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R.T.E. Latham and Change in the Ultimate Rules of a Legal System

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Essay

R.T.E. Latham and Change in the Ultimate Rules of a Legal System

PETER OLIVER

This Article was presented and is written in honour of Professor Richard Kay, and in great admiration for the body of work that he has so impressively produced over his career. That body of work displays great breadth and depth, and it travels through time to make sure that we do not forget the ideas and legacy of constitutional writers who came before us.

I present here another life that in my view illustrates many of these same themes. It is a life that was cut short in active service in World War II at the young age of 34, at the outset of a career that had already displayed a brilliant command of constitutional law and theory.

This Article and the presentation which preceded it take their inspiration from one of Richard Kay's more recent articles, a piece of legal intellectual history, in which he explores the influence of H.W.R. Wade's famous 1955 Cambridge Law Journal article, The Basis of Legal Sovereignty.

My own Article discusses the life, work, and legacy of R.T.E. Latham. I have written before on Latham's life and work. In this Article, I focus on his legacy, a topic that I unfortunately gave short shrift to in my earlier study.

To my mind, this legacy includes a highly impressive list of insights, some of which I have discussed here. Despite their "brilliance," to use the noun (or the adjective "brilliant") most favoured by later readers of Latham, I cannot help but feel that, with a few nudges provided by later theoretical inquiry, Latham's original set of assumptions could have been taken creatively and helpfully further. I set out a few suggestions here.

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R.T.E. Latham and Change in the Ultimate Rules of a Legal System

PETER OLIVER *

INTRODUCTION

This Article and the presentation which preceded it¹ take their inspiration from one of Richard Kay's more recent articles,² a piece of legal intellectual history, in which he explores the influence of H.W.R. Wade's famous 1955 Cambridge Law Journal article, "The Basis of Legal Sovereignty."³ I say "famous" in full knowledge that, for many readers, H.W.R. Wade and the article I just mentioned are not household words, though they certainly are in some households, or common rooms at least, where colleagues talk about United Kingdom and Commonwealth constitutional history.

Right away we can identify one of the remarkable things about Richard Kay's life and work. His interests are broad: He takes an interest in the United States, of course, but also the United Kingdom, the Commonwealth, and elsewhere. All those who have read Richard Kay know that as well as having broad interests along both the X and Y axes, so to speak, he is also a deep thinker (along what is often called the Z axis or the third dimension): deep not just because he has an interest in constitutional theory, but because he always researches and writes with such care, consideration, and insight.

So, I have spoken of two dimensions of breadth—national and comparative—and I have noted a third dimension of depth. While keeping each of these in the picture, I also want to celebrate yet another dimension that we see in his work: That of time. I would not be the first to say that in this present moment, we so often find ourselves and our attention spiraling all too easily into ever-more-intense interest in an ever-narrowing frame of

* Full Professor and founding Co-Director of the Public Law Centre, Faculty of Law, University of Ottawa. I am very grateful to Sarah Gagnon and Allison Lowenger for research assistance.

¹ This Article is based on a paper presented at a conference in honour of Professor Richard Kay that took place September 12–13, 2019 at the University of Connecticut School of Law (Original Constitutionalist: Reconstructing Richard Kay's Scholarship). I am very grateful to the organizers, especially Dr. Yaniv Roznai, to participants for their helpful feedback, and of course to Professor Richard Kay for his ongoing inspiration.

² Richard S. Kay, *Constitutional Change and Wade's Ultimate Political Fact*, 35 U. QUEENSLAND L.J. 31 (2016).

³ H.W.R. Wade, *The Basis of Legal Sovereignty*, 13 CAMBRIDGE L.J. 172 (1955).

time, specifically the present time and space.⁴ Ironically, the past has never been so accessible to us via the internet, with journals and archives often searchable without the need even to leave our desks. And yet, in order to investigate the past, we have to be willing and able to formulate questions about that past. And that we sometimes struggle to do.

As academics we are so often working on questions that are not new. Arguably, we do our jobs better when we see ourselves in dialogue with those who have come before us, as well as those who will follow, assuming we do good enough work to make that worthwhile.⁵ I say all of this as an attempt to find an antidote to our universities' and our society's constant pressure to speak to the present moment, as if doing so exhausts the meaning of relevance. Please do not misunderstand what I am saying. It is vital for academics to stay relevant and to contribute to contemporary debates. The public that funds so much of our work demands nothing less. My point is that we do the job of providing intelligent, authoritative interventions into current affairs when we work with comparative breadth, theoretical depth and a temporal sense that reminds us that we are neither the first nor the last to study so many of the issues that are now before us. I see Richard Kay's work doing just this.

But rather than speak of the breadth, depth, and span of Richard Kay's work, I would like to present here another life that, in my view, illustrates many of these same themes. It is a life that was cut short in active service in World War II at the young age of thirty-four, at the outset of a career that had already displayed a brilliant command of constitutional law and theory, and that would intersect in a fascinating way with the subject of Richard Kay's recent work, the very same H.W.R. Wade and "The Basis of Legal Sovereignty" that I mentioned a moment ago.

I. THE LIFE AND WORK OF R.T.E. LATHAM

So, this Article discusses the life, work, and legacy of R.T.E. Latham—Richard or Dick Latham to his friends. I have written before on Latham's life and work,⁶ so I will only provide a brief summary here. I will then focus on Latham's legacy, a topic that I unfortunately gave short shrift in my earlier study of Latham.

Richard Latham was an Australian, the son of John Latham, later Sir John Latham. Latham Sr. was a politician, an ambassador and—most

⁴ An idea explored brilliantly by science-fiction writers such as William Gibson.

⁵ Richard Kay uses the apt metaphor of academic articles being like so many "messages in a bottle." Happily, as in the case of Kay's work, the bottles sooner or later find their way onto other shores and get read.

⁶ See generally Peter Oliver, *Law, Politics, the Commonwealth and the Constitution: Remembering R.T.E. Latham, 1909–43*, 11 KING'S C. L.J. 153 (2000) (memorializing the life and work of Richard Latham).

famously—a long-serving Chief Justice of Australia. Sir John was known for his rigorous, analytical mind, for his generally conservative political instincts, and for his formalist legal tendencies.⁷

Richard Latham greatly admired his father but would take a different path in so many ways. The son's initial steps were similar: Ormond College at the University of Melbourne and the study of law. A dramatically new route materialized when Richard won a Rhodes Scholarship, allowing him to continue his law studies at Magdalen College, Oxford.⁸

As his law studies neared their close, he decided to write the All Souls' Fellowship examination, and he was successful.⁹ His Fellowship gave him time to write and think, and to talk things over with some of the best legal minds of the British academy and legal establishment. It was through his All Souls' connections that he secured the opportunity to work with the visiting Eastman Professor of Law, Professor Felix Frankfurter, later justice of the Supreme Court of the United States.¹⁰ Frankfurter's memoirs indicate that he was very impressed by Latham, despite their different approaches to law.¹¹ They had frank discussions about the sociological

⁷ See *id.* at 156 (discussing the senior Latham as a “leading conservative politician” committed to rationalist thought).

“To most [John Latham] was a name rather than a personality; a man who was remote and aloof even as a politician; one who compelled respect, even deference, but one who gained the affection only of that smallest circle of intimates who were able to penetrate the barrier of shyness and find behind it warm, human qualities.” *The [London] Times*, 27 July 1964, 12. M.H. Ellis described John Latham, the lawyer, in the 1920s, as “severe, unsmiling, grey of mien and garb.” *Bulletin*, 8 August 1964, 35. Both quoted in Z. Cowen, *Sir John Latham and Other Papers* . . .

Id. at 156 n.21.

On Sir John Latham more generally, see 10 DOUGLAS PIKE, *AUSTRALIAN DICTIONARY OF BIOGRAPHY* 2–6 (1986) for a biographical discussion, and A.D.G. Adam, *Sir John Latham—A Tribute*, 38 *AUSTRALIAN L.J.* 188–90 (1964) for a “tribute to the life and achievements of Sir John Latham.”

⁸ Much of the information in Oliver, *supra* note 6, summarized here, was gleaned from files on Richard Latham at the National Library of Australia (NLA). These documents (photos, letters, school certificates, manuscripts, speeches, cuttings, etc.) formed part of the Sir John Latham Collection at the Library. The bulk of this collection was presented to the NLA in December 1963, a few months before Sir John Latham's death. The information regarding Richard Latham can be found in Series 10, “Family Papers, 1868–1962.” During the course of my research, the materials regarding Richard Latham were separated from the Sir John Latham Collection. References to material taken from these files will be referred to as follows: “*NLA Latham Collection*, [series number][date of document].” A good deal of additional material was obtained from Richard Latham's file at Rhodes House, Oxford. Reference to this material will be designated simply as “*Rhodes House*, [date of document].”

⁹ Oliver, *supra* note 6, at 160.

¹⁰ See Letter from C.K. Allen, Warden, All Souls' Coll., to Felix Frankfurter, Eastman Professor, Univ. of Oxford, Felix Frankfurter, *Rhodes House*, 17 October 1933.

¹¹ “[O]ne day they asked me if I would take a pupil, a very, very brilliant fellow of whom they had great expectations that he was to be a law don. He was Jack [sic] Latham, the son of the then Chief Justice of Australia. I said I would, and he came.” HARLAN B. PHILLIPS, *FELIX FRANKFURTER REMINISCES* 256 (1960). I am grateful to the late Dr. Geoffrey Marshall for this reference.

jurisprudence favoured by Frankfurter and the more orthodox approaches with which Latham would have been familiar.¹² There was no indication in Frankfurter's memoirs or in Latham's many letters home to his parents at the time that the latter had converted to a sociological approach, but it is clear that he was aware of a new range of concerns, and this awareness may well have influenced his legal method, as we shall see.¹³

It is one thing to be aware of the perspective of sociological jurisprudence and quite another to acquire an understanding of the facts on the ground. And yet, whether as a result of his discussions with Frankfurter or spurred by his own curiosity, that is what Richard Latham set out to do.

Richard Latham arrived in the UK in the early 1930s and lived there until his death in 1943.¹⁴ During most of that time he set out discovering first hand that which lay behind the main political events of the day: Spain and its civil war, the rise of the Nazis, the wider circumstances leading up to the *Anschluss*, the Abdication Crisis, and the growing number of displaced refugees.¹⁵ The themes of populism, fascism, identification of so-called "friends" and the vilification of so-called "enemies," and the resulting socio-economic and political circumstances that caused these

¹² "I think it must have been at our first tutorial, certainly not later than the second when he suddenly said, 'I see you're a sociological jurist.' I said, 'I'm very glad to be ticketed, but suppose we leave tickets behind and just find out what the problem is.'" *Id.*

¹³ Latham's later writing shows that he had at least taken on board Frankfurter's reluctance to make hard and fast distinctions between logical/analytical and sociological approaches. See R.T.E. Latham, Book Review, 53 LAW Q. REV. 579, 580 (1937) (reviewing W. ANSTEY WYNES, LEGISLATIVE AND EXECUTIVE POWERS IN AUSTRALIA (1936)):

If the choice were really between an undisciplined sociological interpretation and an anti-socially 'logical' one, the latter would indeed be preferable. The certainty of the law and the exigencies of government must get on together—but while blind legal verbalism merely hampers government, crude perversion of the judicial function destroys all law. But that is not the choice. Law (and its logic) and politics cannot be mutually exclusive. There is, for the purposes of legal interpretation, no such thing as pure logic, and a logic based on political principle in the broadest sense is no less philosophically legitimate than a logic of words. It is also a great deal more useful . . .

Latham concluded that the legal tradition of "the English bench and bar, untouched by speculative theory or by conscious 'sociology', and heightened, rather than broadened," is "not adequate to its task" of interpreting fundamental law. *Id.* at 580.

¹⁴ PETER C. OLIVER, THE CONSTITUTION OF INDEPENDENCE: THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN AUSTRALIA, CANADA, AND NEW ZEALAND 19 (2005) [hereinafter OLIVER, THE CONSTITUTION OF INDEPENDENCE].

¹⁵ In an interview with one of the Australian newspapers on the occasion of a visit home to Australia, Latham gave a sense of his expanding interests and his approach to acquiring knowledge: "Mr [sic] Latham is interested in politics from a sociological point of view" read one report. Latham stated to the journalists that there was no way of learning anything about "politics in dictatorship" without doing so "first hand." This was because the government controlled the newspapers, but also because political opinion is always less unanimous than the press presents. *Australians Play Big Part in English Universities*, [MELBOURNE] STAR, Aug. 6, 1935. Latham had already travelled to Germany, Austria, and Italy and was about to see Japan, China, and Russia.

so-called “enemies” to move across Europe and the world in search of safety and security—all of these are themes that resonate today, sadly.

When I say that Richard Latham set out to learn the facts on the ground first hand, I do not mean political tourism. When Latham went to Spain, he volunteered to drive vehicles for the Republicans.¹⁶ When he went to Germany, the Netherlands, and Austria, he researched the fast-changing politics and made contacts with refugees and refugee organizations, contacts that he would later use to assist Jewish and other refugees in escaping an increasingly unsafe European mainland.¹⁷

Latham’s “sociologically” inspired travels did not exclude indulging his more academic interests. During his time working as a temporary collaborator with the League of Nations in Geneva, Latham secured a visit with Professor Hans Kelsen,¹⁸ and the latter saw fit to offer his young visitor a copy of *Reine Rechtslehre*, published in German in 1934 and nowhere available in English until a much later date.¹⁹ That vellum-bound copy, complete with Latham’s marginal notes, still sits in the law library of King’s College London, so far as I know. It is clear from Latham’s notes in that copy and from his subsequent constitutional writing that Latham read Kelsen closely.

Latham’s German was good enough to read Kelsen’s monograph and to rely on Kelsen in the writing of Latham’s main contribution to constitutional law, history, and theory, a chapter in W.K. Hancock’s, *Survey of British Commonwealth Affairs*, volume I, entitled “The Law and the Commonwealth,” published posthumously as a monograph by Oxford University Press in 1949.²⁰ Latham acknowledged a great debt to Kelsen’s

¹⁶ In the spring of 1937, Latham wrote letters to the British government in support of Spanish Medical Aid work and then, during the summer break from university teaching (he was by then a Lecturer at King’s College, University of London), sought and acquired employment as a vehicle driver in France, running food supplies across the Spanish border to sustain colonies of refugee children who had fled the destruction of the Spanish civil war. Letter from Richard Latham to his mother, *NLA Latham Collection*, 10/26 September 1937.

¹⁷ Over the Christmas vacation of 1938, Latham travelled to Berlin on behalf of a Jewish refugee organization and made use of his serviceable German both to help Jews get out of Germany and to investigate other cases. In March 1939 he returned to the continent, this time to the Dutch-German border dealing with visa matters for the British Committee of Refugees from Czechoslovakia. He wrote to his parents about one Jewish woman who had married a Czech for his nationality and lost all her money to him before having to flee westward. She had just received news that her sister-in-law and brother had committed suicide in Vienna. Latham let her through, despite the absence of the required proof of a financial guarantor in England, and he subsequently put her up with friends in London and Oxford. Letter from Richard Latham to his father, *NLA Latham Collection*, 10/15 January 1939; Letters from Richard Latham to his mother, *NLA Latham Collection*, 10/24 March and 22 April 1939.

¹⁸ In a letter to his father, Latham described Kelsen as “perhaps the most stimulating jurist of today.” He noted that “practically nothing of his work is translated.” Letter from Richard Latham to his father, *NLA Latham Collection*, 10/18 August 1936.

¹⁹ HANS KELSEN, *REINE RECHTSLEHRE* (1934). For the English translation of the second edition, see HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1960).

²⁰ R.T.E. LATHAM, *THE LAW AND THE COMMONWEALTH* 510–610 (Greenwood Press 1970)

ideas regarding the concept of a legal system, but he felt the need to qualify his adoption of the great constitutional thinker's ideas: "But the adoption of Kelsen's calculus of formal validity and of his Kantian *a priori* derivation of it must not be taken to commit the writer to Kelsen's estimate of the actual importance of the purely rational or formal element in law."²¹ (Latham did not specify what more was required beyond that purely rational and formal, that had after all been the intellectual framework of his upbringing and so much of his legal education, but, judging by his other writings, one suspects that a sociological awareness might have been part of what he had in mind.)

When back in London, Latham was practicing law and lecturing part-time at the University of London.²² His colleagues included Sir Ivor Jennings, challenger though never entirely successor to Dicey's heavyweight crown as leading champion of United Kingdom, and therefore Empire and Commonwealth, constitutional law.²³ One of the reasons why Jennings failed to topple Dicey and the constitutional orthodoxy surrounding him was the role played by Richard Kay's subject of study, H.W.R. Wade.²⁴ My contention in this article is that while Dicey and his apologist H.W.R. Wade ruled the day through the middle part of the twentieth century, Jennings perspective, crucially underpinned by Latham's insights, had won out by the end of the century.

Latham's writing takes in parliamentary sovereignty, constituent processes, basic norms, constitutional change, revolution, uncertainty, constitutional evolution, and constitutional pluralism—all themes that resonate, I believe, with others' papers presented at the conference in honour of Richard Kay.

II. DISCOVERING R.T.E. LATHAM

I first came across the name Richard Latham when I was researching my doctoral thesis at Oxford University. I knew that I wanted to discuss the new Canadian amending formula put into place for the first time at the moment Canadians refer to as "patriation"—that is, the United Kingdom Parliament enactment of its final legislation for Canada: the *Canada Act 1982* (UK) that set out the new *Constitution Act, 1982* in its Annex, while at the same time purporting to terminate that same United Kingdom Parliament's power to legislate for Canada. I realized that I could discuss the new Canadian Constitution and its amending formula in a straightforward if rudimentary way, but I first needed to explain how to

(1937) [hereinafter LATHAM, *THE LAW AND THE COMMONWEALTH*].

²¹ *Id.* at 522–23.

²² OLIVER, *THE CONSTITUTION OF INDEPENDENCE*, *supra* note 14, at 85.

²³ *Id.* at 19, 81.

²⁴ *Id.* at 92–93.

make legal sense of the momentous constitutional event that was the 1982 patriation. Everyone, including the experts and the Supreme Court of Canada itself,²⁵ seemed to assume that patriation had been legal and effective, but no one could explain how this could be so in the face of a by-then still-dominant theory of ongoing or continuing parliamentary sovereignty.²⁶

Richard Kay's H.W.R. Wade would have referred to 1982 as "the naked fact of revolution" disguised in "elaborate legal dress."²⁷ My own supervisor, the late Dr. Geoffrey Marshall, had proposed legal solutions in the 1950s²⁸ just after Wade wrote the famous article, but Marshall was never convinced that his own view had won the day, so he was inclined to say that independence acts achieved their purpose in law and in fact, though no one could quite agree on why that was so.²⁹ That realistic account was probably accurate so far as it went, but for the purpose of my doctoral thesis, and perhaps especially in support of what I hoped would be a successful doctoral defence, I needed to find a legally persuasive answer rather than simply an accurate factual observation.

So perhaps you can imagine how I felt when I came across *The Law and the Commonwealth*³⁰ in which Latham worried in 1937 about just the sorts of legal questions that I had encountered, all the while trying (in Latham's case) to remain in touch with the facts on the ground as he observed them. This was the approach I was looking for, and in many ways it is still the approach that I prefer to this day, though I have added a number of embellishments, for better or for worse.

III. LATHAM'S IDEAS AND INFLUENCE

A. *Ultimate Rules*

We should perhaps begin with Latham on parliamentary sovereignty, as that road leads to his broader theoretical concerns. All British and Commonwealth constitutional scholars cut their teeth on the idea of parliamentary sovereignty,³¹ and Latham was no exception. What

²⁵ Reference re Objection to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793, 806 (Can.).

²⁶ OLIVER, *THE CONSTITUTION OF INDEPENDENCE*, *supra* note 14, at 156.

²⁷ H.W.R. Wade, *The Basis of Legal Sovereignty*, 1955 CAMBRIDGE L.J. 172, 191.

²⁸ See GEOFFREY MARSHALL, *PARLIAMENTARY SOVEREIGNTY AND THE COMMONWEALTH* 16–29 (1957) (discussing the power of judicial review and United States courts' power to regulate the legislative body).

²⁹ *Id.*

³⁰ LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20.

³¹ For a thorough and perceptive history of parliamentary sovereignty, see JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 9–16 (2004). For a discussion of the relevance of parliamentary sovereignty in the Commonwealth, particularly Australia,

differentiated Latham was, as I have noted with Richard Kay, the breadth and depth of his approach to the topic. He realized (and it may help readers who are not U.K. and Commonwealth constitutional experts to follow him here) that parliamentary sovereignty is effectively the ultimate rule of the United Kingdom, its Empire and, for a time, the Commonwealth as well. It was the *Grundnorm* or basic norm, to use Kelsen's vocabulary.³² It could be said that, unlike Kelsen, Latham realized that even identifying something as an "ultimate rule" (and with it the supporting "basic norm") is ambiguous. One needs to know whether the ultimate rule can be used to change itself, or whether the ultimate rule alone remains unchanged and unaltered while lesser rules evolve and change. The former take explains the usual assumptions around constituent processes and amending formulae—that they can be used simultaneously to validate new constitutional rules and to terminate the original power-granting power going forward. The latter view explains the persistence of the United Kingdom Parliament's sovereignty over so many centuries, though it has more difficulty explaining twentieth-century developments such as Commonwealth independence processes, accession to and departure from the European legal order, devolution within the United Kingdom, and the protection of human rights under a system of parliamentary sovereignty. In order to explain all of this properly we need to go back to Latham's views on parliamentary sovereignty.

B. *Latham on Parliamentary Sovereignty*³³

So what did Latham have to say about sovereignty of Parliament that was so enlightening? The first part of the Latham take is an article that Latham published prior to writing *The Law and the Commonwealth*. In "What is an Act of Parliament,"³⁴ Latham observed that one cannot know what it means to say that Parliament is sovereign unless one knows what one means by "Parliament."³⁵ Similarly, one can say that the people are sovereign, but, according to Latham, it is not possible to give legal

Canada, and New Zealand, see OLIVER, THE CONSTITUTION OF INDEPENDENCE, *supra* note 14, at 54–61. See also JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES (2010).

³² See Hans Kelsen, *Introduction to GENERAL THEORY OF LAW AND STATE*, at xxvii–xxviii (Anders Wedberg trans., 1945) (elaborating a positivist legal theory based on a basic norm or *Grundnorm*); Kelsen, *PURE THEORY OF LAW*, *supra* note 19, at 8–9 (elaborating again a positivist legal theory based on a basic norm or *Grundnorm*). For a brief account of Kelsen, the pure theory of law, and the *Grundnorm*, see Andrei Marmor, *The Pure Theory of Law*, STAN. ENCYCLOPEDIA PHIL. (Jan. 4, 2016), <https://plato.stanford.edu/archives/spr2016/entries/lawphil-theory/>.

³³ Richard Kay's views on sovereignty are discussed in Richard S. Kay, *Changing the United Kingdom Constitution: The Blind Sovereign*, in SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN, AND INTERNATIONAL PERSPECTIVES 98, 110–16 (Richard Rawlings et al. eds., 2013).

³⁴ R.T.E. Latham, *What is an Act of Parliament?*, KING'S COUNSEL 152 (1939).

³⁵ *Id.* at 152–53.

meaning to that statement until one knows how the people will communicate their sovereign will.³⁶ A crowd shouting incoherently can express a physical and audible force but not a legislative will.³⁷ Similarly, and here bringing in another theme of the Richard Kay conference, we cannot know what we mean by constitutional supremacy until we know how the constitution will be interpreted, whether according to original or evolving understandings, for instance.

Initially, Latham's insight encouraged what is still referred to as the "new view" of parliamentary sovereignty.³⁸ That view is usually expressed as an exception to the general Diceyan rule that Parliament cannot bind a future Parliament. The exception is that a Parliament can perhaps bind a future Parliament as to the "manner and form" of its legislation.³⁹ Without going into a full elaboration of the issue, I hope that readers can see that the so-called "manner and form" exception to parliamentary sovereignty is an unstable position; it is the sort of halfway house in which pragmatic British and Commonwealth constitutional lawyers sometimes prefer to live. But when push comes to shove, either the clearly expressed view of a future, ordinarily constituted Parliament prevails, or the dictates of the earlier Parliament prevail. The so-called "manner and form" exception was really sitting on a fault line between what H.L.A. Hart would later label "continuing" and "self-embracing" sovereignty.⁴⁰ Partly as a result of Latham's ground-breaking insights, Hart, unlike so many before him who were very much in the thrall of Dicey, made clear that both continuing sovereignty—the idea that Parliament may do everything except limit itself—and self-embracing sovereignty—the idea that Parliament may do everything including limit itself—are equally viable.⁴¹ As Latham put it, "the mere assertion of the omnipotence of a sovereign leaves completely uncertain the fundamental question whether or not he can bind himself."⁴²

³⁶ *Id.*

³⁷ *Id.* at 153.

³⁸ See OLIVER, THE CONSTITUTION OF INDEPENDENCE, *supra* note 14, at 76–77 (discussing new thinking about parliamentary sovereignty). See also Geoffrey Marshall, *The Constitution: Its Theory and Interpretation*, in THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY 29, 46 (Vernon Bogdanor ed., 2003) (discussing the new and revised takes on parliamentary sovereignty).

³⁹ OLIVER, THE CONSTITUTION OF INDEPENDENCE, *supra* note 14, at 77; GEOFFREY MARSHALL, CONSTITUTIONAL THEORY 44 (H.L.A. Hart ed., 1971).

⁴⁰ H.L.A. HART, THE CONCEPT OF LAW 149 (2d ed. 1994) [hereinafter HART, THE CONCEPT OF LAW].

⁴¹ *Id.* at 149–50. See also H.L.A. HART, *Self-Referring Laws*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 170, 177 (1983) [hereinafter HART, *Self-Referring Laws*] (categorizing both self-embracing and continuing sovereignty as "intelligible . . . constitutional arrangements").

⁴² LATHAM, THE LAW AND THE COMMONWEALTH, *supra* note 20, at 523. This quotation from Latham was referred to, even as early as the 1950s, as an "almost classical" statement of a more modern (both "new" and "revised") view of sovereignty. For references to this quotation in similar terms, see, for example, Wade, *supra* note 3, at 187 n.45, E.C.S. Wade, *Introduction to A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, at xl–xli, xli n.1 (10th ed. 1959),

This insight moved beyond the “new view” and towards what I and others have referred to as the “revised view” of parliamentary sovereignty.⁴³

It was certainly the case that with Dicey’s help, “continuing” sovereignty was in a dominant position, a holder of what I referred to earlier as the heavyweight crown of United Kingdom and Commonwealth constitutional law.⁴⁴ However, Latham pointed out, apparently for the first time, that Dicey “was unable to cite a single decided case as authority for his classic exposition of the sovereignty of Parliament.”⁴⁵ Continuing sovereignty clearly suited Dicey’s Unionist politics; but why was it to be preferred in the absence of authority? As the twentieth century progressed, Commonwealth scholars would increasingly point to Dicey’s later-edition references to the possibility of terminating sovereignty,⁴⁶ but nowhere in Dicey’s theory of sovereignty could one find how this squared with his background assumption of absolute and continuing sovereignty. In Dicey’s theoretical construct, termination of sovereignty seemed vulnerable (logically, if not always realistically) to reassertion of the continuing authority of the sovereignty of the Westminster Parliament.⁴⁷

Unlike Dicey, Latham sought after explanation rather than dogmatic assertion. Briefly, Latham anticipated two jurisprudential currents—Hartian and Dworkinian—that would later be expanded upon by leading legal thinkers of the twentieth century.

We have already seen that Latham observed that, though the sovereignty of Parliament could be illustrated by various examples, the continuing nature of that sovereignty could not be supported by authority. This meant that one of Dicey’s key dogmas—that no Parliament could bind a future Parliament—was in fact a question or an uncertainty. Like all hypothetical questions of law, it would be answered in the fulness of time, when the matter came fully and properly before a court. In the meantime, however, as H.L.A. Hart would later observe, it was a formalist error for lawyers to assume answers to hard, uncertain questions, in advance of their resolution.⁴⁸ The assertion of continuing parliamentary sovereignty was arguably one example of this sort of formalist error.

and Hamish R. Gray, *The Sovereignty of Parliament Today*, 10 U. TORONTO L.J. 54, 63 (1953) (“[A] passage which has become almost classical.”).

⁴³ OLIVER, *THE CONSTITUTION OF INDEPENDENCE*, *supra* note 14, at 85. *See also* Marshall, *supra* note 38, at 45–47 (identifying new and revised views on sovereignty).

⁴⁴ *See supra* text accompanying note 23.

⁴⁵ LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20, at 525 (footnote omitted).

⁴⁶ DICEY, *supra* note 42, at 68 n.1.

⁴⁷ OLIVER, *THE CONSTITUTION OF INDEPENDENCE*, *supra* note 14, at 289 n.15.

⁴⁸ HART, *THE CONCEPT OF LAW*, *supra* note 40, at 153.

Latham's attention to the facts on the ground caused him to notice not just the uncertainty in the law as a general matter,⁴⁹ but also the fact that courts in many parts of the centrifugally-evolving Commonwealth were coming up with different answers regarding the nature of sovereignty than those that might be thought to be preferred by their U.K. counterparts. Whatever one might think of their quality as legal decision makers in formal terms, the Irish and South African courts in the 1930s were reaching different interpretations regarding the Statute of Westminster, 1931,⁵⁰ for example, than those preferred by the U.K. courts and Judicial Committee of the Privy Council; and the former interpretations were largely acceptable to the local Irish and South African communities.⁵¹ Latham was anticipating Hart's writing on uncertainty in the rule of recognition,⁵² the pathology of legal systems,⁵³ and the real possibility of conflicting perspectives emanating from different legal systems regarding the same legal act. More will be said about this in a moment.

Latham went further. Anticipating the writings of Ronald Dworkin, Latham saw the importance not just of background assumptions regarding sovereignty, but also the significance of, in Latham's words, "the basic beliefs of the judges themselves."⁵⁴ This observation took the jurisprudential approach beyond indeterminacy and shifting assumptions regarding the ultimate rule over time, and into the concept of adjudication where Dworkin was later to make such an impact.

C. *The Grundnorm, or Basic Norm, and the Facts on the Ground*

There are some wonderful phrases in *The Law and the Commonwealth* that capture what I have said regarding parliamentary sovereignty, its uncertainty and its evolution, and that translate all that back into the language of the *Grundnorm* or basic norm, thereby either improving or disrespecting Kelsen, depending on one's view.

Regarding Ireland, for instance, Latham, the sociologically-aware constitutional lawyer, quotes Dublin graffiti—"Damn your concessions, England"⁵⁵—and comments that "the *Grundnorm* has descended into the

⁴⁹ Latham noted that "in such frontier regions," figuratively speaking, further from "the centre of established doctrine . . . to require self-sufficiency of legal scholarship is to ensure not its chastity but its sterility." LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20, at 521.

⁵⁰ Statute of Westminster 1931, 22 Geo. 5. c. 4 (UK).

⁵¹ R.T.E. LATHAM, *THE LAW AND THE COMMONWEALTH* 527–40 (1949).

⁵² HART, *THE CONCEPT OF LAW*, *supra* note 40, at 147–48.

⁵³ *Id.* at 117–20.

⁵⁴ LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20, at 525. *See also* David Dyzenhaus, *The Demise of Legal Positivism?*, 119 HARV. L. REV. F. 112, 120 (2005) (citing Latham in discussing how judges use moral judgments in their rulings).

⁵⁵ LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20, at 534.

market-place.”⁵⁶ What a wonderfully evocative and provocative phrase!

With regard to the points made earlier about different courts in different jurisdictions taking different views over time regarding, for example, the sovereignty question, Latham had the following to say: “It may . . . be said, and not in any cynical way, that the *Grundnorm* of a case-law system is simply the sum of those principles which command the ultimate allegiance of the courts.”⁵⁷ Here we are very close to what Hart later called the rule of recognition. Latham continues: “This loose definition opens up possibilities of indeterminacy of *Grundnorm* and of shifting of *Grundnorm* which will be illustrated in the next few pages.”⁵⁸ These comments on the indeterminacy and shifting of the *Grundnorm* were wholly original. They translate into Hartian terms in the form of “uncertainty in the rule of recognition.”⁵⁹ How the ultimate rule shifts will be the subject of the final section of this Article.

After illustrating the shifting *Grundnorm*, Latham arrives at a conclusion that sounds much like H.W.R. Wade, as Richard Kay and others will recognize, I think. Latham says: “A change of *Grundnorm* is, by definition, an event outside and prior to the law. It constitutes a technical revolution, for the *Grundnorm* embodies the identity of the State.”⁶⁰ And foreshadowing Wade’s most famous phrase, quoted earlier,⁶¹ Latham counselled that “[t]here is much to be said for stealth and subtlety as methods of revolution, if revolution there must be.”⁶² Not only is this reminiscent of Wade, but, as noted a moment ago, it is also reminiscent of Hart’s discussion of the pathology of legal systems. Hart there employs Latham’s reminder that in Commonwealth devolution, for example, it is possible for United Kingdom courts to take one view of an Independence Act emanating from the Westminster Parliament and for the courts of a newly independent country to take a different view.⁶³ The rule of recognition is ultimately a question of the ultimate allegiance of the courts, as Hart and later Raz would say.⁶⁴

⁵⁶ *Id.* at 534–35.

⁵⁷ *Id.* at 525.

⁵⁸ *Id.*

⁵⁹ Michael Bayles, *Hart vs. Dworkin*, 10 *LAW & PHIL.* 349, 355 (1991).

⁶⁰ LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20, at 540.

⁶¹ *See* Wade, *supra* note 27 and text accompanying note 27 (referencing H.W.R. Wade’s infamous quote).

⁶² LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20, at 534 (footnote omitted).

⁶³ HART, *THE CONCEPT OF LAW*, *supra* note 40, at 120–22.

⁶⁴ *See* JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 192 (2d ed. 1980) (“[T]he identity and actions of primary law-applying organs are essential in establishing the membership of a legal system.”).

IV. BUILDING ON LATHAM'S UNDERSTANDING OF ULTIMATE RULES

In this final section, I would like to explore how well the Latham of the 1930s anticipated the constitutional conundrums and solutions of the rest of the twentieth century. Some of the tools that Latham provided needed to be repurposed, but most of what was required was already in place, which is remarkable given that H.W.R. Wade, Hart, Ross, Finnis, Raz, Dworkin, and others had not yet provided any assistance in the task.

Just by way of recap, here are some of the tools that Latham set out:

- Dicey's version of continuing sovereignty is in fact asserted rather than grounded in judicial authority.⁶⁵ (Two cases decided in the 1930s – *Vauxall Estates* and *Ellen Street*—would come to be viewed as authority for continuing sovereignty, although they represent at best very weak *obiter dicta*.)⁶⁶
- Stating that Parliament is sovereign says nothing about whether that Parliament can or cannot limit itself.⁶⁷ (This is what H.L.A. Hart later referred to as the equally credible “self-embracing” and “continuing” sovereignty.)⁶⁸
- Despite the undoubted importance of an ultimate rule or *Grundnorm* such as that regarding Parliament's sovereignty, there can be uncertainty in the rule or *Grundnorm* (as Hart discussed in Chapter Six under the heading “Uncertainty in the Rule of Recognition”).⁶⁹
- While it is natural for constitutional scholars and ardent observers of the constitution to speculate as to how the uncertainties just referred to should be resolved, such questions are not resolved until they are presented before the courts for authoritative resolution.⁷⁰ (Hart referred to

⁶⁵ LATHAM, *supra* note 20, at 525.

⁶⁶ On this point, see OLIVER, *THE CONSTITUTION OF INDEPENDENCE*, *supra* note 14, at 70–72 (addressing the supposed rule of parliamentary sovereignty that the sovereign Westminster Parliament could never effectively bind its successors).

⁶⁷ Michael Gordon, *The UK's Fundamental Constitutional Principle: Why the UK Parliament Is Still Sovereign and Why It Still Matters*, 26 KING'S L.J. 229, 232 (2015) (citing R.T.E. Latham, *What is an Act of Parliament?*, KING'S COUNSEL 152 (1939)).

⁶⁸ See HART, *THE CONCEPT OF LAW*, *supra* note 40, at 149.

⁶⁹ See *id.* at 147–48 (describing uncertainty as it relates to the rule of recognition).

⁷⁰ See LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20, at 521 (“A simple pragmatic view of the nature of law is assumed throughout: that that only is law which is declared and enforced by the courts, or will be declared and applied by the courts if occasion arises; where it is not applied, it is not law.”).

the tendency to provide clear answers in place of uncertainties as a common “‘formalist’ error.”⁷¹

- What Hart was to say regarding uncertainty in the rule of recognition, Latham had already said with respect to its functional Kelsenian equivalent, the *Grundnorm*: “Clearly in such a system [the English system of case law] there is no certainty that the most fundamental principle, the *Grundnorm*, will be reached and declared by the courts. It may be that no case will arise which necessitates resort to the ultimate rule. Yet at any time such a case may arise”⁷²
- If one were to ask, then, according to which factors the *Grundnorm* shifted or became more determinate, Latham’s apparent answer would be what we would later recognize as Dworkinian on the one hand (the importance of the basic beliefs of judges charged with interpreting the law) and context-based on the other.⁷³ Latham’s context-based considerations were both legal and non-legal. In terms of legal context, Latham noted (as Hart would later, regarding the pathology of a legal system) that local courts sometimes adopted different legal takes than UK courts regarding the same legal event: Enactment of independence legislation for instance.⁷⁴ Whatever one’s view of the quality of the local courts’ reasoning, it was hard to deny its legal effect, especially where the legal system in question was now independent of the former metropole. In terms of factual context, Latham acknowledged the force of revolutionary realities, as Kelsen himself had done.

To my mind, this is already a highly impressive list of insights. Despite their “brilliance,” to use the noun (or the adjective “brilliant”) most favoured by later readers of Latham, I cannot help but feel that, with a few nudges provided by later theoretical inquiry, Latham’s original set of assumptions could have been taken creatively and helpfully further. What do I mean by that?

⁷¹ HART, THE CONCEPT OF LAW, *supra* note 40, at 153.

⁷² LATHAM, THE LAW AND THE COMMONWEALTH, *supra* note 20, at 524.

⁷³ *Id.* at 525. For an account of a context-sensitive ‘sustainable jurisprudence,’ see Peter C. Oliver, “A Constitution Similar in Principle to That of the United Kingdom”: The Preamble, Constitutional Principles, and a Sustainable Jurisprudence, 65 MCGILL L.J. 207, 249–63 (2019).

⁷⁴ HART, THE CONCEPT OF LAW, *supra* note 40, at 117–23.

A. *Sovereignty, Independence, and Constitutional Amendment*

The central subject matter of my doctoral work—sovereignty, independence, and constitutional amendment—provides concrete examples. And it is not too difficult to combine each of these questions into one rich, familiar scenario.⁷⁵

After 1931, a country like Canada opted to retain a role for the United Kingdom Parliament where amendment of the *Constitution Acts, 1867 to 1931* was concerned.⁷⁶ For all intents and purposes, then, the Westminster Parliament was the general amending formula for Canada.⁷⁷ By making use of some of the Latham insights listed above, it was possible to assert that while the nature of Westminster sovereignty was, in the 1930s and later, either assumed by formalist error to be uncontrovertibly “continuing” in nature, or, more properly, “uncertain” and “evolving,” by 1982 it was clearly assumed, at least in Canada, that the Westminster Parliament, the general amending formula for Canada at that moment, could do what all amending formulas are assumed to be able to do: That is, to amend itself, to exercise a “self-embracing” sovereignty. And if British courts were ever to balk at this view after 1982, that would be of no concern so long as the Canadian Supreme Court took the view, as it soon did, that the independence process was complete and irreversible.⁷⁸

A similar story involving the same political and formal legal elements could be told in *Grundnorm* language, here again using Latham to a great extent, but also including insights that were not available to him. Regarding the *Grundnorm*, the Scandinavian realist Alf Ross had pointed out in the 1960s that amending an amending formula poses problems for Kelsen’s theory. According to Ross,⁷⁹ if the original amending formula of a first historical constitution were used to amend itself, then, if as is almost

⁷⁵ The balance of this Article focuses to a great extent on the recent constitutional history of Canada. Richard Kay has written on Canadian constitutional issues since at least 1982. A partial list of these publications would include: Richard Kay, *Courts as Constitution-Makers in Canada and the United States*, 4 SUP. CT. L. REV. 23 (1982); Richard Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111 (1984); Richard Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361 (1992); Richard Kay, Book Review, 23 AM. REV. CAN. STUD. 624 (1993) (reviewing CHRISTOPHER P. MANFREDI, *JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM* (1993)); Richard Kay, *The Secession Reference and the Limits of Law*, 10 OTAGO L. REV. 327 (2003); Richard Kay, *Canada’s Constitutional Cul-de-Sac*, 35 AM. REV. CAN. STUD. 705 (2005) (reviewing PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* (3d ed. 2004)).

⁷⁶ Kay, *The Creation of Constitutions in Canada and the United States*, *supra* note 75, at 112–13.

⁷⁷ *Id.* at 114, 122.

⁷⁸ Reference re Objection to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793, 806 (Can.). The Supreme Court of Canada stated (unanimously): “The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects.” *Id.* (emphasis added).

⁷⁹ ALF ROSS, *ON LAW AND JUSTICE* 81 (Univ. of Cal. Press 1974) (1958).

always assumed, the new amending formula is now the applicable amending formula, the legal system cannot be defined according to Kelsen's usual terms, i.e. unbroken derivation from the first original constitution and the *Grundnorm* behind it.⁸⁰ Hart issued a helpful reply pointing out, in essence, that Ross had overlooked the vital temporal element.⁸¹ Listed as logical propositions on a page, Ross's first statement of the problem was right, but given that law is enacted through time rather than set out as a one-time set of logical statements, Ross's problem could be overcome. Ross conceded Hart's point,⁸² but at the price of adding some awkwardness to his theory, and, by necessary implication, Kelsen's. In order to explain constitutional amendment, Ross believed that it was necessary to read into the *Grundnorm* not just the usual simple injunction—"obey the first historical Constitution"—but also the important qualifier "unless it is amended, in which case obey the amendment."⁸³

What both the self-embracing interpretation of Westminster sovereignty and the Ross reformulation point to is the fact that the ultimate rule of a legal system can change by legal means, and not just by the sort of revolution noted by H.W.R. Wade. If self-embracing sovereignty is assumed, and if Hart and Ross's temporal point is borne in mind, then, just as an amendment procedure could, the Westminster Parliament could use its sovereign powers simultaneously to enact a new Constitution for a newly independent country, including a new amendment procedure, and to terminate future Westminster Parliament's power to legislate for that newly independent country. This was "self-embracing sovereignty" in Hart's terms.

We also see here that in a world of self-embracing constitutional change there are effectively two different senses in which the word "legal system" can be used, both of which may be relevant in their own ways and on their own terms. The first is the logical-legal sense of legal system that Ross was initially most concerned with. If we ask why a law is valid in Ottawa in 2021, and if we are committed to following what Kelsen calls a chain of validity, we will find ourselves returning to the Westminster Parliament, which enacted Canada's two key constitutional documents:⁸⁴ the *Constitution Act, 1867*⁸⁵ and the *Constitution Act, 1982*.⁸⁶ It is this sort

⁸⁰ HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 111 (Anders Wedberg trans., 1949) ("All norms whose validity may be traced back to one and the same basic norm form a system of norms, or an order.").

⁸¹ HART, *Self-Referring Laws*, *supra* note 41, at 170, 177.

⁸² Alf Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 *MIND* 1, 21 (1969).

⁸³ For further discussion, see OLIVER, *THE CONSTITUTION OF INDEPENDENCE*, *supra* note 14, at 295–97.

⁸⁴ Kay, *The Creation of Constitutions in Canada and the United States*, *supra* note 75, at 112, 113 & 113 n.9.

⁸⁵ *Constitution Act, 1867*, 30 & 31 Vict. c. 3 (UK).

of legal-logical analysis that has caused newly independent nations to fear for the authenticity of their independence.⁸⁷ They seem inevitably linked, in a legal-logical sense, to the United Kingdom Parliament, and yet that is not what they intended or desired.

However, once one accepts the possibility and coherence of self-embracing legal change, it is possible to see that the first sense of legal system is only needed when one wants to provide a full, rigorous explanation of a country's tradition of respect for legal continuity and the rule of law. The second sense of legal system refers only to those rules that are active and available in the legal system at the present moment. Because of the self-embracing, fully-self-limiting process in 1982 by which the old amendment procedure was entirely replaced by a new amendment procedure, the Westminster is in no sense part of the legal system in the vital second sense.⁸⁸ Because of the self-embracing logic, this is not a revolutionary act; it is a fully legal one.

In Latham's time through until the early 1960s, when only one version of sovereignty, *Grundnorm* and legal system were known to most constitutional observers, ultimate rules were either too adhesive or not adhesive enough. Continuing sovereignty was too adhesive in that it made it hard to achieve true independence. Wade's "disguised revolution" and the positing of new *Grundnormen* provided an explanation for independence but at the cost of constitutional continuity. For that reason, they were not adhesive enough.

In *The Law and the Commonwealth*, Latham was intent on contemplating whether the post-Statute of Westminster Commonwealth could be a new legal system.⁸⁹ Had things worked out differently, the Commonwealth could have evolved into an advanced political and economic legal order along the lines of the European Union. Had that been the case, it is not hard to imagine that that system might have seen fit to confirm the continuing sovereignty of the Westminster Parliament, to ensure the power of Westminster to act as a convenient central legislator, and to ensure that "Member States" of that counter-factually imagined Commonwealth Union not be able to leave the Union easily.⁹⁰ The facts on the ground that Latham was so astute to analyse would have made their

⁸⁶ Constitution Act, 1982, *being* Schedule B to the Canada Act, 1928, c. 11 (UK).

⁸⁷ For further discussion of this point, see Peter Oliver, *Constitutions, Autochthonous*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (R. Wolfrum, F. Lachenmann & R. Grote eds., 2017).

⁸⁸ For more on this observation regarding these two different senses of the term "legal system," see OLIVER, *THE CONSTITUTION OF INDEPENDENCE*, *supra* note 14, at 342–44.

⁸⁹ LATHAM, *THE LAW AND THE COMMONWEALTH*, *supra* note 20, at 513, 609–10.

⁹⁰ I explore the counter-factual in greater detail in Peter C. Oliver, *Change in the Ultimate Rules of a Legal System: Uncertainty, Hard Cases, Commonwealth Precedents and the Importance of Context*, 26 KING'S L.J. 367 (2015).

mark on the evolving rule of recognition or *Grundnorm*, causing it to resolve into a confirmed “continuing” form. Latham was both the first to bring the *Grundnorm* to the British and Commonwealth world and the first to explore the evolution of the ultimate rule of a legal system as an essentially socio-legal phenomenon.

As it turned out, the Commonwealth Union never came to be, the United Kingdom moved (for a time) ever-closer to Europe, and the countries of the former Empire achieved their independence one after the other. The local understandings of the ultimate rule had evolved not in the direction of continuing sovereignty but in the direction of its self-embracing alternative. By the end of the twentieth century, in part as a result of the profound work begun by Latham, countries of the former British Empire had ceased to worry about the problem of what K.C. Wheare called “autochthony,”⁹¹ because it had become clear that independent countries could, consistent with the logic of self-embracing change, simultaneously respect constitutional continuity and the rule of law, and achieve full independence.

CONCLUSION

This Article was presented and is written in honour of Richard Kay and in great admiration for the body of work that he has so impressively produced over his career. As I indicated at the outset, that body of work displays great breadth and depth and it travels through time to make sure that we do not forget the ideas and legacy of constitutional writers who came before us.

It was in that same spirit that I have tried to remember the life and work of R.T.E. Latham. I have always believed that his contributions to constitutional theory are worth remembering and reinvigorating. But in 2019 when these remarks were presented, I was also reminded that Richard Latham’s life and example are an ongoing inspiration, given that he did his best to fight fascism and ignorance, help refugees in distress, ultimately giving his life in doing so.

I am honoured and delighted to have been invited to participate in this wonderful conference. Many thanks to the organizers and to all the participants. And special thanks and congratulations to Richard Kay himself.

⁹¹ See K.C. WHEARE, *THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH* 89 (Greenwood Press 1982) (1960) (discussing the constitutional principle of autochthony asserted by some members of the Commonwealth); Oliver, *supra* note 87.