Pincus, *1688: The First Modern Revolution*, (Yale University Press, 2009).
[49] Martin Loughlin, *Foundations of Public Law*, (Oxford University Press, 2010) ch 9.
[50] Thomas Hobbes, *Leviathan*, (ed JCA Gaskin) (Oxford University Press, 1996).
[51] Malcolm (n 41) 46–7.

doctrine of the separation of legislative, executive and judicial powers came to predominate at the forefront of political theory.[52] Both it and the model of the three estates were abstracted from the common lawyers' juridification of public debate. Decades after the *Answer*, in his *Two Treatises of Government*,[53] John Locke systematised this political abstraction of jurisprudence away from the juridical, pre-1642 model. Goldsworthy delineates the transition to a Lockeian philosophy.[54] In the sixteenth century the removal of papal supremacy in Britain transferred supreme authority over the English church to secular authority. This absorption of ecclesiastical authority by a renaissance King in Parliament, assisted by Low Church reformers endorsing legislative power to oppose High Church policies,[55] disembodied ecclesiastical criticism of the king. Religious questions came to be rendered a largely spiritual matter, removed from the ongoing exercise of Crown power through Crown courts including the High Court of Parliament. Goldsworthy charts how, in the seventeenth century, John Locke could seize what had now become an abstract theological restraint and couple it to community authorisation, to then manifest it as the consent of the governed with religious overtones.[56]

Like the monarchy in 1642, Locke reduced the Crown's curial, supervisory jurisdiction to a political jurisprudence. Locke needed a juxtaposition or "separation" of powers against each other, to prevent tyranny, because he identified legislative, executive and treaty-making or "federative" powers[57] as unmediated, having neglected the Crown's curial jurisdiction. More systematically than the monarchy or pamphleteers who followed the *Answer*, Locke reduced the Crown's curial jurisdiction to political power which he juxtaposed against the parliamentarians' political power. In accordance with Bodin's sovereign power before its English juridification, and Hobbes' sovereign power after its juridification, Locke describes a clash of mere political power. He neglected the reality that a new, curial jurisprudence was distinguishing the old political jurisprudence and encompassing it within a new principle, the requirement that the power act through autonomous courts. He neglected how Coke had characterised Crown power as a feature of the Crown's jurisdiction, a power that was required to act through the Crown's specialist judicial courts, administrative courts, and its dualistic High Court of Parliament as lawful authority. Locke was formulating the social contract and

[52] Vile (n 47) sets out this area in detail, in ch 2 of *Constitutionalism and the Separation of Powers*, in 'The Foundation of the Doctrine'. In 1648, Sir Charles Dallison took a more robust stance against Parliament, asserting that where "the Supremacy, the Power to Judge the Law, and the Authority to make new Lawes" are unified, the known Law "is vanished, instantly thereupon, and Arbitrary and Tyrannical power is introduced" (*The Royalists Defence*, (publisher not stated, 1648, 80.) It fell to George Lawson to note the "judicatory" power in the Lords, and divide government power into three: "There is a threefold power civil, or rather three degrees of that power. The first is legislative. The second judicial. The third executive" (*An examination of the political part of Mr. Hobbs his Leviathan* (Francis Tyton, 1657) 8. Perhaps even more importantly, it is submitted here, Lawson also narrowed the "Power of Jurisdiction" to the "administration of justice", and included that in the executive power, alongside the right of appointing officers. Judicial authority thus began to acquire its modern, substantive sense of judicial power, in juxtaposition against legislative and executive power rather than as a supervisory jurisdiction.
[53] *Two Treatises on Government*, (Awnsham Churchill, 1679–81).
[54] Goldsworthy (n 8) ch 4–7.
[55] Ibid 55.
[56] Ibid 151 ff. As to Locke's own religious beliefs see Diego Lucci, *John Locke's Christianity*, (Cambridge University Press, 2020).
[57] Locke (n 53) ch XII.

emphasised democratic power, yet he neglected the rule of law as founded by Coke's requirement that power, whether monarchical, aristocratic or legislative, act through autonomous courts.

Medieval and early Stuart jurisprudence characterised sovereignty as requiring that even supreme power act through a mediating court. Instead, Locke vested sovereignty directly in the people's consent through their spiritual patriarch, Adam,[58] as expressed in a legislative supremacy[59] with overtones that were private and spiritual rather than public and ecclesiastical. A century before Locke, philosophers were enamoured of the Great Chain of Being that was said to harmonise the whole created world, reaching up to the heavens and ultimately to God.[60] Locke merely sought "a defensible theology",[61] to relieve the confines of a much more limited view of human understanding, "a defensible theology": "We shall not have much reason to complain of the narrowness of our minds, if we will but employ them about what may be of use to us; for of that they are very capable".[62] After Locke, Montesquieu's separation of powers to prevent tyranny;[63] Austin's supreme, uncommanded commander;[64] and HLA Hart's hierarchical "rule of recognition" which derived from Austin[65] — each can be traced to Locke's limiting neglect of the Crown's curial architecture that strove for justice by requiring that all power act through autonomous courts.

The "political jurisprudence", which followed the reductionist *Answer* of 1642, was ineffectual. It did not reconcile the political conflict of the seventeenth century that juxtaposed monarchical power against aristocratic and democratic power. We will address the Revolution shortly. Yet recent scholarship has shown that Locke wrote *Two Treatises of Government* between 1679 and 1681, rather than in response to the Revolution of 1688 as previously thought.[66] He was reacting to the Exclusionary Crisis caused by Bills purporting to exclude the future James II.[67] In 1690, however,

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[58] Ibid ch III. Of Adam's title to sovereignty, IV; Of Adam's title to sovereignty, by donation, Gen. i. 28; V. Of Adam's title to sovereignty, by the subjection of Eve; VI. Of Adam's title to sovereignty, by fatherhood; VII. Of fatherhood and property considered together as fountains of sovereignty; VIII. Of the conveyance of Adam's sovereign monarchical power; IX. Of monarchy, by inheritance from Adam; X. Of the heir to Adam's monarchical power.

[59] Ibid ch XI 'Of the Extent of the Legislative Power' (para 134): "… the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it. This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it…"

[60] Daly (n 26).

[61] John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government*, (Cambridge University Press, 2012).

[62] John Locke, *An essay concerning humane understanding*, ch 1, 'Introduction', (Thomas Basset, 1690) Section 5.

[63] "When legislative power is united with executive power in a single person in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically" (Baron Montesquieu, *The spirit of the laws*, (Cambridge University Press, 1989) 157.

[64] John Austin, *The Province of Jurisprudence Determined*, (John Murray, 1861).

[65] Ibid 94–5; 6–7.

[66] Mark Goldie, 'John Locke on the Glorious Revolution: A New Document' (2021) *History of Political Thought* 74.

[67] John Dunn (n 61) argues: "What is clear is that at some point in 1681 at the very latest Locke set himself to provide a systematic refutation of absolutist theory … In short it was a theoretical proclamation of the ultimate right of revolution" (48). If so, Locke misconceived the true nature of the Revolution. With the distance and perspective of more than 340 years, we can see that Locke brilliantly but mistakenly addressed the royalists on their own terms, juxtaposing Sir Robert Filmer's political supremacy of monarchy against the parliamentarians' political supremacy of aristocracy and democracy. Instead, the Revolutionary parliamentarians fortified the Executive by juridically differentiating the executive power from the executive

Locke commented on the Glorious Revolution. In what has been designated *A Call to the Nation for Unity*,[68] Locke made a partisan demand for allegiance to the new king on a *de jure* rather than *de facto* basis. He feared that assent to the mere fact of William's kingship might allow Tories to backslide and betray what Whigs called "Revolution principles"[69] by denying the right to kingship. Instead, the High Court of Parliament and William's kingship there could have been addressed in curial or political terms, because it was both. The supreme court did not become a specialist court, separate from the legislature, until the nineteenth century as we shall see. Until then, at least, the monarch was defined by a "supreme court – legislature" which allowed for lawful allegiance on the basis of right or fact. Yet since Locke's separation of powers doctrine appeared in *Two Treatises*, the separation of the supreme court has been regarded as allowing the legislature to join the executive branch, instead of the authority of the supreme court as was the case during the juncture of the "supreme court – legislature".

3. A Revolutionary, Curial Jurisprudence

James I claimed for the Sovereign a prerogative outside of Parliament, such that he could even sit as a common law judge. Advisors to Charles I similarly obviated the jurisdiction of the High Court of Parliament, by instead focusing solely on the powers that acted there. In 1672, Charles II issued the Declaration of Indulgence that disapplied parliamentary legislation, to give religious freedom to Catholics.[70] Stuart courts subsequently upheld the monarch's prerogative to dispense with the operation of a statute.[71] At the Glorious Revolution,[72] parliamentarians extruded the executive power from the executive branch, thereby differentiating the Executive from the Crown. They required the new monarch to participate in the Crown's prerogative lawfully, as the Crown inside the autonomy of the jurisdiction or sovereignty of the High Court of Parliament. Parliamentary committees had weakened the Executive during the Interregnum,[73] and parliamentarians undid the Executive by replacing James II with William III. Parliamentarians established the new "parliamentary state" that Martin Loughlin describes as a product of a stable aristocratic club.[74] The "supreme court – legislature", rather than political doctrines such as the three estates or the separation of powers, fortified the political

branch, into the parliamentary court, to then subject to the Executive to the curial, supervisory jurisdiction of the High Court of Parliament, a "supreme court – legislature".

[68] See Goldie (n 66). That was the title both applied to it in a 1922 auction, and used by Peter Laslett, *John Locke, Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1963) 59n. However, Mark Goldie impugns rather than admires the rhetorical quality of that title, to then dispute Laslett's designation precisely because the paper is fiercely partisan rather than unifying, and says it is "without textual warrant" (Goldie n 66, 74).

[69] Goldie finds that Locke feared that such betrayal could provide cover to Jacobitism, and later introduces Locke's actual text by concluding: "There is a touch of Robespierre about the philosopher of the Glorious Revolution" (88).

[70] See Alfred F Havighurst, 'The Judiciary and Politics in the Reign of Charles II' (1950) 66(1) *Law Quarterly Review* 62, 72–5.

[71] See *Thomas v Sorrell* (1674) Vaughan 330 and *Godden v Hales* (1686) 11 St Tr 1165; cf Tom Spencer, 'An Australian Rule of Law' (2014) 21 *Australian Journal of Administrative Law* 98 ('Spencer').

[72] For the historical details of both the Revolution and the *Act of Settlement 1700* (Eng), see Robert Stevens, 'The Act of Settlement and the Questionable History of Judicial Independence' (2001) 1(2) Oxford University Commonwealth Law Journal 253.

[73] See Roberts (n 27).

[74] Loughlin (n 49) 265–6.

supremacy of the Executive, by establishing the "executive power in the High Court of Parliament", separately from the executive power in the executive branch. Parliamentarians now participated in the sovereignty of the Crown in right of the Executive in Parliament. That is not to say that parliamentarians were always wise or careful in doing so; we come shortly to *Stockdale v Hansard*.[75] Instead, parliamentarians defined the Executive curially and so participated in its exercise of the Crown's prerogative.

The parliamentary court legislated *The Act 1688*, which affirmed that the Lords Spiritual and Temporal and Commons convened at Westminster "are the Two Houses of Parlyament", despite any formal defect in any writ of summons. The *Bill of Rights* then fortified the right, prerogative or privilege of the Crown in Parliament to suspend laws, dispense with laws, and levy money.[76] Article 9 likewise asserts the Crown's freedom of speech in Parliament, as against supreme political power, which parliamentarians themselves had just established as the monarchical Executive:

> Freedom of Speech: "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament".

Article 9 excluded the Stuart courts that had supported the Executive prior to the Revolution. However, it did not exclude the jurisdiction of the supreme court which was part of the defining "supreme court – legislature" that enacted Article 9. Subsequent legislation such as the *Crown and Parliament Recognition Act 1689* (Eng) confirmed the authority of the new king and queen, and the Acts of the new "High Court of Parlyament", independently of James II. The *Act of Settlement 1700* (Eng) similarly established the Crown's prerogative to remove judges, in law, by requiring an address of both Houses of Parliament at section 3.[77] To reiterate, parliamentarians fortified the political supremacy of the monarchical Executive, in the executive branch, and then established parliamentary privilege as a Crown immunity, in Parliament, from that supremacy.

We must note, here, that Maitland found only a political basis for the constitutional Convention and the Parliament it became: "We cannot work it into our constitutional law".[78] However, he neglected the participation of the supreme court of England in the Convention and Parliament. The participation of the supreme court in both offered a basis for common law courts to remain independent from the

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[75] *Stockdale v Hansard* (1839) 9 A & E I ('*Stockdale*').
[76] Articles 1, 2 and 4 respectively.
[77] Section 3: "That after the said limitation shall take effect as aforesaid, judges commissions *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them".
[78] FW Maitland, *The Constitutional History of England*, (Cambridge University Press, 1908) 285. De Smith and Brazier, and Sir William Wade held similarly. HWR Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172, 188; Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, (Penguin, 8th ed, 1998) 70, 72. In America, Richard S Kay states his book *The Glorious Revolution and the Continuity of Law* "aims to show how the distortion of legal concepts necessary to accomplish the Revolution influenced the actions, the institutions, and the rhetoric of the new settlement" (Catholic University of America, 2014) 2.

political supremacy of the Executive in the legislature, when accepting legislation as superior to their own precedents. As for the morality of the Revolution, the common lawyers of the seventeenth century succeeded in juridifying Bodin's "sovereign power", and his Renaissance definition of the sovereignty of God. Pollard argues that the Revolution "robbed the crown of liberty of conscience and imposed upon it a whole decalogue of prohibitions".[79] Instead, the medieval conscience and private morality of monarchs was now fortified by the public requirement that they act ultimately through an autonomous "supreme court – legislature", the High Court of Parliament.

4. Political Jurisprudence Strikes Back

AF Pollard has been cited at length in this paper, because he articulated the curiality of the dualistic High Court of Parliament. He also identifies, with regret, the political division of the High Court of Parliament into the Commons and Lords after the Glorious Revolution. The Commons sought to participate in the Lords jurisdiction as the supreme court, while the Lords sought to participate in the Commons taxing power, before each accepted the other's ability to reject its own claim:

> Both houses were, in fact, appropriating the effects of a languishing monarchy, and they agreed to divide the spoil. The divergence of parliament into two houses prevented the common enjoyment of the fruits of parliamentary triumphs; and the lords acquiesced in the commons' control of taxation, while the commons accepted the claims of the lords to the sole exercise of appellate jurisdiction.[80]

It is submitted that this political divergence has had extensive consequences for parliamentary privilege. It obviates the participation of the supreme court in the High Court of Parliament, and hence the "supreme court – legislature". Privilege has come to be founded upon Parliament's representative and other political claims.

In 1832, parliamentarians instituted a parliamentary executive power that required a Commons majority, as responsible government. The *Representation of the People Act 1832* (UK), or the "Great Reform Act", undid the earlier aristocratic arrangement, and abolished the patronised "rotten" and "pocket" boroughs, to draw the Executive from the legislature rather than the monarch's Council.[81] This was the opposite of the aristocratic club whose stability allowed political organisations to form in the eighteenth century. Less than a decade later, in *Stockdale*, the Commons' private printers were sued for defamation.[82] Prison inspectors had criticised the publishers of an illustrated treatise on reproduction found circulating among prisoners. The Commons ordered Hansard to plead its own privilege in defence. The Court of

[79] Pollard (n 2) 179.
[80] Ibid 310.
[81] Stevens (n 3) 23–34. Also Spencer (n 71) 101–2.
[82] See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, (Penguin, 8th ed, 1998) 331–3.

Queen's Bench rejected Hansard's plea as beyond privilege, and awarded the plaintiff damages. Jeffrey Goldsworthy characterises the case as a contest as to which of the Commons or Queen's Bench "had superior jurisdiction to judge the existence and extent of the House's privileges",[83] and states it was "fortunately defused" when the Court acquiesced in the House imprisoning the two sheriffs who executed the Court's judgment, for contempt. Parliament then legislated to confirm its privilege.[84]

The two sheriffs may not have seen the defusing as fortunate, likewise Stockdale and his solicitor, committed in subsequent litigation.[85] De Smith and Brazier instead note the courts' refusal-

> to award habeas corpus to release the Sheriff from arbitrary detention ... It was supported by precedent and was defended on grounds of principle; but the court had chosen to blind itself to notorious reality, and to countenance injustice.[86]

It is submitted that the matter was not fortunate, but the court could not have done otherwise. The supreme court had not yet separated from the legislature. Therefore, when courts deferred to the legislature, they could still be presumed to be deferring to a curial body that was not differentiated from the supreme court whose rulings bind them under the doctrine of precedent.

The supreme court became specialised and separated from the legislature shortly afterwards, in *O'Connell v R*.[87] Daniel O'Connell had been convicted in relation to his political activism. He appealed to the judicial House of Lords on a technicality. The professional judges who "assisted" the Lords on judicial matters held for his release. The Lords themselves disagreed and sought to overrule the judges, but eventually conceded the superior juridicality of the specialists and finally left the House, never to return on judicial business.[88]

Specialisation separated the judiciary from the Executive in the legislature in 1844, as it had from the executive branch in *Prohibitions* in 1607, and again in *King's Council* in 1365. The supreme court continued to be a form of the Crown's High Court of Parliament, after 1844. The judicial House of Lords, later the "Appellate Committee of the House of Lords", continued to be a parliamentary body after *O'Connell*. In 2002, Lord Bingham cited s 4 of the *Appellate Jurisdiction Act 1876* (UK) and referred to it as "Her Majesty the Queen in Her Court of Parliament",[89] before its repeal by

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[83] Goldsworthy (n 8) 242.
[84] Ibid.
[85] See *Howard v Gossett* (1845) 10 QB 359, 411; de Smith and Brazier (n 82) 331.
[86] De Smith and Brazier (n 82) 332.
[87] *O'Connell* (n 3); Stevens (n 3).
[88] In *Bradlaugh v Clarke* (1883) 8 App Cas 354, Lord Denman, 50 years a barrister and son of a former Chief Justice, offered his vote. It was ignored. In 1905, Earl Spencer said: "Probably I am the only lay peer present to-day who has sat in the House when hearing an appeal. I remember very well when I was a mere boy I was called in one morning to make a quorum, and I recollect sitting here and hearing appeals. Happily that state of things has passed away; it was certainly open to objection, and the doing away with it was in my opinion one of the best of reforms" (*In Re Lord Kinross* [1905] AC 468, 476.)
[89] *Grobbelaar v News Group Newspapers Ltd* [2002] WLR 3024 [25].

the *Constitutional Reform Act 2005*.[90] In 1842, in *Kielley v Carson*,[91] the Privy Council differentiated the Commons, as exercising by "ancient usage and prescription"[92] the functions of the High Court of Parliament, from colonial legislatures which exercised analogous functions on the basis of necessity. However, their Lordships also focused on the political division of the High Court of Parliament. The decision can be distinguished as preceding the *O'Connell* separation of the supreme court. The Westminster legislature, like colonial legislatures created separately from supreme courts, cannot be presumed to be a court, since *O'Connell* separated the supreme court from the legislature.

In *Green v Mortimer*,[93] just 17 years after *O'Connell*, Lord Campbell held a statute to be absurd because it was impossible to perform: "There must be the same power in the defendant to encumber his life-estate as if the Act had never passed…".[94] In *British Railways Board v Pickin*,[95] Lord Morris distinguished *Green*, when holding that fraud was not a basis for judicial review of parliamentary proceedings:

> It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed.[96]

However, his Lordship did not sit in the High Court of Justice. The *Supreme Court of Judicature Act 1873* (UK) remade the High Court of Justice by recasting the King's Bench, Common Pleas, Exchequer, and Chancery, and added the new Probate, Divorce and Admiralty division.[97] It was under the *Appellate Jurisdiction Act 1876* (UK) that the role of the judicial House of Lords "as the highest court of appeal in the land was finally placed on a proper judicial footing".[98] It became the Appellate Committee of the House of Lords in 1948.[99] His Lordship sat in the judicial House of Lords in the High Court of Parliament, not the High Court of Justice. However, Lord Denning MR had in the Court of Appeal held that whether the Act of Parliament was improperly obtained is a triable issue, such that the legislature "could put the matter right, if it thought fit, by passing another Act".[100] Further: "In so doing the court is not trespassing on the jurisdiction of Parliament itself. It is

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[90] Schedule 17 of the *Constitutional Reform Act 2005* (UK), Part 2, clause 9, provides "The Appellate Jurisdiction Act 1876 ceases to have effect".
[91] *Kielley v Carson* (1842) 4 Moo PC 63.
[92] Ibid 89.
[93] *Green v Mortimer* (1861) 3 LT 642.
[94] Ibid 643 (emphasis added).
[95] *British Railways Board v Pickin* (1974) AC 765.
[96] Ibid 790. The Appellate Committee held unanimously for the Board, with Lord Simon for instance, concluding that "If the respondent thinks that Parliament has been misled into an enactment inimical to his interests, his remedy lies with Parliament itself, and nowhere else" (800).
[97] UK Parliament (Web Page) <https://www.parliament.uk/about/living-heritage/transformingsociety/laworder/court/overview/judicatureacts/.>
[98] Ibid.
[99] House of Lords, Library Note, *The Appellate Jurisdiction of the House of Lords* <https://researchbriefings.files.parliament.uk/documents/LLN-2009-010/LLN-2009-010.pdf.>
[100] *Pickin v British Railways Board* (1973) QB 219.

acting in aid of Parliament, and, I might add, in aid of justice".[101] This juncture of curial and legislative authority recalls the sovereignty of the High Court of Parliament, as a Crown forum that is independent of the monarchical, aristocratic, democratic or other political powers acting through such forums.

The legislature and supreme court formed a single body, the "supreme court – legislature", which exercised parliamentary privilege at the passage of Article 9. The supreme court was part of the forum described since in terms of an "exclusive cognisance" or "exclusive jurisdiction"[102] that pits the legislature against the courts. Despite the revolution of 1688, Locke entrenched the political jurisprudence of the royalist *Answer* of 1642, by theorising a separation of all three powers. This separated the supreme court from the legislature conceptually. In 1832, responsible government completed the fusion of legislative power and executive power. In 1844, *O'Connell* separated the supreme court from the legislature in practice. Legislatures have come, thus, to be associated with the executive power and hence the executive branch. However, parliamentary privilege derives from the legislature acting as part of a court, the High Court of Parliament. The question is then: How can legislatures be regarded as part of the High Court of Parliament, even after the creation of specialised and separate supreme courts, at Westminster and elsewhere?

5. **Practicalities**

In 2021, UK Prime Minister Boris Johnson explored natural justice as the basis for reviewing procedures in the House of Commons.[103] The Leader of the House Jacob Rees-Mogg also used the phrase repeatedly. They abandoned that plan shortly afterwards, amid claims that their party had acted improperly. A new model of natural justice was not forthcoming from the Westminster legislature. It can come instead from the Westminster Supreme Court and from other supreme courts. Section 1 of the *Constitutional Reform Act 2005* specifies that the Act does not adversely affect the existing constitutional principle of the rule of law. The history of the supreme court indicates that the new Court continues to be part of the "High Court of Parlyament", as at the passage of the *Bill of Rights*. Further, *Erskine May* records that parliamentary privilege derives from each House of the legislature constituting part of the High Court of Parliament. Like Australian Federal, State and Territory legislatures, the House of Commons and the House of Lords can no longer be presumed to constitute courts in themselves. Yet to exercise parliamentary privilege as guaranteed by Article 9, they are required to constitute part of the High Court of Parliament.

Freedom of speech derives from the legislature participating in the High Court of Parliament. An independent, curial basis for natural justice in legislatures would bolster their share of an authority that is independent of power whether

[101] Ibid 231.
[102] *R v Chaytor* (2011) 1 AC 684, 697 [13] (Lord Phillips).
[103] See T. Spencer, 'Natural Justice in Parliament: A Courageous Proposal, Prime Minister', U.K. Const. L. Blog (15th Nov. 2021).

monarchical, aristocratic, or democratic. A duty to act judicially, complementing political authority, offers a broader rationale for the freedom of speech and debate, "right-of-reply" submissions, the sub-judice convention, greater consistency as to who has a "voice" in the legislature and in committee inquiries, and legislatures' social licence.

We saw that Article 9 guaranteed a new Crown immunity, the privilege of the Crown inside Parliament, against the fortified political might of the executive power in the executive branch. The Executive in Parliament, and other parliamentarians, participated in the "supreme court – legislature", a forum that required an externally originating political power to act judicially in the High Court of Parliament. This conception of an immune, free zone of political communication closely coincides with the High Court of Australia's articulation of free political communication that must not be burdened.[104] Parliamentarians can again fortify political power, their own right to speech and debate being free and frank in the public interest, by expressly founding the privilege of the Crown in Parliament upon a duty to act judicially. Legislating shield laws for journalists on the same basis could affirm parliamentarians' own commitment to natural justice, under the joint authority of the High Court of Parliament, a "supreme court – legislature" that since *O'Connell* is both a specialist, independent court and a legislature. However, further research is needed.

[104] See eg *McCloy v New South Wales* (2015) 257 CLR 178.