

CONTENTS

	Detailed table of contents vii Acknowledgments xi
1	Introduction 1
2	The myth of the common law constitution 14
3	Legislative sovereignty and the rule of law 57
4	Homogenising constitutions 79
5	Abdicating and limiting Parliament's sovereignty 106
6	Trethowan's case 141
7	Requirements as to procedure or form for legislating 174
8	Judicial review, legislative override, and democracy 202
9	Parliamentary sovereignty and statutory interpretation 225
10	Challenging parliamentary sovereignty: Past, present and future 267
	Index 319



DETAILED TABLE OF CONTENTS

1	Intro	Introduction 1		
2	The m	nyth of the common law constitution 14		
	I	Introduction 14		
	II	The historical record 18		
	III	Philosophical analysis 47		
3	Legis	lative sovereignty and the rule of law 57		
	I	Introduction 57		
	II	Legal principle or political ideal? 58		
	III	The content of the rule of law 61		
	IV	'Thin' conceptions of the rule of law 63		
	V	'Thicker' conceptions of the rule of law 66		
	VI	Conclusion 78		
4	Home	ogenising constitutions 79		
	I	Introduction 79		
	II	The rule of law in liberal democracies 82		
	III	Institutional authority 84		
	IV	The concept of law 87		
	V	The rule of law as law 95		
	VI	The interpretation of written constitutions 101		
	VIII	Conclusions 104		



viii			CONTENTS
	5	Abdic	ating and limiting Parliament's sovereignty 106
		I	Introduction 106
		II	Some clarifications 109
		III	Competing theories 113 A Limitations imposed by the judiciary: common law constitutionalism 113 B Limitations imposed by Parliament 114 (1) The procedurally self-embracing theory 114 (2) The full self-embracing theory 115 (3) The constituent power theory 116 (4) The abdication theory 118 C Limitations imposed by a change in official consensus 122 (1) The hard cases theory 122 (2) The legal revolution theory 123 (3) The consensual change theory 125
		IV	Oliver's theory scrutinised 126
		V	Conclusion 137
	6	Tretho	owan's case 141
		I	Introduction 141
		II	Background 141
		III	Parliamentary privilege 150
		IV	The validity and bindingness of s. 7A 151 A Reconstitution 156 B Manner and form 160 C Political principle and legal logic 166
	_	V .	Aftermath and consequences 169
	7	_	rements as to procedure or form for legislating 174
		Ι	Introduction 174
		II	Alternative and restrictive requirements: Jackson's case 176
		III	Policy considerations 179
		IV	Distinguishing requirements as to procedure or form



		CONTENTS ix
		from interpretive presumptions 182
	V	Beyond the stereotypes: the variety of requirements as to procedure or form 186
	VI	Validity, enforceability and bindingness 187
	VII	Sources and limits of the validity and enforceability of requirements as to procedure and form 189
	VIII	Is the 'manner and form' provision in s. 6 of the Australia Act redundant? 197
	IX	Reconstitution 198
	X	Conclusion 199
8	Judici	ial review, legislative override, and democracy 202
	I	The 'notwithstanding clause' 202
	II	The rights-based objection to constitutional rights 205
	III	Goal-based objections to constitutional rights 211
	IV	The desuetude of s. 33 217
	V	Conclusion 222
9	Parliamentary sovereignty and statutory interpretation 225	
	I	Introduction 225
	II	The indispensability of legislative intentions 232 A Clarifying interpretation 236 (1) Ambiguity and ellipsis 236 (2) Presuppositions 238 B Creative interpretation 243
	III	Evidence of legislative intention 247
	IV	Alternatives to intentionalism 251 A Judicial override 251 B Constructivism 254 C Criticism of constructivism 259
	V	Conclusion 263



X

		CONTENTS			
10	Challenging parliamentary sovereignty: Past, present and future 267				
	I	Introduction 267			
	II	The past 268 A Doctor Bonham's case and the common law tradition 268 B The Parliament of Scotland before the Union 270 C The philosophical origins of parliamentary sovereignty 272 D The 'collaborative model' 275			
	III	The present and future 280 A Judicial review of administrative action 281 B The Anisminic case 285 C Britain and the European Community 287 (1) Implied repeal and different subject-matters 290 (2) Statutory interpretation, legislative intention, and legislative mistakes 293			
		D Judicial review under the Human Rights Act 299			
		E The common law protection of rights 304			
		F Constitutional statutes 312			

314

G Constitutional principles