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ST. GERMAN ON REASON AND PARLIAMENTARY SOVEREIGNTY

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I. INTRODUCTION

IN the late-nineteenth century, Dicey defined with clarity the modern doctrine of parliamentary sovereignty, identifying both its positive aspect, that Parliament is legally empowered to make any law, and its negative aspect, that no court, institution or person is legally empowered to set Acts of Parliament aside.[1] The historical genesis of this modern understanding of parliamentary sovereignty was, and continues to be, controversial.[2] In his recent study of parliamentary sovereignty, Jeffrey Goldsworthy suggests that the sixteenth-century lawyer Christopher St. German, author of *Doctor and Student* as well as a series of publications relating to the Henrician Reformation, was likely "the first English writer to propound a comprehensive theory of parliamentary sovereignty"[3]—a controversial claim given St. German's insistence that any "statute" made against the law of nature or reason is "voyd".[4] However, Goldsworthy appears to be supported by an impressive list of historians.[5]

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[1] A.V. Dicey, *Introduction To The Study Of The Law Of The Constitution*, 7th edn. (London 1908), pp. 37–38, 66–67.

[2] See for example C.H. McIlwain, *The High Court of Parliament And Its Supremacy* (New Haven 1910); Sir Ivor Jennings, *The Law and the Constitution* 5th edn. (London 1959), pp. 318–329; T.R.S. Allan, *Law, Liberty and Justice* (Oxford 1993), p. 269; Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford 1998).

[3] Goldsworthy *ibid.*, at p. 72.

[4] See note 45 below.

[5] Historians say that St. German advocated the "sovereignty of the king-in-parliament" and "statutory omnicompetence" (John Guy, "Thomas More and Christopher St. German" in Alistair Fox and John Guy (eds.), *Reassessing the Henrician Age: Humanism, Politics and Reform, 1500–1550* (Oxford 1986), pp. 101–102 and *Christopher St. German on Chancery and Statute* (London: Selden Society, Supp. Series, vol. VI, 1985), p. 32), that he denied that a "gap" could exist between "parliamentary enactment and higher law" (Donald W. Hanson, *From Kingdom to Commonwealth* (Cambridge, Mass. 1970), pp. 261–262), that he attributed to Parliament "a quite unlimited authority" (J.W. Allen, *A History of Political Thought in the Sixteenth Century* (London 1957), p. 167), that he was a "champion of the sovereignty of parliament" and the "doctrine of parliamentary infallibility" (Franklin Le Van Baumer, *The Early Tudor Theory of Kingship* (New Haven 1940), pp. 59, 76), that the "theory of Parliamentary power owes much" to his work (R.J. Schoeck, "Strategies of Rhetoric in St. German's Doctor and Student" in Richard Eales and David Sullivan (eds.), *The Political Context of Law: Proceedings of the Seventh British Legal History Conference Canterbury 1985* (London 1987), at p. 86), and that he was among those scholars who sought to "remove

In this article I argue that the characterisation of St. German as an early proponent of parliamentary sovereignty is erroneous if "parliamentary sovereignty" is understood in Dicey's terms, and very misleading if the expression is being used in some other way. St. German was, in Yale's words, both "a legal scholar and controversialist".[6] As a controversialist, St. German may well have contributed to the emergence of parliamentary sovereignty as a political reality. But within the *legal* discourse on legislative authority as it emerged in the seventeenth century, St. German's work was read as supporting a legally-limited Parliament, and this reading reflected his own theoretical intentions. Historians do allude to this aspect of St. German's writing,[7] but the clarity of St. German's theoretical position is obscured by their emphasis of his political role as "controversialist". This problem is compounded by those legal historians who adopt what Dworkin would call a "semantic" theory of law[8] that establishes a positivist definition of law as the interpretative lens through which historical texts are read. This article seeks to refocus attention upon St. German the "legal scholar" by examining his legal theory both on its own terms and as it was interpreted by the legal community of the seventeenth and early-eighteenth centuries.

St. German (1460?–1540/1) was a member of Middle Temple and practised in the Courts of Star Chamber and Requests.[9] Between 1523 and 1530 he produced two dialogues between a Doctor of Divinity and a Student of English law that explored the relationship between English law and conscience.[10] A third dialogue entitled *New Additions* followed in 1531[11], but only the first two dialogues were re-published together and came to be known as *Doctor and Student*. St. German wrote a defence of *Doctor and Student* entitled *A Litle Treatise concerning writs of Subpoena*, but it

positive law from the control of any higher law and its interpreters" (Glenn Burgess, *The Politics of the Ancient Constitution* (Basingstoke 1992), p. 42, in general pp. 30–43).

[6] D.E.C. Yale, "St. German's *Little Treatise Concerning Writs of Subpoena*" (1975) 10 Irish Jurist (NS) 324, 333.

[7] *E.g.*, S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge 1936), pp. 203–214; Franklin Le Van Baumer, "Christopher St. German: The Political Philosophy of a Tudor Lawyer" (1937) 42 American Hist. Rev. 631, 643, 651; Baumer, *Early Tudor Theory* note 5 above at pp. 79, 162; Guy, *St. German on Chancery* note 5 above at p. 42.

[8] R. Dworkin, *Law's Empire* (Cambridge, Mass. 1986), pp. 31–44.

[9] Guy, *St. German on Chancery* note 5 above at pp. 3–15; Guy, "Thomas More and Christopher St. German" note 5 above at p. 99.

[10] For a summary of St. German's works, see Guy, *St. German on Chancery* above note 5 at pp. 16–18. References to *Doctor and Student*, below, are to T.F.T. Plucknett and J.L. Barton (eds.), *St. German's Doctor and Student* (London: Selden Society, vol. 91, 1974).

[11] *Here after foloweth a lyttell treatise called the newe addicions* (1531). References hereinafter are to the text of *New Additions* in Plucknett and Barton, *ibid.* A fourth Doctor-Student dialogue on religious matters was written in 1537 but not published: Guy, *St. German on Chancery* note 5 above at pp. 48–50.

was not published until 1787.[12] Although *New Additions* continued the Doctor-Student dialogue, it marked a shift in St. German's writing to a polemical consideration of the constitutional crisis between church and state. *New Additions*, together with his "Parliamentary Draft" of 1531, *A Treatise concerning the Division between Spirituality and Temporality, Salem and Bizance*, and *The Additions of Salem and Bizance*, represented "propaganda" supporting Henry VIII's struggle with Rome, much of it responding to pamphlets by Sir Thomas More.[13] After the Act of Supremacy, 1534[14] confirmed England's split with Rome, St. German's writing departed from the government position somewhat: in *Treatise on the power of the Clergy* and *Answer to a Letter* he defended the Reformation but argued that church affairs fell ultimately to King-in-Parliament rather than King alone.[15]

Lawyers celebrate St. German as the legal scholar whose *Doctor and Student* gave modern English equity its intellectual foundations, while historians of Tudor England tend to focus upon St. German the controversialist with emphasis upon his debate with More relating to the Reformation.[16] In the following analysis I will argue that while St. German's legal theory is best revealed in his work as legal scholar, *both* aspects of his work reflect a single argument about reason and legislative will. I will examine *Doctor and Student* in Part II and St. German's later writings in Part III, and then in Part IV I will consider the significance of St. German's work for judges, lawyers and legal textbook writers of the seventeenth and early-eighteenth centuries. Historical arguments concerning the doctrine of parliamentary sovereignty have a legitimate place within the normative arguments made today about the doctrine's legal,

[12] *A Litle Treatise concerning writs of Subpoena* [c. 1532] written in response to *Replication of a Serjaunte at the Lawes of England, to certaine Pointes alleaged by a Student of the said Lawes of England, in a Dialogue in Englishe between a Doctor of Divinitye and the said Student*, in F. Hargrave (ed.), *A Collection of Tracts Relative to the Law of England, From Manuscripts* (1787), pp. 323–355. See Yale note 6 above; R.J. Schoeck, "The Date of the Replication of a Serjeant-At-Law" (1960) 76 L.Q.R. 500; Guy, *St. German on Chancery* note 5 above at pp. 56–62.

[13] "Parliamentary Draft of 1531" printed in Guy, *St. German on Chancery* note 5 above at pp. 127–135; *A Treatise concernynge the diuision betwene the spiritualitie and temporaltie* ([1532]), printed in J.B. Trapp (ed.), *Complete Works of St. Thomas More*, IX, (New Haven 1979), app. A, pp. 173–212; *Salem and Bizance* (1533), printed in J.A. Guy, R. Keen, C.H. Miller, & R. McGugan (eds.), *Complete Works of St. Thomas More*, X, (New Haven 1987), app. B, pp. 325–392; *The Addicions of Salem and Byzance* (1534; facsimile, New York: 1973). On the propagandist nature of this work and the St. German-More debate see Guy, "Thomas More and Christopher St. German" note 5 above.

[14] 26 Hen VIII c. 1.

[15] *A treatyse concernige the power of the clergye and the lawes of the Realme* (London: Thomas Godfray, [1535]); *An Answere to a letter* ([1535]; facsimile, New York 1973). See Guy, *St. German on Chancery* note 5 above at pp. 38–39, 54–55.

[16] Cf. W.S. Holdsworth, *A History of English Law* (London 1924), vol. V, pp. 268–269 (St. German's work is the "basis and starting point" of English equity) with Allen note 5 above at p. 165, n. 1 (St. German "is now chiefly known through his controversy with Sir Thomas More").

political and philosophical foundations. The purpose of this analysis is not to engage in this normative debate, but rather to provide a restatement of St. German's position on reason and legislative will so that St. German's legacy for the modern legal discourse about the nature of parliamentary sovereignty can be properly assessed.

II. St. German the Legal Scholar: Doctor and Student

Consistent with the legal-humanist trend of the sixteenth century, St. German ordered his account of law upon a set of clear conceptual premises.[17] In the prologue to the first dialogue of *Doctor and Student*, St. German identifies two propositions concerning the relationship between law and conscience, and hints at a third. First, he states that he intends to demonstrate the grounds of the law of England and how conscience ought "in many cases" to be formed in accordance with those grounds.[18] It is clearly wrong to "covet thy neighbour's house" or other property, he observes, but it is only by reference to "human law" that one can know what belongs to one's neighbour.[19] Conscience, then, is judged in light of human law. St. German also states that it is his objective to examine "the question of when English law ought to be rejected or not on account of conscience".[20] This second proposition is the converse of the first: human law may be judged in light of conscience. Finally, St. German observes that distinguishing when conscience is ruled by human law and when it is not is necessary "for the rendering of justice in the king's courts".[21] This statement hints at a third proposition developed later in the dialogue: that law and conscience may be synthesised upon the application of general laws in particular cases. The theory of law developed in *Doctor and Student* affirms the truth of each of these three propositions. Restated in the order of their exposition within the first dialogue they are: conscience binds positive law; conscience is part of positive law; and, conscience is bound by positive law. The purpose of the dialogue, then, was not (as one historian suggests) "to demonstrate that the Englishman ought to govern his conscience by the positive law of the land and not by an abstract reason lying outside it",[22] but rather to differentiate occasions when conscience is governed by positive law from those

[17] C.P. Rodgers, "Humanism, History and the Common Law" (1985) 6 J. Legal Hist. 129, 132–133.
[18] *Doctor and Student* note 10 above at p. 3.
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] Burgess, *Ancient Constitution* note 5 above at p. 86.

when positive law is governed, controlled and/or rejected by conscience.

St. German reconciles the three propositions by identifying different interfaces between law and conscience based upon different conceptions of "reason". He follows the familiar natural law theory found in Aquinas: humans are governed by an eternal law consisting of the law of God, which is communicated by divine revelation, the law of nature, which is known to each rational being through the light of natural reason, and the law of man, or those human or positive laws authorised by the law of God.[23] But he quickly abandons the "law of nature" expression in favour of the "law of reason" because it is (he says) the one used by English lawyers.[24] According to St. German, it is through one's conscience that abstract insights into good and evil (provided by "sinderesis") are rendered by practical reason into the concrete moral norms, or right reason, with which human behaviour must comply.[25] The purpose of *Doctor and Student* is therefore to identify the role that English law plays in the practical reasoning that defines the dictates of conscience.

To this end, St. German identifies six grounds of English law. English law, he says, embraces the laws of God and reason that guide conscience, as well as general customs, legal maxims, local customs, and statutes.[26] His exploration of the relationship between English law and conscience is premised upon a distinction between primary and secondary laws of reason. The primary law of reason consists of universal moral truths self-evident to rational beings without reference to positive laws or customs.[27] His examples of things prohibited by primary reason are: murder, perjury, deceit, breaking the peace, and promises relating to one's own body.[28] The secondary law of reason is derived by practical reason from positive laws and customs relating to property, and is divided into two branches. The law of secondary reason "general" is derived from "that generall lawe or generall custome of propretye" which is "diffused throughout the whole world", and includes general norms relating to (for example) trespass, theft and contracts.[29] The law of secondary reason "pertyculer" derives from laws of property peculiar to specific jurisdictions.[30] According to St. German,

[23] *Doctor and Student* note 10 above at Dial. I, ch. I–IV. Cf. St. Thomas Aquinas, *Summa Theologiae*, I–II, qq. 90–95.
[24] *Doctor and Student*, at pp. 31–33.
[25] *Ibid.*, at Dial I, ch. XII–XIV.
[26] *Ibid.*, at Dial I, ch. V–XI.
[27] *Ibid.*, at p. 33.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*, at p. 35.

property laws were unknown while the world was held in common (in its natural state), and are therefore not founded upon the *primary* law of reason (or the law of nature), but once the general idea of property emerged it followed as a matter of *secondary* reason that rights to property were to be respected and contracts relating to property fulfilled.[31] As McIlwain observed, St. German's distinction between primary and secondary laws of reason corresponds with a distinction between "personal rights" and "property rights".[32] There seem to be important differences, then, between St. German's distinction in this respect and the distinction that Aquinas made between the first precepts of natural law, which are universal, self-evident and general moral truths, and the secondary precepts of natural law, which are conclusions of practical reason drawn by deduction from those first precepts in specific fact situations.[33]

The distinction between primary and secondary reason provides St. German with a theoretical tool capable of distinguishing instances in which positive law must be ruled by conscience from those in which conscience must be ruled by positive law: rules of primary reason guide conscience and define the boundaries of valid positive law or custom; rules of secondary reason guide conscience too, but are derived from whatever positive laws or customs a community has adopted concerning property. It is argued that St. German internalises the law of nature or reason within English law, rendering it wholly incapable of constituting an external check upon the content of English law.[34] This view fails to take seriously each of the three propositions on law and conscience that St. German defends. St. German does push human relations concerning property beyond the critical reach of the primary law of reason, and so it must be conceded that reason cannot, in his view, represent a constraint upon the making of positive laws on a large range of morally contentious issues relating to property. Indeed, his law of reason appears less restrictive than Aquinas' law of nature, for Aquinas said that secondary precepts of natural law, including (apparently) basic norms relating to property and contracts, could *not* be altered by human law except in rare cases.[35] St. German's

[31] *Ibid.*, at p. 183.
[32] McIlwain note 2 above at pp. 105–106.
[33] *Summa Theologiae* I–II q. 94 aa. 2, 4, 5.
[34] Chrimes note 7 above at p. 209; Hanson note 5 above at pp. 256–260; Burgess, *Ancient Constitution* note 5 above at pp. 30–31. The argument is at least implicit in Guy, *St. German on Chancery* note 5 above at p. 20 and Guy, "Law, Equity and Conscience in Henrician Juristic Thought" in *Reassessing the Henrician Age* note 5 above at p. 181.
[35] *Summa Theologiae* I–II, q. 94 a. 5; q. 95 a. 4. This point being subject, of course, to the fact that Aquinas was stating a general jurisprudential point rather than articulating a rule of law for a particular legal system. See in general J. Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford 1998), pp. 266–274.

theoretical strategy therefore lends support to Barton's claim that *Doctor and Student* was primarily "an apology for English law", a claim reminiscent of Hart's critique of Blackstone's use of natural law; it also supports Guy's claim that St. German was merely laying the foundations for parliamentary authority over church property.[36] However, despite his definition of primary and secondary reason and the supposed political motivations for it, St. German is absolutely clear in his insistence that primary reason constitutes a higher law that is both part of English law *and* binding upon English lawmakers, and this theoretical claim is never abandoned in any of his writings.

Throughout *Doctor and Student* St. German relies heavily upon the work of theologian Jean Gerson (1363–1429), and it is useful when assessing St. German's theoretical intentions to consider how he uses Gerson's ideas.[37] St. German's definition of the "lawe of reason" is expressly modelled on Gerson's definition of the "lex naturalis" and has three basic parts: the law of reason/nature is (a) a natural sign (b) indicative of the right reason of God willing humans to do or refrain from doing things (c) in order to pursue the natural end of human life which is happiness, whether monastic, domestic or political.[38] St. German's definition of human law also contains three parts: human or positive law is (a) a true sign constituted by human tradition and authority (b) showing that right reason wills to bind rational creatures to do or not to do something (c) with a view to some spiritual or temporal end consonant with reason.[39] Gerson is not cited on this occasion, but

[36] J.L. Barton, "Introduction" in T.F.T. Plucknett and J.L. Barton (eds.), *St. German's Doctor and Student*, p. xlvi; H.L.A. Hart, "Blackstone's Use of the Law of Nature" [1956] Butterworth's S. African L. Rev. 169; Guy, *St. German on Chancery* note 5 above at p. 89.

[37] On Gerson's approach to law, see Louis B. Pascoe, *Jean Gerson: Principles of Church Reform* (Leiden 1973), pp. 49–79 and G.H.M. Posthumus Meyjes, *Jean Gerson, Apostle of Unity: His Church Politics and Ecclesiology*, (J.C. Grayson, trans., Leiden 1999), pp. 232–246. Gerson's works are published in Jean Gerson, *Oeuvres Complètes* (P. Glorieux, ed., Paris 1960–73), 10 volumes. Among Gerson's works that St. German relied upon are: *Regulae Morales* (IX, 94–103), *Definitiones terminorum ad theologiam moralem pertinentium* (IX, 133–141), and *De vita animae* (III). On Gerson's influence on St. German generally: Sir Paul Vinogradoff, "Reason and Conscience in Sixteenth Century Jurisprudence" (1908) 24 L.Q.R. 373; Barton note 36 above at pp. xxiii–xxiv. On Gerson's influence on St. German's approach to equity: Zofia Rueger, "Gerson's Concept of Equity and Christopher St. German" (1982) 3 Hist. of Political Thought 1. On St. German and Gerson on sinderesis: Schoeck note 5 above.

[38] The Latin versions from St. German and Gerson, with letters added to indicate the three parts of the definition of the law of reason/nature, are: "Et secundum Iohannem gerson: est [(a)] signum naturaliter [(b)] habitum notificatiuum recte rationis diuine volentis creaturam rationalem humanam teneri seu ligari ad aliquid agendum vel non agendum [(c)] pro consecutione finis sui naturalis/qui est felicitas humana siue monastica siue yconomica siue politica" [*Doctor and Student* note 10 above at p. 12] and "Lex vero naturalis praeceptiva appropriate talem habet rationem quod est [(a)] signum inditum cuilibet homini non impedito in usu debit rationis, [(b)] notificativum voluntatis divinae volentis creaturam rationalem humanam teneri seu obligari ad aliquid agendum vel non agendum [(c)] pro consecutione finis sui naturalis, qui finis est felicitas humana et in multis debita conversatio domestica et etiam politica; homo enim natura animal civile est" [Gerson, *De vita* note 37 above at p. 135].

[39] *Doctor and Student* note 10 above at p. 27.

his work contains a very similar three-part definition of "lex humana seu positiva" that appears to have been St. German's source.[40] There is, however, an important difference. Clause (b) of Gerson's definition states that human law is that which is not inferred from a necessary deduction from divine and natural law, whereas St. German's clause (b) states that human law shows "that right reason wills to bind a rational creature to do (or not to do) something".[41] St. German appears to have modelled this clause of his definition of human law upon the parallel clause (b) of his definition of the law of reason, which was, as stated above, expressly based upon Gerson's definition of the law of nature. In adapting this clause from the definition of the law of reason/nature for his definition of human law, however, St. German dropped his—and Gerson's—reference to God. The result is that St. German's definition of human law is grammatically strained, for he says that right reason, rather than God, "wills" certain norms for rational creatures. However, the effect of St. German's modification of Gerson's definition of human law is to place greater emphasis on right reason than Gerson's definition, which focuses upon human tradition. Gerson gave his definition in the course of arguing that failure to distinguish between positive and divine law was a cause of the major constitutional crisis of his day (the schism in the Catholic Church).[42] His definition of human law therefore suggested a separation of positive and natural law that would have been misleading in light of his general jurisprudence.[43] St. German seems

[40] Cf. St. German's Latin text with Gerson's definition (with letters inserted to identify the three parts): "Lex quoque humana sic describitur lex humana est [(a)] signum verum humana traditione & auctoritate immediate constitutum [(b)] notificatiuum recte rationis volentis rationalem creaturam ad aliquid agendum vel non agendum [(c)] propter finem aliquem rationi consonum spiritualem vel temporalem obligare" [*Doctor and Student* note 10 above at p. 26] and "Lex humana sive positiva praeceptiva pure et appropriate describitur quod est [(a)] signum verum humana traditione et auctoritate immediate constitutum, [(b)] aut quod non infertur necessaria deductione ex lege divina et naturali, ligans ad adliquid agendum vel non agendum [(c)] pro consecutione finis alicujus humani" [Gerson, *De vita* note 37 above at p. 135]. Just a few sentences earlier in *Doctor and Student*, p. 27, St. German states that human law is derived by reason as something that necessarily and probably follows from the law of reason and god. Again, Gerson was not cited but the Latin text is taken almost verbatim from Gerson. Cf. "Lex humana siue positiva est lex per rationem ex lege rationis et diuina deducta in consequentiis probabilibus necessariisque [ad finem debitum humane nature.] dicitur autem proabile quod pluribus & maxime sapientibus apparet verum [*Doctor and Student* p. 26] with "Lex humana seu positiva est lex per ratiocinationem ex lege naturali deducta in consequentiis probabilibus ad finem debitum humanae creaturae. Probabile dicitur quod pluribus et maxime sapientibus apparet verum" [Gerson *Definitiones* note 37 above at p. 136].

[41] Barton's translation at *Doctor and Student* note 10 above at p. 27 [italics removed].

[42] The theoretical basis of Gerson's argument is summarised in the following ways: "[s]ince positive law rests primarily upon human authority, it is not deduced from divine or natural law" (Pascoe note 37 above at p. 64), and because positive law is based on "tradition" it is "a law which cannot possibly be related to the divine or natural law" (Meyjes note 37 above at p. 236).

[43] Rueger note 37 above at p. 9 concludes that Gerson's work represents a "condemnation of legal positivism and the separation of law and morals".

to have modified Gerson's definition to avoid potential misunderstanding, in the process confirming his own commitment to a theory of law premised upon an inherent connection between reason and positive law.

With the general structure of St. German's argument in *Doctor and Student* in mind, it is now possible to consider his views upon legislative authority in more detail. I will examine his position in light of his approach to each of the three propositions he seeks to defend: that conscience binds positive law, that conscience is part of positive law, and that conscience is bound by positive law.

Conscience binds positive law

According to St. German's Doctor, kings and princes are "inferior governors" whose jurisdiction is "derived from the reason of the supreme governor" (God) and therefore "in temporall lawes no thynge is ryghtwyse ne lawful but that the people haue deryuyed to them out of the lawe eternall".[44] The idea that human law cannot be either right *or lawful* unless derived from the eternal law informs the entire dialogue. The law of reason, the Doctor continues, is "immutable" ("*iura naturalia immutabilia sunt*"), with the result that "agaynst this lawe prescripcyon statute nor custome may not preuayle and yf any be brought in agaynst it they be no prescripcyons statutes nor customes but thyngis voyd & agaynst iustyce".[45] St. German's Latin version of this important passage is similar to a passage in Gerson's work, with the notable addition by St. German of "statutes" amongst the laws constrained by reason.[46] The Doctor makes the same point in relation to the law of God: "the statutes of commynalties" are neither "ryghtwyse nor oblygatorye" except insofar as they are "consonant to the lawe of god."[47]

The Student re-articulates the Doctor's conclusions within the context of English law. The Student states that if "yf any statute were made dyrectly agaynst" the law of God, such as a statute prohibiting the giving of alms, that "statute were voyde".[48] The same result would follow if a statute were against the primary law of reason. The Student observes that general customs, the third

[44] *Doctor and Student* note 10 above at p. 11.
[45] *Ibid.*, at p. 15.
[46] *Ibid.* The Latin version of St. German's passage is: "Et contra eam non est prescriptio vel ad oppositum statutum siue consuetudo. Et si aliqua fiant non sunt statuta siue consuetudines sed corruptele" [*Doctor and Student* p. 14]. Cf. Gerson: "Secus de divina atque naturali diceretur, contra quas non est praescriptio vel ad oppositum consuetudo, sed tantum corruptela" [Gerson, *Regulae Morales* note 37 above at p. 100], and also Aquinas, *Summa Theologiae* I–II, q. 95 a. 2: "Si vero in aliquo a lege naturali discordet, jam non erit lex, sed legis corruptio".
[47] *Doctor and Student* note 10 above at p. 29.
[48] *Ibid.*, at p. 41.

ground of English law, obtain the force of law from long usage and consent of King and people; they are, for the most part, rules relating to property and therefore are not derived "dyrectly" from the law of reason or God, though they cannot be against those laws.[49] The Student then addresses parliamentary authority in relation to general customs and the law of reason:

> And ⟨so⟩ a statute made agaynst suche [general] customes *is perfectly valid and* ought to be obseruid *as law* {bycause they be not merely the lawe of reason.} *And certain it is that there is not, and never has been, a law of reason which could be changed.*[50]

In other words, in English law a statute cannot be "valid" "as law" if it violates the "lawe of reason". As the Doctor states in summarising the Student's position: English laws cannot be "contrary to reason or the law of God" but it is not pretended that English law is "in all respects the law of reason", for many customs "derive their force not from highest reason but from the custom of the realm"; these customs "can be changed by a statute made contrary to them" and that which can be changed "was certainly never the law of reason primary".[51]

It must be conceded that on occasion St. German appears to use a circular argument on this point: statutes cannot lawfully violate primary reason, statutes often alter general customs, therefore general customs cannot be directly derived from primary reason. There seems to be an assumption, in other words, that Parliament would or could not violate primary reason—that Parliament is morally infallible. I will return to this claim below. It is sufficient for now simply to emphasise that St. German's commitment to the major premise of this argument—that statutes cannot lawfully violate primary reason (or the law of God)—is undeniable, and that he very clearly states that *if* a statute violated (primary) reason *then* it would be void.

Conscience as part of positive law

The second proposition concerning law and conscience defended in *Doctor and Student* is that conscience forms a necessary part of every positive law in so far as the judicial exposition of general laws in particular cases requires reference to "equity". Given the unpredictable nature of human affairs, general rules will occasionally produce unjust results. To "folowe the wordes of the lawe" in such cases would, the Doctor says, produce results

[49] *Ibid.*, at pp. 57, 45–47.
[50] *Ibid.*, at p. 57.
[51] *Ibid.*, at p. 75 [italics in Barton and Plucknett edition removed].

"agaynst Iustyce" and therefore "reason and Justyce" rather than the words must be followed—and to this end "equity", or "epicaia", is ordained.[52]

At the time St. German wrote, the term "equity" had not yet acquired its modern English legal meaning, *i.e.* the rules enforced by Chancery, and although one of the most significant legacies of *Doctor and Student* was to provide the theoretical foundation for the emergence of equity in this sense, St. German himself did not use the term so narrowly.[53] Aristotle had expounded a general theory of *epieikeia*, and it was this concept, as found in Gerson's work, that St. German invoked.[54] Equity in this sense was, as the Doctor explains, "an excepcyon of the lawe of god/or of the lawe of reason" from the general rules of law when by reason of their "generalytye" they produce unjust results in "partyculer" cases.[55] It is "secretely" understood to form part of "euery *generall* rewle of euery posytyue lawe", and any attempt to enact a law without such an exception "expressyd or implyed" would be "manyfestly vnresonable" and "not to be sufferyd".[56] St. German therefore viewed *epieikeia* as a restriction upon sovereign legislative power implicitly operative in relation to *every* enactment at the stage of judicial application—an approach to equity that derived from Gerson's expansive use of Aristotelian *epieikeia* rather than the more narrow approach found in Aquinas.[57]

At one point, the Student states that a statute prohibiting the giving of alms to beggars capable of labour would, in light of *epieikeia*, exempt one who gave clothes to a beggar who would otherwise die from cold before reaching a town.[58] The Doctor accepts that the alms-giver would be exempt from this statute "by conscyence", but then asks whether he would also be "dischargyd in the common lawe by suche an excepcyon of the lawe of reason".[59] The Student suggests that the alms-giver would likely be discharged at common law because it could be said that "it was the intent of the makers of the statute to excepte suche cases", and common law judges may "Iuge after the mynde of the makers as farre as the lettre maye suffre"; so, in such cases relief by *epieikeia*

[52] *Ibid.*
[53] Samuel E. Thorne, "Preface" in Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* [c 1597–98], ed. D.E.C. Yale (Oxford: Oxford and Yale University Presses, 1953), p. vi.
[54] *Nicomachean Ethics*, bk. V, ch. 9, sec. 10, in Richard McKeon (ed.), *The Basic Works of Aristotle* (New York 1941), pp. 1019–1020. See Rueger note 37 above; Barton note 36 above at p. xliv; Georg Behrens, "An Early Tudor Debate on the Relation Between Law and Equity" (1998) 19 J. Legal Hist. 143.
[55] *Doctor and Student* note 10 above at p. 97.
[56] *Ibid.*
[57] Rueger note 37 above.
[58] *Doctor and Student* note 10 above at pp. 99–101.
[59] *Ibid.*, at p. 101.

is possible "in the same courte and by the common lawe" rather than in another forum.[60] It has been argued that therefore St. German asserts that the law of reason is *only* available at common law to check statutory injustices if it can be said that Parliament intended to be bound by the law of reason, and where statutory language that is unjust does not permit that conclusion then one was left to the discretionary power of the King's Chancellor; in other words St. German subordinates the entire law of reason or nature to royal and ultimately parliamentary power.[61]

The problem with this argument is that it looks at St. German's second proposition, that conscience is part of positive law through the mechanism of equity, in isolation, and ignores the fact that St. German had already defended the proposition that conscience, in some cases, binds positive law and thereby limits parliamentary authority in more direct ways. St. German clearly limits *epieikeia* to instances in which the positive law in question is, as the Student says, "good"—*i.e.* valid—"in itself" when considered at a "general" or abstract level but produces injustice in "some particular cases".[62] *Epieikeia* does not, in other words, address the problem of a law that is, when considered in a general or abstract sense, clearly against the law of reason or God; in St. German's view such statutes are, as shown above, void. So, while St. German does say that common law judges may only invoke *epieikeia* when the words of the statute suffer the conclusion that Parliament intended to respect the law of reason, little scope would exist for *epieikeia* to operate if the words of the statute did not permit that reading. A statute incapable of such a reading would be one that reveals a clear legislative intention to violate the law of God or reason; but such a statute is, according to earlier chapters of the dialogue, simply "voyd" and not "oblygatorye", and there is no need to resort to *epieikeia* to secure the ends of justice.

This point is obscured by the fact that *Doctor and Student* is frustratingly unclear about what remedy one would have in the case of a statute that was void as being directly or expressly against the laws of God or reason. St. German suggests that common law judges cannot resort to *epieikeia* in such cases, but can they declare the statute void? St. German does not address this question directly in *Doctor and Student*, and it is a point about which he made seemingly contradictory statements in later writings.

[60] *Ibid.*, at pp. 101, 103.
[61] Hanson note 5 above at pp. 256–263; Burgess, *Ancient Constitution* note 5 above at pp. 30–31. The argument seems to underlie Guy's reading of St. German's chapter on equity: Guy, *St. German on Chancery* note 5 above at pp. 19–21.
[62] *Doctor and Student* note 10 above at p. 117.

Conscience ruled by law

After explaining the first two propositions concerning law and conscience, St. German turns in chapter 20 of the first dialogue to the third proposition. The question, he says, is when is conscience bound by law? The Student says that conscience is bound by the laws of reason and God, and by "the law of man that is not contrary to the law of reason nor the lawe of god", though if human law is changed then "the conscience founded upon it must change likewise".[63] In considering the converse question, when must law "be lefte and forsaken for conscyence"[64], the Student states that one cannot leave law for conscience when the law in question is the "law of reason", the "law of god", or "the lawe of man" that is "consonant to the lawe of reason/& to the lawe of god".[65] However, the Student also insists that the idea of leaving law for conscience is nonsensical when the law in question is "a law made by man commaundynge or prohybytynge any thyng to be done that is agaynst [the lawe of reason/or the lawe of god.]".[66] His reason for this conclusion is a clear restatement of the first proposition concerning law and conscience established in earlier chapters:

> For yf any lawe made by man/bynde any person *by way of precept or prohibition* to any thynge that is against [the sayd lawes/] it is no lawe/but a corrupcyon [& a manifest errour.] *And if it does not bind, it is not a law; for law is the art of living honestly and binds man to observe it, for otherwise (if it did not bind) it would not be law.*[67]

In assessing this chapter, John Guy points to the passage in which the Student insists that conscience changes with changes to positive law and concludes that it reflects "the most fundamental and pervasive" aspect of St. German's legal thought, namely, that reason is part of human law and conscience is ruled by that law, whatever it happens to be.[68] However, Guy makes no mention of the above-quoted passage which reflects an equally fundamental and pervasive aspect of St. German's theory, namely, that conscience, or reason, sometimes binds positive law, rendering human laws void. St. German defended *both* propositions.

In the end, St. German identifies the cases in which law must be left for conscience as those where a legal right should, in good conscience, be waived in favour of someone else's interests. These are cases where law does not compel breaches of the laws of God

[63] *Ibid.*, at p. 111.
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*, at pp. 111–113.
[67] *Ibid.*
[68] Guy, "Law, Equity and Conscience" note 34 above at p. 181.

or reason but leaves the individual free to exercise rights consistently or inconsistently with those higher laws. These are precisely the sorts of cases in which conscience was enforced by Chancery—explaining the importance of St. German's lengthy discussion on this point to the development of modern equity.[69] One theme of this discussion is that most rules of English law that appear to create moral dilemmas are rules of property or contract law; because these rules are not derived directly from the laws of God or reason, any moral obligations that follow from them are conclusions of *secondary* reason only. Rules of positive law interfering with or limiting those obligations are binding in conscience even when they appear contrary to this law of reason, for secondary reason is a mere product of positive law that may be "alteryd" by it.[70] At one point the Student expresses doubt about whether "a statute" would be "lawful" that prohibited sales of all personal and real property, given that "sales are based on the law of reason, and that the law of reason secondary requires that they be kept".[71] In response, the Doctor does not dispute that a statute against reason is not lawful but simply reminds the Student that rules of secondary reason, unlike primary reason, are defined, and may be changed, by positive law.[72]

If one attends to St. German's own theoretical objectives, *Doctor and Student* must be read as an argument about both the ways in which positive law binds conscience and the ways in which conscience, or right reason, binds positive law. St. German returns again and again to the idea that legislative authority is legally constrained by the laws of God and primary reason. Parliament is "the most hyghe courte in this realme byfore any other"[73], the Doctor observes at one point, but immediately adds that a statute binds people "in lawe and conscience" only "yf it be not agaynst the lawe of god nor agaynst the lawe of reason".[74] Goldsworthy argues that we should not overemphasise these appeals to higher laws, for Blackstone and Austin also "said the same thing, but still accepted the doctrine of parliamentary sovereignty."[75] However, though Blackstone and Austin may have accepted St. German's point that an Act of Parliament against a higher law of nature or reason is not binding "in conscience", they did not go on to say, as St. German did, that such an Act is also not binding "in

[69] Barton note 36 above at p. xlviii.
[70] *Doctor and Student* note 10 above at p. 147; for this general argument see also pp. 135, 158, 183.
[71] *Ibid.*, at p. 147 [italics in Barton and Plucknett ed. removed].
[72] *Ibid.*
[73] *Ibid.*, at pp. 159–160.
[74] *Ibid.*, at p. 158.
[75] Goldsworthy note 2 above at p. 71.

lawe".[76] It is St. German's adherence to this view that makes it impossible to say that he was a proponent of parliamentary sovereignty as Dicey would later define it.

St. German does, however, show great faith in Parliament's wisdom. Indeed, it is argued that he advances a theory of "parliamentary infallibility", and this theory, says Baumer, is his main contribution to the development of parliamentary sovereignty.[77] Parliamentary infallibility implies that Parliament *is* bound by higher laws of God and/or reason but due to the wisdom of the King, Lords and Commons it could *never* violate those higher laws; its moral judgment is infallible. This may be contrasted with "parliamentary moral omnipotence", or the idea that statutes themselves constitute or determine the content of the law of God and/or reason. Neither of these claims is the same as Diceyan parliamentary sovereignty, which asserts that Parliament is neither morally infallible nor morally omnipotent but rather is *legally* omnipotent; that is, its decisions are law regardless of their morality or immorality.[78] If parliamentary infallibility is not parliamentary sovereignty, Baumer's argument can only make sense if it is accepted that, despite the differences, acceptance of parliamentary infallibility was a critical step in the historical evolution of parliamentary sovereignty—and that St. German did in fact advocate parliamentary infallibility.

But did he do so? A passage from chapter 55 of the second dialogue of *Doctor and Student* is said to show St. German's acceptance of parliamentary infallibility.[79] The Doctor argues that the statute *Silva cedua*, 1372,[80] which permitted temporal courts to interfere with actions for tithes on timber before ecclesiastical courts, violated church liberties, and, even if the Act merely confirmed a prescriptive right, that right was void because the payment of tithes is grounded upon the laws of God and reason.[81] The Student responds:

> That there was such a prescrypyon before the sayd statute/and that yf a man before the sayd statute had ben suyd in the spyrytuall courte for tythes of woode of the age of .xx. yere or aboue that a prohybycyon laye/apperyth in the sayd statute & it can not be thought that a statute that is made by authorytye

[76] J. Finnis, "Blackstone's Theoretical Intentions" (1967) 12 Natural L. Forum 163; J. Austin, *The Province of Jurisprudence Determined* (London 1954), pp. 184–185.
[77] Baumer, *Early Tudor Theory* note 5 above at p. 76 n. 135, p. 156.
[78] On this difference see Robert Eccleshall, *Order and Reason in Politics* (Oxford: Oxford University Press, 1978), pp. 100–102.
[79] *Doctor and Student* note 10 above at p. 300. Baumer, *Early Tudor Theory* note 5 above at p. 76; Hanson note 5 above at pp. 261–262; Goldsworthy note 2 above at p. 71.
[80] 45 Ed. III c. 3.
[81] *Doctor and Student* note 10 above at p. 300.

> of the hole realme/as well of the kynge & of the lordes spyrytuall & temporall as of all the comons/wyl recyte a thynge agaynst the trouth.[82]

The Student is saying, then, that Parliament's assertion of the fact that a certain prescriptive right existed must be taken as accurate. This statement falls short of an assertion of moral or religious infallibility. If the Student means that Parliament is morally and religiously infallible, then the very long discussion following this comment, in which he provides detailed substantive reasons why the statute *is* consistent with the law of God and reason, would be unnecessary. In this discussion the Student invokes Gerson's argument that the payment of support to the clergy is required by the law of God, but the form and amount paid is a matter for positive law. The payment of the tenth part of income to the church, or tithes, is not "assyngned by god" as the required payment, but had it been then, says the Student, a lesser part could not be assigned "by the lawe of man" for "that sholde be contrarye to the lawe of god & so it sholde be voyde".[83] In other words, the discussion of the statute *Silva cedua*, read as a whole, is an express denial of parliamentary sovereignty as Dicey would later define it, and is equivocal support at best for the idea of parliamentary infallibility. Indeed, the statement seems rather insignificant when read in light of the many passages of *Doctor and Student* in which St. German proclaims that statutes against the law of reason or God are void and not to be observed.

III. St. German the Controversialist: writings on the Reformation

John Guy argues that *Doctor and Student* was not designed to explore issues of "practical jurisprudence *per se*" but was merely an elaborate effort to establish the theoretical foundations for the more focused attacks upon the clergy that St. German later produced, and therefore it may be artificial to distinguish between "St. German the lawyer and St. German the anticlerical polemicist".[84] There is, however, a real danger that by reading *Doctor and Student* as a mere preface to St. German's political pamphlets we will misunderstand St. German's jurisprudential position. As Trapp observes, *Doctor and Student* looks like "the fruit of a lifetime's brooding" on fundamental points of legal theory when compared

[82] *Ibid.*, at p. 300.
[83] *Ibid.*, at p. 303.
[84] Guy, *St. German on Chancery* note 5 above at p. 89; Guy, "Thomas Cromwell and the Intellectual Origins of the Henrician Revolution" in *Reassessing the Henrician Age* note 5 above at p. 170.

to the rapid succession of short, polemical attacks on the clergy that St. German later wrote.[85] At least for a lawyer seeking to identify St. German's legal theory, as opposed to a historian seeking to identify St. German's political impact, *Doctor and Student* represents St. German's considered jurisprudential opinions, and these opinions should inform the reading of his subsequent political pamphlets and not vice versa. Of course it may well be that St. German's views about the constitutional relationship between church and state changed and became more "radical" as the revolutionary events of the Reformation unfolded.[86] However, although St. German proclaimed parliamentary power in ever-more-forceful terms, he never abandoned the basic theoretical arguments of *Doctor and Student*: throughout his writing he remained committed to the idea that Parliament is *legally* bound by higher laws of God and reason.

In *New Additions*, for example, St. German argues that "the kynge in his parlyament" is "the hyghe soueraygne ouer the people" with power to resolve religious differences and to determine for "this realme" the identity of the Pope.[87] This passage is (rightly) cited to show St. German's acceptance of extensive parliamentary power.[88] However, it must be emphasised that in *New Additions* St. German also insisted that Parliament did *not* have "direct power"[89] over the laws of reason and God, and therefore could *not* "laufully"[90] enact statutes to, for example, prohibit grants of all forms of property into mortmain[91], "make an appropryacion [of a benefice] without spirytuall assente"[92], "prohibite entre in to religion"[93], "prohibite" or "confourme" rights "of matrimonie" except according to church law[94], or "enacte, that prestes shuld go vniuersally vpon enquestes".[95] In addition, he said that statutes that purported to do such things would be "voyde" and "nat to be obserued".[96] Although St. German recommended a radical programme of legislative intervention into church affairs in 1531, he was careful to limit legislative reform to clergy abuses that "the

[85] J.B. Trapp, "Introduction" in *Complete Works of Sir Thomas More* note 13 above at vol. IX, p. l.
[86] Baumer, *Early Tudor Theory* note 5 above at p. 37.
[87] *New Additions* note 11 above at pp. 327–329.
[88] Guy, *St. German on Chancery* note 5 above at p. 24; Guy, "The King's Council and Political Participation" in *Reassessing the Henrician Age* note 5 above at p. 129; Baumer, *Early Tudor Theory* note 5 above at p. 64.
[89] *New Additions* note 11 above at pp. 332–333.
[90] *Ibid.*
[91] *Ibid.*, at pp. 320–321.
[92] *Ibid.*, at p. 321.
[93] *Ibid.*, at p. 331.
[94] *Ibid.*
[95] *Ibid.*, at p. 334.
[96] *Ibid.*, at p. 331.

parliament have auctoritye to redresse", leaving purely spiritual matters not within parliamentary authority to negotiation between King and clergy.[97] Guy's description of *New Additions* and the Parliamentary Draft as advocating "statutory omnicompetence" may therefore be questioned.[98] In his last publication, *Answer to a Letter*, St. German defends the legality of the Act of Supremacy, 1534, which denied papal jurisdiction in England and acknowledged the King as supreme head of the English Church, but he also states that if Parliament had tried to grant to the King powers that by the law of God are vested only in the clergy (such as making consecrations or granting absolutions) the statute would be "voyde" for Parliament has "no auctorite to chaugne the lawe of god."[99]

At times St. German was especially forceful in asserting parliamentary power over church property. In *Diuision betwene the spiritualitie and temporaltie*, he asserts that Parliament has "an absolute power" as to spiritual and temporal possessions and that if Parliament takes property "it byndeth in the lawe" and if it gives compensation then it "byndethe in lawe and conscience".[100] This passage is said to show St. German's advocacy of "unlimited" parliamentary power.[101] But if St. German really meant that a legal obligation need not bind in conscience to be "legal", then, with this brief comment in a political pamphlet, he would have repudiated the detailed analysis of his treatise *Doctor and Student*. This intention seems unlikely.[102] Instead the passage may simply represent a re-statement of the basic point in *Doctor and Student* that property rights derive from secondary reason and are defined by positive law, and a statute altering or abrogating rights of property would be valid (*i.e.*, not contrary to primary reason) even if contrary to (secondary) reason.

In the end it is impossible to deny that St. German continued to assert the supremacy of the laws of God and reason over Parliament. However, it is argued that these higher laws were not *legally* meaningful because in his later writing St. German confirmed his commitment to a theory of parliamentary infallibility, and he also confirmed that the laws of God and reason were not justiciable in the regular courts. Both of these points are related to a very practical question: even if the laws of God and reason are

[97] "Parliamentary Draft of 1531" note 13 above at p. 128.
[98] Guy, *St. German on Chancery* note 5 above at p. 32.
[99] *Answer to a Letter* note 15 above at ch. II.
[100] *Division* note 13 above at p. 194.
[101] Allen note 5 above at p. 167. Also Goldsworthy note 2 above at p. 71.
[102] Baumer, "Political Philosophy of a Tudor Lawyer" note 7 above at p. 646, says that in this passage it is "doubtful whether St. German really means all he says".

binding upon Parliament, who has the authority under the English constitution to determine what those laws mean and whether or not Parliament has breached them?

Looking first at the argument on parliamentary infallibility, St. German did continue to express faith in the wisdom of Parliament. In *Power of the Clergy* he reiterates his argument concerning tithes and the statute *Silva cedua* from *Doctor and Student*, again making statements that, taken in isolation, suggest parliamentary infallibility. "[I]t is nat to thynke", he writes, "that the kige and his lordes spyrituall & temporall and the comens that were at that parliament wholde haue ben so farre ouer seen/to haue made a statute againste the lawe of god".[103] But, as before, this statement came in the midst of an analysis of substantive reasons why Parliament did have "full power" over tithes.[104] To give substantive reasons why "that" Parliament—*i.e.*, the one that enacted the statute—did not overlook the law of God is hardly to advocate a general theory of parliamentary infallibility. Later in *Power of the Clergy* St. German discusses the claim that the clergy are exempt by the law of God from the jurisdiction of temporal courts. St. German cites a number of statutes inconsistent with that claim. Then, in a passage that is cited to show his acceptance of parliamentary sovereignty and parliamentary infallibility, he states:

> For it is nat to presume/that so many noble princes and their counseyle/ne the lordes/and the nobles of the realme ne yet the Comons gathered in the sayde parlyament/wolde fro tyme to tyme/renne in to so great offence of conscyence/as is the brekynge of the lawe of god.[105]

Again, the context of this statement suggests that it was not a general assertion of parliamentary infallibility (let alone parliamentary sovereignty), for it is found between the following two sentences:

> And furthermore it is nat lyke that there was any sufficient proufe shewed at any of the seyd parlyaments that it shulde be against the lawe of god/that preestes shulde be put to aunswer before laye men. ... And if ther be no suffycyent proufe/that it is against the lawe of god/than the custome of the realme is good/to put them to answere upon.[106]

St. German's point, then, was simply that Parliament would not likely violate the law of God, and, unless there is sufficient proof

[103] *Power of the Clergy* note 15 above at ch. IV.
[104] *Ibid.*
[105] *Power of the Clergy* note 15 above at ch. VI, which is cited by Goldsworthy note 2 above at p. 71 (parliamentary sovereignty) and Baumer, *Early Tudor Theory* note 5 above at pp. 76–77, n. 135 (parliamentary infallibility).
[106] *Power of the Clergy* note 15 above at ch. VI.

that it did, it must be presumed that it did not. This is, at most, the assertion of a *rebuttable* presumption of parliamentary infallibility based upon the noble and representative composition of Parliament.

St. German arguably goes a step further in chapter 7 of *Answer to a Letter* when he concludes that God provided people with a means of finding "knoweldge of the trouth" about religious doctrine, namely, obedience to temporal princes "whom god hathe appoynted to haue rule ouer them" and whose exposition of doctrine has to be treated as authoritative and final to ensure stability and order.[107] In light of this assertion, it has been argued that the limit of the law of God invoked by St. German is "unreal" because in St. German's view Parliament could "decide authoritatively what the law of God is."[108] But St. German proceeds to acknowledge that some lawmakers whose exposition of religious doctrine is final may actually commit errors, at least in a system of *jus regale* or "kyngely gouernaunce" alone.[109] In contrast, under the more "noble" form of constitution based on *jus regale politicum*—like England's—the King "maye make no Lawe to bynde his subiectes without their assent/but by their assent he maye so that the lawes that he maketh be nat agaynste the lawe of God nor the lawe of reason."[110] In other words, he accepts that the laws of God and reason exist *a priori* and bind temporal lawmakers (he rejects parliamentary moral or religious omnipotence). But is he saying that in systems like England's based upon *jus regale politicum* people could *never* assent through their representatives to statutes against the law of God or reason? Or, is he simply saying that the King acting with a representative legislature is more likely to achieve the goal of enacting laws consistent with the laws of God and reason than other lawmakers? Is he advocating absolute parliamentary infallibility or a rebuttable presumption of parliamentary infallibility? In light of his earlier work examined above, as well as other passages in *Answer to a Letter*, the latter interpretation is more plausible. He had already stated in chapter 2 of *Answer to a Letter* that if an Act of Parliament granted the King powers that, by the law of God, vest in the clergy alone, it would be "voyd".[111] He went on in the same chapter to refute the argument "that the parlyamente erred" in enacting the Act of

[107] *Answer to a Letter* note 15 above at ch. VII.
[108] Allen note 2 above at p. 167. Chapter VII of *Answer to a Letter* is cited by Baumer, *Early Tudor Theory* note 5 above at p. 59 as showing St. German as "champion of the sovereignty of Parliament" and Goldsworthy note 2 above at pp. 70–71 to show Parliament as "omnicompetent".
[109] *Answer to a Letter* note 15 above at ch. VII.
[110] *Ibid.*
[111] *Ibid.*, at ch. II.

Supremacy, 1534 by declaring the King to be head of the Church in England "under god" without mentioning Christ.[112] If St. German really accepted parliamentary infallibility he could simply have said that Parliament cannot err. Instead he says that it is "truly" "daungerouse" to say that Parliament "erred", for if it did err "than were no man bounden to obey the plyament in that behalfe: for the Parliament may nothige do against the lawe of god."[113] St. German's point seems to be that such allegations are "daungerouse", and must be considered with care, precisely because they *are* possible and, if true, the impugned statute would not bind anyone. He therefore proceeds to explain why the Act, properly interpreted, did not violate the law of God—an unnecessary step under a theory of parliamentary infallibility. On the whole, then, it appears as though St. German did not assert parliamentary infallibility in any absolute form. Instead, he thought that the King, Lords and Commons were wise, that statutory error was extremely unlikely, and that challenges to statutes were dangerous to social and political stability; *but*, if sufficient proof rebutted the presumption of parliamentary infallibility and an error was made out, then the impugned Act of Parliament was void and not binding upon the people.

This conclusion leads to the question of remedies and the role of courts. The second argument mentioned above is that St. German denied the justiciability of the laws of God and reason in the regular courts, and hence these higher laws were not binding upon Parliament in a legally meaningful sense. It must be said that St. German remained unclear in his post-*Doctor and Student* writings about the practical remedies available to one aggrieved by an allegedly invalid statute. He provides some indication of how he might have addressed this issue in *Salem and Bizance* in the course of responding to More's claim that no one need fear an instrument of canon law if it is void. St. German states that if the "lawe is voyde" then "as longe as it standeth so not repelled" it is "good to eschewe it", *i.e.*, refuse to obey it.[114] However, the problem is that so long as it stands un-repealed, ecclesiastical courts may try to enforce it and "fal therby into a wrongful and vntru iugement".[115] Therefore, invalid laws should be repealed rather than left to "do hurte".[116] It may be said, then, that St. German accepted a theory of legal invalidity in which "voyde" laws are void *ab initio* and

[112] *Ibid.*
[113] *Ibid.*
[114] *Salem and Bizance* note 13 above at p. 369.
[115] *Ibid.*
[116] *Ibid.*

even if left un-repealed they should be neither obeyed by individuals nor enforced through judicial "iugement".

The argument that St. German therefore recognised a judicial power to set aside Acts of Parliament on grounds of repugnancy to the higher laws of God and reason is, however, difficult to make in light of comments in *Little Treatise*. In discussing the Chancellor's equitable jurisdiction he observes that in certain circumstances one may be under a duty in conscience to return land to a landowner whose title was extinguished by operation of a statutory limitation period, but that one could not be compelled to do so by Chancery for "there lyeth no sub pena directely againste a statute ... for [if] it shuld lye, then the lawe shuld be juged to be voyd, and that may not be don by no courte, but by ye parliament."[117] He goes on to write that a statute providing for the forfeiture of goods owned by aliens who die while in England on pilgrimage would be "againste reason and not to be observid yn conscyence", but executors of the deceased would have no remedy in Chancery, for if they did "then shulde the chauncellor gyve jugemente directelie againste the statute, and that may not be yn no wise; for if the statute be not good, it muste be broken by parliamente as yt was made."[118] Of course, St. German could have added that the statutes in his examples affect property rights only and do not therefore affect rights derived from *primary* reason and so could not (in his view) be "voyd". However, he seems to be addressing a different point by use of these examples, namely, *if* a statute is to be "*juged to be voyd*" then such a judgment can be given "by no courte but ... parliament". This assertion is premised upon the idea that statutes against conscience *are* void, but it denies to regular courts the ability to make that determination.

Although these passages have recently been used to show St. German's support for parliamentary sovereignty[119], *Little Treatise* was not published until 1787 and there is no evidence that it had any impact on the thinking of lawyers.[120] Furthermore, the passages appear inconsistent with observations on the Statute of Carlisle, 1307[121] that St. German makes in *Power of the Clergy*. This Act provided that common seals of abbeys be kept in the custody of the prior and four trusted members of the house, that deeds sealed by a seal not kept in this manner are void, and that deeds of abbeys be sealed by the abbot. The Act was held "void" in 1449 in a case reported as *Annuitie 41* in Fitzherbert's

[117] *Little Treatise* note 12 above at p. 116 [italics removed].
[118] *Ibid.*, at p. 117.
[119] Goldsworthy note 2 above at p. 72.
[120] Yale note 6 above at p. 333; Guy, "Law. Equity and Conscience" note 34 above at p. 190.
[121] 35 Edw I stat. I cap. IV.

Abridgment on the ground that it was impossible to perform.[122] Coke would later rely upon this case in support of his conclusion in *Dr Bonham's Case* that statutes against common right and reason are to be judged void at common law.[123] St. German does not mention this particular case, but he does acknowledge and explain the judicial failure to enforce the Act. He observes that the "wordes of the statute" were "so uncertayn" that judges were unable to "iuge upon them"; the relevant parts of the Act were therefore "voyed and of none effecte" and the Act was not "put in execucyon" by judges.[124] He also observes that the clergy "in tho dayes" argued that the statute "was nat in the power of the parlyament" because it related to "spyrituall matters" and therefore "they under the pretence of a more clere way in consyence encouraged ye iuges to suffre the seyd statute to lye unexecuted".[125] St. German denies that the custody of seals was a spiritual matter outside Parliament's power, but makes no effort to deny the validity of the general argument that judges may refuse to enforce statutes that are void as being outside Parliament's power or impossible to perform.

Reading his comments from *Little Treatise* and *Power of the Clergy* together, it might be said that St. German denied to judges the ability to declare statutes void but acknowledged their ability to refuse to enforce statutes that appeared void, leaving it to Parliament to respond legislatively, by amending or repealing the Act, or judicially, by declaring it void. In the end, however, it is hard to escape the conclusion that his position was simply ambiguous on this point. His failure to provide a clear statement suggests that he did not regard the invalidity of statutes as a practical problem for individuals: primary reason, as he defined it, would not often be violated by a legislature composed of King, Lords and Commons in such a way that could not be remedied through judicial application of *epieikeia*. It does not follow, however, that St. German did not consider the constraints upon Parliament imposed by the laws of God and reason as *legally* meaningful. As seen above, he describes the boundaries set by these higher laws as defining what Parliament could "laufully"[126] do, and that statutes exceeding those boundaries were "voyd"[127], "not a

[122] The report of the case is reproduced at Chrimes note 7 above at app., p. 359. See also J.W. Gough, *Fundamental Law in English Constitutional History* (Oxford 1955), pp. 17, 33.

[123] *Dr. Bonham's Case* (1610) 8 Co. Rep. 114. On Coke's authorities, see Gough, *ibid.*, at p. 33, and T.F.T. Plucknett, "Bonham's Case and Judicial Review" (1926) 40 Harv. L. Rev. 30.

[124] *Power of the Clergy* note 15 above at ch. VIII.

[125] *Ibid.*

[126] *New Additions* note 11 above at pp. 332–333.

[127] *Doctor and Student* note 10 above at pp. 15, 303; *New Additions* note 11 above at p. 331; *Power of the Clergy* note 15 above at ch. VIII; *Answer to a Letter* note 15 above at ch. II.

lawe"[128] or not "lawful"[129], and they were not binding upon individuals in "lawe and conscience"[130] and not "to be obseruid *as law*".[131] He also insists that the constraints imposed upon legislative will by the laws of God and reason were proper subjects of legal education, legal analysis and legal advice. In *Power of the Clergy*, he states that "the lerners of the lawes of ye realme" must know what power the clergy enjoy by the law of God if they are to "kneow the power of the kynge and of his parlyament", for Parliament "can nat take it from theym".[132] In *New Additions*, the Student initially appears to resist the Doctor's queries about the legality of statutes affecting spiritual matters, saying that he supposed "no man wolde thynke" that the King, Lords and Commons would enact "any thynge, that they hadde nat power to do."[133] This passage is often cited to show St. German's commitment to parliamentary power.[134] However, as seen, the Student went on to explore the legal limits to Parliament's authority in detail.[135] He finishes by observing that it is the special duty of those "lerned in the lawes of the realme" to know about these matters so "that they may enstructe the paryament whan nede shall require, what they may laufully do concernynge the spirituall iurisdiction/and what nat"; lawyers must be able to advise what laws are founded "vpon the lawe of god/or vpon the lawe of reason, and what nat" for "commonly the parliament hath ouer tho lawes no directe power".[136] For St. German, the constraints of reason and religion on legislative power were matters of *English law* that could and should be the subject of a distinctly *legal* discourse. This point, first made in *Doctor and Student*, is confirmed, not denied, by his subsequent political pamphlets.

IV. St. German's place in the legal literature of the sixteenth, seventeenth and eighteenth centuries

The assessment today of St. German's contribution to the history of legal discourse concerning legal and constitutional theory must include consideration of how his work was received by judges, lawyers and legal textbook writers in the past, especially during the

[128] *Doctor and Student ibid.*, at pp. 111–113.
[129] *Ibid.*, at p. 147.
[130] *Ibid.*, at p. 158.
[131] *Ibid.*, at p. 57; also, *New Additions* note 11 above at p. 331.
[132] *Power of the Clergy* note 15 above at ch. XIX.
[133] *New Additions* note 11 above at p. 317.
[134] Guy, *St. German on Chancery* note 5 above at p. 24; Guy, "Thomas Cromwell and the Intellectual Origins of the Henrician Revolution" note 84 above at p. 169; Goldsworthy note 2 above at p. 71.
[135] Above notes 89–96.
[136] *New Additions* note 11 above at pp. 332–333.

constitutionally-formative seventeenth century. As Pollock observed, texts like those written by St. German may have had a different meaning for "judges and serjeants" than they did for "Tudor councillors of state."[137] There is no need to take sides on the contentious question of whether English law acknowledged Parliament as having legally limited or unlimited powers. It is simply necessary to identify whether the legal community associated St. German's work with one or the other of these two possibilities.

By the end of the sixteenth century, *Doctor and Student* was being cited in both cases and legal commentaries.[138] It was soon regarded as one of "the best Authorities" on English law, comparable to the classic texts of Bracton and Fleta, an ascendance no doubt assisted by the reverential treatment St. German received from Coke.[139] In contrast to the spectacular success of *Doctor and Student* as an authoritative statement of English law, St. German's other writings seem to have gone unnoticed by lawyers, judges and legal commentators.[140] In considering St. German's contribution to the evolution of legal discourse on reason and legislative authority it is therefore appropriate to focus the inquiry upon the impact of *Doctor and Student*.

Despite its theoretical focus, *Doctor and Student* was most frequently cited as authority on substantive legal doctrine.[141] Still, it helped to inform legal arguments on larger questions of constitutional theory as well. For example, Sir Christopher Hatton (later Lord Chancellor) relied upon the discussion on equity in

[137] Sir Frederick Pollock, "A Plea for Historical Interpretation" (1923) 39 L.Q.R. 163, 165.

[138] *Wroth* v. *Countess of Sussex* (1586) 3 Leo. 130, 135; *Wentworth* v. *Wright* (1596) Cro. Eliz. 526, 527; *Parker* v. *Combleford* (1599) Cro. Eliz. 725; Sir Christopher Hatton, *A Treatise Concerning Statutes, Or Acts of Parliament: And the Exposition thereof* [c. 1580–1590] (1677). Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* [c. 1597–98] (ed. D.E.C. Yale, Oxford 1953); R. Crompton, *L'Avthoritie et ivrisdiction des covrts de la Maiestie de la Roygne* (1594), pp. 49–51, 60.

[139] 1 Equity Cases Ab. 129, and *Bishop of London* v. *Attorney-General* (1694) Shower 164, 168. On Coke's influence, see *e.g. Murray* v. *Eyton* (1680) Raym. T. 338, 349: "St Germin in his book called Doctor & Stud" is "commended by the Lord Coke in his Epistle to his 9th Rep'. For favourable citations by Coke himself see: *Whittingham's Case* (1603) 8 Co. Rep. 42b, 44b and *The First Part Of The Institutes of the Laws of England. Or, A Commentarie upon Littleton* (1628), Preface [n.p.]. Coke's *First Part of the Institutes* and the subsequent three parts, being *The Second Part of the Institutes of the Laws of England, Containing The Exposition of Many Ancient and Other Statutes, The Third Part of the Institutes of the Laws of England, Concerning High Treason and Other Pleas of the Crown and Criminal Cases* and *The Fourth Part of the Institutes of the Laws of England, Concerning the Jurisdiction of Courts*, are hereinafter referred to as Co. Inst. I, II, III and IV respectively.

[140] The first judicial reference to St. German's other work I have found is *Crowley's Case* (1818) 2 Swans. 1, 91 (reference to Hargraves' 1787 publication of St. German's *Little Treatise* note 12 above).

[141] *E.g. Wickham* v. *Wood* (1611) Lane 113, 114; *Godfrey* v. *Dixon* (1619) Cro. Jac. 539; *Southern* v. *How* (1618) Pop. 143; *Secheverel* v. *Dale* (1626) Pop. 193; *Williams* v. *Hide* (1628) Palm. 548, 550; *Bolton* v. *Canham* (1674) Pollex. 125, 128; *Kempe* v. *Crews* (1697) 1 Raym. Ld. 167, 167–168; *Earl of Stafford* v. *Buckley* (1750) 2 Ves. Sen. 170, 179; *Menetone* v. *Athawes* (1764) 3 Burr. 1592, 1593. A complete list of cases citing *Doctor and Student* is too long to include here.

Doctor and Student in his treatise on statutory interpretation, accepting St. German's view that equity secured a connection between positive law and conscience generally and not just within Chancery.[142] Hatton also recognised a judicial power to review the legality of statutes. "Parliament may err", he wrote, and "though there be no Court higher to convince or pronounce upon the error, yet when the matter is plain, every Judg may esteem of it as it is, and being void, is not bound to allow it for good and forcible."[143] While this proposition is certainly consistent with St. German's arguments in *Doctor and Student* (and in *Power of the Clergy*), Hatton did not cite St. German on this point. In contrast, Lord Ellesmere cited *Doctor and Student* in the *Earl of Oxford's Case*[144] and appeared to accept its analysis of the grounds of English law, but he denied that judges could set Acts of Parliament aside. Ellesmere criticised Coke's position on this point but did not mention St. German. The approaches to *Doctor and Student* taken by Hatton and Ellesmere suggest that acceptance of St. German's general theoretical arguments concerning the connection between reason and positive law did not require acceptance of a particular view on the role of regular courts in the enforcement of reason over parliamentary will.

Like other judges and lawyers, Coke relied heavily upon *Doctor and Student* for technical points of common law and equity while at the same time appreciating its relevance to arguments of constitutional law and theory.[145] As Attorney General, Coke had confronted an argument from opposing counsel that "an Act of Parliament against the law of God directly is void, as is expressed in the Book of Doctor and Student."[146] The case dealt with the legality of letters patent and the argument was not mentioned in the judgment or in Coke's report of the case[147], but it reveals much about how lawyers at the time read *Doctor and Student*. It also foreshadowed Coke's later use of St. German's text in *Calvin's Case*, in which it was held that the Scottish subjects of James I were not aliens disqualified from inheriting freehold estates in England.[148] Coke, by then Chief Justice of the Common Pleas, wrote an extensive report of the case in which he argued that the

[142] Hatton note 138 above. See also Hake note 138 above.
[143] Hatton, *ibid.*, at pp. 20–21.
[144] (1615) 1 Ch. Rep. 1.
[145] Coke's references to St. German on technical points of law include: *Case of Heresy* (1601) 12 Co. Rep. 56; *Six Carpenters Case* (1610) 8 Co. Rep. 146a, 147b; *Leyfield's Case* (1611) 10 Co. Rep. 88a, 90a; *Pinchon's Case* (1611) 9 Co. Rep. 86b, 88b; *Porter and Rochester's Case* (1608) 13 Co. Rep. 4, 9; Co. Inst., I: 3b, 11b, 33a, 47b, 53b, 104b, 118b, 120a, 144b, 365b; Co. Inst., II: 273, 298–99, 302, 645, 623; Co. Inst., III: 58, 109, 122, 124; Co. Inst., IV: 83.
[146] *Darcy* v. *Allin* (1602) Noy 173, 180.
[147] *Ibid.*, at p. 180. Coke's report is at *The Case of Monopolies* (1602) 11 Co. Rep. 84b.
[148] (1608) 7 Co. Rep. 1a.

reciprocal obligations of protection and allegiance owed between sovereign and subject "are due by the law of nature".[149] "[I]t followeth", he said, "that the same cannot be changed or taken away" for "the very law of nature itself never was nor could be altered or changed".[150] Citing Bracton and *Doctor and Student* as authorities, Coke asserted that it is "certainly true" that "jura naturalia sunt immutabilia".[151] He then gave the example of a statute enacted in Edward III's reign which "by express words" deprived persons attainted by *premunire* of the King's protection, and he observed that because "Parliament could not take away that protection which the law of nature giveth" the King could protect attainted persons "notwithstanding that statute".[152] This is the clearest judicial invocation (albeit in passing) of *Doctor and Student* for the idea that Parliament cannot lawfully violate the law of nature or reason.

Coke would later state in *Dr Bonham's Case* that "the common law" may adjudge statutes against "common right and reason" to be void.[153] The relationship between this statement and the ideas expressed in *Doctor and Student* and adopted in *Calvin's Case* is not altogether clear—neither source was cited in *Bonham's Case*. Elsewhere Coke distinguished "natural reason" from the "artificial reason" of judges acquired through long years of legal training.[154] Coke's artificial reason has more in common with St. German's "secondary reason", which derives from a knowledge of positive law, than the *a priori* natural law or "primary reason" that he said was accessible to all rational beings. If Coke's reference to "common right and reason" in *Bonham's Case* was a reference to "artificial reason" then it is difficult to say that he was directly influenced by *Doctor and Student* when he said in *Bonham's Case* that statutes against reason are void, for, as seen, St. German said that statutes against "secondary reason" are *not* void. However, Coke's *common* right and reason may not have been the *artificial* reason of the judicial elite that he later invoked but the more basic and accessible "primary reason" of *Doctor and Student* or the "jura naturalia" of *Calvin's Case*. Coke did acknowledge St. German's practice of using "law of reason" and "law of nature" as synonyms,[155] and the connection between the reference to "common right and reason" in *Bonham's Case* and the reference to "jura

[149] *Ibid.*, at pp. 13b–14a.
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] *Dr. Bonham's Case* (1610) 8 Co. Rep. 113b, 118a. Coke made similar statements in *Rowles* v. *Mason* (1612) 2 Brownl. 192 and *Case of Proclamations* (1610) 12 Co. Rep. 74, 76.
[154] *Prohibitions Del Roy* (1607) 12 Co. Rep. 63, 65.
[155] *Case of Modus Decimandi* (1608) 13 Co. Rep. 12, 16–17.

naturalia" in *Calvin's Case* seemed to be apparent to other judges of the time.[156] In the end, however, the relationship between these statements need not be defined with precision here; it is sufficient simply to observe that Coke's statement from *Bonham's Case* is broadly consistent with the theory of limited parliamentary authority that he articulates, with St. German's assistance, in *Calvin's Case*.

More important than the relationship between *Doctor and Student, Calvin's Case* and *Bonham's Case* is the relationship between all three of these sources and Coke's forceful characterisations of parliamentary authority found elsewhere in his writings. In his first *Institute* Coke states:

> Parliament is the highest and most honourable and absolute Court of Justice in England .... The jurisdiction of this Court is so transcendent, that it maketh, enlargeth, diminisheth, abrogateth, repealeth and reviveth Lawes, Statutes, Acts and Ordinances concerning matters Ecclesiasticall, Capitall, Criminall, Common, Civill, Martiall, Maritime, and the rest ... Of which Court it is said (a) *Que il est de trasgrand honor & Justice, de que nul doit imagine chose dishonourable* ....[157]

The last sentence of this passage—that Parliament's honour and justice is very great and no one can imagine of it things dishonourable—is taken from Plowden's *Commentaries*.[158] However, Coke also cites chapter 55, folio 164 of *Doctor and Student*. This is the location of St. German's statement, made in the course of defending the statute *Silva cedua*, that "it can not be thought that a statute ... wyl recyte a thynge agaynst the trouth". In his fourth *Institute* Coke reasserts that Parliament's power is "transcendent and absolute."[159] *Doctor and Student* is not cited on this occasion, but it is cited later in the fourth *Institute* in Coke's response to the argument that the declaration that England is an "empire" in the Act in Restraint of Appeals to Rome, 1533[160] was "unjust and untrue, and that history or chronicle doth not affirm the same."[161] To this argument, Coke states:

[156] *Day* v. *Savadge* (1614) Hob. 85, 87: "an Act of Parliament, made against natural equity, as to make a man Judge in his own case [an apparent reference to *Dr Bonham's Case*], is void in it self, for *jura naturalia sunt immutabilia* [an apparent reference to *Calvin's Case*]". John Underwood Lewis, "Sir Edward Coke (1552–1633): Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory" (1968), 84 L.Q.R. 330, 338 argues that "common right and reason" represented a development of the "medieval" natural law approach of writers like St. German.

[157] Co. Inst. I, 109b–110a.

[158] Edmund Plowden, *Les commentaries, ou reportes de Edmunde Plowden vn apprentice de le comen ley* (1578), f. 398b.

[159] Co. Inst. IV, 36.

[160] 24 Hen VIII c. 12.

[161] Co. Inst. IV, 342.

> I might answer* that *le court de parliament est de tresgrand honor et justice, de que nul home doit imaginer chose dishonerable*. And with the Doctor and Student upon the statute of 45 E. 3. cap. [*i.e.*, the statute *Sedua celua*] that it cannot be thought that a statute that is made by the authority of the whole realm as well of the king, and of the lords spirituall and temporall, as of all the commons, wil recite a thing against the truth.[162]

The "*" is a marginal reference to (again) Plowden's *Commentaries* and *Doctor and Student*, chapter 55, folio 164.

It might be argued that Coke's report of the *Case of Modus Decimandi* confirms that he appreciated St. German's actual point in chapter 55 (that Parliament could alter tithes because tithes were *not* mandated by the law of reason or God[163]); however, the fact remains that in his *Institutes* Coke twice invokes chapter 55 of *Doctor and Student* in the course of making very forceful claims about parliamentary power, leaving an impression that he regarded *Doctor and Student* as at least indirectly supportive of those claims. How can these statements of parliamentary power from the first and fourth *Institutes* be reconciled with his earlier statements in *Calvin's* and *Bonham's* cases concerning the limited nature of parliamentary authority? The literature on this question is vast, and the answers given are many.[164] Although this debate cannot be addressed fully here, it is important to address two interpretations of Coke's position: that Coke changed his mind when writing his *Institutes* and repudiated his earlier statements about the limited nature of parliamentary authority,[165] or that in these earlier statements Coke did not really mean what he said in the first place.[166] These arguments must be addressed because they imply that Coke either changed his mind about *Doctor and Student* later or did not take his interpretation of that text seriously in his earlier writings. Neither argument is persuasive. Coke continued to insist upon the validity of *Calvin's Case*, as well as *Bonham's Case, after* acknowledging Parliament's absolute and transcendent power in the first *Institute*. He cited both cases in his second, third and fourth *Institutes*, in some instances expressly acknowledging them as authority for the immutability of natural

[162] Co. Inst. IV, 343.
[163] (1608) 13 Co. Rep. 12.
[164] For recent accounts of this old debate see J. Stoner, *Common Law and Liberal Theory* (Lawrence, Kansas 1992), pp. 48–68; G. Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven 1996), ch. 6.
[165] Goldsworthy note 2 above at p. 112; J.H. Baker, *An Introduction to English Legal History* 4th edn. (London 2002), pp. 210–211.
[166] W.S. Holdsworth, "Central Courts of Law and Representative Assemblies in the Sixteenth Century" (1912) 12 Columbia L. Rev. 1, 28.

law and the conclusion that statutes may be "void".[167] Although Coke did restate the point about Parliament's absolute and transcendent jurisdiction early in the fourth *Institute*, later in that work he referred "the studious reader" to consider his report of "Doctor Bonhams case", a clear invitation to read the controversial statement on "common right and reason".[168] Coke's above-noted use of chapter 55 of *Doctor and Student* in the fourth *Institute* comes near the end of that work, and is essentially a repetition of the parallel passage on Parliament's absolute power found in his first *Institute*. If Coke really did change his mind each time he asserted Parliament's limited or absolute power, he would have changed it at least *three* times during the course of writing the *Institutes*, the last change coming mid-way through writing the fourth *Institute*. The idea that Coke, who withstood intense pressure from James I to repudiate his views in *Bonham's Case*[169], later engaged in such intellectual flip-flopping on the most fundamental of constitutional questions is unlikely. His continued use of the two cases also answers Holdsworth's claim that *Bonham's Case* was "an isolated" exception to Coke's general approach to legislation, and that his assertion of natural law over statute in *Calvin's Case* was just "some loose talk".[170] It must be concluded that Coke was and continued to be serious about his various statements concerning legislative authority, and that he regarded them as somehow reconcilable, or in the alternative that he saw them as confirmation of an unresolved or dialectical tension between reason and legislative will inherent within common-law constitutional theory itself.[171]

Doctor and Student was also cited in Sir Henry Finch's important work on English law originally published in Law-French in 1613 under the title *Nomotexnia*; an English version entitled *Law, Or a Discourse thereof* was published in 1627, and a more accurate English translation of the 1613 text was published in 1759 under the title *A Description of the Common Laws of England*.[172]

[167] *Calvin's Case* is cited for its passage on the immutability of natural law at Co. Inst. II, 234, 564, and Co. Inst. III, 126, and on other points at Co. Inst. II, 374 and Co. Inst. IV, 283. *Bonham's Case* is cited in support of the view that statutes may be "void" at Co. Inst. II, 587–588, for rule that an Act of Parliament must be interpreted so that it is not "contrary to itselfe" at Co. Inst. II, 402, and for more general points at Co. Inst. II, 381 and 560.

[168] Co. Inst. IV, 251. See Jennings note 2 above at p. 328; Stoner note 164 above at p. 48.

[169] A.D. Boyer, "'Understanding, Authority, and Will': Sir Edward Coke and the Elizabethan Origins of Judicial Review" (1997) 39 Boston Coll. L. Rev. 43, 86–89.

[170] Holdsworth, "Central Courts" note 166 above at p. 28.

[171] Burgess, *Absolute Monarchy* note 164 above at pp. 165–208; Mark Walters, "Common Law, Reason and Sovereign Will" (2003) 53 U. Toronto L.J. 77.

[172] *Nomotexnia*; *Cestascavoir, Un Description Del Common Leys Dangleterre Solnque les Rules de Art* (1613); *Law, Or a Discourse thereof, In foure Bookes* (1627); *A Description of the Common Laws of England* (1759).

Finch's work was influential—Blackstone said it was "greatly superior" to all previous commentaries on English law[173]—and so the impact of St. German on Finch is another good measure of the impact of St. German on the emerging legal discourse on reason and legislative will.

Finch relied upon *Doctor and Student* for points of substantive legal doctrine[174] but did not follow St. German's theoretical arguments in all respects. Finch clearly adopted St. German's argument that higher laws restricted Parliament's legislative authority: Finch stated that if "a Statute were made directly contrary to the Law of God", such as the prohibiting of alms, "such Statute should be void", and he cited the relevant passage from *Doctor and Student*.[175] However, Finch did not adopt St. German's analysis of primary and secondary reason. In his view the "secondary law of reason" derived from the application of self-evident "primary" laws of nature in practical cases through "the discourse of sound reason" by those with "judgement, learning, and much experience".[176] St. German, in contrast, defined secondary reason as derived from positive laws and customs relating to property.[177] The difference is critical in light of their respective approaches to legislative authority. Finch argued that "positive law will yield" to the "higher and more perfect Law"[178] in the event of conflict, for positive laws that are "contrary to the Laws of Nature" "lose their force, and are not to be reputed as Laws at all."[179] In relation to the law of nature which is "plain and manifest to all" the invalidity of positive law is uncontroversial, but in relation to the secondary law of reason, which "is known but by such as can judge well", and then only "imperfectly", it is more difficult to identify "what [positive] Laws shall be said to agree, or disagree to the same".[180] However, Finch concluded that "in

[173] W. Blackstone, *An Analysis of the Laws of England; To Which is Prefixed An Introductory Discourse on the Study of The Law* 3rd edn. (1758), p. v. See in general W Prest, "The Dialectical Origins of Finch's *Law*" [1977] C.L.J. 326.

[174] *Nomotexnia* note 172 above at lib. II, fol. 49, lib. III, fol. 60, lib. III, fol. 71, lib. IV, fol. 134, lib. IV, fol. 146.

[175] *Description of the Common Law* note 172 above at lib. I, ch. I, p. 6; see also, *Nomotexnia* note 172 above at lib. I, fol. 4, citing *Doctor and Student* note 10 above at ch. VI.

[176] *Finch's Law* note 172 above at lib. I, ch. I, p. 3, ch. II, pp. 4–5, and ch. IV, p. 74; see also *Nomotexnia* note 172 above at lib. I, ch. I, fol. 1–3; *Description of the Common Law* note 172 above at lib. I, ch. I, pp. 1–4.

[177] But see Burgess, *Ancient Constitution* note 5 above at pp. 42–43 who argues that Finch and St. German followed the same approach to primary and secondary reason.

[178] *Finch's Law* note 172 above at lib. I, ch. II, pp. 5–6; also, *Nomotexnia* note 172 above at lib. I, fol. 19–20; *Description of the Common Law* note 172 above at lib. I, ch. VI, p. 53.

[179] *Description of the Common Law* note 172 above at lib. I, ch. VI, p. 53; see also, *Nomotexnia* note 172 above at lib. I, ch. VI, fol. 19–20; *Finch's Law* note 172 above at lib. I, ch. IV, p. 75.

[180] *Description of the Common Law* note 172 above at lib. I, ch. VI, 53; see also, *Nomotexnia* note 172 above at lib. I, ch. VI, fol. 19–20; *Finch's Law* note 172 above at lib. I, ch. IV, p. 75.

general" it is true to say that "Laws which do in reality contradict the Law of Reason, are null and void, as well as those which contradict the Law of Nature".[181] In other words, Finch argued that positive laws were void if contrary to either primary natural law or secondary reason, whereas, as seen, St. German argued that positive laws were void if contrary to primary reason but valid if contrary to secondary reason. There are therefore good reasons why Finch did not cite *Doctor and Student* in support of his discussion on natural law and reason although he shared with St. German the idea that legislative authority was constrained by natural law or reason and although he expressly adopted St. German's proposition concerning the invalidity of statutes contrary to the law of God.

Finch's work also contains a statement concerning Parliament's legislative and judicial powers. He stated: "Parliament hath an absolute Power in all Cases, as to make Laws, to adjudge Matters in Law, to try the Life of a Man, to reverse Errors in the King's Bench ... And if the Parliament itself err, as it may, this may not be reversed in any Place but in Parliament".[182] St. German was not cited for this statement, which both asserts Parliament's legislative and judicial supremacy and denies parliamentary infallibility. Finally, it is worth noting that the anonymous 1759 translator of *Nomotexnia* cited additional authorities for Finch's text. If St. German was, by then, regarded as an early advocate of parliamentary sovereignty, one would expect that the translator would have cited *Doctor and Student* (or other works by St. German) as authority for Finch's account of parliamentary power; but instead *Doctor and Student* was inserted as additional authority for Finch's assertion that positive laws contrary to either primary natural law or secondary reason are "null and void".[183]

Finally, *Doctor and Student* was influential for Thomas Wood. Wood's *Institute of the Laws of England*[184] was the leading commentary on English law of the early-eighteenth century, attracting the praise of Blackstone for having, like Finch's work, made "happy Progress in reducing the Elements of Law from their former Chaos to a regular methodical Science".[185] Wood adopted

[181] *Description of the Common Law* note 172 above at lib. I, ch. VI, p. 53; see also, *Nomotexnia* note 172 above at lib. I, ch. VI, fol. 19–20; *Finch's Law* note 172 above at lib. I, ch. IV, p. 75.

[182] *Description of the Common Law* note 172 above at lib. II, ch. I, p. 59; see also, *Nomotexnia* note 172 above at lib. II, ch. I, fol. 22.

[183] *Description of the Common Law* note 172 above at lib. I, ch. VI, p. 53.

[184] Thomas Wood, *An Institute of the Laws of England; Or, The Laws of England in their Natural Order, according to Common Use* 3rd edn. (1724).

[185] Blackstone note 173 above at p. v. See in general R.B. Robinson, "The Two *Institutes* of Thomas Wood: A Study in Eighteenth Century Legal Scholarship" (1991), 35 American J. Legal Hist. 432.

St. German's six-part classification of English law, describing the first ground as "the *Law of Nature*", or as "we say", the "Law of *Reason*".[186] The footnote to this statement states: "*Doc Stud Dial chap 1 and Jura Naturalia sunt Immutabilia.* [*Calvin's Case*] 7 Rep. 13". When discussing Acts of Parliament, Wood provided a long list of "*Rules*" concerning statutes, including the rule that "Acts of Parliament that are against Reason, or impossible to be performed, shall be judged void"[187], for which *Bonham's Case* was cited as authority.[188] Clearly, Wood did not read *Doctor and Student* as a tract about parliamentary sovereignty. Wood, like Finch and Coke, read St. German's work as supportive of a theory of parliamentary power limited legally by higher laws of God and reason.

V. Conclusion

The origins of modern parliamentary sovereignty, it is often said, lay in the revolutionary Acts of Parliament made during the Henrician Reformation.[189] If so, then historians of English legal and political thought must be right to conclude that St. German was instrumental in the development of parliamentary sovereignty—at least as a political reality—for they have demonstrated the importance of his work as "controversialist" to the building of an intellectual case for the Reformation Acts. However, we must be precise about the theory of parliamentary power to which he is said to have contributed, and about the nature of his contribution. Historians use various descriptions of parliamentary power—statutory omnicompetence, sovereignty of Parliament, parliamentary supremacy—but do not always define them with precision, and so it is sometimes difficult to identify the theory of legislative authority to which, in their view, St. German contributed. Guy is right to conclude that St. German advocated "statutory omnicompetence"—if, that is, statutory omnicompetence is taken to mean parliamentary power over all subject matters, spiritual and temporal, including the power to control, or "supremacy" over, the

[186] Wood note 184 above at p. 4. Other authors to adopt St. German's six-part categorisation of English law include: George Dawson, *Origo Legum: Or A Treatise Of The Origin of Laws* (1694), pp. 84–85, who also adopted St. German's idea that positive law against the law of God "is *ipso facto*, void, and no Law at all", H. Curson, *A Compendium Of The Laws and Government Ecclesiasitical, Civil and Military, of England, Scotland & Ireland* (1699), pp. 4–19, 75, who also cites Coke's *Bonham Case* dictum with approval, and John Cowel, *The Institutes of the Lawes of England, Digested into the Method of the Civill or Imperiall Institutions* trans. into English by W.G. (1651), pp. 1–5, who also asserts that statutes may not "oppugne Reason, or the Law of Nature".

[187] Wood note 184 above at p. 4.

[188] *Ibid.*

[189] *E.g.* Holdsworth, "Central Courts" note 166 above at p. 28; Gough note 122 above at p. 4; G.R. Elton, *The Tudor Constitution* (Cambridge 1962), pp. 232–234; M.A.R. Graves, *The Tudor Parliaments: Crown, Lords, and Commons, 1485–1603* (London 1985), pp. 78, 157.

king's prerogative powers. However, statutory omnicompetence or parliamentary supremacy, defined in this manner, is different from statutory or legal omnipotence, which is the power not just to legislate on all subject matters but also to legislate free of any legal limitations setting moral or religious (or other) minimum standards for the content of legislation. Parliamentary sovereignty in its modern or "Diceyan" sense involves the assertion of legal omnipotence, but St. German's theory of parliamentary authority, whether expressed in his work as "legal scholar" or in his work as "controversialist", most clearly did not.

Turning to the nature of St. German's contribution, however, a case can still be made that St. German "contributed" to the development of parliamentary sovereignty as Dicey would later define it, for it can be said that St. German the "controversialist" unwittingly helped set in motion a train of constitutional events the ultimate destination of which was "Diceyan" parliamentary sovereignty. The fact that he himself did not advocate or even anticipate that destination, and that he would not have recognised or liked it, does not mean that his work did not "contribute" to its being reached. If this is the nature of the contribution being alleged, then it should be clearly stated as such and evidence of this unintended causal connection considered. Once defined in this way, however, the argument that he did contribute in a meaningful way to the evolution of parliamentary sovereignty confronts serious difficulties. As seen, so long as the "Diceyan" destination remained a contested point in England, as it did throughout the seventeenth century and perhaps into the eighteenth century, the legal community appeared, on balance, to have associated St. German's name with that of the "legal scholar" who advocated a different destination—one where Parliament, while perhaps supreme and omnicompetent, was not legally omnipotent.

These various obstacles to the claim that St. German and other historical writers supported parliamentary sovereignty are circumvented by some legal theorists/historians by use of what Dworkin would call a "semantic" argument about the definition of law.[190] Most historians of Tudor England seem to acknowledge that at least some doubt exists about whether St. German advocated parliamentary sovereignty in its modern sense; in doing so, however, they tend to resort to the characterisation of St. German's ideas as "medieval". It is "questionable", concludes Guy, that St. German had "statutory omnicompetence in the modern sense" in mind, though "[w]e are left wondering where medieval concepts end

[190] Dworkin note 8 above.

and modern thought begins ..."[191] Not only does the tentative nature of this concession obscure the clarity of St. German's theoretical position, but the suggestion that, to the extent that he may not have advocated parliamentary omnicompetence or sovereignty in the modern sense his views were "medieval", implies that the theory of a legally-limited Parliament can only make sense within an obsolete intellectual tradition that has no parallel in the "modern" world. This conclusion forms the basis of a legal-positivist construction of the history of English legal and constitutional thought in which historical claims that Parliament was constrained by laws of God, nature or reason are denigrated as "medieval". According to this positivist construction, "we" must re-read historical texts using "our" definition of law in place of the "medieval" one, and since "our" definition is that law consists of rules enforced by regular courts, the historical references by St. German, Coke and others to laws of God, nature or reason are properly regarded as references to extra-legal principles of religion or morality.[192] Moral rights and obligations, it is said, "were not differentiated, as they would be today, from legal rights and obligations", and once this fact is appreciated the legal limits claimed for parliamentary power must be understood today as having been purely non-legal, moral limits.[193]

This positivist construction of the history of legal and constitutional theory is "semantic" because it hides by means of definitional stipulation what is properly seen as conceptual disagreement about the nature of law. This semantic argument is itself concealed and rendered superficially plausible by the insistence that the medieval-modern gulf cannot be bridged without a form of linguistic translation. The argument is revealed for what it is—a purely semantic argument—once it is clear that the conceptual disagreement that it hides transcends any supposed medieval-modern distinction, and no translation of terms is required. St. German's objective in writing *Doctor and Student* was to demonstrate that moral and legal obligations can and should be "differentiated", for he believed that only by attending to the ways in which these forms of obligation can be differentiated can one begin the task of identifying the occasions in which they operate together. It was only through very precise differentiation of legal

[191] Guy, "Thomas Cromwell and the Henrician Revolution" note 84 above at p. 169. See also Baumer, *Early Tudor Theory* note 5 above at pp. 160, 163; Hanson note 5 above at p. 256.

[192] Goldsworthy note 2 above at p. 17. See also Gough note 122 above at pp. 44–45, who says that Coke's use of natural law in *Calvin's Case* looks "[o]n the face of it" like the assertion of limited parliamentary authority, but in fact Parliament was only "limited by what we should call moral rights and obligations".

[193] Gough, *ibid.*

and moral obligation, then, that St. German was able to say that reason provides *legal* limits to legislative capacity in some cases but not others. His sources, the style of his exposition, and his commitment to a theological foundation to law and politics may appear "medieval", but his use of the terms "law" and "conscience" are, in certain important respects, thoroughly "modern". It would distort our understanding of St. German's position that statutes contrary to reason did not bind "in law or conscience" to translate his reference to "law" into a redundant reference to conscience. St. German really did think that Parliament was *legally* bound by reason. Of course, whether St. German's theory of reason and legislative authority represents an accurate statement of English law—either during his day or today—is an entirely separate matter.